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FILED

JUN -7 2021

TIMOTHY W. FITZGERALD
SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

KALISPEL TRIBE OF INDIANS, a federally recognized Indian Tribe, and KALISPEL TRIBAL ECONOMIC AUTHORITY, an instrumentality and enterprise of Kalispel Tribe of Indians,

Plaintiffs,

v.

- (1) LEXINGTON INSURANCE COMPANY;
- (2) UNDERWRITERS AT LLOYD'S-SYNDICATES: ASC 1414, XLC 2003, TAL 1183, MSP 318, ATL 1861, KLN 510, AGR 3268;
- (3) UNDERWRITERS AT LLOYD'S SYNDICATE: CNP 4444;
- (4) UNDERWRITERS AT LLOYD'S - ASPEN SPECIALTY INSURANCE COMPANY;
- (5) HOMELAND INSURANCE COMPANY OF NY (ONE BEACON);
- (6) HALLMARK SPECIALTY INSURANCE COMPANY;
- (7) UNDERWRITERS AT LLOYD'S SYNDICATES: KLN 0510, ATL 1861, ASC 1414, QBE 1886, MSP 0318, APL 1969, CHN 2015, XLC 2003;
- (8) UNDERWRITERS AT LLOYD'S SYNDICATE: BRT 2987;
- (9) ENDURANCE WORLDWIDE INSURANCE Ltd t/as SOMPO INTERNATIONAL;
- (10) UNDERWRITERS AT LLOYD'S-

Case No. **21201522-32**

COMPLAINT FOR DECLARATORY JUDGMENT AND MONETARY DAMAGES

1 SYNDICATES: KLN 0510, TMK 1880, BRT
2 2987, BRT 2988, CNP 4444, ATL 1861, Neon
3 Worldwide Property Consortium, AUW 0609,
4 TAL 1183, AUL 1274;
5 (11) ARCH SPECIALTY INSURANCE
6 COMPANY;
7 (12) EVANSTON INSURANCE COMPANY;
8 (13) ALLIED WORLD NATIONAL
9 ASSURANCE COMPANY;
10 (14) LIBERTY MUTUAL FIRE INSURANCE
11 COMPANY;

12 Defendants.

13 The Plaintiffs, Kalispel Tribe of Indians and Kalispel Tribal Economic Authority, through
14 their attorney Seth H. Row of Miller Nash LLP, allege as follows:

15 **I. NATURE OF THE ACTION**

16 1.1. This is an insurance coverage action between Plaintiffs Kalispel Tribe of Indians
17 (“KTI” or “the Tribe”) and Kalispel Tribal Economic Authority (“KTEA”) and their property
18 insurers, to recover business income and other losses that are covered by “all risk” insurance
19 policies issued to Plaintiffs, the payment of which Defendants have wrongfully withheld.

20 1.2. Defendants herein are “participants” in “Tribal First” policies issued to Plaintiffs,
21 which used a master policy form, known as Tribal First Insurance Program (“TPIP”), Form
22 Number 15 (“TPIP 15 Form”), for the year July 1, 2019, through July 2020.

23 1.3. The TPIP 15 Form policy was drafted by Defendants or their agents and as part of
24 the policies referred to herein provided “all risk” commercial property coverage to Plaintiffs and
25 contained, among other coverages, coverage for financial loss due to business interruption.

26 1.4. The TPIP 15 Form provided insurance against “all risk of direct physical loss or
damage” unless excluded elsewhere in the policy. The Policies issued to Defendants did not
exclude virus, pandemic, governmental orders or proclamations (other than in connection with
environmental impairment), or communicable disease (other than in animals).

1 2.3. Defendant Lexington Insurance Company (“Lexington”) is a foreign insurance
2 company organized under the laws of Delaware with its principal place of business in
3 Massachusetts. On information and belief Lexington does business within Spokane County,
4 Washington.

5 2.4. Defendants Underwriters at Lloyds numbered 2, 3, 7, 8, and 10 in the caption above
6 (“Certain Underwriters”) are syndicates which include ASC1414, XLC 2003, TAL 1183, MSP
7 318, ATL 1861, KLN 510, AGR 3268; CNP 4444; KLN 0510, ASC 1414, QBE 1886, MSP 0318,
8 APL1969, CHN 2015, XLC 2003; TMK 1880, BRT 2987, BRT 2988; Neon Worldwide Property
9 Consortium, AUW 0609, TAL 1183, and AUL 1274, and are, on information and belief,
10 underwriting syndicates consisting of corporate and natural persons who are members and conduct
11 business at the insurance marketplace known as Lloyd’s of London, which is chartered under the
12 laws of the United Kingdom. On information and belief Certain Underwriters do business within
13 Spokane County, Washington.

14 2.5. Defendant Underwriters at Lloyd’s - Aspen Specialty Insurance Company
15 (“Aspen”) is a foreign insurance company with its principal place of business in the
16 United Kingdom. On information and belief Aspen does business within Spokane County,
17 Washington.

18 2.6. Defendant Homeland Insurance Company of New York (“Homeland”) is a foreign
19 insurance company that on information and belief is organized under the laws of New York with
20 its principal place of business in Massachusetts. On information and belief Homeland does
21 business within Spokane County, Washington.

22 2.7. Hallmark Specialty Insurance Company (“Hallmark”) is a foreign insurance
23 company that is on information and belief organized under the laws of Texas with its principal
24 place of business in Texas. On information and belief Hallmark does business within
25 Spokane County, Washington.
26

1 Court also has jurisdiction over unauthorized non-resident insurers that solicit insurance business
2 in this state or transact insurance business in this state under RCW 48.05.215.

3 3.2. The Court has specific personal jurisdiction over Defendants because each of them
4 insured Plaintiffs' property located in the state of Washington such that the exercise of jurisdiction
5 by this Court is proper pursuant to RCW 4.28.185. Moreover, Defendants have each contractually
6 consented to personal jurisdiction and the jurisdiction of this Court.

7 3.3. This Court has subject matter jurisdiction pursuant to RCW 2.08.010.

8 3.4. Venue is proper pursuant to RCW 4.12.025(1) because the subject policies of
9 insurance insure property within Spokane County, Washington. Venue is additionally proper
10 because Defendants consented in the subject Policies to answer a suit concerning the Policies in
11 this Court.

12 **IV. FACTUAL ALLEGATIONS**

13 *Summary of Plaintiffs' Revenue-Generating Operations*

14 4.1. KTI directly operates several businesses that generate revenue and employment
15 opportunities for Tribal and non-Tribal members, including Kalispel Fresh Market; Kalispel RV
16 Park; Kalispel Storage; Kalispel Metal Products; Kalispel Auto Repair; Kalispel Auto Sales;
17 Kalispel Camas Center and Clinic (all located in Cusick, Washington); and a Deli; Early Learning
18 Center; and a Health & Wellness Center (all located in Usk, Washington).

19 4.2. KTEA is an instrumentality and enterprise of the Tribe, responsible for the
20 economic development and business operations of the Tribe. KTEA's efforts have allowed the
21 Tribe to contribute millions of dollars to the regional economy since its formation.

22 4.3. KTEA operates the Kalispel Casino, a casino with dining, located in Cusick,
23 Washington.

24 4.4. KTEA also operates a number of businesses in Spokane County, Washington,
25 including Northern Quest Resort & Casino ("Northern Quest Casino"), a 59,000-square foot
26 Las Vegas-style casino, hotel, and spa with over a dozen restaurants and lounges at the facility;

1 the Windfall Retail store inside the Northern Quest Casino; the Northern Quest RV Resort (a 67-
2 site luxury resort); the Kalispel Golf and Country Club (“KGCC”); Kalispel Linen Services;
3 Kalispel Upholstery; two Kalispel Market & Chevron Fuel Stations; and two Fatburger franchise
4 restaurants, one located in the Northern Quest Casino and one in the City of Spokane’s Five Mile
5 neighborhood. All of the above businesses are on Tribal trust land, with the exception of KGCC,
6 and the Fatburger in the Five Mile neighborhood of the City of Spokane.

7 The Policies

8 4.5. KTI purchased an “All Risk” insurance policy, entitled “Tribal Property Insurance
9 Program” and denominated “TPIP Policy # 017471589/06 (Dec 31) 9420,” for the period
10 July 1, 2019, through July 1, 2020 (the “Tribal Policy” or “KTI Policy”). The Tribal Policy lists
11 the insured’s address as “P.O. Box 39, Usk WA 99180.” The Tribal Policy was referred to and
12 marketed as a “Tribal First” policy through or in association with “Tribal First Alliant
13 Underwriting Solutions” and was marketed to tribal governmental policyholders, like KTI.

14 4.6. Each Defendant sued herein is listed as a “participant” in the Tribal Policy as
15 indicated on a document that is part of the Tribal Policy and entitled “Declaration #31 – TPIP 1
16 Schedule of Carriers,” which for each Defendant lists a financial level of “participation” in either
17 an initial layer of “all risk” coverage or an “excess” layer of “all risk” coverage of the Tribal Policy.

18 4.7. KTEA purchased an “All Risk” insurance policy, entitled “Tribal Property
19 Insurance Program” and denominated “TPIP Policy # 017471589/06 (Dec 16) 9418,” for the
20 period July 1, 2019, through July 1, 2020 (the “KTEA Policy”). The KTEA Policy lists the
21 insured’s address as “100 N. Hayford Road Airway Heights, WA 99001.” The KTEA Policy was
22 referred to and marketed as a “Tribal First” policy through or in association with “Tribal First
23 Alliant Underwriting Solutions” and was marketed to tribal enterprise policyholders, like KTEA.

24 4.8. Each Defendant sued herein is listed as a “participant” in the KTEA Policy as
25 indicated on a document that is part of the KTEA Policy and entitled “Declaration #16 – TPIP I
26 Schedule of Carriers,” which for each Defendant lists a financial level of “participation” in either

1 an initial layer of “all risk” coverage or an “excess” layer of “all risk” coverage of the KTEA
2 Policy.

3 4.9. The Tribal Policy and the KTEA Policy are referred to collectively hereinafter as
4 “the Policies.”

5 4.10. The Policies were expressly issued under the Surplus Lines law of the state of
6 Washington.

7 4.11. On information and belief each Defendant sued herein “participates” in each of the
8 Policies pursuant to an agreement between each such Defendant and an entity known as
9 Tribal First/Alliant Specialty Insurance Services, Inc., and/or Alliant Insurance Services, Inc.
10 Those agreements, which are alleged to exist on information and belief only, are referred to
11 hereinafter as the “Participation Agreements.” On information and belief the policy or agreement
12 numbers of the Participation Agreements are indicated in each of the Policies on the “schedules”
13 of “carriers” referred to above.

14 4.12. Neither Plaintiff received a copy of any Participation Agreement prior to the losses
15 described herein, or at any time thereafter. The terms on which each or any Defendant sued herein
16 “participates” in the Policies is nowhere described or defined in the Policies, other than the
17 “Declaration Page – Primary Layer” and “Excess Declarations Page” documents referred to below,
18 and a “Several Liability Notice” on page 36 of a 68-page form that is part of each Policy.

19 4.13. The Policies describe the role of non-party Tribal First/Alliant Specialty Insurance
20 Services as “provid[ing] underwriting, claims/risk management, and administrative services all as
21 part of the insurance solution for your clients protection.”

22 4.14. The Policies each contain a document entitled “Evidence of Coverage” that lists
23 certain information about the named insured; “Insurance Companies;” certain “insured values;”
24 the limits of coverage provided for certain “All Risk Coverages;” “Special Terms;” “Total Annual
25 Costs” (premiums); and the address for notification of claims. Each “Evidence of Coverage”
26

1 document further states that “Coverage outlined in this Evidence of Coverage is subject to the
2 Terms and Conditions set forth in the policy.”

3 4.15. The Policies each contain a schedule of “Named Insureds.” The KTEA Policy lists
4 a number of entities as “Named Insureds” including, but not limited to, Northern Quest Casino;
5 Northern Quest RV Resort; and Kalispel Casino. The KTI Policy lists only KTI.

6 4.16. The Policies each contain three documents entitled “Declaration Page – Primary
7 Layer.” Each of these “Primary Layer” documents lists Defendant Lexington under “Insurer
8 Name” and lists a percentage of a “primary layer,” either \$25,000,000 or \$2,500,000. None of
9 these “Primary Layer” amounts correspond with any other amount indicated in the Policies as
10 “primary” or “excess,” including the “schedules” of “carriers” referred to above that are present in
11 each of the Policies.

12 4.17. The Policies each contain one document entitled “Excess Declarations Page” which
13 under “Policy Number” indicates “See attached schedule of carriers” and refers also to the
14 “policies indicated on the attached Schedule of Carriers and Participation,” which reference is on
15 information and belief to the Subscription Agreements.

16 4.18. On information and belief Lexington functions as the lead insurer in the Tribal First
17 program for purposes of claims handling under inter-insurer agreements among Defendants and/or
18 agreements between Defendants and Tribal First/Alliant Specialty Insurance Services, Inc., and/or
19 Alliant Insurance Services, Inc. On information and belief coverage decisions made by Lexington
20 are binding on all other “participants” in the Policies.

21 4.19. The Policies are package policies that provide multiple types of coverage. Under
22 one document entitled “Tribal First Policy Wording TPIP Form No. 15 Coverage Incepting
23 July 1, 2019 to July 1, 2020” (the “TPIP 15 Form”), the Policies provide coverage described as
24 “Property Damage,” “Business Interruption, Extra Expense & Rental Income,” “Fine Arts
25 Floater,” “Mobile/Contractors Equipment,” “Accounts Receivable,” “Unmanned Aircraft,” and
26 “Boiler and Machinery Breakdown Extension.”

1 4.20. Other endorsements or forms that are part of the Policies but not part of the TPIP 15
2 Form provide coverage described as “Tribal Terrorism Insurance Program,” “Cyber Insurance,”
3 “Pollution Liability,” and “Deadly Weapons Coverage.”

4 4.21. For purposes of the claims asserted herein, the contractual terms and conditions of
5 coverage under the Policies are found in the documents that follow the Evidence of Coverage
6 document and that are listed above, and are principally found in the TPIP 15 Form.

7 4.22. The Participation Agreements do not form a part of the Policies nor do their terms
8 and conditions, unknown to Plaintiffs, bind or control the coverage available under the Policies in
9 any way.

10 4.23. Under the TPIP 15 Form, the Policies provide coverage for “all risk of direct
11 physical loss or damage occurring during the period” of the Policies (July 1, 2019–July 1, 2020).

12 4.24. Under the TPIP 15 Form, the Policies provide coverage for Business Interruption
13 losses. Specifically, the Policies insure “[a]gainst loss resulting directly from interruption of
14 business, services or rental value caused by direct physical loss or damage, as covered by this
15 Policy to real and/or personal property insured by this Policy, occurring during the term of this
16 Policy.” Business Interruption carries its own monetary limit of coverage in each of the Policies.

17 4.25. Under the TPIP 15 Form, the Policies’ Business Interruption coverage further
18 provides that “in the event of such loss or damage the Company shall be liable for the actual loss
19 sustained by the Named Insured for gross earnings ... resulting from such interruption of
20 business ... less all charges and expenses which do not necessarily continued during the period of
21 restoration.” The Policies provide a definition of “Gross Earnings.”

22 4.26. Under the TPIP 15 Form, the Policies’ Business Interruption coverage further
23 provides for the payment by Defendants of “ordinary payroll.” “Ordinary Payroll” has its own
24 monetary limit of coverage in each of the Policies.

25 4.27. Under the TPIP 15 Form, the Policies provide coverage for “Extended Period of
26 Indemnity.” Specifically, the Policies cover “business interruption” loss “for the additional length

1 of time required to restore the business of the Named Insured to the condition that would have
2 existed had no loss occurred,” commencing on *inter alia* “the date on which rebuilding, repairing
3 or replacement of such property as has been lost, damaged or destroyed is actually completed,” for
4 a maximum period of 180 days.

5 4.28. Under the TPIP 15 Form the Policies expressly cover “Interruption by Civil
6 Authority.” Specifically, the Policies cover “the actual loss sustained by the Named Insured, as
7 covered hereunder during the length of time, not exceeding 30 days, when as a direct result of
8 damage to or destruction of property by a covered peril(s) occurring at a property located within a
9 10 mile radius of covered property, access to the covered property is specifically prohibited by
10 order of a civil authority.”

11 4.29. Under the TPIP 15 Form the Policies provide “Contingent Time Element
12 Coverage.” Specifically, the Policies state that “Business interruption, rental income, and extra
13 expense coverage provided by this Policy is extended to cover loss directly resulting from physical
14 damage to property of the type not otherwise excluded by this Policy at direct supplier or direct
15 customer locations that prevents a supplier of goods and/or services to the Named Insured from
16 supplying such goods and/or services, or that prevents a recipient of goods and/or services from
17 the Named Insured from accepting such goods and/or services.”

18 4.30. Under the TPIP 15 Form the Policies also provide “Tax Revenue Interruption
19 Coverage.” Specifically, the Policies provide that, “[e]xcept as hereinafter or heretofore excluded,
20 this Policy insures against loss resulting directly from necessary interruption of sales, property or
21 other tax revenue including, but not limited to, Tribal Incremental Municipal Services Payments
22 collected by or due the Named Insured caused by damage, or destruction by a peril not excluded
23 from this Policy to property which is not operated by the Named Insured and which wholly or
24 partially prevents the generation of revenue for the account of the Named Insured.”

25 4.31. Under the TPIP 15 Form the Policies provide coverage for “Accidental
26 Contamination.” Specifically, the Policies provide that the Policies are “hereby extended to cover

1 Business Interruption and Property Damage loss as a result of accidental contamination, discharge
2 or dispersal from any source to Covered Property, including expenses necessarily incurred to clean
3 up, remove and dispose of contaminated substances so as to restore the Covered Property to the
4 same condition as existed prior to loss.” The “Accidental Contamination” coverage under each
5 Policy is sub-limited to \$25,000.

6 4.32. Under the TPIP 15 Form the Policies provide coverage for “Ingress/Egress.”
7 Specifically the Policies provide that coverage is “extended to insure the actual loss sustained
8 during the period of time not exceeding 30 days, when as a direct result of physical loss or damage
9 caused by a covered peril(s) specified by this Policy and occurring at property located within a
10 10 mile radius of covered property, ingress to or egress from the covered property covered by this
11 Policy is prevented.”

12 4.33. Under the TPIP 15 Form the Policies provide coverage for several other types of
13 expenditures arising from or related to other covered losses, including “Expediting Expenses,”
14 “Protection and Preservation of Property,” “Architects and Engineers Fees and Loss Adjustment
15 Expenses,” “Extra Expense,” and “Expense to Reduce Loss.”

16 The Pandemic

17 4.34. COVID-19 is a severe infectious disease caused by the Covid-19 virus. COVID-19
18 can cause serious systemic illness and death.¹ To date, there have been over 159 million confirmed
19 cases of COVID-19 (over 32.4 million of them in the U.S. alone) and over 2.6 million deaths
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25 ¹ Tianna Hicklin, *Immune cells for common cold may recognize SARS-COV-2*, NAT. INST. OF HEALTH (Aug. 18, 2020),
26 <https://www.nih.gov/news-events/nih-research-matters/immune-cells-common-cold-may-recognize-sars-cov-2> (last
visited May 12, 2021).

1 worldwide.² Due to pervasive spread and presence of the Covid-19 virus and COVID-19 across
2 the planet, both are presumed to be present or imminently present everywhere.³

3 4.35. The existence and/or presence of the Covid-19 virus and COVID-19 is not simply
4 reflected in reported cases or individuals' positive test results. The Centers for Disease Control
5 and Prevention ("CDC") estimates that the number of people in the U.S. who have been infected
6 with the Covid-19 virus is likely to be 10 times higher than the number of reported cases.⁴
7 Additionally, at least 40 percent of people infected with the Covid-19 virus are asymptomatic.⁵
8 COVID-19 also includes a pre-symptomatic incubation period of up to 14 days, during which time
9 infected people can transmit the Covid-19 virus to people, into the air and onto surfaces without
10 having experienced symptoms and without realizing that they are infected.⁶

11 4.36. Studies have demonstrated that pre-symptomatic individuals have an even greater
12 ability to transmit the Covid-19 virus than other infected people because they carry the greatest
13 "viral load."⁷ The National Academy of Sciences has concluded that "the majority of transmission

14 ² *Coronavirus Disease 2019 (COVID-19)*, CDC, updated Mar. 20, 2021, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last visited May 12, 2021); *Europe, Southeast Asia, and Eastern Mediterranean COVID Cases: WHO Coronavirus Disease (COVID-19) Dashboard*, WHO (last updated Mar. 20, 2021), <https://covid19.who.int/> (last visited May 12, 2021).

17 ³ See, e.g., Christopher Ingraham, *At the population level, the coronavirus is almost literally everywhere*, WASH. POST, Apr. 1, 2020, <https://www.washingtonpost.com/business/2020/04/01/population-level-coronavirus-is-almost-literally-everywhere/> (last visited May 12, 2021).

19 ⁴ Lena H. Sun and Joel Achenbach, *CDC chief says coronavirus cases may be 10 times higher than reported*, WASH. POST (June 25, 2020), <https://www.washingtonpost.com/health/2020/06/25/coronavirus-cases-10-times-larger/> (last visited May 12, 2021).

21 ⁵ Ellen Cranley, *40% of people infected with covid-19 are asymptomatic, a new CDC estimate says*, BUS. INSIDER (July 12, 2020), <https://www.businessinsider.com/cdc-estimate-40-percent-infected-with-covid-19-asymptomatic-2020-7> (last visited May 12, 2021).

22 ⁶ See WHO, *Coronavirus disease 2019 (COVID-19) Situation Report - 73* (Apr. 2, 2020), <https://apps.who.int/iris/bitstream/handle/10665/331686/nCoVsitrep02Apr2020-eng.pdf?sequence=1&isAllowed=y> (last visited May 12, 2021); Minghui Yang, Liang Li, Ting Huang, Shaxi Li, Mingxia Zhang, Yang, Yujin Jiang, Xiaohu Li, Jing Yuan, and Yingxia Liu, *SARS-CoV-2 Detected on Environmental Fomites for Both Asymptomatic and Symptomatic Patients with COVID-19*, <https://doi.org/10.1164/rccm.202006-2136LE> (last visited Mar. 12, 2021).

26 ⁷ See, e.g., Xi He et al., *Temporal dynamics in viral shedding and transmissibility of COVID-19*, 26 NATURE MED. 672, 674 (Apr. 15, 2020), <https://www.nature.com/articles/s41591-020-0869-5> (last visited May 12, 2021); Lirong Zou, M.Sc., et al., *SARS-CoV-2 Viral Load in Upper Respiratory Specimens of Infected Patients*, NEW ENG. J. OF

1 is attributable to people who are not exhibiting symptoms, either because they are still in the pre-
2 symptomatic stage, or the infection is asymptomatic.”⁸

3 4.37. On or about January 2020, the United States saw its first documented cases of
4 people infected with the Covid-19 virus and people becoming ill with the disease caused by the
5 virus, known as COVID-19.

6 4.38. As early as February 26, 2020, the CDC advised that COVID-19 was spreading
7 freely without the ability to trace the origin of new infections, also known as community
8 transmission or community spread.

9 4.39. The Covid-19 virus is highly contagious, uniquely resilient, and potentially deadly.
10 The degree to which an infectious disease is contagious is measured by R^0 , a term that defines how
11 many other people will become infected by one person with that disease. Studies have concluded
12 that one person infected with the Covid-19 virus will infect up to 5.7 others ($R^0 \approx 5.7$), which is
13 much higher than seasonal influenza for example, where on average, one person will infect only
14 1.3 others ($R^0 \approx 1.3$).⁹

15 4.40. The Covid-19 virus can remain infectious for “much longer time periods than
16 generally considered possible.”¹⁰ In the Journal of Virology, researchers demonstrated that the
17 Covid-19 virus can survive up to 28 days at room temperature (68°F) on a variety of surfaces
18 including glass, steel, vinyl, plastic, and paper.¹¹ A CDC report from March 27, 2020, stated that

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20 MED. (Mar. 19, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMc2001737> (last visited May 12, 2021).

21 ⁸ Meagan C. Fitzpatrick, Alison P. Galvani, Seyed M. Moghadas, Abhishek Pandey, Pratha Sah, Affan Shoukat, and
22 Burton H. Singer, *The implications of silent transmission for the control of COVID-19 outbreaks*, 117 PNAS 30,
17513-15, July 28, 2020 <https://www.pnas.org/content/117/30/17513> (last visited May 12, 2021).

23 ⁹ M. Cevik, C.C.G. Bamford, A. Ho, *COVID-19 pandemic-a focused review for clinicians*, 26 CLIN MICROBIOL
24 INFECT. 7, 842-47 (July 2020), [https://www.clinicalmicrobiologyandinfection.com/article/S1198-743X\(20\)30231-7/fulltext](https://www.clinicalmicrobiologyandinfection.com/article/S1198-743X(20)30231-7/fulltext) (last visited May 12, 2021).

25 ¹⁰ Shane Riddell, Sarah Goldie, Andrew Hill, Debbie Eagles & Trevor W. Drew, *The effect of temperature on
persistence of SARS-CoV-2 on common surfaces*, 17 VIROLOGY J. 145 (2020), <https://doi.org/10.1186/s12985-020-01418-7> (last visited May 12, 2021).

26 ¹¹ *Id.*

1 the Covid-19 virus was identified on surfaces of the cabins on the Diamond Princess cruise ship
2 17 days after the cabins were vacated but before they were disinfected.¹² Numerous other scientific
3 studies and articles have identified the persistence of the Covid-19 virus on doorknobs, toilets,
4 faucets and other high-touch points, as well as on commonly overlooked surfaces such as floors.¹³

5 4.41. The World Health Organization (“WHO”) states that “[t]he disease spreads
6 primarily from person to person through small droplets from the nose or mouth, which are expelled
7 when a person with COVID-19 coughs, sneezes, or speaks People can catch COVID-19 if
8 they breathe in these droplets from a person infected with the virus These droplets can land
9 on objects and surfaces around the person such as tables, doorknobs and handrails. People can
10 become infected by touching these objects or surfaces, then touching their eyes, nose or mouth.”¹⁴

11 4.42. On February 29, 2020, Washington State Governor Jay Inslee issued
12 Proclamation 20-05, proclaiming that a State of Emergency existed in all Washington counties due
13 to the conditions described above that existed in the state of Washington (“the Pandemic”).

14 4.43. On March 14, 2020, the first confirmed cases of COVID-19 were identified in
15 Spokane County, Washington. On March 20, 2020, the Spokane Regional Health District declared
16 a state of emergency in Spokane County, Washington, due to the Pandemic. On March 27, 2020,
17 the Spokane Regional Health District confirmed the first death from COVID-19 in
18 Spokane County.

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20 _____
21 ¹² Leah F. Moriarty, Mateusz M. Plucinski, Barbara J. Marston, et al., *Public Health Responses to COVID-19*
22 *Outbreaks on Cruise Ships — Worldwide, February–March 2020*, 69 MMWR 12, 347-352, March 27, 2020,
<https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e3.htm> (last visited May 12, 2021).

23 ¹³ Zhen-Dong Guo, Zhong-Yi Wang, Shou-Feng Zhang, Xiao Li, Lin Li, Chao Li, Yan Cui, Rui-Bin Fu, Yun-Zhu
24 Dong, Xiang-Yang Chi, Meng-Yao Zhang, Kun Liu, Cheng Cao, Bin Liu, Ke Zhang, Yu-Wei Gao, Bing Lu, Wei
Chen, *Aerosol and Surface Distribution of Severe Acute Respiratory Syndrome Coronavirus 2 in Hospital Wards,*
Wuhan, China, 2020, 26 EMERG. INFECT. DIS. 7, 1583-91 (July 2020),
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7323510> (last visited May 12, 2021).

25 ¹⁴ *Q&A on coronaviruses (COVID-19)*, World Health Organization,
26 <https://web.archive.org/web/20200506094904/https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses> (last visited May 12, 2021).

1 4.44. On March 16, 2020, the City of Spokane issued an Executive Declaration of Civil
2 Emergency or Disaster due to the Pandemic.

3 4.45. Spokane County Situation Reports for COVID-19 stated that by March 31, 2020,
4 there had been 145 cases and 5 deaths; by April 29, 2020, there had been 355 cases and 22 deaths;
5 and by May 29, 2020, there had been 570 cases and 32 deaths. Pend Oreille County Situation
6 Reports for COVID-19 stated that by March 31, 2020, there had been 0 cases and 0 deaths; by
7 April 29, 2020, there had been 2 cases and 0 deaths; and by May 29, 2020, there had been 3 cases
8 and 0 deaths. As of March 20, 2021, Pend Oreille County reported 657 cases and 7 deaths;
9 Spokane County reported 37,663 cases and 584 deaths..

10 4.46. Washington experienced an exceptionally high positivity rate: as of March 31,
11 2020, Washington had a 7-day moving positivity average rate of 9.3%.¹⁵ Washington's positivity
12 rate remained consistently over 5 percent until dropping below this figure in February 2021,
13 demonstrating the need for continuing health and safety measures.¹⁶

14 4.47. Every county where Plaintiffs have business operations has reported positive tests
15 for infection by the Covid-19 virus.

16 4.48. The presence of the Covid-19 virus at Plaintiffs' insured properties, in March 2020
17 and thereafter, was statistically certain or near-certain, using statistical modeling based on the
18 known incidences of infection and other information generally used in epidemiology, despite the
19 lack of commercially available tests for fomite or the aerosolized Covid-19 virus, and despite the
20 shortage of tests that could have otherwise been administered to every individual who was on-site
21 at the relevant times.¹⁷

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23 ¹⁵ *Daily State-By-State- Testing Trends*, JOHNS HOPKINS UNIV.MED. (last updated May 12, 2021),
<https://coronavirus.jhu.edu/testing/individual-states/washington> (last visited May 12, 2021).

24 ¹⁶ *COVID-19 Data Dashboard*, Washington Department of Health (updated May 8, 2021),
<https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard> (last visited May 12, 2021).

25 ¹⁷ *See, e.g.*, Aroon Chande, Seolha Lee, Mallory Harris, Quan Nguyen, Stephen J. Beckett, Troy Hilley, Clio Andris,
26 & Joshua S. Weitz, *Real-time, interactive website for US-county-level COVID-19 event risk assessment*, 4 NAT.
HUMAN BEHAVIOR, 1313-19 (Nov. 9, 2020), <https://doi.org/10.1038/s41562-020-01000-9> (last visited May 12, 2021).

1 4.49. Early in the course of the spread of the Covid-19 virus, testing was limited, and
2 thus potentially thousands more people were infected than were reported.¹⁸ Using the testing that
3 was available at that time, local positivity rates clearly demonstrated the pervasiveness of the
4 Covid-19 virus throughout the counties and areas where Plaintiffs' business properties are located.

5 4.50. Epidemiologists have explained that "the percent positive is a critical measure
6 because it gives us an indication of how widespread infection is in the area where the testing is
7 occurring[.]"¹⁹ It is a crucial indicator of whether a business can safely remain open. As a threshold
8 for the percent positive being "too high," the WHO stated that the percent positive should remain
9 below 5 percent for at least two weeks before re-opening.²⁰

10 4.51. As of May 7, 2021, Washington had reported over 413,980 COVID-19 cases.²¹

11 4.52. The economic impact of the Pandemic has also been staggering. The
12 unemployment rate in Washington more than tripled from 5.1 percent before the Pandemic to
13 15.4 percent in April 2020.²² Washington is also expected to suffer substantial revenue declines as
14 a result of COVID-19's impact on Washington's economy. Washington's budget shortfall is
15 projected at \$1 billion per year for 2020, 2021, and 2022.²³

18 _____
19 ¹⁸ See, e.g., Benedict Carey and James Glanz, *Hidden Outbreaks Spread Through U.S. Cities Far Earlier Than
Americans Knew, Estimates Say*, N.Y. TIMES (Apr. 23, 2020), (updated July 6, 2020),
20 <https://nytimes.com/2020/04/23/us/coronavirus-early-outbreaks-cities.html> (last visited May 12, 2021).

21 ¹⁹ David Dowdy and Gypsyamber D'Souza, *COVID-19 Testing: Understanding the "Percent Positive"*, Johns
Hopkins Bloomberg School of Public Health Expert Insights (Aug. 10, 2020), [https://www.jhsph.edu/covid-
19/articles/covid-19-testing-understanding-the-percent-positive.html](https://www.jhsph.edu/covid-19/articles/covid-19-testing-understanding-the-percent-positive.html) (last visited May 12, 2021).

22 ²⁰ *Id.*

23 ²¹ *Data Dashboard*, Washington Department of Health (updated May 7, 2021),
<https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard> (last visited May 12, 2021).

24 ²² Jim Camden, *Washington lost a half-million jobs in April; unemployment reaches 15%*, The Spokesman-Review
(May 20, 2020) (last visited May 12, 2021).

25 ²³ *State Budget Watch*, Center on Budget and Policy Priorities (Nov. 6, 2020),
26 <https://www.cbpp.org/research/statebudget-and-tax/states-grappling-with-hit-to-tax-collections> (last visited May 12,
2021).

1 Properties of the Covid-19 Virus

2 4.53. The omnipresence of the Covid-19 virus is enabled by multiple modes of viral
3 transmission, including respiratory droplets, airborne and fomite transmission (*i.e.*, transmission
4 from surfaces and objects).²⁴ These transmission methods demonstrate that the Covid-19 virus
5 causes direct physical loss of or damage to property.

6 4.54. In addition to being found in air samples,²⁵ the Covid-19 virus remains stable in
7 body secretions (respiratory, urine, feces), on surfaces, and in sewage, particularly at lower
8 temperatures.²⁶

9 4.55. Respiratory transmission of the Covid-19 virus occurs through exposure to an
10 infected person's respiratory particles, such as from saliva or mucus.²⁷ Respiratory transmission
11 of the Covid-19 virus is commonly divided into droplets (larger particles that have a transmission
12 range of about six feet) and airborne (smaller particles that can remain suspended in the air for
13 prolonged periods of time) modes of transmission. Though convenient, this binary division is an
14 oversimplification that underscores transmission risk.²⁸ Humans produce a wide range of particle
15 sizes when coughing, sneezing, talking, singing, or otherwise dispersing droplets, with pathogens
16 predominating in the smallest particles.²⁹ Respiratory particles produced by the average person can
17

18 ²⁴ See, e.g., WHO, *Transmission of SARS-CoV-2: implications for infection prevention precautions* (Jul. 9, 2020),
19 [https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-
prevention-precautions](https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions) (last visited May 12, 2021).

20 ²⁵ Zhen-Dong Guo, Zhong-Yi Wang, Shou-Feng Zhang, Xiao Li, Lin Li, Chao Li, Yan Cui, Rui-Bin Fu, Yun-Zhu
21 Dong, Xiang-Yang Chi, Meng-Yao Zhang, Kun Liu, Cheng Cao, Bin Liu, Ke Zhang, Yu-Wei Gao, Bing Lu, Wei
22 Chen, *Aerosol and Surface Distribution of Severe Acute Respiratory Syndrome Coronavirus 2 in Hospital Wards,
Wuhan, China*, 2020, 26 EMERG. INFECT. DIS. 7, 1583-91 (July 2020),
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7323510/> (last visited May 12, 2021).

23 ²⁶ Nevio Cimolai, *Environmental and decontamination issues for human coronaviruses and their potential surrogates*,
92 J. OF MED. VIROLOGY 11, 2498-510 (June 2020), <https://doi.org/10.1002/jmv.26170> (last visited May 12, 2021).

24 ²⁷ *Id.*

25 ²⁸ Kevin P. Fennelly, *Particle sizes of infectious aerosols: implications for infection control*, 8 LANCET RESPIRATORY
26 MED. 9, P914-24 (Sept. 1, 2020), [https://www.thelancet.com/journals/lanres/article/PIIS2213-2600\(20\)30323-
4/fulltext](https://www.thelancet.com/journals/lanres/article/PIIS2213-2600(20)30323-4/fulltext) (last visited May 12, 2021).

²⁹ *Id.*

1 travel almost 20 feet by sneezing.³⁰ An M.I.T. researcher has found that virus-laden “clouds”
2 containing clusters of droplets can travel 23 to 27 feet.³¹

3 4.56. Airborne transmission involves the spread of the infectious agent caused by the
4 dissemination of droplet nuclei (aerosols) from, for example, exhaled breath, that remain infectious
5 when suspended in the air over long distances and time.³² These tiny particles can remain
6 suspended “for indefinite periods unless removed by air currents or dilution ventilation.”³³ As a
7 result, the risk of disease transmission increases substantially in enclosed environments, such as
8 medical offices, as compared to outdoor settings.³⁴

9 4.57. The WHO and the scientific community have studied the spread of the Covid-19
10 virus through aerosols in indoor settings via air circulation systems. For example, the CDC
11 published a research letter concluding that a restaurant’s air conditioning system triggered the
12 transmission of the Covid-19 virus, spreading it to people who sat at separate tables downstream
13 of the restaurant’s airflow.³⁵ Moreover, a study detected the Covid-19 virus inside the HVAC

14 _____
15 ³⁰ *Id.*

16 ³¹ Lydia Bourouiba, *Turbulent Gas Clouds and Respiratory Pathogen Emissions, Potential Implications for Reducing
Transmission of COVID-19*, 323 JAMA 18, 1837-38, Mar. 26, 2020, <https://jamanetwork.com/journals/jama/fullarticle/2763852> (last visited May 13, 2021).

17 ³² *Id.*; see also Jose-Luis Jimenez, *COVID-19 Is Transmitted Through Aerosols. We Have Enough Evidence, Now It Is
Time to Act*, TIME, Aug. 25, 2020, <https://time.com/5883081/covid-19-transmitted-aerosols/> (last visited May 13,
18 2021); Ramon Padilla & Javier Zarracina, *WHO agrees with more than 200 medical experts that COVID-19 may
spread via the air*, (last updated Sept. 21, 2020), [www.usatoday.com/in-
19 depth/news/2020/04/03/coronavirusprotection-how-masks-might-stop-spread-throughcoughs/5086553002/](http://www.usatoday.com/in-depth/news/2020/04/03/coronavirusprotection-how-masks-might-stop-spread-throughcoughs/5086553002/) (last
20 visited May 13, 2021); Wenzhao Chen, Nan Zhang, Jianjian Wei, Hui-Ling Yen, and Yuguo Li, *Short-range airborne
route dominates exposure of respiratory infection during close contact*, 176 BLDG. AND ENV'T (June 2020),
21 <https://www.sciencedirect.com/science/article/pii/S0360132320302183> (last visited May 13, 2021).

22 ³³ Kevin P. Fennelly, *Particle sizes of infectious aerosols: implications for infection control*, 8 LANCET RESPIRATORY
MED. 9, P914-24 (Sept. 1, 2020), [https://www.thelancet.com/journals/lanres/article/PIIS2213-2600\(20\)30323-
23 4/fulltext](https://www.thelancet.com/journals/lanres/article/PIIS2213-2600(20)30323-4/fulltext) (last visited May 13, 2021).

24 ³⁴ Muge Cevik, Julia L Marcus, Caroline Buckee, & Tara C Smith, *Severe Acute Respiratory Syndrome Coronavirus
2 (SARS-CoV-2) Transmission Dynamics Should Inform Policy*, CLINICAL INFECTIOUS DISEASES (2020),
<https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1442/5910315> (last visited May 13, 2021).

25 ³⁵ Jianyun Lu, Jieni Gu, Kuibiao Li, Conghui Xu, Wenzhe Su, Zhisheng Lai, Deqian Zhou, Chao Yu, Bin Xu, and
Zhicong Yang, *COVID-19 outbreak associated with air conditioning in restaurant, Guangzhou, China*, 2020, 26
EMERGING INFECTIOUS DISEASES 7 (July 2020), https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article (last visited
26 May 13, 2021); see also Keun-Sang Kwon, Jung-Im Park, Young Joon Park, Don-Myung Jung, Ki-Wahn Ryu, and

1 system connected to hospital rooms of patients sick with COVID-19. The study found the Covid-
2 19 virus in ceiling vent openings, vent exhaust filters and ducts located as much as 56 meters (over
3 183 feet) from the rooms of the sick COVID-19 patients.³⁶

4 4.58. Additionally, the CDC has stated that “there is evidence that under certain
5 conditions, people with COVID-19 seem to have infected others who were more than 6 feet away”
6 and infected people who entered the space shortly after the person with COVID-19 had left.³⁷ A
7 recently published (February 2021) systematic review of airborne transmission of the Coronavirus
8 corroborated the CDC’s concerns and recommended procedures to improve ventilation of indoor
9 air environments to decrease bioaerosol concentration and reduce the Coronavirus’ spread.³⁸

10 4.59. Occupancy of indoor spaces is reported to be a major risk factor for transmission
11 of the Covid-19 virus. Investigation of over 7,000 COVID-19 cases found that all outbreaks
12 involving three or more people occurred indoors.³⁹ The airborne Covid-19 virus RNA has been
13 detected inside indoor spaces at distances over 50 meters from its source and in outdoor air in
14 crowded areas outside of buildings.⁴⁰

15 4.60. The CDC has recommended “ventilation interventions” to help reduce exposure to
16 the airborne Covid-19 virus in indoor spaces, including increasing airflow and air filtration (such

17 Ju-Hyung Lee, *Evidence of Long-Distance Droplet Transmission of SARS-CoV-2 by Direct Air Flow in a Restaurant*
18 *in Korea*, 35 J. KOREAN MED. SCI. 46 (Nov. 2020), <https://doi.org/10.3346/jkms.2020.35.e415> (last visited May 13,
2021).

19 ³⁶ Karolina Nissen, Janina Krambrich, Dario Akaberi, Tobe Hoffman, Jiaxin Ling, Ake Lundkvist, Lennart Svensson
20 & Erik Salaneck, *Long-distance airborne dispersal of SARS-CoV-2 in COVID-19 wards*, SCI REP 10, 19589 (Nov. 11,
2020), <https://doi.org/10.1038/s41598-020-76442-2> (last visited May 13, 2021)

21 ³⁷ CDC, *How COVID-19 Spreads* (last updated May 10, 2020), [https://www.cdc.gov/coronavirus/2019-ncov/prevent-](https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html)
22 [getting-sick/how-covid-spreads.html](https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html) (last visited May 13, 2021).

23 ³⁸ Zahra Noorimotlagh, Neemat Jaafarzadeh, Susana Silva Martínez, & Seyyed Abbas Mirzaee, *A systematic review*
of possible airborne transmission of the COVID-19 virus (SARS-CoV-2) in the indoor air environment, 193 ENV’T
24 RSCH. 110612, 1-6 (Feb. 2021),
https://www.sciencedirect.com/science/article/pii/S0013935120315097?dgcid=rss_sd_all (last visited May 13, 2021).

25 ³⁹ Hua Qian et al., *Indoor transmission of SARS-CoV-2*, INDOOR AIR (Oct. 31, 2020),
<https://pubmed.ncbi.nlm.nih.gov/33131151/> (last visited May 12, 2021).

26 ⁴⁰ Yuan Liu et al., *Aerodynamic analysis of SARS-CoV-2 in two Wuhan hospitals*, 582 NATURE 7813, 557-60
(June 2020), <https://pubmed.ncbi.nlm.nih.gov/32340022/> (last visited May 12, 2021).

1 as with high-efficiency particulate air (“HEPA”) fan/filtration systems).⁴¹ These and other
2 remedial measures can be implemented, at high cost and extra expense, to reduce the amount of
3 the Covid-19 virus present in the space and to make property safe for its intended use. These
4 extreme measures demonstrate that the Covid-19 virus and COVID-19 cause direct physical loss,
5 damage or destruction to interior spaces. And even then, those interventions, at most, reduce—but
6 do not eliminate—the aerosolized Covid-19 virus in an indoor space.

7 4.61. The Covid-19 virus may also be transmitted to people from physical objects,
8 materials or surfaces. “Fomites” are physical objects or materials that carry, and are capable of
9 transmitting infectious agents, altering these objects to become vectors of disease.⁴² Fomite
10 transmission has been demonstrated as highly efficient for viruses, both from object-to-hand and
11 from hand-to-mouth.⁴³

12 4.62. The WHO has described fomite transmission as follows:

13 Respiratory secretions or droplets expelled by infected individuals can contaminate
14 surfaces and objects, creating fomites (contaminated surfaces). **Viable SARS-**
15 **CoV-2 virus and/or RNA detected by RT-PCR can be found on those surfaces**
16 **for periods ranging from hours to days**, depending on the ambient environment
17 (including temperature and humidity) and the type of surface, in particular at high
18 concentration in health care facilities where COVID-19 patients were being treated.
19 Therefore, transmission may also occur indirectly through touching surfaces in the
20 immediate environment or objects contaminated with virus from an infected person
21⁴⁴ (Emphasis added).

21 ⁴¹ CDC, *Ventilation in Buildings* (last updated March 23, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html#:~:text=HEPA%20filters%20are%20even%20more,with%20SARS%2DCoV%2D2> (last visited May 13, 2021).

22 ⁴² Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/fomite> (last visited May 13, 2021).

23 ⁴³ CDC, Jing Cai, Wenjie Sun, Jianping Huang, Michelle Gamber, Jing Wu, Guiqing He, *Indirect Virus Transmission*
24 *in Cluster of COVID-19 Cases, Wenzhou, China, 2020*, 26 EMERGING INFECTIONS DISEASES 6 (June 2020),
25 https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article (last visited May 13, 2021).

26 ⁴⁴ See, e.g., WHO, *Transmission of SARS-CoV-2: implications for infection prevention precautions* (Jul. 9, 2020),
<https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions> (last visited May 13, 2021).

1 4.63. In addition to studies cited by the WHO,⁴⁵ numerous other studies and scientific
2 articles have discussed fomite transmission as a mode of virus transmission, including, but not
3 limited to:

4 a. A study of a COVID-19 outbreak published by the CDC identifying
5 elevator buttons and restroom taps as possible causes of the “rapid spread of SARS-CoV-2” in a
6 shopping mall in China.⁴⁶

7 b. A National Institutes of Health study published in the New England Journal
8 of Medicine finding that the Covid-19 virus survives up to 4 hours on copper, up to 24 hours on
9 cardboard, and up to 3 days on plastic and stainless steel, and suggesting that people may acquire
10 the virus through the air and after touching contaminated objects.⁴⁷ Indeed, another insurance
11 company, Zurich, republished the study on its website and restated the study’s conclusion when
12 discussing the fomite transmission of the Covid-19 virus in a workplace.⁴⁸

13 c. An American Society for Microbiology article discussing fomite infection
14 as involving both porous and non-porous surfaces, and occurring through a fomite’s contact with
15 bodily secretions, hands, aerosolized virus from talking, sneezing, coughing, etc., or other airborne
16 viral particles that settle after a disturbance of a fomite (e.g., shaking a contaminated textile such
17 as clothing merchandise).⁴⁹ According to the researchers, “[o]nce a fomite is contaminated, the
18 transfer of infectious virus may readily occur between inanimate and animate objects, or vice versa,
19

20 ⁴⁵ *Id.*

21 ⁴⁶ CDC, Jing Cai, Wenjie Sun, Jianping Huang, Michelle Gamber, Jing Wu, Guiqing He, *Indirect Virus Transmission
in Cluster of COVID-19 Cases, Wenzhou, China, 2020*, 26 EMERGING INFECTIONS DISEASES 6 (June 2020),
22 https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article (last visited May 13, 2021).

23 ⁴⁷ National Institutes of Health, *New coronavirus stable for hours on surfaces* (May 13, 2020),
<https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last visited May 13, 2021).

24 ⁴⁸ RiskTopics, *Cleaning and Disinfecting Plans During COVID-19 Outbreak* (April 2020), <https://www.zurich.com/-/media/project/zurich/dotcom/industry-knowledge/covid-19/docs/cleaning-and-disinfecting-during-covid-19-outbreak-rt.pdf?la=en&rev=e3c9d0882ef14be7b77587a4a95749a2> (last visited May 13, 2021).

25 ⁴⁹ Stephanie A. Bone and Charles P. Gerba, *Significance of Fomites in the Spread of Respiratory and Enteric Viral
Disease*, 73 APPLIED AND ENVIRONMENTAL MICROBIOLOGY 6, 1687-96 (Mar. 2007)
26 <https://aem.asm.org/content/73/6/1687> (last visited May 13, 2021).

1 and between two separate fomites (if brought together).⁵⁰ Generally, frequently touched surfaces
2 can become highly transmissible fomites.⁵¹

3 d. A CDC research letter reporting that the Covid-19 virus can remain viable
4 on polystyrene plastic, aluminum, and glass for 96 hours in indoor living spaces.⁵²

5 e. A *Journal of Hospital Infection* article citing studies revealing that human
6 coronaviruses can persist on inanimate surfaces like metal, glass, or plastic for up to 9 days.⁵³

7 4.64. Importantly, the Covid-19 virus has been detected on environmental objects and
8 surfaces from symptomatic, pre-symptomatic, and asymptomatic individuals.⁵⁴ Fomites transform
9 the surface of property into a potentially deadly transmission device. A study published in the
10 *Journal of Epidemiology and Infection* demonstrated that after lockdown in the United Kingdom,
11 Covid-19 virus transmission via fomites may have contributed to as many as 25 percent of deaths
12 in that region.⁵⁵

13 4.65. Accordingly, the presence of the Covid-19 virus in and on property, including in
14 indoor air, on surfaces, and on objects, causes direct physical loss or damage to property by causing
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16 ⁵⁰ *Id.*

17 ⁵¹ *Id.*

18 ⁵² CDC, Boris Pastorino, Franck Touret, Magali Gilles, Xavier de Lamballerie, and Rémi N. Charrel, *Prolonged*
Infectivity of SARS-CoV-2 in Fomites, 26 EMERGING INFECTIOUS DISEASES 9 (Sept. 2020),
https://wwwnc.cdc.gov/eid/article/26/9/20-1788_article (last visited May 13, 2021).

19 ⁵³ G. Kampf, D. Todt, S. Pfaender, E. Steinmann, *Persistence of coronaviruses on inanimate surfaces and their*
inactivation with biocidal agents, J. OF HOSPITAL INFECTION 104, 246-51 (2020),
20 <https://www.journalofhospitalinfection.com/action/showPdf?pii=S0195-6701%2820%2930046-3> (last visited
21 May 13, 2021).

22 ⁵⁴ See WHO, *Coronavirus disease 2019 (COVID-19) Situation Report - 73* (Apr. 2, 2020),
<https://apps.who.int/iris/bitstream/handle/10665/331686/nCoVsitrep02Apr2020-eng.pdf?sequence=1&isAllowed=y>
(last visited Mar. 20, 2021); Minghui Yang, Liang Li, Ting Huang, Shaxi Li, Mingxia Zhang, Yang, Yujin Jiang,
23 Xiaohe Li, Jing Yuan, and Yingxia Liu, *SARS-CoV-2 Detected on Environmental Fomites for Both Asymptomatic and*
Symptomatic Patients with COVID-19, <https://doi.org/10.1164/rccm.202006-2136LE> (last visited May 13, 2021).

24 ⁵⁵ A. Meiksin, *Dynamics of COVID-19 transmission including indirect transmission mechanisms: a mathematical*
analysis, 148 EPIDEMIOLOGY & INFECTION e257, 1-7 (Oct. 2020),
25 [https://www.cambridge.org/core/journals/epidemiology-and-infection/article/dynamics-of-covid19-transmission-](https://www.cambridge.org/core/journals/epidemiology-and-infection/article/dynamics-of-covid19-transmission-including-indirect-transmission-mechanisms-a-mathematical-analysis/A134C5182FD44BEC9E2BA6581EF805D3)
[including-indirect-transmission-mechanisms-a-mathematical-analysis/A134C5182FD44BEC9E2BA6581EF805D3](https://www.cambridge.org/core/journals/epidemiology-and-infection/article/dynamics-of-covid19-transmission-including-indirect-transmission-mechanisms-a-mathematical-analysis/A134C5182FD44BEC9E2BA6581EF805D3)
26 (last visited May 13, 2021).

1 physical harm to and altering property and otherwise making physical property incapable of being
2 used for its intended purpose.

3 4.66. Among other things, the presence of the Covid-19 virus transforms everyday
4 surfaces and objects into fomites, causing a tangible change of the property into a transmission
5 vehicle for disease from one host to another. The WHO’s description of fomite transmission of
6 COVID-19 expressly recognizes this physical alteration of property, describing viral droplets as
7 “*creating* fomites (contaminated surfaces)”⁵⁶ (emphasis added). “Creating” involves making or
8 bringing into existence something new⁵⁷—such as something that is in an altered state from what it
9 was before the Covid-19 virus was present on, in, and around the property.

10 4.67. The Covid-19 virus adheres to surfaces and objects, harming and physically
11 changing and physically altering those objects by becoming a part of their surface and making
12 physical contact with them unsafe for their ordinary and customary use. Once the Covid-19 virus
13 is in, on, or near property, it is easily spread by the air, people, and objects, from one area to
14 another, causing additional direct physical loss or damage.

15 4.68. Additionally, the presence of the dangerous and potentially fatal Covid-19 virus in
16 and on property, including in indoor air, on surfaces, and on objects, renders the property lost,
17 unsafe, and unfit for its normal usage. Respiratory particles (including droplets and airborne
18 aerosols) and fomites are physical substances that alter the physical properties of the interiors of
19 buildings to make them unsafe, untenable, and uninhabitable.

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24 ⁵⁶ See, e.g., WHO, *Transmission of SARS-CoV-2: implications for infection prevention precautions* (Jul. 9, 2020),
25 [https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-
prevention-precautions](https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions) (last visited Mar. 20, 2021) (last visited May 13, 2021).

26 ⁵⁷ See, e.g., Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/create> (last visited May 13,
2021).

1 *The Covid-19 Virus Cannot Be Eliminated from Property by Routine Cleaning*

2 4.69. A number of studies have demonstrated that the Covid-19 virus is “much more
3 resilient to cleaning than other respiratory viruses so tested.”⁵⁸ The measures that must be taken to
4 remove the Covid-19 virus from property are significant, and far beyond ordinary or routine
5 cleaning.

6 4.70. The efficacy of decontaminating agents for viruses is based on a number of factors,
7 including the initial amount of virus present, contact time with the decontaminating agent, dilution,
8 temperature, and pH, among many others. Detergent surfactants are not recommended as single
9 agents, but rather in conjunction with complex disinfectant solutions.⁵⁹

10 4.71. Additionally, it can be challenging to accurately determine the efficacy of
11 decontaminating agents. The toxicity of an agent may inhibit the growth of cells used to determine
12 the presence of virus, making it difficult to determine if lower levels of infectious virus are actually
13 still present on treated surfaces.⁶⁰

14 4.72. In order to be effective, cleaning and decontamination procedures require strict
15 adherence to protocols not necessarily tested under “real life” or practical conditions, where treated
16 surfaces or objects may not undergo even exposure or adequate contact time.⁶¹ Studies of
17 coronaviruses have demonstrated viral RNA persistence on objects despite cleaning with
18 70 percent alcohol.⁶²

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21 _____
22 ⁵⁸ *Id.*

23 ⁵⁹ *Id.*

24 ⁶⁰ *Id.*

25 ⁶¹ *Id.*

26 ⁶² Joon Young Song, Hee Jin Cheong, Min Joo Choi, Ji Ho Jeon, Seong Hee Kang, Eun Ju Jeong, Jin Gu Yoon, Saem Na Lee, Sung Ran Kim, Ji Yun Noh, & Woo Joo Kim. *Viral Shedding and Environmental Cleaning in Middle East Respiratory Syndrome Coronavirus Infection*, 47 *INFECTION & CHEMOTHERAPY* 4, 252-5 (2015), <https://www.icjournal.org/DOIx.php?id=10.3947/ic.2015.47.4.252> (last visited May 13, 2021).

1 4.73. When considering disinfection and decontamination, the safety of products and
2 procedures must be considered as well, due to the risks of harmful chemical accumulation,
3 breakdown of treated materials, flammability, and potential for allergen exposure.⁶³

4 4.74. Studies have demonstrated that the Covid-19 virus can survive on fabrics and be
5 transferred to skin and other surfaces, “suggesting it is biologically plausible that . . . infectious
6 diseases can be transmitted directly through contact with contaminated textiles.”⁶⁴ Given the
7 inadequacy of conventional cleaning procedures, disinfection and decontamination measures
8 include, but are not limited to, the use of harsh chemicals to perform deep disinfection, the removal
9 and disposal of porous materials like clothing, cloth and other fabrics, and making changes to air
10 filtration systems, and redesigning interior spaces, all performed at great cost and expense to
11 property owners. These measures, among others, demonstrate that the Covid-19 virus causes
12 physical loss or damage to property.

13 4.75. Many of the surfaces and materials discussed in the studies and articles cited above
14 are used throughout Plaintiffs’ operations, including plastics, glass, metals, and cloth and fabrics
15 such as upholstery.

16 4.76. Moreover, the aerosolized Covid-19 virus particles cannot be eliminated by routine
17 cleaning. Cleaning surfaces in an indoor space will not remove the aerosolized Covid-19 virus
18 particles from the air that people can inhale and become infected with the Covid-19 virus—no more
19 than cleaning friable asbestos particles that have landed on a surface from that surface will remove
20 the friable asbestos particles suspended in the air that people can inhale and develop asbestos-
21 related diseases.

22 4.77. Moreover, given the ubiquity and pervasiveness of the Covid-19 virus, no amount
23 of cleaning or ventilation intervention will prevent a person infected and contagious with the
24

25 ⁶³ *Id.*

26 ⁶⁴ Lucy Owen and Katie Laird, *The role of textiles as fomites in the healthcare environment: a review of the infection control risk*, 8 PEER J. LIFE AND ENV’T e9790, 1-35 (2020), <https://peerj.com/articles/9790/> (last visited May 13, 2021).

1 Covid-19 virus from entering an indoor space and exhaling millions of additional Covid-19 virus
2 particles into the air, further: (a) filling the air with the aerosolized Covid-19 virus that can be
3 inhaled, sometimes with deadly consequences; and (b) depositing Covid-19 virus particles on the
4 surfaces, physically altering and transforming those surfaces into disease-transmitting fomites.

5 *The Tribal Orders & The Washington Orders*

6 4.78. Beginning in early March, the State of Washington issued a series of declarations
7 and orders, including, but not limited to, those from Governor Inslee discussed below, that limited
8 KTEA’s use of properties not located on Tribal trust land. These orders are referred to herein as
9 the “Washington Orders.”

10 4.79. On February 29, 2020, Governor Inslee issued Proclamation 20-5, declaring a State
11 of Emergency for the state of Washington.

12 4.80. On March 13, 2020, Governor Inslee issued Proclamation 20-11, “Statewide Limits
13 on Gatherings,” which prohibited gatherings of 250 people or more in all Washington counties,
14 including Spokane County.

15 4.81. On March 16, 2020, Governor Inslee issued Proclamation 20-13, which prohibited
16 in-person dining in restaurants and stated that COVID-19 “remains a public disaster affecting life,
17 health, [and] property.”

18 4.82. On March 16, 2020, Governor Inslee also issued Proclamation 20-14, “Reduction
19 of Statewide Limits on Gatherings,” which prohibited all gatherings of 50 people or more in all
20 Washington counties, and also imposed social distancing and sanitation requirements on smaller
21 gatherings.

22 4.83. On March 23, 2020, Governor Inslee issued Proclamation 20-25, known as the
23 “Stay Home—Stay Healthy Order,” prohibiting Washington residents from leaving their homes
24 except for essential functions such as getting groceries and seeking medical care.
25 Governor Inslee’s Proclamation 20-25 also ordered that all non-essential businesses in
26 Washington State cease performing all but “minimum basic operations” necessary to “maintain

1 the value of the business' inventory, preserve the condition of the business' physical plant and
2 equipment, [and] ensure security," among other things.

3 4.84. On April 2, 2020, Governor Inslee issued Proclamation 20-25.1, which, among
4 other things, extended Proclamation 20-25's restrictions to at least May 4, 2020. On May 4, 2020,
5 Governor Inslee extended Proclamations 20-25 and 20-25.1 through May 31, 2020.

6 4.85. Effective October 6, 2020, Governor Inslee ordered businesses in counties in
7 "Phase Two," including Spokane County, to continue to curtail dining and consumption of
8 beverages although indoor dining was permitted.

9 4.86. On November 15, 2020, Governor Inslee issued Proclamation 20-25.8, entitled
10 "Rollback of County-by-County Phased Reopening Responding To A Covid-19 Outbreak Surge."
11 As part of the Governor's efforts in "preserve and maintain life, health, [and] property," he again
12 prohibited restaurants from allowing any customers into their insured premises for indoor dining.

13 4.87. These Washington Orders and others had the effect of dispossessing, restricting, or
14 preventing KTEA from using all or a portion of insured business property that was not on Tribal
15 trust land for its intended use, or in some instances for any use, during the lengths of time that the
16 orders were in effect, and in addition required KTEA to make physical changes and alterations to
17 its property, policies, procedures, and operations.

18 4.88. Tribal officials also issued a series of orders in an effort to stop or slow the
19 transmission of COVID-19 via, *inter alia*, property-to-person transmission of the Covid-19 virus.
20 These orders are referred to hereinafter as the "Tribal Orders." The Tribal Orders applied to all of
21 KTI and KTEA's business operations on trust land, and tribal "fee" lands.

22 4.89. On March 18, 2020, the Kalispel Business Committee, the authorized governing
23 body of the Tribe, issued Resolution No. 2020-25 (the "Tribal Closure Order"), ordering the
24 closure of certain KTI and KTEA properties including Northern Quest Casino, Kalispel Casino,
25 the KGCC, both Fatburger locations, and tribal government other than essential services.
26

1 4.90. The Tribal Closure Order was issued in response to the actual presence of the
2 Covid-19 virus within ten miles of Plaintiffs' insured properties, and specifically in
3 Spokane County, Washington.

4 4.91. On April 28, 2020, the Kalispel Business Committee issued Resolution No. 2020-
5 43, which permitted limited re-opening of certain KTI and KTEA properties, including
6 Northern Quest Casino and Kalispel Casino.

7 4.92. These Tribal Orders had the effect of dispossessing, restricting, or preventing
8 Plaintiffs from using all or a portion of their insured business property for its intended use, or in
9 some instances for any use, during the lengths of time that the orders were in effect.

10 The Impact of the Covid-19 Virus, the Pandemic, and the Washington Orders and Tribal
11 Orders on Plaintiffs' Insured Property and Business Operations

12 4.93. Due to the Pandemic, over 50 KTEA employees have confirmed that they were
13 infected with the Covid-19 virus at a time that they may have been on KTEA's insured property.
14 Given the high percentage of persons infected by the Covid-19 virus who are asymptomatic, it is
15 certain or near-certain that the actual number of KTEA employees, vendors, or customers infected
16 with the Covid-19 virus that have been in or on KTEA's insured property since the beginning of
17 the Pandemic is substantially greater than the number of employees, vendors, and customers
18 known to have been infected with the Covid-19 virus. Throughout the Pandemic and specifically
19 in response to the infection information above, KTEA immediately implemented, and continues
20 to implement, the best practices available at the time to mitigate and prevent the further spread of
21 the Covid-19 virus in order to protect, as much as possible, KTEA's employees, vendors,
22 customers, and insured property.

23 4.94. Also due to the Pandemic, a number of KTI employees have also confirmed that
24 they were infected with the Covid-19 virus at a time that they may have been on KTI's insured
25 property. Given the high percentage of persons infected by the Covid-19 virus who are
26 asymptomatic, it is certain or near-certain that the actual number of KTI employees, vendors, or

1 customers infected with the Covid-19 virus that have been in or on KTI's insured property since
2 the beginning of the Pandemic is substantially greater than the number of employees, vendors, and
3 customers known to have been infected with the Covid-19 virus. Throughout the Pandemic and
4 specifically in response to the infection information above, KTI immediately implemented, and
5 continues to implement, the best practices available at the time to mitigate and prevent the further
6 spread of the Covid-19 virus in order to protect, as much as possible, KTI's employees, customers
7 and insured property.

8 4.95. KTEA received information in early March 2020 that a customer at the
9 Northern Quest Casino, who had been on KTEA's insured property in early March 2020 prior to
10 the issuance of the Tribal Orders or the Washington Orders, had tested positive for infection by
11 the Covid-19 virus.

12 4.96. After receiving that information, KTEA closed the Northern Quest Casino on
13 March 16, 2020, and began to incur expense for cleaning and other response measures to the
14 Pandemic, using appropriate best practices as known at the time, at the Northern Quest Casino and
15 other insured properties.

16 4.97. In light of the number of customers, vendors, and employees in KTI and KTEA's
17 insured properties, and the particularities of the Pandemic (including how highly contagious the
18 Covid-19 virus is; the reported rate of infection in the areas in which KTI and KTEA had
19 businesses in March 2020; what is known about the reported rate of infection substantially
20 undercounting the actual rate of infection in the early months of the Pandemic; and other factors),
21 on information and belief it is statistically certain or near-certain that additional individuals in or
22 on KTI and KTEA's insured properties were infected with the Covid-19 virus in early March 2020,
23 prior to the effective dates of the Tribal Orders or Washington Orders referred to above, and prior
24 to KTI and KTEA's suspension of operations.

1 4.98. It is therefore also on information and belief statistically certain or near-certain that
2 the Covid-19 virus was continuously dispersed into the air and on physical surfaces and other
3 property in or on KTI and KTEA's insured property in early March 2020 and thereafter.

4 4.99. The continuous dispersal into the air and onto physical surfaces and other property
5 of the Covid-19 virus from persons infected due to the Pandemic rendered KTEA and KTI's
6 standard cleaning practices ineffective at removing the virus from surfaces and from the air inside
7 KTEA and KTI's insured properties, requiring physical and other changes to Plaintiffs' insured
8 property, policies, practices, and operations; it also created apprehension about the imminent
9 presence of the Covid-19 virus on insured property and awareness of the risk of the presence of
10 the Covid-19 virus on insured property.

11 4.100. In response to the Tribal Orders referred to above, the actual, likely, imminent, or
12 suspected presence of or risk of the presence of the Covid-19 virus, and the Pandemic, KTEA
13 suspended operations at the following businesses on March 16, 2020: Northern Quest Casino
14 (including all other KTEA businesses located inside the casino) and Kalispel Casino.

15 4.101. KTEA also suspended some operations at the RV Resort on or about March 16,
16 2020.

17 4.102. The KTEA locations listed above resumed full or nearly-full operations on or about
18 May 5, 2020.

19 4.103. In response to the Washington Orders referred to above, the actual, likely,
20 imminent, or suspected presence of or risk of the presence of the Covid-19 virus, and the Pandemic,
21 KTEA suspended most operations at KGCC on March 16, 2020.

22 4.104. KGCC resumed some additional operations on or about May 5, 2020, and continued
23 to resume and limit operations consistent with the Washington Orders thereafter.

24 4.105. In response to the Washington Orders referred to above, the actual, likely,
25 imminent, or suspected presence of or risk of the presence of the Covid-19 virus, and the Pandemic,
26 KTEA suspended most operations at the Five Mile Fatburger on March 17, 2020.

1 4.106. The Five Mile Fatburger restaurant resumed additional operations on or about
2 May 5, 2020, and continued to resume and limit operations consistent with the Washington Orders
3 thereafter.

4 4.107. In connection with the resumption of operations at the businesses discussed above,
5 KTEA made alterations to physical structures, operations, practices, policies, and procedures at
6 insured properties that were needed to protect employee and customer safety and health; to mitigate
7 the impact of the Pandemic on insured properties and operations; to enable resumption of
8 operations; to protect insured property from further physical loss or damage; to mitigate losses
9 covered under the Policies; and to comply with directives including, but not limited to, the
10 Washington Orders and Tribal Orders, to the extent applicable.

11 4.108. In response to the Tribal Orders referred to above, the actual, likely, imminent, or
12 suspected presence of or risk of the presence of the Covid-19 virus, and the Pandemic, KTI
13 suspended operations at several businesses on March 17, 2020, including, but not limited to:
14 Camas Center Clinic (certain practices); Camas Center Wellness Deli; Camas Center Wellness
15 Center; Early Learning Center; Kalispel Metal Products; and Kalispel Auto Repair.

16 4.109. The KTI businesses listed above resumed operations (Early Learning Center–
17 May 18, 2020; Camas Center Wellness Center (fitness area) –May 18, 2020; Camas Center Deli–
18 not yet reopened; Kalispel Auto Repair–April 20, 2020; Kalispel Metal Products–April 27, 2020),
19 and continued to resume and limit operations consistent with the Tribal Orders thereafter.

20 4.110. In connection with the resumption of operations at the businesses discussed above,
21 KTI made alterations to physical structures, operations, practices, policies, and procedures at
22 insured properties that were needed to protect employee and customer safety and health; to mitigate
23 the impact of the Pandemic on insured properties and operations; to enable resumption of
24 operations; to protect insured property from further physical loss or damage; to mitigate losses
25 covered under the Policies; and to comply with directives including, but not limited to, the Tribal
26 Orders, to the extent applicable.

1 4.111. In addition, both KTI and KTEA will, in connection with this litigation or
2 otherwise, incur expense to quantify losses covered under the Policies.

3 *The Pandemic, the Resulting Spread of the Covid-19 Virus, and the Washington and*
4 *Tribal Orders Trigger Coverage Under the Policies*

5 4.112. The Pandemic is a natural disaster.

6 4.113. The Washington Orders and Tribal Orders referred to above caused direct physical
7 loss to insured property to which the Washington Orders and Tribal Orders applied, triggering
8 coverage under the Policies.

9 4.114. The Washington and Tribal Orders caused physical loss to KTEA and KTI's
10 insured property in that they made portions of those properties (including the portions of casinos,
11 restaurants, hotels, and other properties that could not be opened to the public; and those physical
12 spaces that could not accommodate social distancing or were otherwise unsuitable due to
13 requirements of the Washington Orders or Tribal Orders) unusable, untenable, inaccessible, and
14 devoid of functionality; deprived Plaintiffs of use of insured property for its intended purposes;
15 deemed Plaintiffs' property or portions of such property uninhabitable and dangerous to use; and
16 limited the use of all portions of the insured properties by requiring social distancing and other
17 measures; and required the physical alteration of insured properties and dependent properties to
18 comply with various requirements of the Washington Orders and Tribal Orders.

19 4.115. The Washington Orders and Tribal Orders caused physical loss leading to the
20 necessary suspension of operations at insured properties resulting in business income loss covered
21 by the Policies' Business Interruption coverage.

22 4.116. And, or in the alternative, the presence, suspected presence, or imminent presence
23 of the Covid-19 virus in, on, and around Plaintiffs' insured properties, due to the Pandemic, caused
24 direct physical loss or damage to KTEA and KTI's insured property.

25 4.117. The direct physical loss or damage to KTEA and KTI's insured property (and
26 specifically, the business property used in the operations of the insureds' businesses) due to the

1 presence, suspected presence, or imminent presence of the Covid-19 virus in, on, and around
2 Plaintiffs' insured property, due to the Pandemic, resulted in the necessary suspension of
3 operations at insured locations, resulting in business income loss covered by the Policies' Business
4 Interruption coverage.

5 4.118. And, or in the additional alternative, the risk of the presence of the Covid-19 virus
6 in, on, and around Plaintiffs' insured property caused direct physical loss or damage to KTEA and
7 KTI's insured property, resulting in the necessary suspension of operations at insured locations
8 and resulting business income loss covered by the Policies' Business Interruption coverage.

9 4.119. And, or in the additional alternative, the Washington and Tribal Orders constitute
10 "order[s] of a civil authority" that prohibited access to insured property, in that the Washington
11 Orders and Tribal Orders arose from "damage to" property (the presence of the Covid-19 virus)
12 located within ten miles of insured property by a covered peril, and prohibited access to those
13 portions of Plaintiffs' property that were used for social gatherings, dining, or recreation and could
14 not be used for those purposes, or could not be used in compliance with restrictions imposed by
15 the relevant orders. The actual loss sustained by the Plaintiffs as a result of these orders is covered
16 under the Policies' "Interruption by Civil Authority" coverage.

17 4.120. And, or in the additional alternative, KTI and KTEA's losses described above and
18 below occurred because full ingress to such locations was prevented as a direct result of physical
19 loss or damage by a covered peril to property (the presence of the Covid-19 virus) within ten miles
20 of insured property. The actual loss sustained by Plaintiffs as a result of the prevention of ingress
21 is covered under the Policies' "Ingress/Egress" coverage.

22 4.121. The direct physical loss or damage described above and the impacts of that direct
23 physical loss or damage also may trigger multiple other coverages under the Policy including
24 without limitation "Extended Period of Indemnity" and "Tax Revenue Interruption" coverages.

25 4.122. The expenditures by Plaintiffs in connection with and to permit resumption of
26 operations further trigger coverage under one or more of the following coverages: "Expediting

1 Expenses,” “Protection and Preservation of Property,” “Extra Expense,” and “Expense to Reduce
2 Loss.”

3 4.123. The expenses that Plaintiffs expect to incur in this litigation or otherwise, to
4 calculate their losses, are covered under the Policies’ “Architects and Engineers Fees and Loss
5 Adjustment Expenses.”

6 Plaintiffs’ Covered Financial Losses

7 4.124. KTEA’s losses due to the suspension of operations at Northern Quest Casino that
8 are covered under one or more of the coverages afforded by the KTEA Policy as described above,
9 are in an amount to be proven at trial but not less than \$28,597,000.

10 4.125. KTEA’s losses due to the suspension of operations at Kalispel Casino that are
11 covered under one or more of the coverages afforded by the KTEA Policy as described above, are
12 in an amount to be proven at trial but not less than \$450,000.

13 4.126. KTEA’s losses due to the suspension of operations at its non-gaming businesses as
14 described above that are covered under one or more of the coverages afforded by the KTEA Policy
15 as described above, are in an amount to be proven at trial but not less than \$590,000.

16 4.127. KTEA’s Ordinary Payroll at businesses with covered losses under one or more
17 coverages afforded by the KTEA Policy, as described above, are in an amount to be proven at trial
18 but not less than \$2,767,136.

19 4.128. KTEA’s expenditures that are covered under one of more of the coverages in the
20 KTEA Policy described above including, but not limited to, Extra Expense, Expense to Reduce
21 Loss, and Protection and Preservation of Property are in an amount to be proven at trial.

22 4.129. KTI’s losses due to the suspension of operations at its businesses as described
23 above, that are covered under one or more of the coverages afforded by the KTI Policy as described
24 above, are in an amount to be proven at trial but not less than \$220,000.

1 4.130. KTI's Ordinary Payroll at businesses with covered losses under one or more
2 coverages afforded by the Tribal Policy, as described above, are in an amount to be proven at trial
3 but not less than \$150,000.

4 4.131. KTI's expenditures that are covered under one of more of the coverages in the KTI
5 Policy described above including, but not limited to, Extra Expense, Expense to Reduce Loss, and
6 Protection and Preservation of Property are in an amount to be proven at trial.

7 Plaintiffs' Insurance Claim, Defendants' Claims Handling, and Resulting Coverage Denials

8 4.132. Plaintiffs timely submitted a claim pursuant to the terms and conditions of the
9 Policies.

10 4.133. In making the claim, Plaintiffs informed Defendants about the customer at
11 Northern Quest Casino who had been reported to be infected with the Covid-19 virus when on the
12 premises, and that Northern Quest Casino had incurred costs to clean the premises after that
13 information was received.

14 4.134. Defendant Lexington concluded that the "Accidental Contamination" coverage
15 under the KTEA policy applied to the costs incurred by KTEA to clean the Northern Quest Casino
16 after KTEA learned about the customer who had reportedly tested positive, and paid KTEA the
17 coverage limit under that coverage (\$25,000).

18 4.135. However, Defendants denied coverage for any loss by either Plaintiff under any
19 other coverage provision in the Policies.

20 4.136. Defendants' denial of coverage was made without adequate or proper investigation.

21 4.137. Defendants never sent an adjuster, or anyone on their behalf, to visit, inspect, or
22 survey any of Plaintiffs' business properties or investigate their claims.

23 4.138. Defendants, acting through Lexington, denied coverage on the basis that "the
24 information that any covered location suffered any direct physical loss or damage," "the
25 [Covid-19] virus would not be a covered peril," and that a "contamination" exclusion applies to
26 bar coverage.

1 4.139. But the coverage provided under the Policies is not so narrow, and the exclusion
2 does not apply. The Policies provide “all risk” coverage without any broad exclusion for virus.
3 Because it is not specifically excluded, the orders referred to above and or in the alternative the
4 Pandemic and the resulting actual, imminent, and threatened presence of the Covid-19 virus, and
5 the risk of its presence, on insured property, are covered perils.

6 4.140. The Policies are at the least subject to multiple competing reasonable interpretations
7 as to the meaning of phrases in the Policies, including “all risk of direct physical loss or damage,”
8 and other terms and phrases in the TPIP 15 Form, some of which interpretations would afford
9 coverage to Plaintiffs for the losses specified herein for the reasons described above.

10 4.141. As further evidence that Defendants’ interpretation of the TPIP 15 Form is
11 impermissibly and unreasonably narrow and self-serving, Defendants sought to modify the
12 coverage available under the “Tribal First” property insurance program, effective July 1, 2020—
13 after the Pandemic had begun and policyholders had begun making claims on the TPIP “all-risks’
14 policy form—by among other things adding the word “virus” to the “contamination” exclusion in
15 the TPIP coverage form, and adding a “communicable disease” exclusion by endorsement to the
16 TPIP program.

17 4.142. If, as Defendants now contend, the TPIP 15 Form does not cover losses arising out
18 of the Covid-19 virus and the Pandemic, these changes to the new version of the master coverage
19 form would not have been necessary.

20 4.143. Further, on information and belief Defendants or their agents were aware that a
21 prior version of the TPIP basic property coverage form had contained broad exclusionary language
22 in Exclusion 15 for “microorganisms,” which language was deleted on information and belief prior
23 to the issuance of the TPIP coverage form for the policy year July 1, 2017–July 1, 2018 and did
24 not appear in the TPIP 15 Form. This change to Exclusion 15 indicated an intent to narrow the
25 exclusions from coverage in the TPIP form, which is inconsistent with the expansive reading of
26 those exclusions that Defendants have now adopted.

1 4.144. Defendants also appear to have given no consideration to, or failed to reconsider
2 their coverage position in response to being informed of, court decisions from Washington and
3 elsewhere that have rejected Defendants' interpretation of the Policies' terms and specifically the
4 TPIP 15 Form, which decisions indicate (at the least) that the Policies are ambiguous under
5 Washington law.

6 4.145. Defendants' interpretations of the TPIP 15 Form's terms and phrases are self-
7 serving, narrow, and not supported by the history of the drafting of the documents that make up
8 the TPIP coverage program, or by Washington law, and therefore the denial of coverage based on
9 such interpretations, along with the failure to conduct any meaningful investigation of coverage or
10 Plaintiffs' losses, is evidence that Defendants placed their interests above those of their
11 policyholders, and constitutes a breach of the duty of good faith and fair dealing that Defendants
12 owed to their policyholders.

13 4.146. On information and belief each Defendant sued herein acted in concert, or
14 consented to have others act in concert on its behalf, to refuse business income and property
15 damage benefits to policyholders under the Tribal First program for losses arising out the Covid-19
16 Pandemic, including by adopting unreasonable and self-serving interpretations of the TPIP 15
17 Form without regard to state law and without regard to the history of the drafting of the documents
18 that make up the TPIP coverage program, by failing to conduct meaningful investigations, and
19 other similar conduct.

20 **V. CAUSES OF ACTION**

21 **A. BREACH OF CONTRACT**

22 5.1. Plaintiffs incorporate by reference each of the allegations in the above paragraphs
23 as if fully set forth herein.

24 5.2. The Policies are valid and enforceable contracts between Plaintiffs and Defendants.

25 5.3. Plaintiffs have complied with all conditions to coverage under the Policies with
26 regard the losses claimed herein, excepting any that were waived or excused.

1 5.4. Defendants have denied coverage for Plaintiffs' losses under the Policies as alleged
2 above and in so doing have breached the Policies.

3 5.5. As a result of Defendants' breaches, KTEA has suffered damages in an amount to
4 be proven at trial, but currently estimated to exceed \$32,404,136 in the aggregate.

5 5.6. As a result of Defendants' breaches, KTI has suffered damages in an amount to be
6 proven at trial, but currently estimated to exceed \$370,000 in the aggregate.

7 **B. DECLARATORY JUDGMENT**

8 5.7. Plaintiffs incorporate by reference each of the allegations in the above paragraphs
9 as if fully set forth herein.

10 5.8. This is a cause of action for declaratory judgment pursuant to the Uniform
11 Declaratory Judgments Act, RCW 7.24.010 *et seq.*

12 5.9. An actual and justiciable controversy exists between Plaintiff and Defendants
13 concerning their respective rights and obligations under the Policies.

14 5.10. This Court has the authority to enter a declaratory judgment concerning the
15 respective rights and obligations of the Plaintiffs and the Defendants under the Policies.

16 5.11. Plaintiffs seek a declaratory judgment that the Policies cover the losses that they
17 have suffered as described above.

18 5.12. Plaintiffs seek a declaratory judgment that Defendants are responsible for full and
19 timely payment of Plaintiffs' losses described above.

20 **C. COMMON LAW BAD FAITH**

21 5.13. Plaintiffs incorporate by reference each of the allegations in the above paragraphs
22 as if fully set forth herein.

23 5.14. Defendants owe Plaintiffs duties of good faith and fair dealing under Washington
24 law.

25 5.15. Defendants committed bad faith through multiple acts and omissions including, but
26 not limited to: failing to conduct an adequate investigation; adopting unreasonable and self-serving

1 interpretations of undefined terms and phrases in the Policies; unreasonably failing to analyze
2 Plaintiffs' losses for coverage under all coverages of the Policies; failing to treat Plaintiffs'
3 economic interests as equivalent to their own; unreasonably denying Plaintiffs insurance benefits
4 under the Policies.

5 5.16. Defendants' unreasonable acts and omissions constitute bad faith under
6 Washington law.

7 5.17. Defendants' bad faith acts and omissions directly and proximately caused and
8 continue to cause Plaintiffs to suffer damages in an amount to be proven at trial. These include,
9 but are not limited to, the deprivation of benefits owed to Plaintiffs under the Policies, and the
10 costs associated with bringing this action for coverage, including court costs and attorney fees.

11 **D. PER SE AND NON PER SE CONSUMER PROTECTION ACT VIOLATIONS**

12 5.18. Plaintiffs incorporate by reference each of the allegations in the above paragraphs
13 as if fully set forth herein.

14 5.19. Defendants' acts and omissions as described above violated multiple provisions of
15 WAC 284-30-330 including, but not limited to, subsections (4), (7), and (13); such violations are
16 per se violations of RCW 19.86, Washington's Consumer Protection Act (the "CPA")

17 5.20. Defendants' acts and omissions also constitute non *per se* violations of the CPA: as
18 pled above, such unreasonable acts and omissions were unfair or deceptive; occurred in trade or
19 commerce; and affected Washington's policyholders and the public interest.

20 5.21. Such unfair or deceptive acts omissions directly and proximately caused and
21 continue to cause Plaintiffs to suffer damages in an amount to be proven at trial. These damages
22 include, but are not limited to, the deprivation of benefits owed to Plaintiffs under the Policies and
23 the costs associated with bringing this action for coverage, including court costs and attorney fees.

24 5.22. Plaintiffs are entitled to recovery of their actual damages, attorney fees, litigation
25 costs, and treble damages up to \$25,000, pursuant to RCW 19.86.090.

1 **E. RESERVATION TO AMEND TO ASSERT IFCA CLAIM AS CAUSE OF**
2 **ACTION**

3 5.23. Plaintiffs will by June 10, 2021, have given notice to Defendants pursuant to
4 RCW 48.30.015(8). In the event Defendants fail to resolve Plaintiffs' claims within the statutory
5 period, Plaintiffs reserve the right to amend this Complaint to assert claims under Washington's
6 Insurance Fair Conduct Act ("IFCA").

7 **VI. PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiffs respectfully request that the Court grant the following relief:

9 A. On their First Cause of Action, for an award of damages in favor of
10 Plaintiffs in an amount to be proven at trial, plus pre- and post-judgment at the maximum legal
11 rate, attorneys' fees, costs and disbursements for this action;

12 B. On their Section Cause of Action, for a declaratory judgment that the losses
13 Plaintiffs have suffered are covered by the Policies, and that Defendants are responsible for fully
14 and timely paying Plaintiffs' losses;

15 C. On their Third Cause of Action, for damages in an amount to be proven at
16 trial, and the costs associated with bringing this action for coverage, including court costs and
17 attorney fees;

18 D. On their Fourth Cause of Action, for actual damages, attorney fees,
19 litigation costs, and treble damages up to \$25,000, pursuant to RCW 19.86.090;

20 E. For an award of attorney fees, expert costs, and other costs in bringing this
21 action;

22 ///

23 ///

24 ///

25 ///

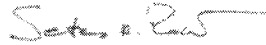
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1 F. For prejudgment interest accruing until the date judgment is entered; plus
2 post-judgment interest at the statutory rate;

3 G. For such other relief as the Court deems equitable, just and proper.
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5 DATED: June 4, 2021

6 MILLER NASH LLP

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