

FILED
07-27-2021
CIRCUIT COURT
DANE COUNTY, WI
2021CV001780
Honorable Juan B Colas
Branch 10

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

HO-CHUNK NATION
W9814 Airport Road
Black River Falls, WI 54615

Plaintiff,

v.

Case No. _____

(1) LEXINGTON INSURANCE
COMPANY
A foreign corporation
c/o FLWA Service Corp,
c/o Foley and Lardner LLP
555 California Street, Suite 1700
Francisco, CA 94104-1520

Codes:
30301 – Money Judgment
30303 – Other – Contracts
30701 – Declaratory Judgment

(2) UNDERWRITERS AT LLOYD'S -
SYNDICATES ASC1414, XLC
2003, TAL 1183, MSP 318,
ATL1861, KLN 510, AGR 3268,
SUBSCRIBING TO POLICY
NO. PJ193647
Foreign corporations and individuals
c/o FLWA Service Corp.
c/o Foley and Lardner LLP
555 California Street, Suite 1700
Francisco, CA 94104-1520

(3) UNDERWRITERS AT LLOYD'S -
SYNDICATE: CNP 4444,
SUBSCRIBING TO POLICY
NO. PJ1900131
Foreign corporations and individuals
c/o FLWA Service Corp.
c/o Foley and Lardner LLP
555 California Street, Suite 1700
Francisco, CA 94104-1520

(4) UNDERWRITERS AT LLOYD'S -
ASPEN SPECIALTY
INSURANCE COMPANY,
SUBSCRIBING TO POLICY
NO. PX006CP19
Foreign corporations and individuals
c/o FLWA Service Corp,
c/o Foley and Lardner LLP
555 California Street, Suite 1700
Francisco, CA 94104-1520

- (5) HOMELAND INSURANCE
COMPANY OF NEW YORK
Foreign corporation
c/o FLWA Service Corp.
c/o Foley and Lardner LLP
555 California Street, Suite 1700
Francisco, CA 94104-1520
- (6) HALLMARK SPECIALTY
INSURANCE COMPANY
Foreign corporation
c/o FLWA Service Corp.
c/o Foley and Lardner LLP
555 California Street, Suite 1700
Francisco, CA 94104-1520
- (7) UNDERWRITERS AT LLOYD'S -
SYNDICATES KLN 0510, ATL
1861, ASC 1414, QBE 1886, MSP
0318, APL 1969, CHN 2015, XLC
2003, SUBSCRIBING TO POLICY
NO. PJ1933021
Foreign corporation and individuals
c/o FLWA Service Corp.
c/o Foley and Lardner LLP
555 California Street, Suite 1700
Francisco, CA 94104-1520
- (8) UNDERWRITERS AT LLOYD'S -
SYNDICATE BRT 2987,
SUBSCRIBING TO POLICY
NUMBER PD-10363-05
Foreign corporations and individuals
c/o FLWA Service Corp.
c/o Foley and Lardner LLP
555 California Street, Suite 1700
Francisco, CA 94104-1520
- (9) ENDURANCE WORLDWIDE
INSURANCE LTD T/AS SOMPO
INTERNATIONAL
Foreign corporation
c/o FLWA Service Corp.
c/o Foley and Lardner LLP
555 California Street, Suite 1700
Francisco, CA 94104-1520
- (10) UNDERWRITERS AT LLOYD'S -
SYNDICATES KLN 0510, TMK
1880, BRT 2987, BRT 2988, CNP
4444, ATL 1861, NEON
WORLDWIDE PROPERTY
CONSORTIUM, AUW 0609, TAL
1183, AUL 1274, SUBSCRIBING

TO POLICY NUMBER PJ1900067
Foreign corporations and individuals
c/o FLWA Service Corp.
c/o Foley and Lardner LLP
555 California Street, Suite 1700
Francisco, CA 94104-1520

(11) ARCH SPECIALTY INSURANCE
COMPANY

Foreign corporation
c/o FLWA Service Corp.
c/o Foley and Lardner LLP
555 California Street, Suite 1700
Francisco, CA 94104-1520

(12) EVANSTON INSURANCE
COMPANY

Foreign corporation
c/o FLWA Service Corp.
c/o Foley and Lardner LLP
555 California Street, Suite 1700
Francisco, CA 94104-1520

(13) ALLIED WORLD NATIONAL
ASSURANCE COMPANY

Foreign corporation
c/o FLWA Service Corp.
c/o Foley and Lardner LLP
555 California Street, Suite 1700
Francisco, CA 94104-1520

(14) LIBERTY MUTUAL FIRE
INSURANCE COMPANY

Foreign corporation
c/o FLWA Service Corp.
c/o Foley and Lardner LLP
555 California Street, Suite 1700
Francisco, CA 94104-1520

(15) XL INSURANCE AMERICA, INC.

Foreign corporation
c/o FLWA Service Corp.
c/o Foley and Lardner LLP
555 California Street, Suite 1700
Francisco, CA 94104-1520

Defendants.

COMPLAINT

Plaintiff Ho-Chunk Nation (the “Nation”) on behalf of itself and other entities organized under the laws of the Nation or otherwise affiliated with the Nation (together the “Policyholders”) for its complaint against the Defendants (the “Insurers”) in the above-captioned action (the “Action”) alleges as follows.

NATURE OF THE ACTION

1. The Nation is a federally recognized Indian tribe principally located in Wisconsin.
2. The Policyholders purchased an insurance agreement (the “Agreement”) from the Insurers under a Tribal Property Insurance Program (the “TPIP”). The Agreement binds the parties under the terms of a form policy titled “Tribal First Policy Wording – TPIP USA FORM No. 15” (the “Form Policy”). A true and correct copy of the Agreement is attached to this Complaint as **Exhibit A**. The Policyholders are identified as named insureds on page 13 of Exhibit A.
3. The TPIP is comprised of insurance policies from several insurance carriers, led by Defendant Lexington Insurance Company. The TPIP is comprised of various layers of coverage such that a particular insurer is responsible for losses that fall between specified amounts. At least some of these layers of coverage have aggregate limits of coverage that may be exhausted by losses of any one or more of insureds under the TPIP (which include Policyholders and several other tribes), such that if a loss of one tribe is paid, it reduces the insurance available in that layer to pay losses for other tribes.
4. The Policyholders own, operate, generate business revenue, and receive tax revenue from, among other things, casino and hospitality businesses.
5. The Policyholders’ properties and businesses have suffered direct physical loss and damage from the COVID-19 pandemic (the “Pandemic”) caused by the Severe Acute

Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) (the "Coronavirus").

6. The Form Policy provides coverage for "loss resulting directly from interruption of business, services, or rental value caused by direct physical loss or damage, as covered by this Policy to real and/or personal property insured by this Policy, occurring during the term of this Policy."

7. Due to the Pandemic and the Coronavirus, the Policyholders have suffered "direct physical loss or damage" to their properties and businesses. The Pandemic caused a loss of the Policyholders' certain property covered under the Agreement (the "Property"), because the Pandemic made the Property unusable and/or uninhabitable for clients.

8. The Property includes without limitation real property and personal property located in the following Wisconsin municipalities: Black River Falls, Lake Delton, La Crosse, South Milwaukee, Tomah, Nekoosha, Wittenberg, Lyndon Station, Madison, Wisconsin Dells, Baraboo, Mauston, Milwaukee, Wisconsin Rapids, Muscoda, Kildare, Port Edwards, North Freedom, Neillville, New Lisbon, and Green Bay. The Property also includes without limitation real property and personal property in Illinois, Minnesota, and Missouri.

9. The Pandemic limited access, reduced usable space, and required the installation of physical barriers; it also increased the need to clean and sanitize at the Property. The Policyholders undertook significant repair and remediation before use of the Property could be permitted without risking further loss and injury to visiting patrons.

10. The loss is direct because the Policyholders suffered loss of business income directly caused by the Coronavirus and the Pandemic, and the Policyholders' Property was rendered unusable.

11. The loss is physical because the probability of illness for any patron if the Property were physically used made the Property uninhabitable and/or unusable; the Pandemic prohibited access to the Property.

12. The loss experienced by the Policyholders thus constitutes a loss as defined by the Form Policy.

13. The loss or damage incurred by Policyholders is capable of repair, but such repair is difficult. Policyholders already completed some repairs.

14. The Policyholders suffered physical loss of property also because of Pandemic-related closure orders ("Closure Orders").

15. To protect themselves from loss or damage, the Policyholders had purchased "all risk" property coverage through the Form Policy.

16. To protect themselves from business disruption, the Policyholders had purchased "time element" coverage through the Form Policy.

17. Upon information and belief, Lexington and the other Insurers have all refused to pay the Policyholders' arising out of Coronavirus, the Pandemic, and Closure Orders covered by insurance provisions, including without limitation the Form Policy provisions identified in this Complaint.

THE PARTIES

18. The Nation is a federally recognized Indian tribe with its main office located at W9814 Airport Road, Black River Falls, WI 54615, Jackson County, Wisconsin.

19. Upon information and belief, Defendant Lexington Insurance Company is organized under the laws of the Delaware and has its principal place of business in Boston, Massachusetts.

20. Upon information and belief, Defendants Underwriters at Lloyd's - Syndicates ASC1414, XLC 2003, TAL 1183, MSP 318, ATL1861, KLN 510, AGR 3268, subscribing to Policy No. PJ193647 are underwriters organized in separate syndicates, in turn comprised of companies and individuals (known as "names") around the world, which underwrite insurance in a market known as Lloyd's of London. Upon information and belief, each of the syndicates and names is a foreign citizen.

21. Upon information and belief, Defendants Underwriters at Lloyd's - Syndicate: CNP 4444, subscribing to Policy Number PJ1900131 is an underwriting syndicate, comprised of companies and individuals (known as "names") around the world, which underwrites insurance in the Lloyd's of London market. Upon information and belief, the syndicate and each of the names is a foreign citizen.

22. Upon information and belief, Defendants Underwriters at Lloyd's - Aspen Specialty Insurance Company, subscribing to Policy No. PX006CP19 is an underwriting syndicate, comprised of companies and individuals (known as "names") around the world, which underwrites insurance in the Lloyd's of London market. Upon information and belief, the syndicate and each of the names is a foreign citizen.

23. Upon information and belief, Defendant Homeland Insurance Company of New York is organized under the laws of New York and has its principal place of business in Plymouth, Minnesota.

24. Upon information and belief, Defendant Hallmark Specialty Insurance Company is organized under the laws of Oklahoma and has its principal place of business in Dallas, Texas.

25. Upon information and belief, Defendants Underwriters at Lloyd's - Syndicates

KLN 0510, ATL 1861, ASC 1414, QBE 1886, MSP 0318, APL 1969, CHN 2015, XLC 2003, subscribing to Policy No. PJ1933021 are underwriters organized in separate syndicates, in turn comprised of companies and individuals (known as "names") around the world, which underwrites insurance in the Lloyd's of London market. Upon information and belief, the syndicate and each of the names is a foreign citizen.

26. Upon information and belief, Defendants Underwriters at Lloyd's - Syndicate BRT 2987, subscribing to Policy Number PD-10363-05 is an underwriting syndicate, comprised of companies and individuals (known as "names") around the world, which underwrites insurance in the Lloyd's of London market. Upon information and belief, the syndicate and each of the names is a foreign citizen.

27. Upon information and belief, Defendant Endurance Worldwide Insurance Ltd t/as Sompo International is organized under the laws of the United Kingdom and has its principal place of business in London, United Kingdom.

28. Upon information and belief, Defendants Underwriters at Lloyd's - Syndicates KLN 0510, TMK 1880, BRT 2987, BRT 2988, CNP 4444, ATL 1861, Neon Worldwide Property Consortium, AUW 0609, TAL 1183, AUL 1274, subscribing to Policy Number PJ1900067 are underwriters organized in separate syndicates, in turn comprised of companies and individuals (known as "names") around the world, which underwrites insurance in the Lloyd's of London market. Upon information and belief, the syndicate and each of the names is a foreign citizen.

29. Upon information and belief, Defendant Arch Specialty Insurance Company is organized under the laws of Missouri and has its principal place of business in Jersey City, New Jersey.

30. Upon information and belief, Defendant Evanston Insurance Company is organized under the laws of Illinois and has its principal place of business in Rosemont, Illinois.

31. Upon information and belief, Defendant Allied World National Assurance Company is organized under the laws of New Hampshire and has its principal place of business in New York, New York.

32. Upon information and belief, Defendant Liberty Mutual Fire Insurance Company is organized under the laws of Massachusetts and has its principal place of business in Boston, Massachusetts.

33. Upon information and belief, Defendant XL Insurance America Inc. is organized under the laws of Delaware and has its principal place of business in Stamford, Connecticut.

34. Each Insurer has agreed that in the event of its failure to pay any amount claimed to be due under the Agreement, the Insurer, at the request of any of the Policyholders, will submit to the jurisdiction of a court of competent jurisdiction within the United States. (Ex. A at 88.)

35. Each Insurer further agreed that service of process in such suits may be made upon FLWA Service Corp, c/o Foley and Lardner LLP, 555 California Street, Suite 1700, San Francisco, CA 94104-1520, United States of America. (*Id.*)

JURISDICTION AND VENUE

36. This Court has general jurisdiction under Wis. Stat. § 753.03.

37. This Court has personal jurisdiction over each of the Insurers under Wis. Stat. § 801.05, because, upon information and belief, each Insurer engaged in substantial and not isolated activities in the State of Wisconsin, which through the Insurer's acts and omissions

within and without this state caused injury to occur in this state. Upon information and belief, at the time of the injury, solicitations and service activities were carried on within this state by and on behalf of each Insurer, and services by the Insurer were used within this state in the ordinary course of trade. Further, each Insurer made a promise to the Policyholders and some third parties to insure upon and against the happening of an event. The Policyholders were residents of this state when the event out of which the causes of action in this Action are claimed to arise occurred, and the event out of which such causes of action are claimed to arise occurred within this state.

38. Venue lies in the Circuit Court of the State of Wisconsin, Dane County, under Wis. Stat. § 801.50(2) because Dane is (a) a county where the claim arose; (b) a county where the real or tangible personal property, or some part thereof, which is the subject of the claim, is situated; and (c) a county where each Insurer does substantial business.

39. There is an actual, justiciable controversy between the Policyholders and the Insurers.

FACTUAL BACKGROUND

40. In return for the payment of substantial premiums, for the policy period July 1, 2019, to July 1, 2020, the Insurers issued an insurance policy in the written Agreement to the Policyholders under the TPIP prepared by Tribal First ("Tribal First"). Tribal First is a specialized program of Alliant Insurance Services, Inc. ("Alliant"), a California corporation.

41. The Agreement contains a front cover page (page 1 of 396 of Exhibit A) with the Tribal First Logo and the title "Property Solutions: Recognizing the Past While Protecting the Future." The Agreement contains also a back cover page (page 396 of 396): the top three fourths of the page are solid white with no markings, and the bottom of the page contains the Tribal First Logo, address, phone and fax numbers, and a certain license

number. Beyond the Form Policy (pages 49 through 116 of 396), the Agreement contains various schedules, contracts, endorsements, and other documents. Upon information and belief, the Nation does not possess and did not ever receive any other document purported to be part of (or in any way incorporated into) the Agreement from Tribal First, Alliant, any Insurer, or any other legal or natural person.

42. The Nation is the first named insured in the Agreement.

43. The Form Policy “insures Real and Personal Property within the United States of America” and covers loss or damage to “all property of every description both real and personal.”

44. Coverage under the Form Policy extends to “Miscellaneous Unnamed Locations,” including “property at locations (including buildings, or structures, owned, occupied or which the Named Insured is obligated to maintain insurance)” within the United States.

45. Under the Form Policy, “occurrence” is defined as “a loss, incident or series of losses or incidents not otherwise excluded by this Policy and arising out of a single event or originating cause and includes all resultant or concomitant insured losses.”

46. Under the Form Policy, under the heading “Perils Covered,” the Insurers promised that: “Subject to the terms, conditions and exclusions stated elsewhere herein, this Policy provides insurance against *all risk* of direct physical loss or damage occurring during the period of this Policy.” (emphasis added)

47. The Form Policy does not include, and is not subject to, any exclusion for losses caused by viruses or communicable diseases.

48. The Form Policy expressly excludes “fungus, mold(s), mildew or yeast,” as well as “spores or toxins” created or produced by such “fungus, mold(s), mildew or yeast.” The

exclusion provides an exhaustive list that does not cover viruses, which are in a completely different biological category.

49. The Form Policy also contains an exclusion for “seepage, pollution, or contamination.” This exclusion does not refer or apply to a virus or communicable disease, nor does the Form Policy extend the undefined term “contamination” to viruses. This exclusion ends with a paragraph that reads in its entirety:

However, if the covered property is the subject of direct physical loss or damage for which the Company has paid or agreed to pay, then this Policy (subject to its terms, conditions and limitations) insures against direct physical loss or damage to the property covered hereunder caused by resulting seepage and/or pollution and/or contamination.

50. The Policyholders suffered a loss that the Insurers agreed to pay because the Form Policy “provides insurance against all risk of direct physical loss or damage.”

51. Losses due to the Pandemic are therefore a covered cause of loss and fall within the “Perils Covered” under the Policy.

52. The Form Policy includes “Protection and Preservation of Property” coverage that pays the cost of actions taken by insureds due to “actual or imminent physical loss or damage” to covered property. The Insurers agreed to pay “the expenses incurred by the Named Insured in taking reasonable and necessary actions for the temporary protection and preservation” of covered property. In this same provision, the Insurers require that Policyholders “shall endeavor to protect covered property from further damage” “[i]n the event of loss likely to be covered” by the Form Policy.

53. The Form Policy provides coverage for Business Interruption, Extra Expense, Ingress/Egress, Civil Authority, Contingent Time Element and Tax Revenue Interruption coverages, each of which applies here.

54. As described below, the Policyholders' business properties, as well as their tax-generating properties, have suffered direct physical loss. Due to the Pandemic, these properties became effectively uninhabitable and/or unusable by patrons and unsafe for their intended purpose and thus suffered physical loss. The business functions of the Policyholders' business properties, as well as their tax-generating properties, have been impaired due to this physical loss. If the Policyholders had conducted business as usual, COVID-19 and the Coronavirus would have appeared on the Property, the Property would have suffered further damage, and patrons, guests, and others would have gotten sick. It is a direct physical loss.

55. The insurance industry has long been aware of the need for a written exclusion specific to pandemics or viruses when an insurer wishes to exclude pandemic- or virus-related coverage. For example, Lloyd's of London, where several Insurers are underwriters, has advised as much for more than a decade.¹ Lloyd's of London wrote in 2008, "Some potentially affected policies may not have been written with such [pandemic] claims in mind and one possible response from the insurance industry is to clarify coverage intentions sooner rather than later." Also, as early as 2006, the Insurance Services Office ("ISO") warned insurers of the need for a virus-specific exclusion in policies if an insurer desired to exclude coverage for virus-related property loss or damage. ISO proposed form CP 01 40 07 06 titled "Exclusion for Loss Due To Virus Or Bacteria" which read, in relevant part, "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."²

¹ <https://www.lloyds.com/news-and-insights/risk-reports/library/pandemic-potential-insurance-impacts> (accessed May 24, 2021)

² Lucy E. Tufts, *A Brief Primer on Business Interruption Claims*, 40 Ala. Ass'n Just. J. 30, 31 (2020).

Upon information and belief, insurers who wish to exclude virus-caused damages have adopted this clause or variations thereof since 2006.

56. Upon information and belief, the Insurers are sophisticated, large insurance companies, and/or members of Lloyd's of London, itself a sophisticated, large player in the insurance industry. Upon information and belief, all Insurers have a multi-state clientele and some have an international clientele.

57. Upon information and belief, each Insurer reviewed the Form Policy and every applicable exclusion before becoming a party to the Form Policy.

58. The Policyholders entered into a new insurance agreement (the "2020-2021 Agreement") with various insurers, including without limitation some or all of the Insurers, under the TPIP. The 2020-2021 Agreement included an exclusion which preempted coverage based on the threat or fear of viruses. The (2019–2020) agreement did not contain such exclusion.

59. The Form Policy does not contain the word "pandemic," the concept of pandemic, or any reference, whether direct or indirect, to such concept.

60. Apart from three references to "computer viruses," the Form Policy does not contain the word "virus," the concept of virus, or any reference, whether direct or indirect, to such concept.

61. Upon information and belief, some or all of the Insurers have used a pandemic exclusion endorsement in other policies issued to other policyholders.

62. "Loss," in many provisions of the Form Policy, does not require physical alteration to the property.

63. The Form Policy does not require actual physical alteration as a condition

precedent for coverage: in fact, some provisions explicitly govern imminent physical loss.

64. The Form Policy uses the undefined phrases “physical loss” and “physical damages” separately and disjunctively: nowhere in the Form Policy is one used interchangeably with the other.

65. The Policyholders suffered direct physical loss because the Pandemic rendered their Property unusable for its intended purpose and unsafe.

66. No exclusion applies to bar coverage.

67. All conditions precedent to coverage under the Agreement have been satisfied or waived.

68. The Form Policy provides Business Interruption coverage for “loss resulting directly from interruption of business, services or rental value caused by direct physical loss or damage” to covered property during the “period of restoration.”

69. Business Interruption losses include loss of gross earnings, which the Form Policy defines as the sum of: (a) “total net sales,” plus (b) “other earnings derived from the operation of the business,” minus the cost of: (c) “merchandise sold including packaging,” (d) “materials and supplies consumed directly in supplying” services, and (e) services “purchased from outside (not employees of the Named Insured) for resale that does not continue under contract.” “No other cost shall be deducted in determining gross earnings.”

70. The Form Policy defines Rental Value as the sum of several defined amounts, including “total anticipated gross rental income from tenant occupancy.” “In determining rental value, due consideration shall be given to the experience before the date of loss or damage and the probable experience thereafter had no loss occurred.”

71. The period of restoration during which Business Interruption losses accrue, as

defined in the Form Policy, begins “on the date direct physical loss occurs and interrupts normal business operations and ends on the date that the damaged property should have been repaired, rebuilt or replaced with due diligence and dispatch, but not limited by the expiration of this policy.”

72. Under the Form Policy, the Insurers agreed to pay reasonable and necessary “Extra Expense” incurred to continue the normal operation of business “as nearly as practicable” following damage to covered property by a covered cause of loss during the “period of restoration.”

73. Under the Form Policy, the Insurers also agreed to provide Ingress/Egress coverage, which applies to loss sustained for up to 30 days when “direct physical loss or damage . . . occurring at property located within a 10 mile radius of covered property” prevents ingress to or egress from covered property.

74. Under the Form Policy, the Insurers further agreed to provide “Interruption by Civil Authority” coverage, which applies to loss sustained when a civil authority issues an order under which access to covered property is “specifically prohibited” due to property damage “at a property located within a 10-mile radius of covered property.” The Form Policy does not define “prohibited.” The Form Policy’s reference to prohibited access does not state “any access,” “all access,” “access for all persons,” or any similar language suggesting universal prohibition.

75. The Pandemic caused physical damage to property within a 10-mile radius of the covered property of the Policyholders. Damage caused by the presence of COVID-19, including within 10 miles of the Policyholders’ properties, and the resulting threat of further damage to property and to health, prompted the issuance of several civil authority orders by

the State of Wisconsin, various counties in Wisconsin, and the Nation. These Civil Orders in turn prohibited access to the Policyholders' Property by patrons and caused the Policyholders to incur further loss.

76. In the Form Policy, the Insurers agreed to "Contingent Time Element" coverage, which applies to losses caused by property damage at the properties of the suppliers or customers of the Policyholders. Under these Contingent Time Element coverages, the Insurers agreed to pay losses for business interruption, rental income, or extra expenses due to property damage "at direct supplier or direct customer locations" that (a) prevents a supplier of goods or services to the Insureds from supplying such goods or services, or (b) prevents recipients of goods or services of the Insured from accepting those goods or services. The Pandemic caused physical damage to property of direct suppliers and direct customers, resulting in business interruption and rental income losses, as well as extra expenses, and the Form Policy provides coverage for these losses under the Contingent Time Element Coverage.

77. In the Form Policy, the Insurers agreed to pay "Tax Revenue Interruption" losses "resulting directly from necessary interruption of sales, property or other tax revenue . . . collected by or due" insureds caused by damage to property which is not operated by insureds, "and which wholly or partially prevents the generation of revenue for the account of" insureds. Tax revenue covered by this provision includes "Tribal Incremental Municipal Services Payments," as well as property tax and other tax revenue.

78. The time period for "Tax Revenue Interruption" coverage begins "with the date of damage to the contributing property" and continues "for only the length of time as would be required with exercise of due diligence and dispatch to rebuild, replace or repair the

contributing property,” but is “not limited by the expiration date” of the Policy.

79. The Pandemic caused physical damage to such “contributing property” resulting in the interruption of Tribal Incremental Municipal Services Payments, property tax, and other tax revenue.

80. Losses caused by the Coronavirus, COVID-19, and the Pandemic and by the related Closure Orders issued by local, state, and tribal authorities therefore triggered the Protection and Preservation of Property, Business Interruption, Extra Expense, Ingress/Egress, Civil Authority, Contingent Time Element, and Tax Revenue Interruption coverage provisions of the Policy.

The Pandemic

81. According to the Center for Disease Control and Prevention (“CDC”), COVID-19 is a disease caused by the Coronavirus contracted by humans: COVID-19 can cause severe illness and death. Certain groups, including older adults and people with underlying medical conditions, are at increased risk.³

82. The Coronavirus and COVID-19 spread “very easily” between people who are physically near each other (within about six feet). Infected people, whether showing symptoms or not, can spread the virus to others.⁴

83. The Coronavirus spreads most often by respiratory droplets or aerosol particles, i.e., particles formed when the droplets rapidly dry. People may also get COVID-19 by touching a surface that has the virus on it and then touching their own mouth, nose, or eyes.⁵

³ <https://www.cdc.gov/coronavirus/2019-ncov/> (accessed May 19, 2021)

⁴ *Id.*

⁵ *Id.*

84. The Coronavirus and Coronavirus-containing droplets and aerosol particles are physical substances active in the air and on physical surfaces. Droplets can remain in the air for hours.⁶

85. The Coronavirus's incubation period is up to fourteen days, and most virus transmissions occur from persons who do not show symptoms.⁷

86. The Coronavirus caused physical loss by rendering Property unusable, uninhabitable, unfit for intended function, dangerous and unsafe.

87. Coronavirus-containing droplets and aerosol particles land on and adhere to surfaces thereby changing the surface by becoming a part of it. Viable Coronavirus can survive and be detected on a surface for weeks.⁸

88. When the Coronavirus adheres to a surface, it becomes a part of the surface and materials, converting the surface and materials to "fomites." Cleaning and sanitizing surfaces may reduce but does not eliminate the risk of transmission, and such reduction is only temporary.⁹

89. When individuals carrying the Coronavirus breathe, talk, cough, or sneeze, they expel droplets that remain in the air and make their surroundings unsafe.

90. Droplets and aerosol particles spread through HVAC systems, and thus the Environmental Protection Agency has recommended that buildings improve their HVAC systems by air filtration and ventilation with outdoor air.¹⁰

⁶ <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html> (accessed May 24, 2021)

⁷ <https://www.cdc.gov/coronavirus/2019-ncov/> (accessed May 24, 2021)

⁸ <https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html> (accessed May 24, 2021)

⁹ *Id.*

¹⁰ <https://www.epa.gov/coronavirus/indoor-air-and-coronavirus-covid-19> (accessed May 19, 2021)

91. The presence or threatened presence of COVID-19 at a property causes physical loss and damage by necessitating remedial measures to avoid, reduce or eliminate the presence of cases of COVID-19 and the Coronavirus on site.

92. The presence or threatened presence of the Coronavirus changes any surface and makes it dangerous, so that it cannot be used without burdensome remedial measures, including the wait for Coronavirus-potentially-infested air to be evacuated.

93. The presence or threatened presence of the Coronavirus at a property causes physical loss and damage by rendering a property that is usable and safe for humans into a property that, absent burdensome remedial measures, is unusable, uninhabitable, unfit for its intended function, and extremely dangerous and potentially deadly for humans. Remedial measures do not completely alleviate any of these negative consequences.

94. In addition, the presence of the Coronavirus on property creates the imminent threat of further damage to that property or to nearby property. For example, individuals who come into contact with respiratory droplets at one location by touching a surface will carry droplets and particles and deposit them on other surfaces, causing additional damage and loss.

95. The Pandemic has caused civil authorities throughout the country to issue orders requiring the whole or partial suspension of business at a wide range of establishments, including the Closure Orders issued by civil authorities with jurisdiction over the Policyholders' businesses. These Closure Orders have directly affected the Policyholders' businesses.

96. Because the threat and presence of the Coronavirus and the Pandemic constitute direct physical loss or damage to property, rendering that property actually or imminently

uninhabitable and unusable by patrons, civil authorities across the United States have issued orders to suspend or restrict business at a wide range of establishments. Many governmental bodies in their orders specifically found that the Coronavirus and the Pandemic directly and indirectly cause property damage. *See, e.g.*, N.Y.C. Emergency Exec. Order No. 100, at 2 (Mar. 16, 2020)¹¹ (“[T]he [Corona]virus physically is causing property loss and damage.”); N.Y.C. Emergency Exec. Order No. 103, at 1 (Mar. 25, 2020)¹² (“[A]ctions taken to prevent [the] spread of [the Coronavirus] have led to property loss and damage.”); Harris Cty. Tex. Office of Homeland Security & Emergency Mgmt., Order of Cty. J. Lina Hidalgo, at 2 (Mar. 24, 2020)¹³ (“[The Coronavirus] causes property loss and damage due to its ability to attach to surfaces for prolonged periods of time.”); Napa Cty. Cal. Health & Human Service Agency, Order of the Napa Cty. Health Officer at 2 (Mar. 18, 2020)¹⁴ (“This Order is issued based on evidence of . . . the physical damage to property caused by the virus.”); City of Key West Fla. State of Local Emergency Directive 2020-03, at 2 (Mar. 21, 2020)¹⁵ (“[T]he [Corona]virus is causing property damage due to its proclivity to attach to surfaces for prolonged periods of time”); Sixth Supp. to San Francisco Mayoral Proclamation Declaring the Existence of a Local Emergency, at 2 (Mar. 27, 2020) (“[T]he [Corona]virus physically is causing property loss or damage due to its proclivity to attach to surfaces for prolonged periods of time”).

¹¹ <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-100.pdf> (accessed May 20, 2021)

¹² <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-103.pdf> (accessed May 20, 2021)

¹³ <https://www.readyharris.org/Portals/60/documents/03-24-20-Stay-Home-Work-Safe-Order-by-the-County-Judge.pdf?ver=2020-03-24-150732-793> (accessed May 20, 2021)

¹⁴ <https://www.countyofnapa.org/DocumentCenter/View/16687/3-18-2020-Shelter-at-Home-Order>, (accessed May 20, 2021)

¹⁵ <http://cityofkeywest-fl.gov/DocumentCenter/View/1660/Emergency-Directive-2020-03?bidId=> (accessed May 20, 2021)

97. Authorities in Wisconsin have issued the Closure Orders, which restrict and prohibit business activity.

98. Although the Nation has a certain level of sovereignty and autonomy in managing the Pandemic, the vast majority of the Policyholders' visitors and patrons come from other parts of Wisconsin subject to state and local government actions and decisions in managing the Pandemic.

99. On March 12, 2020, Wisconsin Governor Tony Evers issued Executive Order 72, "Declaring a Health Emergency in Response to the COVID-19 Coronavirus."¹⁶

100. Wisconsin then issued Emergency Order 4, Effective March 17, 2020, ordering "a statewide moratorium on mass gatherings of 50 people or more to mitigate the spread of COVID -19." Restaurants and bars were limited to "50 percent of seating capacity or 50 total people, whichever is less" and required to maintain "distancing of 6 feet between tables, booths, bar stools, and ordering counters."

101. On March 17, 2020, Wisconsin issued Emergency Order 5, effective at 5 P.M. on March 17, 2020, prohibiting gatherings of "10 or more people in a single room or single confined space at the same time." Restaurants were allowed to "remain open for take-out or delivery service only" and required to "preserve social distancing of six feet between customers during pick up."

102. On March 20, 2020, Wisconsin issued Emergency Order 8, "Updated Mass Gathering Ban," further detailing the limit on bars and restaurants to take-out and delivery (with no delivery of alcoholic beverages to retail customers unless they paid in person).

103. On March 24, 2020, Wisconsin issued Emergency Order 12, a "Safer At Home

¹⁶ <https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx> (accessed July 2, 2021)

Order,” which read in part, “Despite prior emergency orders banning mass gatherings, the rates of infection continue to drastically increase, necessitating additional measures to slow the rate of infection and save lives.” The order closed all Non-Essential Businesses and Operations and required Essential Businesses and Operations to comply with Social Distancing Guidelines. All individuals in the state were ordered “to stay at home or their place of residence,” with certain exceptions. Bars and restaurants remained limited to take-out and delivery (with no delivery of alcoholic beverages to retail customers).

104. Many of the restrictions in Emergency Order 12 were renewed through May 26, 2020. The order exempted tribal members acting within their own reservation but emphasized that tribal authorities could issue their own orders providing similar restrictions. As described below, the Nation had already issued and would continue to issue restrictions that applied to tribal members.

105. Emergency Order 28, issued on April 16, 2020, applied to non-tribal members who wished to travel to patronize businesses at a reservation and encouraged them to “be respectful of and avoid nonessential travel to Tribal territory.”

106. Emergency Orders 12 and 28 provided that violations were punishable by up to thirty days in jail and a fine up to \$250.00.

107. On November 10, 2020, Wisconsin issued Executive Order 94, “Relating to the Actions Every Wisconsinite Should Take to Protect their Family, Friends, and Neighbors from COVID-19,” encouraging businesses to limit the number of staff and customers on their premises and adopt stringent measures to avoid the spread of the virus. Individuals and businesses were instructed to “[f]requently clean high-touch surfaces and objects” and “comply with social distancing of 6 feet between all individuals on the premises.”

108. On November 20, 2020, Wisconsin issued Executive Order 95, "Relating to Declaring a State of Emergency and Public Health Emergency," declaring the COVID-19 crisis a disaster and public health emergency and directing state agencies to assist the ongoing response. Executive Order 95 was accompanied by Emergency Order 1, "Relating to Reducing Hospital Bed and Staff Shortages by Requiring Face Coverings," which limited in-person gatherings, required individuals to wear masks, and seriously restricted the ability of individuals to interact in enclosed spaces. Emergency Order 1 imposed civil penalties for noncompliance "enforceable by civil forfeiture of not more than \$200."

109. On January 19, 2021, Wisconsin issued Executive Order 104, "Relating to Declaring a State of Emergency and Public Health Emergency," again declaring the COVID-19 crisis a disaster and public health emergency and authorizing additional measures to combat the spread of COVID-19, e.g., by directing state agencies to assist the ongoing response.

110. Executive Order 104 was accompanied by Emergency Order 1, "Relating to Stopping the Spread of a New Highly Contagious Variant of COVID-19 by Requiring Face Coverings," which identified a "new highly contagious variant" of COVID-19 and issued restrictions on the use of enclosed spaces and physical distancing as well as mask mandates.

111. On February 4, 2021, Wisconsin issued Executive Order 105, "Relating to Declaring a State of Emergency and Public Health Emergency," declaring again that the COVID-19 crisis is a disaster and public health emergency and authorizing additional measures to combat the spread of COVID-19, with direction to state agencies to assist the ongoing response.

112. Executive Order 105 was accompanied by Emergency Order 1, "Relating to

Stopping the Spread of a New Highly Contagious Variant of COVID-19 by Requiring Face Coverings.” The state detailed its response to the COVID-19 crisis and again imposed restrictions on the use of enclosed spaces and physical distancing as well as mask mandates. Emergency Order 1 imposes civil penalties for any failure to comply with its strictures, “enforceable by civil forfeiture of not more than \$200.”

113. Local governments across the state, including counties and municipalities, also promulgated orders, ordinances, and other rules that similarly hampered the Policyholders’ businesses in order to manage the Pandemic.

114. Governments in other states, including without limitation Illinois, Missouri, and Minnesota issued similar orders restricting business activity.

115. The Nation also issued a series of executive orders to manage the Pandemic.¹⁷

116. In Administrative Order Mar. 11, 2020–4, the Nation postponed its Baraboo March Madness Basketball Tournament indefinitely, making the decision “in consideration of the recent World Health Organization declaring the Coronavirus (COVID-19) a global pandemic” and “following the [CDC] Interim Guidelines.”

117. In Administrative Order Mar. 13, 2020–1, the Nation declared a state of emergency suspending all employment-related travel outside Wisconsin, ordering departments to assist with the response to the public health emergency, and suspending certain meetings, among other things.

118. In Administrative Order Mar. 17, 2020–1, the Nation, in response to its state of emergency declaration, ordered all gaming facilities closed to the public on or before March 20, 2020 and anticipated reopening possibly on April 4, 2020.

¹⁷ <https://ho-chunknation.com/ho-chunk-nation-executive-orders-in-response-to-covid-19/> (accessed July 21, 2021)

119. In Administrative Order Mar. 20, 2020–1, the Nation ordered a Nation-wide moratorium on mass gatherings of ten people or more to mitigate the spread of COVID-19. Gatherings of less than ten people were required to follow social distancing guidelines and follow all recommendations issued by the Nation’s Department of Health, the Wisconsin Department of Health Services, and the CDC.

120. In Administrative Order Apr. 3, 2020–1, the Nation referred back to Administrative Order Mar. 17, 2020–1 and its potential reopening date of April 4. Upon reevaluation, the Nation scratched the date and closed all gaming facilities until further notice.

121. In Administrative Order May 22, 2020–1, the Nation finally decided to stagger the opening of its facilities starting with one casino on May 27, 2020, such opening being “limited” and “with added precautions.” The other facilities would reopen depending on “fiscal, health, and regulatory concerns and considerations.”

122. In Administrative Order May 26, 2020–1, the Nation lifted Administrative Orders March 17, 2020-1 and April 3, 2020-1, ordered the continued staggered opening of facilities, and encouraged all persons under the Nation’s jurisdiction to follow CDC guidelines, maintain social distancing, avoid gatherings, and follow the Nation’s various facilities’ guidelines.

The Impact of the Pandemic and the Closure Orders

123. The immediate threat of physical spread of the Coronavirus caused direct physical loss by rendering the Property effectively or imminently uninhabitable and unusable for Policyholders and patrons, by impairing the function of the Property, and by causing the “interruption of business, services or rental value” during a “period of restoration.”

124. The Insurers have not investigated, swabbed, or tested any property to detect the presence of the Coronavirus.

125. The Coronavirus has caused a loss of functionality and use of the Property.

126. The Closure Orders prohibited access to the Property. Those Closure Orders were issued by civil authorities in response to the physical presence of the Coronavirus at properties around the State of Wisconsin, including property within a 10-mile radius of Policyholders' Property, and the imminent threat of further physical spread of the virus and resulting danger to individuals.

127. The Closure Orders and the property damage caused by the presence of the Coronavirus at other properties restricted the use of the Property and the Policyholders' businesses. The restrictions also resulted in increased spending by Policyholders for physical barriers, cleaning, sanitizing, and other measures to prepare the Property for safe reopening.

128. Because the Coronavirus is still present throughout Wisconsin, it continues to pose an actual imminent threat to the Policyholders and the Property.

129. Property damage caused by the Pandemic at the properties of suppliers and customers further harmed the Policyholders' business. For example, operators and bus companies which provide services to Policyholders by attracting and bringing patrons to the Policyholders' businesses ceased to do so, and, when they resumed, did so at a slow pace. Hotels and other businesses that facilitate travel by customers to the Policyholders' businesses also experienced slowdowns. These interruptions and reductions were due to physical loss and/or damage from the Coronavirus to the suppliers' and customers' property.

130. The Closure Orders and Property loss and/or damage caused by the presence of

the Coronavirus at other businesses and households in the area further harmed Policyholders' business by depriving Policyholders of tax revenue.

131. As a result of the presence of COVID-19, the loss and/or damage to Policyholders' Property, and the Closure Orders, the Policyholders suffered losses covered by Protection and Preservation of Property, Business Interruption, Extra Expense, Ingress/Egress, Civil Authority, Contingent Time Element and Tax Revenue Interruption protections.

132. The Policyholders have performed all their obligations under the Agreement including the timely payment of substantial premiums.

133. The Policyholders submitted a claim for loss to the Insurers under the Agreement due to the presence and/or threat of COVID-19 and the Closure Orders, and the Insurers denied that claim.

FIRST CAUSE OF ACTION

DECLARATORY JUDGMENT

134. The Policyholders incorporate the above paragraphs by reference.

135. This is a claim for relief for declaratory judgment pursuant to Wis. Stat. §§ 806.01, 806.04. An actual and justiciable controversy exists between the Policyholders and the Insurers concerning their respective rights and obligations under the Agreement.

136. The issuance of declaratory relief will terminate the controversy between the Policyholders and the Insurers that gave rise to this Action.

137. Therefore, this Court has the authority to issue a declaratory judgment concerning the respective rights and obligations of the Policyholders and the Insurers under the Agreement.

138. The Policyholders seek a declaratory judgment declaring that the Agreement

covers the losses they have suffered.

139. The Policyholders seek a declaratory judgment declaring that the Insurers are responsible for fully and timely paying the Policyholders' claim.

SECOND CAUSE OF ACTION

BREACH OF CONTRACT

140. The Policyholders incorporate the above paragraphs by reference.

141. The Agreement is a valid and enforceable contract.

142. The Policyholders paid substantial premiums for the Agreement and the promises of coverage contained therein.

143. The Policyholders performed all of their obligations owed under the Agreement or were excused from performance.

144. The Insurers denied the Policyholders' claim and have refused to pay or otherwise honor their promises.

145. In denying coverage for the Policyholders' insurance claim as alleged above, the Insurers breached the Agreement.

146. As a result, the Policyholders suffered and continue to suffer damages in an amount to be proven at trial.

THIRD CAUSE OF ACTION

BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

147. The Policyholders incorporate the above paragraphs by reference.

148. The Agreement is a valid and enforceable contract.

149. In Wisconsin, the law implies a covenant of good faith and fair dealing in every contract.

150. The Policyholders have the right to a fair and prompt investigation, payment and/or settlement of their claim.

151. The Insurers failed to fully, fairly, and adequately investigate and adjust the Policyholders' property claim, various business interruption claims, and other potential claims for damages. In so doing, the Insurers breached the covenant of good faith and fair dealing to the Policyholders.

152. By denying the Policyholders' claims with no reasonable basis to do so, the Insurers breached the covenant of good faith and fair dealing. The Insurers were aware that they had no reasonable basis for denying the claims.

153. Upon information and belief, the Insurers' wrongful denial of the Policyholders' claim was part of the Insurers' regular practice to reduce their respective claim payments to insureds who purchased coverage under the TPIP across the United States. The Insurers engage in this practice for the express purpose of increasing their respective profitability.

154. The Insurers' breach of their duty of good faith and fair dealing directly and proximately caused the Policyholders to suffer monetary damages in an amount to be determined at trial.

155. The Insurers acted in disregard of the rights of the Policyholders, and with oppression, fraud, malice, or wanton disregard of duty or gross or outrageous conduct, justifying the imposition of punitive damages.

PRAYER FOR RELIEF

Wherefore, the Policyholders respectfully request that the Court enter Judgment in its favor against Insurers as follows:

(1) A declaratory judgment that the losses the Policyholders suffered are covered by

the Agreement and that the Insurers are responsible for fully and timely paying the Policyholders' losses;

- (2) An award of compensatory and punitive damages in favor of the Policyholders in an amount to be proven at trial, plus pre- and post-judgment interest at the maximum legal rate, attorney fees, costs, and disbursements for this action; and
- (3) Such other further relief as this Court deems just and proper.

JURY DEMAND

The Policyholders hereby demand a trial by jury on all issues so triable in this action.

Respectfully submitted this 27th day of July 2021.

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