IN THE 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** **ORAL ARGUMENT REQUESTED**

RESPONSE TO DEFENDANT ARCH INSURANCE COMPANY'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiffs 7th Inning Stretch LLC d/b/a Everett AquaSox ("Everett AquaSox") and DeWine Seeds Silver Dollars Baseball, LLC ("DeWine Seeds") (collectively, the "Teams") are small businesses that own and operate Minor League Baseball teams that have, for many years, provided affordable summertime family entertainment in Everett, Washington and Asheville, North Carolina, respectively.[1] Every year, the Teams paid substantial premiums to Arch Insurance Co. ("Arch") to protect the Teams from the economic consequences they would suffer if they were unable to engage in their business. With the full cancellation of the 2020 minor league season, the Teams have suffered catastrophic losses.

The First Amended Complaint (the "Complaint") alleges a complex set of facts leading to these losses, including the coronavirus pandemic, the actual and/or threatened presence of the coronavirus at the ballparks, governmental orders restricting access to the Teams' ballparks and nearby properties, and Major League Baseball not supplying players. Without their players, and without access to their ballparks, the Teams have been unable to host fans at baseball games, which is their financial lifeblood.

The Teams purchased "all risk" first-party property & casualty policies from Arch that cover their business-interruption losses (the "Policies"). These Policies cover "direct physical loss to covered property" as well as business-income losses and extra expense due to suspension of the Teams' operations, including losses caused by governmental orders restricting access to their ballparks. This has happened for each of the Teams, and each sought coverage from Arch under the Policies. But Arch effectively denied the Teams' claims, forcing the already-struggling

[1] Plaintiff Whitecaps Professional Baseball Corporation (the "West Michigan Whitecaps") has asserted causes of action only against Defendant Federal Insurance Company. The Whitecaps' claims are therefore not the subject of this Motion, which was brought by Arch only.

Teams to file this suit to obtain the coverage to which they are entitled.

Notwithstanding the fact that the Teams' claims fall within the Policies' coverage, Arch moves to dismiss the Complaint on three grounds. First, Arch asserts that the Teams do not allege a "direct physical loss of or damage" to property. Second, Arch asserts that the Teams fail to allege "civil authority" coverage because they do not allege that access to the ballparks was denied by governmental orders as a result of "direct physical loss of or damage" to property other than the Teams' ballparks. Third, Arch asserts that coverage is barred by an exclusion in the Policies for loss resulting from a "virus" (the "Exclusion").

Arch's Motion, however, ignores the growing body of case law denying insurers' motions to dismiss complaints involving COVID-19-related losses. These cases hold that the insured's loss of use of insured property for its intended function—and specifically as a result of civil-authority orders and the actual and/or threatened presence of the virus—is sufficient to trigger coverage. These decisions are based on policy language similar to that at issue here as well as a robust body of case law, including clear-cut law from New Jersey and the Third Circuit, holding that virus-like substances cause physical loss or damage when they render property essentially unusable for its intended function. Arch also ignores that the Teams have alleged various causes of their losses, including the actual and/or threatened presence of COVID-19 at their ballparks and the closure of their ballparks due to governmental orders in connection with the actual and/or threatened presence of COVID-19 at nearby properties. These allegations are sufficient to plead a "direct physical loss" and civil-authority coverage.

Regarding the Exclusion, Arch's argument for dismissal rests on the false premise that all of the Teams' losses are caused by the "virus." But that is not something that can be presumed, let alone decided at this stage of the case. The burden to prove that the Exclusion is triggered

rests on Arch, and that includes the burden to prove that the loss resulted from an excluded cause. This is a quintessential factual question that must be resolved against Arch at this stage. Significantly, the Teams plead other causes of loss, including the governmental orders effectively shutting down the Teams' ballparks and Major League Baseball not supplying players. At this stage, the Complaint's allegations must be credited, and the factual issues surrounding application of the Exclusion preclude dismissal. Tying the relevant causes to the relevant losses simply cannot be accomplished on this Motion.

Moreover, even if it could be concluded at this stage that COVID-19 is the sole cause of the Teams' losses, the Exclusion presents a latent ambiguity that requires construing it in favor of coverage. In a recent decision from the Middle of District of Florida, the court held that a similar exclusion relating to viruses was ambiguous as to whether it reached beyond isolated viral incidents to a global pandemic. The same is true here. Indeed, there was another express exclusion for pandemics available to Arch, but it chose instead to use only the more narrow exclusion for viruses in these Policies. Arch's current argument that it intended an exclusion for viruses to have the same reach as an exclusion for global pandemics highlights the latent ambiguity lurking in the Exclusion. At the very least, *both* the scope *and* the applicability of the Exclusion present issues of fact that cannot be resolved on a motion to dismiss.

Finally, even if the Exclusion were applicable and the fact-intensive cause of loss could be resolved at the motion to dismiss stage, there are further issues of fact with respect to whether Arch is estopped from relying on the Exclusion at all. The Teams have alleged that to receive approval for the Exclusion, Arch represented to state regulators that existing coverage did not insure disease-causing agents. Arch represented, that is, that the Exclusion reflected only a clarification of existing coverage, and not a reduction of existing coverage. But as the Teams

plead in substantial detail, that representation was false. And significantly, that false representation permitted Arch to reduce the scope of coverage under their Policies—through the Exclusion—without a commensurate reduction in premiums. Under these circumstances, Arch is estopped from relying on the Exclusion. Its arguments to the contrary raise, at best, still more issues of fact.

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

BACKGROUND

The Teams are owners and operators of Minor League Baseball teams in North Carolina and Washington. Compl. ¶¶ 9–11. Minor League Baseball ("MiLB") was a growing business through 2019, with tens of millions of fans attending games each year in the 160 MiLB ballparks throughout the country. *Id.* ¶ 1. Such attendance is essential as MiLB's business model, and the Teams' primary source of revenue, is dependent on attracting fans to each ballpark to purchase tickets, merchandise, food, beverages, and use of other park amenities. *Id.* ¶¶ 4, 6, 45. But in 2020, the entire MiLB baseball season was cancelled. *Id.* ¶¶ 1, 2, 43. This first-ever cessation of Minor League Baseball is linked to a complicated set of facts—the SARS-CoV-2 virus, the attendant disease, the pandemic, the governmental responses to the pandemic, and Major League Baseball ("MLB") not supplying players to their affiliated MiLB teams. *Id.* ¶ 2. Cancellation of the MiLB season has led to catastrophic financial losses for the Teams. *Id.* ¶¶ 3, 48, 49, 51.

The Teams prepared for these risks by purchasing business-interruption insurance from Arch. *Id.* ¶¶ 7, 52. The Teams' policies are commercial "all risk" first-party property & casualty policies with identical grants of coverage for "business income" losses, covering all risks unless

specifically excluded. *See id.* ¶¶ 7, 52–69. As relevant here, the Policies cover:

- "[D]irect physical loss," *id.* ¶ 57 (cleaned up); and
- "[L]ost earnings, extra expense, and lost rent during the 'restoration period' when the insured's property 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,'" *id.* ¶ 58 (cleaned up).[2]

The Policies purport to exclude from coverage:

- "[L]oss, 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" (the 'Exclusion'). *Id.* ¶ 63 (cleaned up).

The Teams purchased the Policies for significant premiums. But when the 2020 season was cancelled, and the Teams' business-income losses were near total, Arch failed to honor its obligations under the Policies. *Id.* ¶¶ 72–74. Arch anticipatorily denied each Team's claim for coverage on essentially the same grounds: The losses (1) do not result from direct physical loss or damage to property and (2) are barred by the purported Exclusion. *Id*. Accordingly, the Teams brought this action against Arch for anticipatory breach of contract and for a declaratory judgment that the Teams are entitled to the full amount of coverage under the Policies.

LEGAL STANDARDS

I. Standard for Motion to Dismiss

In ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "a court must consider no more than whether the complaint establishes 'enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary elements' of the cause of action." *Trzaska v. L'Oreal USA, Inc.*, 865 F.3d 155, 162 (3d Cir. 2017), *as amended* (Aug. 22,

[2] "Extra Expense" is "expenses incurred by the insured 'to avoid or reduce the interruption of "business" and continue operating at a "covered location," replacement location, or a temporary location.'" Compl. ¶ 60 (cleaned up).

2017) (cleaned up). The facts "must be taken as true and interpreted in the light most favorable to the plaintiffs, and all inferences must be drawn in favor of them." *McTernan v. City of York*, 577 F.3d 521, 526 (3d Cir. 2009). "A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts alleged is improbable and that a recovery is very remote and unlikely." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 213 (3d Cir. 2009) (cleaned up).

II. Standards for Insurance-Policy Interpretation

Arch concedes that the laws of all potentially applicable jurisdictions are consistent with respect to basic principles of insurance-policy interpretation and, therefore, that no conflict-of-law analysis is required with regard to these cannons. Mot. 14 n.4. Specifically, exclusions in insurance policies are strictly construed against the drafter. 2 *Couch on Insurance* § 22:31 (3d ed. 2001) [hereinafter *Couch on Insurance*]. So too with ambiguous provisions—those that are "fairly susceptible of two or more different, but sensible and reasonable, constructions." 2 *Couch on Insurance* § 22:31. "[T]o ascertain the ordinary meaning of words," courts "refer to standard reference works such as legal and general dictionaries." *Pa. Dep't of Pub. Welfare v. U.S. Dep't of Health & Human Servs.*, 647 F.3d 506, 511 (3d Cir. 2011) (cleaned up).

ARGUMENT

I. The Teams Allege Direct Physical Loss or Damage to Covered Property and Civil-Authority Coverage Under the Policies.

A. Arch Misstates the Applicable Standards And Ignores Relevant Authority.

The crux of Arch's argument is that a "disease causing agent" cannot cause "direct physical loss or damage to property" as required by the Policies because these losses are "intangible or economic loss unrelated to some physical impairment of the property." Mot. 16–18. In support of this argument, Arch relies primarily on dictionary definitions of the terms "direct," "physical," "damage," and "loss" and on two non-COVID-19-related cases from

Washington and North Carolina that purportedly support Arch's position. *Id.* Notably absent from the Motion, however, is any reference to the recent wave of case law denying insurers' motions to dismiss on materially indistinguishable facts and looking at the very same dictionary definitions, including a recent North Carolina decision granting a *policyholder's* motion for summary judgment for COVID-19-related losses. These cases rest on a robust and longstanding body of case law, including clear-cut case law from the Third Circuit, holding that the threatened and/or actual presence of a disease-causing agent that renders insured property unusable for its intended and insured function constitutes "direct physical loss." That is because the loss of use of insured property due to the actual and/or threatened presence of a physical substance, such as a virus, fits squarely into the ordinary meaning of the term "direct physical loss." At the very least, it is reasonable to interpret the Teams' allegations as satisfying the term "direct physical loss"—numerous courts have done so. Thus, under black-letter insurance law, these policy terms must be construed in favor of coverage. *See Brunswick Surgical Ctr., LLC, v. CIGNA Healthcare*, No. 09-cv-5857, 2010 WL 3283541, at *5 (D.N.J. Aug. 18, 2010).

The North Carolina case of *North State Deli, LLC v. The Cincinnati Insurance Co.*, No. 20-cvs-02569 (N.C. Super. Ct. Oct. 9, 2020) (order granting plaintiffs' motion for partial summary judgment), is instructive. *See* **Ex. A**. There, the plaintiffs sought coverage for COVID-19-related losses suffered at their restaurants in North Carolina under policies that covered "accidental physical loss or accidental physical damage." *Id.*, slip op. at 3 (cleaned up). Specifically, the restaurants suffered losses as a result of orders issued by North Carolina authorities relating to the pandemic. The insurer argued that the term "physical loss" requires a "physical alteration to property." The court rejected this argument. Indeed, like Arch, the court analyzed the dictionary definitions of these policy terms and concluded that "the ordinary

meaning of the phrase 'direct physical loss' includes the inability to utilize or possess something in the real, material, or bodily world." *Id.* at 6. Therefore, the court held that "'direct physical loss' describes a scenario where business owners and their employees, customers, vendors, and others lose the full range of rights and advantages of using or accessing their business property." *Id.* The court held that this was "precisely the loss caused by the Government Orders." *Id.* Alternatively, the court observed that even if the insurer's contrary interpretation were reasonable, that just meant that the policy provision was ambiguous. Thus, Arch's position that there is no North Carolina law on this issue, Mot. 18, is incorrect, and its argument that the Teams' losses are purely "intangible" has been rejected by a North Carolina court.[3]

North State Deli is not an outlier. In *Optical Services USA/CI v. Franklin Mutual Insurance Co.*, No. BER-L-3681-20 (N.J. Super. Ct. Aug. 13, 2020) (order denying motion to dismiss), the plaintiffs sought coverage for business-interruption losses when their business operations were suspended by executive orders based on the risk of COVID-19 in New Jersey. *See* **Ex. B**. The insurer moved to dismiss the complaint on the ground that "plaintiffs' loss of use of their respective properties [did] not constitute a direct physical loss and therefore [was] not a direct covered loss defined by the policies." Transcript at 25, *Optical Services*, No. BER-L-3681-20. *See* **Ex. C**. But the court rejected the insurer's argument, reasoning coverage did not require "material alteration or damage," *id.* at 28 (cleaned up), and holding the plaintiffs' allegation the loss of use of their premises based on executive orders in New Jersey satisfied the direct physical

[3] Arch notes in a footnote that the North Carolina Insurance Commissioner issued a letter to business owners suggesting that business-interruption losses caused by viruses are not covered by property-insurance policies. Mot. 18 n.5. A North Carolina court, however, disagreed, and that ruling should, along with other precedent, guide the Court here. Moreover, a review of the letter reveals that it was not motivated by any analysis of relevant policy language. Rather, it was motivated by a concern that if COVID-19-related business-interruption losses were covered, it may cause hardship for North Carolina insurance companies. That apparent concern is not relevant to this dispute, which focuses only on whether Arch agreed to cover the Teams' losses under a particular insurance contract.

loss language in the policy and warranted further discovery, *id.* at 29–30.

Similarly, in *Ridley Fitness, LLC* v. *Philadelphia Indemnity Insurance Company*, No. 01093 (Pa. Commw. Ct. Aug. 31, 2020) (order overruling preliminary objections), an insured sought coverage for losses in connection with COVID-19 and civil-authority restrictions on access to its properties. *See* **Ex. D**. The insured alleged that it had suspended operations as a result of the pandemic and governmental closure orders. Brief for Defendant at 1, *Ridley*, No. 01093. *See* **Ex. E**. The insurer moved to dismiss on the ground that the complaint failed to allege that property was "physically altered or damaged," *id.* at 9, did not "establish any actual physical loss or damage to any business premises anywhere, and contain[ed] no allegations that any insured property required repair or replacement of any kind," *id.* at 2. The court denied the insurer's motion to dismiss, holding that "it would be premature for this court resolve the factual determinations put forth by defendants to dismiss plaintiff's claims. Taking the factual allegations made in plaintiff's complaint as true, as this court must at this time, plaintiff has successfully pled to survive this stage of the proceeding." *Ridley*, slip op. at 1 n.1.

The same result has been reached in numerous other recent cases to address this issue. *See Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-cv-03127, 2020 WL 4692385, at *2 (W.D. Mo. Aug. 12, 2020) (reviewing dictionary definitions of "direct," "physical," and "loss" and holding that the insured had sufficiently alleged a "direct physical loss" by alleging that "the presence of [the virus] 'render[ed] physical property in [the virus's] vicinity unsafe and unusable,'" forcing it "to suspend or reduce business at their covered premises" (cleaned up)); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, No. 20-cv-00383, 2020 WL 5637963, at *4 (W.D. Mo. Sept. 21, 2020) (same). These cases are grounded in case law from courts across the country commonly holding that a variety of virus-like substances, or the threat thereof, may

cause direct physical loss, even though none alters the structural integrity of property or requires repair or replacement of property.[4] The substances in these cases and the virus share a commonality: Their presence or threatened presence renders properties uninhabitable or otherwise unusable for their intended purposes.

Notably, the Third Circuit and courts in New Jersey and this District have held that losses such as those alleged by the Teams are covered under property-insurance policies. In *Port Authority of New York & New Jersey v. Affiliated FM Insurance Co.*, 311 F.3d 226 (3d Cir. 2002), the plaintiff and its subsidiary incurred expenses while removing asbestos-containing materials from their buildings. *Id.* at 230. The Third Circuit observed, as to asbestos, that physical loss or damage occurs when "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. In that case, however, there was no evidence that asbestos had been released

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[4] *See, e.g.*, *Am. Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957) (radioactive dust and radon gas); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968) (en banc) (gasoline vapors); *Pillsbury Co. v. Underwriters at Lloyd's, London*, 705 F. Supp. 1396, 1399 (D. Minn. 1989) (health-threatening organisms); *Hetrick v. Valley Mut. Ins. Co.*, No. 2245 Civil 1988, 1992 WL 524309, at *2 (Com. Pl. May 28, 1992) (oil); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1336 (Or. Ct. App. 1993) (methamphetamine fumes); *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So. 2d 600, 601 (Fla. Dist. Ct. App. 1995) (unknown pollutant); *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, No. 9400837, 1996 WL 1250616, at *1–2 (Mass. Super. Mar. 15, 1996) (oil fumes); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (asbestos); *Matzner v. Seaco Ins. Co.*, 1998 WL 566658, at *4 (Mass. Super. Aug. 12, 1998) (carbon monoxide); *Bd. of Educ. v. Int'l Ins. Co.*, 720 N.E.2d 622, 626 (Ill. App. Ct. 1999), *as modified on denial of reh'g* (Dec. 3, 1999) (asbestos); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. 98-cv-434, 1999 WL 619100, at *8 (D. Or. Aug. 4, 1999) (mold or mildew); *Yale Univ. v. Cigna Ins. Co.*, 224 F. Supp. 2d 402, 413–14 (D. Conn. 2002) (asbestos and lead); *Graff v. Allstate Ins. Co.*, 54 P.3d 1266, 1269 (Wash. Ct. App. 2002) (methamphetamine vapors); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *8 (D. Or. June 18, 2002) (mold); *Cooper v. Travelers Indem. Co. of Ill.*, No. 01-cv-2400, 2002 WL 32775680, at *1 (N.D. Cal. Nov. 4, 2002) (coliform bacteria and E.coli); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 824–27 (3d Cir. 2005) (E.coli); *de Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714, 723 (Tex. App. 2005) (mold); *Schlamm Stone & Dolan LLP*. v. *Seneca Ins. Co.*, 800 N.Y.S.2d 356 (N.Y. Sup. Ct. 2005) (unpublished table decision) (dust and noxious particles).

(or that there was an imminent threat of release) at the insured locations in sufficient quantities to render the locations unusable. Here, the Teams have alleged the actual and/or threatened presence of the virus at insured locations, as well as the loss of use of the Teams' ballparks for their intended function. This easily satisfies the standard set out in *Port Authority*.

Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America, No. 2:12-cv-04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014), is also illustrative. There, a packaging company suffered business-interruption losses after a discharge of ammonia within its packaging facility. *Id.* at *1. The insurer, like Arch here, argued that direct physical loss requires "a physical change or alteration to insured property requiring its repair or replacement." *Id.* at *2 (cleaned up). The court rejected that argument. "While structural alteration provides the most obvious sign of physical damage," the court reasoned, "[courts] have also found that property can sustain physical loss or damage without experiencing structural alteration." *Id.* at *5. Because the packaging facility could not function as a packaging facility, the facility suffered direct physical loss:

> [T]here is no genuine dispute that the ammonia release physically transformed the air within [the] facility so that it contained an unsafe amount of ammonia or that the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated. The Court finds that the ammonia discharge inflicted "direct physical loss of or damage to" [the] facility . . . because the ammonia physically rendered the facility unusable for a period of time.

Id. at *6.

Similarly, in *Wakefern Food Corp. v. Liberty Mutual Fire Insurance Co.*, 968 A.2d 724 (N.J. Super. Ct. App. Div. 2009), a group of plaintiff-supermarkets suffered business-interruption losses after an electrical-grid failure resulted in an extended blackout. *Id.* at 727. The court rejected the insurer's argument that coverage was unavailable because "the loss of power was not due to 'physical damage'" and held that "the electrical grid was 'physically damaged' because,

due to a physical incident or series of incidents, the grid and its component generators and transmission lines were physically incapable of performing their essential function of providing electricity." *Id.* at 734. *Wakefern* plainly holds that loss of function is direct physical loss and can constitute "property damage."

Notably, the Supreme Court of Pennsylvania, in upholding the governor's authority to issue an order closing all non-life-sustaining businesses, found that the virus can live on surfaces for up to four days and that the pandemic was a catastrophe akin to a natural disaster "which results in substantial damage to property, hardship, suffering or possible loss of life." *Friends of Danny Devito v. Wolf*, 227 A.3d 872 (Pa. 2020) (cleaned up). Thus, the virus fits squarely into the circumstances triggering coverage under *Gregory Packaging*, *Port Authority*, and *Wakefern*.

COVID-19 is no different from the ammonia in *Gregory Packaging* for these purposes. And the Teams have alleged the actual and/or threatened presence of the virus at their ballparks, rendering them unusable for their intended functions, as well as alternative causes for the Teams' "loss of use" of the ballparks, including civil-authority orders (such as the one in *Optical Services*). Compl. ¶¶ 2, 26–32, 39. These allegations are sufficient to survive Arch's Motion.

B. Arch's Authority Is Inapposite or Supports the Sufficiency of the Teams' Allegations.

The policy language and on-point case law support the conclusion that the Teams have adequately alleged direct physical loss. The cases that Arch relies upon, in contrast, are inapposite and fail to support its position.

Arch cites *Harry's Cadillac-Pontiac-GMC Truck Co. v. Motors Insurance Corp.*, 486 S.E.2d 249 (N.C. Ct. App. 1997), for the proposition that under North Carolina law—which Arch argues is applicable to the Policy issued to the DeWine Seeds—a property-insurance policy will cover business-interruption losses caused only by actual damage to property. Arch's reliance

on this case is misplaced. *Harry's* involved a snowstorm that did not impact the property itself; it had nothing to do with disease-causing agents. And in the twenty-three years since it was decided, *Harry's* has been cited only three times. One of those citations was in a decision from the Eastern District of North Carolina that distinguished *Harry's* on its facts. The facts here are also plainly distinguishable. The Teams have alleged, among other things, that COVID-19 threatens and is statistically certain to have been present *in* the ballparks and that access to the ballparks has been limited due to governmental orders, which all falls squarely into the civil-authority coverage of the Policies. Put differently, if the snowstorm in *Harry's* had physically penetrated the insured property, rendered its interior unusable, or limited its functionality, and resulted in governmental orders limiting access to the property, the result would assuredly have been different.

Arch's reliance on *Nautilus Group, Inc. v. Allianz Global Risks US*, No. 11-cv-5281, 2012 WL 760940 (W.D. Wash. Mar. 8, 2012)—which it contends reflects Washington law that should be applied to the Everett AquaSox Policy—is also misplaced. In *Nautilus*, an insurer argued that an employee's theft of property was not "direct physical loss or damage." The court rejected this argument and noted that if "'physical loss' was interpreted to mean 'damage,' then one of the words would be superfluous." *Id.* at *6. Thus, the *Nautilus* court rejected the "extremely narrow" view of physical loss advanced by the insurer. *Id.*

Next, Arch relies on a smattering of non-controlling cases that it contends show that physical impairment is necessary to constitute "direct physical loss." *See* Mot. 24–25. But none of these cases address facts remotely like the circumstances here—where the Teams have alleged that is it statistically certain the virus was present at their ballparks and threatened the ballparks and, along with governmental orders, resulted in business-interruption losses.

Finally, Arch asserts that "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." Mot. 25. Arch buries this argument on page 25 of its brief for good reason: The primary case on which Arch relies, S*andy Point Dental, P.C. v. Cincinnati Insurance Co.*, No. 20-cv-2160, 2020 WL 5630465 (N.D. Ill. Sept. 21, 2020), applied Illinois law, reached a conclusion contrary to Third Circuit precedent, and also relied on cases where the insured had failed to allege that the virus was present on the property, unlike the Teams here. For example, in *Rose's 1, LLC v. Erie Insurance Exchange*, No. 2020 CA 002424 B, 2020 WL 4589206 (D.C. Super. Aug. 06, 2020), the court held against the policyholder *at summary judgment* because it had presented "no evidence that COVID-19 was actually present on their insured properties at the time they were forced to close." *Id.* at *2. Similarly, in *Gavrilides Management Co. LLC v. Michigan Insurance Co.*, No. 20-258-CB, 2020 WL 4561979 (Mich. Cir. Ct. July 21, 2020), the court relied on the fact that the plaintiffs in those cases failed to allege that "COVID-19 entered the [property] through any employee or customer." Transcript at 25, *Gavrilides Mgmt.*, No. BER-L-3681-20. *See* **Ex. F**. And in *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-cv-461, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020), the court based its holding on the law applicable in the Fifth Circuit and expressly distinguished *Port Authority* from the Third Circuit as reflecting a contrary view. *Id.* at *5.

The Teams' claims and the applicable law are distinguishable from each of these cases. The Teams have alleged, among other things, that it is statistically certain that the virus was present at their ballparks and that the actual and/or threatened presence of the virus, and

governmental orders, are among the causes of the Teams' business-interruption losses. Moreover, the relevant Third Circuit, New Jersey, North Carolina, and Washington law *all* support the Teams' claims.

C. Arch Ignores the Teams' Factual Allegations.

Arch cannot rebut the weight of case law, including cases such as *Gregory Packaging* and *Port Authority*, holding that when an insured alleges that disease-causing agents and governmental orders render insured property unusable for its intended purpose, the insured has sufficiently alleged "direct physical loss." Indeed, Arch effectively concedes the import of cases such as *Gregory Packaging* and *Port Authority* but simply argues that those cases are factually distinguishable because, here, the Teams have supposedly not alleged "that their business was interrupted because their ballparks or stadiums were actually physically contaminated by COVID-19 or that any property was physically lost." Mot. 21–22. This is false. The Complaint is replete with such allegations:

1) COVID-19 "is easily transmitted from person to person, person to surface, and surface to person," Compl. ¶ 19;

2) "people . . . catch the virus by touching . . . objects or surfaces, then touching their eyes, noses, or mouths," *id.*;

3) "individuals who appear healthy and present no identifiable symptoms of the disease might still spread the virus by breathing, speaking, or touching objects and surfaces," *id.* ¶ 20;

4) viral droplets are "are physical objects that travel and attach to surfaces and cause harm," *id.* ¶ 22;

5) "Current evidence suggests that SARS-CoV-2 remains viable for hours to days on surfaces made from a variety of materials," *id.* ¶ 23;

6) "It is statistically certain the virus has been present at the Teams' ballparks for some period of time since their closures," *id.*;

7) 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)," *id.* ¶ 32; and

8) one of the "causes of the first-ever cessation of Minor League Baseball in 2020" was "concerns for the health and safety of players, employees, and fans related to the SARS-CoV-2 Virus," *id.* ¶ 2.

These allegations make clear that, like the ammonia in *Gregory Packaging*, the Teams have alleged that the virus has physically rendered their ballparks unusable for their intended function—hosting baseball games.

Arch raises several additional factual arguments that it contends warrant dismissal. None survives scrutiny. Arch argues that the Teams have failed to allege direct physical loss because the Teams have still been able to use the stadiums for some non-baseball events. Mot. 23. But the fact that the Teams may have been able to hold small events at their ballparks does not change the fact that the essential functionality of the ballparks has been substantially impaired—they cannot be used as ballparks. In *Blue Springs*, the court rejected an insurer's similar argument that the insured had failed to allege direct physical loss. The court specifically held that "physical loss" does not require a "total cessation" of business activities. 2020 WL 5637963, at *6–7. This Court should reach the same conclusion here.

Next, Arch asserts that coverage is only available for a period ending "when the property should be rebuilt, repaired, or replaced . . . or business is resumed at a new permanent location." Mot. 22. Arch contends the Teams have not alleged that the ballparks need to be "rebuilt, repaired, or replaced." Mot. 23. But this says nothing about the Policies' broad grant of coverage, *i.e.*, all risks of direct physical loss. And indeed, the Complaint contains no allegation relating to the endpoint of coverage—the pandemic remains an ongoing concern. Any prospective disputes regarding the Policies' treatment of the period when coverage will end are thus premature. Moreover, the fact that the Policies contemplate a period of recovery ending when business is

resumed at a "new permanent location," as well as a period of recovery in response to governmental decrees regulating the use of property, ECF No. 30-1 at 104, reflects that the Policies do not require that property require physical brick-and-mortar rebuilding in order to trigger coverage. Notably, this argument was rejected in *Blue Springs*, where the court held that the period of restoration for the insured's COVID-19-related losses, which similarly referenced rebuilding, repair, or replacement of property, warranted discovery. 2020 WL 5637963, at *6.

D. The Teams Have Sufficiently Alleged Civil-Authority Coverage.

As Arch concedes, the Policies cover losses sustained while access to insured property is denied by an order of civil authority, as a result of "direct physical loss of or damage to property, other than" at insured property, caused by a covered peril. Mot. 26–27. Arch asserts the Teams have failed to allege any governmental orders limiting access to insured property as a result of "'direct physical loss of or damage to property' at other people's property." *Id.* This is false.

The Teams allege authorities in each relevant state issued statewide stay-in-place orders "pursuant to which all non-essential businesses were closed" and all citizens "were ordered to stay home and permitted to leave only for" essential reasons. Compl. ¶¶ 26–30.[5] The Teams further allege that these orders "forced [them] to close their stadiums for baseball games" and that their "ballparks have been closed to the public for baseball since March 2020." *Id.* The Teams also allege that COVID-19 and governmental responses have harmed the ballparks "as well as the areas surrounding them" and that the "ballparks are within one mile of locations that have also suffered" damages. *Id.* ¶¶ 32, 39, 50. And, as stated, there is ample authority that the

[5] The very Orders Arch attaches as exhibits to its Motion reflect the impact of COVID-19 on property. *See* ECF No. 40-3 (Washington Order stating that the COVID-19 pandemic "remains a public disaster affecting life, health, *property* or the public peace" (emphasis added)); ECF No. 40-4 (North Carolina Order stating the order was issued to protect "life and *property*" (emphasis added)).

actual or threatened presence of COVID-19 constitutes physical loss or damage. The Complaint therefore sufficiently alleges that access was restricted to the ballparks and nearby properties within each of those states as a result of governmental orders affecting nearby properties and that these orders were issued as a result of actual or threatened physical loss or damage to these properties. *See North State Deli*, slip op. at 7 (holding that the insured's loss of use of property due to civil-authority orders by North Carolina governmental authorities due to COVID-19 was covered under a property-insurance policy requiring "physical loss"); *Blue Springs*, 2020 WL 5637963, at *8 (holding, when a dental office was closed but continued offering emergency services, "access to the clinics was prohibited to such a degree that the Civil Authority provision could be invoked"); *Studio 417*, 2020 WL 4692385, at *7.

II. The Teams Have Adequately Pled the Exclusion Does Not Bar Coverage.

Arch's Motion on the Exclusion fails for three independent reasons. First, the specific causes of the Teams' specific losses raise questions of fact. Second, the Exclusion is ambiguous, insofar as the parties did not intend a limited virus exclusion to function as an expansive global pandemic exclusion. And third, the Teams have sufficiently alleged that Arch, having procured the Exclusion through misrepresentation, is now estopped from enforcing it.

A. The Cause or Causes of the Teams' Losses Is a Question of Fact.

The Complaint properly pleads that the Exclusion may not be enforced by Arch. But even if Arch could enforce it, Arch would bear a heavy burden to prove the Exclusion applied to preclude the insurance coverage otherwise available under the Policies. And that burden would necessarily require relevant proof of causation: that the Teams' losses were caused by the "virus" rather than by, for example, the governmental orders restricting access to the Teams' ballparks or the Teams' inability to obtain players from MLB. But such questions of causation are questions

of fact—"The majority of cases addressing causation disputes under an insurance policy hold that the causal relationship of a loss to a particular alleged instrumentality is a question of fact to be decided by the jury." 7 *Couch on Insurance* § 101:59 (cleaned up)). Here, the Teams have pled at least *five* possible causes of their loss or damage, including "the SARS-CoV-2 virus, the attendant disease, the pandemic, the governmental response to it, or the Teams' inability to obtain players." Compl. ¶¶ 7, 36–51. The fact-intensive nature of causation is at its apex when multiple causes are present. *See* 7 *Couch on Insurance* § 101:59. The Court should therefore deny the Motion.

B. Applied to the Pandemic, the Exclusion Is Ambiguous.

Arch's reliance on the Exclusion further ignores that, as applied to this Pandemic, the Exclusion is ambiguous and therefore must be construed in favor of coverage. An ambiguity can be patent or latent. *Cont'l Ins. Co. v. PACCAR, Inc.*, 634 P.2d 291, 293 (Wash. 1981). "[W]hile a patent ambiguity must exist on the face of the document, a latent ambiguity exists when the language becomes doubtful only in light of proof of extrinsic or collateral circumstances." *Id.*; *see Myers v. Myers*, 714 S.E.2d 194, 198 (N.C. Ct. App. 2011).

Insisting the Exclusion is "clear and unambiguous on its face," Mot. 3, Arch conceals a lurking latent ambiguity: whether a "virus" exclusion applies to a global pandemic—the likes of which last occurred amidst the First World War. *Urogynecology Specialist of Florida LLC v. Sentinel Insurance Co.*, No. 6:20-cv-1174, 2020 WL 5939172 (M.D. Fla. Sept. 24, 2020), is instructive. There, highlighting a similar exclusion for "loss or damage caused directly or indirectly by . . . "[p]resence, growth, proliferation, spread or any activity of . . . virus," *id.* at *3 (cleaned up), the insurer argued "the unambiguous policy terms exclude coverage for . . . COVID-19," *id.* The court was unconvinced the exclusion "necessarily" excluded the

policyholder's losses, however, emphasizing as "significant" "the unique circumstances of the effect COVID-19 has had on our society." *Id.* at *4. The same is true here: The Exclusion expressly references a virus, but it makes no reference whatsoever to a global pandemic. An average insured would not have reasonably anticipated or expected that such a limited, virus-related exclusion would render an all-risk policy effectively worthless in the face of a global pandemic. As in *Urogynecology Specialist*, "ambiguous aspects of the Policy make determination of coverage inappropriate at this stage." *See id. Cf., e.g.*, *Little v. MGIC Indem. Corp.*, 836 F.2d 789, 796 (3d Cir. 1987) ("[T]hat different courts have arrived at conflicting interpretations of the policy is strongly indicative of the policy's essential ambiguity.").

This latent ambiguity is a problem of Arch's making. Before 2020, a Pandemic Exclusion for first-party property & casualty policies was widely available in the United States. *See, e.g.*, *Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co.*, 218 F. Supp. 3d 1034, 1037–38 (D. Neb. 2016) (highlighting an exclusion for "loss or damage caused by or resulting from . . . [t]he actual or suspected presence or threat of any virus, organism or like substance that is capable of inducing disease, illness, physical distress or death, whether infectious or otherwise, **including but not limited to any epidemic, pandemic, influenza, plague, SARS, or Avian Flu**" (cleaned up and emphasis added)). As the drafter of the Policies, Arch could have included this Pandemic Exclusion. "It chose not to do so." *See Miller v. Poole*, 45 A.3d 1143, 1147–48 (Pa. Super. Ct. 2012). The availability of the Pandemic Exclusion, and Arch's decision not to use it, undermines Arch's argument the Exclusion is "clear and unambiguous on its face." *See* Mot. 3. "When construing an ambiguous clause in an insurance policy, courts should consider whether clearer draftsmanship by the insurer 'would have put the matter beyond reasonable question.'" *Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 129 A.3d 1069, 1075 (N.J.

2016) (cleaned up); *see Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 871 P.2d 146, 151 (Wash. 1994) (same). The Exclusion thus presents a latent ambiguity, and the Teams should be permitted to present parol evidence of the parties' intent.

C. Having Secured the Exclusion Through Misrepresentation, Arch Is Estopped from Enforcing It Here.

Arch's Motion fails for a third reason: The Teams have sufficiently alleged Arch is estopped from enforcing the Exclusion. The virus is a disease-causing agent, Compl. ¶ 17, and before 2006, courts had long held that such agents trigger coverage under "all risk" policies. *Id.* ¶¶ 78–81. In 2006, however, when Arch sought regulatory approval of the Exclusion, Arch told state insurance commissions the opposite—that such agents did not trigger coverage and that the Exclusion, rather than reducing coverage, merely clarified it. *Id.* ¶ 78. This false representation was significant because if an insurer reduces insured risk, it must also reduce the premium. Relying on Arch's false representation, the commissions approved the Exclusion, and Arch and other insurers evaded what should have been a "significant rate reduction." *See Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 872 (N.J. 1993). Thus, for the past fourteen years, Arch has collected inflated premiums based on its misrepresentation that the Exclusion reflected only a clarification, and not a reduction, of insured risk. Arch now seeks dismissal based on the Exclusion's reduction of insured risk. The law, however, bars an insurer from relying on an exclusion that was obtained through misrepresentation to regulators. *Id.* at 873. The Teams have sufficiently pled that Arch—having profited from its misrepresentation for "more than a decade," *id.* at 851—is now estopped under federal and state law from enforcing the Exclusion.

1. State Insurance Commissions Protect Policyholders.

An insurance policy is a contract of adhesion. *McMillan v. State Mut. Life Assur. Co. of Am.*, 922 F.2d 1073, 1075 (3d Cir. 1990). Accordingly, "the typical commercial insured rarely

sees the policy form until after the premium has been paid." *Morton*, 629 A.2d at 852. To protect insureds, the insurance industry is "heavily regulated," *Clark v. Prudential Ins. Co. of Am.*, 736 F. Supp. 2d 902, 915 (D.N.J. 2010), and the two jurisdictions here each have state insurance commissions. The commissioners are "the only persons who can negotiate meaningfully with insurers about standard-form policy language," Compl. ¶ 95; *see Morton*, 629 A.2d at 874. The commissions protect policyholders principally through the form and rate approval process. The jurisdictions require new forms and rates to be submitted to the commissions for approval. When setting rates for new forms, the commissions must by statute consider "all factors reasonably related to the kind of insurance involved." *Id.* at 872.

2. *Morton* Estops Enforcement of Wrongfully Obtained Exclusions.

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

3. The Teams Have Sufficiently Pled *Morton*'s Protections.

In 2006, to obtain approval of the Exclusion without being required to reduce its

premiums, Arch told insurance regulators that "property policies have not been a source of recovery for losses involving contamination by disease-causing agents." Compl. ¶ 92 (cleaned up). That was false. "Before 2006, based on judicial opinions in numerous civil actions across the United States, insurers were aware insured property damage and resulting business income loss and extra expenses could be caused by an array of noxious and untenable conditions impacting property," including a "variety of claims involving disease-causing agents." *Id.* ¶¶ 81, 94. Arch thus misrepresented the scope of previously available coverage. And the commissions relied on that misrepresentation to permit Arch to charge the same premiums for what was, unknown to the Teams, reduced coverage. *Id.* ¶¶ 96–98. *Cf. Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1189, 1192 (Pa. 2001) (reversing the trial court's grant of a motion to dismiss when the inquiry was whether regulatory estoppel was "properly pleaded," not whether "proof of the insurance department's reliance on the insurance industry's memorandum [w]as likely or probable").

4. *Morton* and Its Estoppel Principles Govern This Dispute.

Rather than contest the sufficiency of the Teams' factual allegations, Arch argues only that regulatory estoppel has not been adopted by and is inconsistent with the laws of Washington and North Carolina. Mot. 31–32. This argument fails for three independent reasons. *First*, federal law governs the Teams' estoppel allegations, and federal law would apply something much like *Morton* and its estoppel principles. *Second*, even were state law to govern, Arch has failed to demonstrate (1) an actual conflict with New Jersey law or (2) Washington and North Carolina maintain a more significant connection to estoppel than New Jersey. Under New Jersey conflicts rules, New Jersey law therefore applies. *Third*, even if the Court concludes that state law governs and that New Jersey conflicts rules mandate application of Washington and North Carolina law,

estoppel is consistent with those states' laws, and the Court should apply the regulatory-estoppel doctrine laid out in *Morton* accordingly.

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

As several courts have recognized, regulatory estoppel is simply "a form of judicial estoppel." *Sunbeam*, 781 A.2d at 1192 (cleaned up); *see Grede v. Bank of N.Y.*, No. 08-cv-2582, 2009 WL 188460, at *6 (N.D. Ill. Jan. 27, 2009); *Mueller Copper Tube Prod., Inc. v. Pa. Mfrs.' Ass'n Ins. Co.*, No. 04-cv-2617, 2006 WL 8435027, at *6 (W.D. Tenn. Dec. 14, 2006), *aff'd sub nom. Mueller Copper Tube Prod., Inc. v. Pa. Mfrs.' Ass'n Ins. Co.*, 254 F. App'x 491 (6th Cir. 2007). In this Circuit and across the country, judicial estoppel is governed by federal common law. *G-I Holdings, Inc. v. Reliance Ins. Co.*, 586 F.3d 247, 261 (3d Cir. 2009), *as amended* (Dec. 4, 2009). Because regulatory estoppel is "a form of judicial estoppel," this Court should apply federal common law to regulatory estoppel—as did the Western District of Tennessee. *See Mueller Copper Tube Prod.*, 2006 WL 8435027, at *6. *Cf. Sunbeam*, 781 A.2d at 1193 (reversing and remanding, holding "it was error to dismiss the complaint without applying the doctrine of regulatory estoppel"). In shaping the contents of federal law, "federal courts must be free to develop principles that most adequately serve their institutional interests," including, importantly, the "integrity of judicial institutions." *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 n.4 (6th Cir. 1982). Those institutions include state institutions, even institutions that are "administrative rather than judicial." *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 604 (9th Cir. 1996); *see id.* (citing as an example of such an administrative proceeding a "Maine Bureau of Insurance approval proceeding"). Here, Arch would offend the integrity of the state insurance commissions *and* this Court by procuring the Exclusion through misrepresentation in the former only to enforce the Exclusion in the latter. By applying *Morton*, the Court short-

circuits Arch's misconduct and preserves the institutions' integrity: The Court encourages insurers to be honest with state regulators and, at minimum, prevents insurers from profiting from dishonesty in federal court.

b. If State Law Controls, Arch Fails to Meet Its Burden of Proving Washington and North Carolina Law Apply.

If the Court determines state rather than federal law applies, Arch has failed to meet its burden to demonstrate (1) an actual conflict between Washington and North Carolina law and New Jersey law and (2) those states have a more significant relationship to estoppel than does New Jersey. Accordingly, the Court must apply New Jersey law. Though Arch sets out New Jersey conflicts rules, Mot. 11–14, it fails to acknowledge that the party arguing for application of law other than that of New Jersey bears the burden of proof. *See, e.g.*, *Miller v. Chrysler Grp. LLC*, No. 12-cv-760, 2014 WL 12617598, at *4 (D.N.J. June 30, 2014) (applying New Jersey law on a motion to dismiss when the moving defendant "fail[ed] to identify a conflict between potentially applicable laws"); *Majdipour v. Jaguar Land Rover N. Am., LLC*, No. 2:12-cv-07849, 2013 WL 5574626, at *11 (D.N.J. Oct. 9, 2013) (same). Arch falls short of its burden at both stages of the conflicts analysis.

First, Arch cannot establish an "actual conflict." *See Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 188 A.3d 297, 311 (N.J. 2018). Arch concedes no Washington or North Carolina state court has addressed regulatory estoppel under those states' laws. Mot. 32, 36. Yet the "mere possibility of a conflict of laws," *Bridgeview Health Care Ctr., Ltd. v. State Farm Fire & Cas. Co.*, 10 N.E.3d 902, 909 (Ill. 2014), is not an "actual conflict between the laws," *Honeywell*, 188 A.3d at 311. In *Bridgeview*, to avoid application of the forum state's law, the insurer faced the burden of proving an "*actual conflict*" between Illinois and Indiana law. 10 N.E.3d at 909 (emphasis in original). Yet the insurer could identify "no Indiana law on point." *Id.* The court therefore held

that the insurer "failed to meet its burden of demonstrating an actual conflict" and applied Illinois law accordingly. *Id.* So too here: Because Arch cannot point to a single Washington or North Carolina state-court decision addressing regulatory estoppel under those states' laws, it has failed to meet its burden.[6]

Second, even if there were an actual conflict, Arch has not shown that Washington or North Carolina has a more significant relationship than does New Jersey *to regulatory estoppel*. Under New Jersey law, significant-relationship analysis proceeds "issue by issue." *Woessner v. Air Liquide Inc.*, 242 F.3d 469, 472 (3d Cir. 2001). Yet Arch's significant-relationship analysis—a four-sentence paragraph devoid of any law whatsoever, Mot. 37–38—makes no attempt to analyze the states' respective relationships to the relevant issue. Arch states the Policies contain Washington and North Carolina endorsements but never explains how the endorsements prove those states have the more significant relationship to the regulatory-estoppel doctrine. Arch therefore fails to meet its burden.

Finally, even if the Court decides state law applies, and further finds a conflict, dismissal would still be unwarranted; rather, further discovery concerning state interests would be needed. *Cf., e.g.*, *Harper v. LG Elecs. USA, Inc.*, 595 F. Supp. 2d 486, 491 (D.N.J. 2009) (applying New Jersey law to deny a motion to dismiss, reasoning the choice-of-law analysis required "a factual record full enough to permit th[e] [c]ourt to undertake the . . . 'governmental interest' analysis"); *E. Concrete Materials, Inc. v. Jamer Materials Ltd.*, No. 19-cv-9032, 2019 WL 6734511, at *9

[6] Though *Wysong & Miles Co. v. Employers of Wausau*, 4 F. Supp. 2d 421 (M.D.N.C. 1998), addressed regulatory estoppel, Mot. 35–36, under *Erie*, this Court must apply "state law as announced by the highest state court," *Wayne Moving & Storage of N.J., Inc. v. Sch. Dist. of Philadelphia*, 625 F.3d 148, 154 (3d Cir. 2010) (cleaned up). The Middle District of North Carolina is not North Carolina's highest court. In fact, in *Bridgeview*, the only on-point law that created an actual conflict was a decision of a federal district court. "Because a federal district court's *Erie* prediction is not state law," however, "such a prediction cannot, by itself, establish a conflict between state laws." 10 N.E.3d at 906.

(D.N.J. Oct. 25, 2019), *report and recommendation adopted*, No. 19-cv-9032, 2019 WL 6726476 (D.N.J. Dec. 10, 2019) (Wettre, J.) (declining, on a motion to dismiss, to undertake "fact-intensive [conflict-of-laws] analysis without the benefit of discovery").

c. *Morton* Accords with Washington and North Carolina Law.

Lastly, regulatory estoppel is consistent with Washington and North Carolina law, even were the Court to apply the laws of those states. Arch concedes as much in the opening sentences of its argument when it states that exclusions should be enforced only when "not violative of public policy." Mot. 28. Permitting insurers to mislead regulators without consequence is plainly violative of public policy—particularly when those regulators act as de facto fiduciaries for policyholders. *Cf. Joy Techs., Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493, 497 (W. Va. 1992) (reaching its regulatory-estoppel holding on public-policy grounds). Unable to state otherwise, Arch contends regulatory estoppel has been rejected in many jurisdictions. Mot. 32. Yet Arch fails to cite a single Washington or North Carolina state-court decision rejecting regulatory estoppel. And the *SnyderGeneral* case on which Arch relies, *id.* at 32 n.10, as well as the cases cited therein, were all decided on summary judgment or after a trial.[7] The question here is dispositively different: whether the pleadings, taken as true, state a cause of action.

Arch frames *Morton* as a reasonable-expectations case, not an estoppel case. Mot. 34–35.

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[7] *SnyderGeneral Corp. v. Great Am. Ins. Co.*, 928 F. Supp. 674, 676 (N.D. Tex. 1996), *aff'd sub nom. SnyderGeneral Corp. v. Cont'l Ins. Co.*, 133 F.3d 373 (5th Cir. 1998); *Federated Mut. Ins. Co. v. Botkin Grain Co.*, 64 F.3d 537, 539 (10th Cir. 1995); *Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 40 F.3d 146, 148 (7th Cir. 1994); *Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 842 F. Supp. 575, 576 (D.D.C. 1994), *aff'd sub nom. Charter Oil Co. v. Am. Employers' Ins. Co.*, 69 F.3d 1160 (D.C. Cir. 1995); *Dimmitt Chevrolet, Inc. v. Se. Fid. Ins. Corp.*, 636 So. 2d 700, 702 (Fla. 1993); *Farm Bureau Mut. Ins. Co. v. Laudick*, 859 P.2d 410, 411 (Kan. Ct. App. 1993); *ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co.*, 22 Cal. Rptr. 2d 206, 208 (Cal. Ct. App. 1993), *as modified* (Sept. 21, 1993); *Smith v. Hughes Aircraft Co. Corp.*, 783 F. Supp. 1222, 1223 (D. Ariz. 1991), *aff'd in part*, *rev'd in part sub nom. Smith v. Hughes Aircraft Co.*, 10 F.3d 1448 (9th Cir. 1993), *opinion amended and superseded on denial of reh'g*, 22 F.3d 1432 (9th Cir. 1993), *and aff'd in part*, *rev'd in part sub nom. Smith v. Hughes Aircraft Co.*, 22 F.3d 1432 (9th Cir. 1993).

Yet *Morton* was an "appropriate and compelling" "application" of "the estoppel doctrine in a regulatory context." 629 A.2d at 874. And both Washington and North Carolina recognize the availability of equitable estoppel to protect policyholders like the Teams. *Baker v. Phoenix Ins. Co.*, No. 12-cv-1788, 2013 WL 12109403, at *3 (W.D. Wash. Mar. 5, 2013); *Gaston-Lincoln Transit, Inc. v. Md. Cas. Co.*, 206 S.E.2d 155, 160 (N.C. 1974). The three elements of equitable estoppel are met. First, Arch misled the commissions on the pre-2006 decisional law interpreting "direct physical loss or damage." Compl. ¶¶ 88–98. *Cf. Morton*, 629 A.2d at 875 (holding the insurers' misrepresentation to regulators must be "imputed" to policyholders themselves). Second, the commissions relied on Arch's representations to approve the Exclusion without requiring a corresponding reduction in premium. Compl. ¶¶ 96–98. Third, injury resulted when, despite the Teams having paid a premium commensurate with the virus being an insured risk, Arch denied the Teams' claims, forcing them to bear "catastrophic financial losses." *Id.* ¶ 3.[8]

In short, *Morton* is nothing new, and the Teams have adequately pled relief under both equitable and regulatory estoppel. *Cf.* 17 *Couch on Insurance* § 239:93 (explaining the "doctrine of estoppel will be used liberally, as a matter of equity, to prevent fraud and to require fair dealing"). Arch nevertheless argues that (1) parole evidence is inadmissible to construe the Exclusion, Mot. 38–39, and (2) estoppel may not be used to expand coverage, *id.* at 35–37. Even if these general maxims are true, they neither address nor undermine the Teams' allegations.

First, the Teams do not seek to admit parol evidence to clarify the meaning of the

[8] Regardless, Arch's assertion the reasonable-expectations doctrine has not been recognized under North Carolina law, Mot. 35, 36, is erroneous. *See Great Am. Ins. Co. v. C. G. Tate Const. Co.*, 279 S.E.2d 769, 771, 774 (N.C. 1981) (adopting the reasonable-expectations doctrine, holding "an insurance contract should be read to accord with the reasonable expectations of the purchaser so far as its language will permit," (quoting *Cooper v. Gov't Emp. Ins. Co.*, 237 A.2d 870, 873 (N.J. 1968)), and reasoning "adoption of the modern rule of reasonable expectations promotes the social function of insurance coverage: providing compensation for injuries sustained by innocent members of the public").

Exclusion. They argue, rather, the Exclusion is unenforceable, whatever its meaning. The parol-evidence rule does not apply to defenses to formation and enforcement like misrepresentation. Restatement (Second) of Contracts § 214 (Am. Law. Inst. 1981). And regulatory estoppel springs from misrepresentation, not from ambiguity in the policy language. *See Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 998 P.2d 856, 869 (Wash. 2000) (calling regulatory estoppel "a species of fraud in the inducement"). *Morton* underscores this point, reaching its holding "notwithstanding the literal terms of the standard pollution-exclusion clause." 629 A.2d at 875; *see also id.* at 847–48; *Sunbeam*, 781 A.2d at 1194–95 (partitioning analysis of an ambiguity claim from the "regulatory estoppel claim").

Second, Arch wrongly conflates the non-enforcement of an exclusion with an expansion of coverage. Yet "[e]xclusion clauses do not grant coverage; rather, they subtract from it." *Harrison Plumbing & Heating, Inc. v. N.H. Ins. Grp.*, 681 P.2d 875, 880 (Wash. Ct. App. 1984). Arch nonetheless contends "insureds cannot use the doctrine of estoppel to bring within the coverage of a policy risks . . . expressly excluded from its terms." Mot. 35 (cleaned up). Arch paints with too broad a brush, however. Though estoppel does not apply to "coverage" provisions, it *does* apply to "forfeiture" provisions. *Brendle v. Shenandoah Life Ins. Co.*, 332 S.E.2d 515, 518 (N.C. Ct. App. 1985). Whereas a coverage provision concerns a "new risk," a forfeiture provision concerns existing subject matter. *Id.* Under the Teams' "all risk" Policies, Compl. ¶¶ 7, 52, Arch insured all risks of direct physical loss or damage to the Teams' ballparks, which are the subject matter of the Policies. As explained, the virus is a risk of direct physical loss or damage, *see supra* Part I, a risk the Exclusion purports to "subtract," *see Harrison Plumbing & Heating*, 681 P.2d at 880. The virus is therefore not a "new risk," *Brendle*, 332 S.E.2d at 518; falling under the Policies' broad grants of coverage, it is an old risk, the exclusion

of which the Teams allege Arch has forfeited. Arch's own case explains why the Teams have sufficiently alleged estoppel. "[C]ourts have reasoned that an insurance company should not be required by . . . estoppel to pay for a loss for which it charged no premium." Mot. 36 (cleaned up). **Here, however, the Teams allege Arch must pay for a loss for which it *did* charge a premium.** *See* Compl. ¶¶ 97 (explaining Arch "improperly" maintained "pre-existing premiums"), 95, 98. In short, were the Teams to prove the elements of estoppel, thereby rendering the Exclusion unenforceable, judgment for the Teams would not be an expansion of coverage but the provision of coverage that would otherwise be excluded. *Cf. Bituminous Fire & Marine Ins. Co. v. Izzy Rosen's, Inc.*, 493 F.2d 257, 260 (6th Cir. 1974) (holding though estoppel does not permit a policyholder to "write into an insurance policy coverage that was not specified in the contract," it does bar the insurer from "assert[ing] an exclusionary clause, thereby permitting the insured to rely on the coverage provisions in the policy").

D. Arch's Decisions Addressing the Exclusion Are Non-Precedential and Distinguishable.

Arch cites three COVID-19 business-interruption decisions that analyzed the Exclusion, but none addresses the issues presented by the Teams here. *See* Mot. 30–31. None is precedential; each is distinguishable. *Turek Enterprises, Inc. v. State Farm Mutual Automobile Insurance Co.*, No. 20-cv-11655, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020), and *Wilson v. Hartford Casualty Co.*, No. 20-cv-3384, 2020 WL 5820800 (E.D. Pa. Sept. 30, 2020), do not analyze regulatory estoppel. 2020 WL 5258484, at *9 n.13; 2020 WL 5820800, at *7. And *Mauricio Martinez, DMD, P.A. v. Allied Insurance Co. of America*, No. 20-cv-00401, 2020 WL 5240218 (M.D. Fla. Sept. 2, 2020), addresses neither causation nor regulatory estoppel. *Id.* at *2.

CONCLUSION

For these reasons, the Court should deny Arch's Motion to Dismiss.

Date: November 2, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, a true and correct copy of Plaintiffs' Response to Defendant Arch Insurance Co.'s Motion to Dismiss was filed with the Clerk of the United States District Court for the District of New Jersey, Martin Luther King Building & U. S. Courthouse, 50 Walnut Street, Room 4015, Newark, NJ 07101, via ECF electronic filing, and that a true and correct copy of the foregoing document was served upon all counsel of record listed below by ECF electronic filing.

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Dated: November 2, 2020

Respectfully submitted,

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