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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Chattanooga Professional Baseball LLC, et al.,

No. CV-20-01312-PHX-DLR

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Plaintiffs,

ORDER

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v.

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National Casualty Company, et al.,

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Defendants.

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Before the Court is Defendants’ motion to dismiss, which is fully briefed. (Docs. 27, 30, 33.) For the following reasons, Defendants’ motion is granted.¹

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I. Background

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¹ The parties’ requests for oral argument are denied because the issues are adequately briefed and oral argument will not help the Court resolve the motion. *See* Fed. R. Civ. P. 78(b); LRCiv. 7.2(f); *Lake at Las Vegas Investors Grp., Inc. v. Pac. Malibu Dev.*, 933 F.2d 724, 729 (9th Cir. 1991).

1 related to controlling the spread of the virus; and Major League Baseball (“MLB”) not
2 supplying players to their affiliated minor league teams.” (*Id.* at 4.) Following cessation,
3 Plaintiffs submitted claims for coverage under the Policies to Defendants, but Defendants
4 have allegedly denied their claims or intend to do so.² (*Id.* at 6.) On July 2, 2020, Plaintiffs
5 filed suit against Defendants in this Court. (Doc. 1.) The operative amended complaint,
6 filed on August 21, 2020, brings claims for breach of contract, anticipatory breach of
7 contract, and declaratory judgment. (Doc. 23.) On September 11, 2020, Defendants filed
8 a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The motion is now ripe.

9 **II. Legal Standard**

10 **A. Fed. R. Civ. P. 12(b)(6)**

11 To survive dismissal for failure to state a claim pursuant to Federal Rule of Civil
12 Procedure 12(b)(6), a complaint must contain factual allegations sufficient to “raise a right
13 to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
14 (2007). The task when ruling on a motion to dismiss “is to evaluate whether the claims
15 alleged [plausibly] can be asserted as a matter of law.” *See Adams v. Johnson*, 355 F.3d
16 1179, 1183 (9th Cir. 2004); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). When
17 analyzing the sufficiency of a complaint, the well-pled factual allegations are taken as true
18 and construed in the light most favorable to the plaintiff. *Cousins v. Lockyer*, 568 F.3d
19 1063, 1067 (9th Cir. 2009). However, legal conclusions couched as factual allegations are
20 not entitled to the assumption of truth, *Iqbal*, 556 U.S. at 680, and therefore are insufficient
21 to defeat a motion to dismiss for failure to state a claim, *In re Cutera Sec. Litig.*, 610 F.3d
22 1103, 1108 (9th Cir. 2008).

23 **B. Choice of Law**

24 “In a diversity case, the district court must apply the choice-of-law rules of the state
25 in which it sits.” *Abogados v. AT&T, Inc.*, 223 F.3d 932, 934 (9th Cir. 2000). Applying
26 Arizona choice-of-law rules, when addressing a claim based on an insurance policy, the

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28 ² Plaintiffs explain that they fall into “two categories—the “Breach Plaintiffs or the
“Anticipatory-Breach Plaintiffs—depending on the steps their respective Insurers have
taken to avoid honoring their contractual commitments.” (Doc. 23 at 7.)

1 Court applies the law of the “state which the parties understood was to be the *principal*
2 *location of the insured risk during the term of the policy*[.]” *Beckler v. State Farm Mut.*
3 *Auto. Ins. Co.*, 987 P.2d 768, 772 (Ariz. Ct. App. 1999) (emphasis in original). Here, it is
4 undisputed that the insured risk for each Plaintiff rests in the state where each team
5 resides—California, Idaho, Indiana, Maryland, Oregon, South Carolina, Tennessee, Texas,
6 Virginia, or West Virginia.

7 **III. Discussion**

8 Defendants assert that each of the amended complaint’s counts should be dismissed
9 as a matter of law because Plaintiffs are not entitled to recover from Defendants from their
10 COVID-related losses because the Policies include a virus exclusion provision that
11 expressly excludes coverage for losses caused by a virus. The virus exclusion, which
12 applies to all coverage under the Policies, generally reads, “[w]e will not pay for loss or
13 damage caused by or resulting from any virus, bacterium or other microorganism.” (Doc.
14 23-1 at 58.) Under the law of each of the ten states in which the MiLB teams reside, the
15 Court construes insurance contracts according to their plain and ordinary meaning.³
16 Plaintiffs do not dispute that the virus exclusion’s meaning—that policy coverage does not
17 include losses stemming from or related to a virus—is clear and unambiguous. Rather,
18 they contend that the exclusion’s existence should not result in a dismissal of their
19 complaint because (1) whether the losses were caused by the virus is a question of fact that
20 cannot be decided at this juncture and (2) Defendants are estopped from applying the
21 exclusion. The Court will address Plaintiffs’ arguments, in turn.

22 **A. Factual Dispute**

23 Plaintiffs’ argument that a factual dispute exists as to the cause of their loss is not

24 ³ *Tustin Field Gas & Good, Inc. v. Mid-Century Ins. Co.*, 219 Cal. Rptr.3d 909, 914
25 (Cal. Ct. App. 2017); *Clark v. Prudential Prop. & Cas. Ins. Co.*, 66 P.3d 242, 245 (Idaho
26 2003); *Erie Indem. Co. for Subscribers at Erie Ins. Exch. v. Estate of Harris by Harris*, 99
27 N.E.3d 625, 630 (Ind. 2018); *Kurland v. ACE Am. Ins. Co.*, CV No. JKB-15-2668, 2017
28 WL 354254, at *2 (D. Md. Jan. 23, 2017); *Groshong v. Mutual of Enumclaw Ins. Co.*, 985
P.2d 1284, 1289 (Or. 1999); *Whitlock v. Stewart Title Guar. Co.*, 732 S.E.2d 626, 628 (S.C.
2012); *Garrison v. Bickford*, 377 S.W.3d 659, 664 (Tenn. 2012); *Aggreko, L.L.C. v. Chartis*
Specialty Ins. Co., 942 F.3d 682, 688 (5th Cir. 2019); *Erie Ins. Exch. v. EPC MD 15, LLC*,
822 S.E.2d 351, 355 (Va. 2019); *W. Virginia Fire & Cas. Co. v. Stanley*, 602 S.E.2d 483,
489 (W. Va. 2004).

1 plausible. Plaintiffs’ amended complaint explicitly attributes their losses to the virus,
2 stating, “[t]he nature of the virus including its continuing damaging and invisible presence
3 and the measures required to mitigate its spread constitute an actual and imminent threat
4 and direct physical loss or damage to the ballparks (as well as the areas surrounding them)
5 and has contributed to cancellations of the Teams’ MiLB games” and “[a]s a result of the
6 virus, attendant disease, resulting pandemic governmental responses, and MLB not
7 supplying players, the Teams have been deprived of their primary source of revenue[.]”
8 (Doc. 23 at ¶¶ 58, 71.) Plaintiffs’ attempt to create a question of fact by arguing it is
9 unclear whether their losses were caused by the government’s orders in response to the
10 virus or the virus itself, (Doc. 30 at 6), is unavailing.

11 The amended complaint alleges that the government orders in question were issued
12 as a direct result of the virus. It states, “[t]he nature of the virus has caused authorities
13 around the country to issue stay-in-place orders to protect persons and property. . . Indeed,
14 authorities in each of the Teams’ respective states have issued such orders.” (Doc. 23 at ¶
15 45.) Plaintiffs’ amended complaint does not allege any fact supporting an alternative
16 theory for the issuance of the government orders. There is no allegation in the complaint
17 that absent the pandemic, the government would have been prompted to issue stay-at-home
18 orders or otherwise inhibit access to the ballparks. Similar COVID-19 causation
19 arguments have been consistently rejected. *See Diesel Barbershop, LLC v. State Farm*
20 *Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305, at * 6 (W.D. Tex. Aug. 13, 2010)
21 (“While the Orders technically forced the Properties to close[,] the Orders only came about
22 sequentially as a result of the COVID-19 virus. . . Thus, it was the presence of COVID-19
23 . . . that was the primary root cause of Plaintiffs’ business temporarily closing.”); *Franklin*
24 *EWC, Inc. v. The Hartford Finn. Servs. Grp., Inc.*, No. 20-cv-04434 JSC, 2020 WL
25 5642483, at *2 (N.D. Cal. Sept. 22, 2020) (“[U]nder Plaintiffs’ theory, the loss is created
26 by the Closure Orders rather than the virus, and therefore the Virus Exclusion does not
27 apply. Nonsense.”).

28 Turning to MLB’s failure to provide players, even if Plaintiffs’ losses were caused

1 by such failure—and the virus did not cause such failure—the Policies include an exclusion
2 for losses stemming from the “[s]uspension, lapse or cancellation” of a contract. (Doc. 23-
3 1 at 44.) Again, Plaintiffs do not argue that the exclusion is ambiguous, but rather that it
4 is inapplicable because they have not alleged that a suspension, lapse or cancellation of a
5 contract between MLB and MiLB occurred when MLB failed to provide players to MiLB.
6 Not so. Plaintiffs state in their amended complaint that MLB is contractually obligated to
7 supply Plaintiffs’ teams with players but failed to do so. (Doc. 23 at ¶¶ 69-70.) Any effort
8 to ignore the contractual nature of MLB and MiLB’s relationship is disingenuous. In sum,
9 the Court rejects Plaintiffs’ first argument against the applicability of the virus exclusion.

10 **B. Estoppel**

11 Plaintiffs next argue dismissal is inappropriate because they have adequately alleged
12 that Defendants are estopped from enforcing the virus exclusion. Particularly, they contend
13 that regulatory estoppel prevents enforcement of the provision because Defendants were
14 only able to gain regulatory approval for the virus exclusion in 2006 by making
15 misrepresentations⁴ to the state insurance commissions. However, regulatory estoppel is a
16 New Jersey state law defense, espoused in *Morton Inter. v. Gen. Acc. Ins. Co. of Am.*, 629
17 A. 2d 831 (N.J. 1993), which no state whose laws apply has adopted. *See Snyder General*
18 *Corp. v. General Am. Ins. Co.*, 928 F. Supp. 674, 682 (N.D. Tex. 1996) (collecting cases)
19 (explaining that regulatory estoppel “has been rejected by virtually every other state and
20 federal court to address the issue.”). Plaintiffs suggest that, even if no relevant state has
21 adopted regulatory estoppel,⁵ lack of current recognition is of no import, because the states
22 *would* recognize it if given the opportunity, each state nevertheless recognizes general
23 equitable estoppel, and, regardless, federal common law governs their estoppel defense.

24 Plaintiffs’ arguments are unpersuasive. First, contrary to Plaintiffs’ assertions,

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26 ⁴ Plaintiffs assert that Defendants falsely represented to regulatory commissions,
27 when securing approval, that the exclusion was merely a clarification of current policy in
28 order to avoid premium reductions when, in fact, the exclusion reduced prior coverage.

⁵ Plaintiffs argue West Virginia has recognized regulatory estoppel, citing to *Joy Tech., Inc. v. Liberty Mut. Ins. Co.*, 421 S.E. 2d 493 (W. Va. 1992), a case which does not discuss estoppel.

1 courts in Texas and Indiana have already refused to follow *Morton*'s guidance when given
2 the opportunity, declining to apply regulatory estoppel when facing an unambiguous
3 insurance provision. *Id.*; *Cincinnati Ins. Co. v. Flanders Elect. Motor Serv., Inc.*, 40 F.3d
4 146, 153 (7th Cir. 1994). Second, general equitable estoppel is "not available to bring
5 within the coverage of a policy risks not covered by its terms, or risks expressly excluded
6 therefrom." *Reno Contracting, Inc. v. Crum & Forster Specialty Ins. Co.*, 359 F. Supp. 3d
7 944, 952 (S.D. Cal. 2019); *see also Spring Vegetable Co. v. Hartford Cas. Ins. Co.*, 801 F.
8 Supp. 385, 392 (D. Or. 1992) ("estoppel cannot be invoked by an insured to create
9 insurance coverage where none exists under the policy."). Rather, "[t]he doctrine of
10 estoppel prevents the insurer from denying coverage based on printed provisions in the
11 policy that conflict with representations by the insurer or its agents on which the policy
12 holder reasonably relied." *Shoup v. Union Sec. Life Ins. Co.*, 124 P.3d 1028 (Idaho 2005).⁶
13 Plaintiffs, here, make the estoppel defense in attempt to bring virus-related losses within
14 the coverage of the Policies, even though such risks are expressly excluded. Plaintiffs have
15 not alleged that Defendants made representations to them that the virus exclusion did not
16 apply, or that their coverage otherwise differed from that represented in the printed
17 materials. Plaintiffs' estoppel theory—that Defendants should not be able to apply the
18 virus exclusion because it allegedly came into being following misrepresentations made by
19 Defendants to state commissions to avoid premium reductions—is not one that is
20 cognizable under general equitable estoppel. Third, federal common law does not govern
21 Plaintiffs' estoppel defense. "[A]bsent some congressional authorization to formulate
22 substantive rules of decision, federal common law exists only in such narrow areas as those
23 concerned with the rights and obligations of the United States, interstate and international
24 disputes implications the conflicting rights of States or our relations with foreign nations,
25 and admiralty cases." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 461 U.S. 630, 641

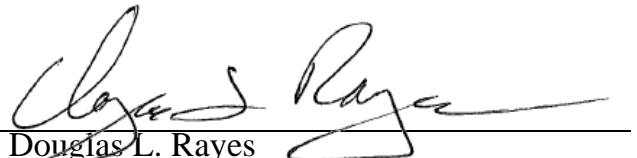
26 ⁶ *See also Emmco Ins. v. Pashas*, 224 N.E.2d 314, 318 (Ind. App. 1967); *St. Paul*
27 *Mercury Ins. Co. v. Am. Bank Holdings, Inc.*, 819 F.3d 728, 739 (4th Cir. 2016); *Mayes v.*
28 *Paxton*, 437 S.E.2d 66, 68 (S.C. 1993); *Henry v. S. Fire & Cas. Co.*, 330 S.W.2d 18, 31
(Tenn. Ct. App.1958); *Mitchell v. State Farm Lloyds*, No. 05-08-00184-CV, 2009 WL
596611, at *3 (Tex. Ct. App. Mar. 10, 2009); *Harris v. Criterion Ins. Co.*, 281 S.E.2d 878,
881 (Va. 1981); *Potesta v. U.S. Fid. & Guar. Co.*, 504 S.E.2d 135, 150 (W. Va. 1998).

1 (1981). The rare circumstances in which federal common law exists are absent here. In
2 sum, Plaintiffs' estoppel defense fails as a matter of law

3 Plaintiffs have advanced no additional arguments against the applicability of the
4 virus exclusion. Accordingly, dismissal of Plaintiffs' complaint is appropriate.

5 **IT IS ORDERED** that Defendants' motion to dismiss (Doc. 27) is **GRANTED**.
6 The Clerk of Court is directed to terminate the case.

7 Dated this 13th day of November, 2020.

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12 Douglas L. Rayes
13 United States District Judge
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