IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

ANGEL OF THE WINDS CASINO, an instrumentality and enterprise of the STILLAGUAMISH TRIBE OF INDIANS, a federally recognized Indian Tribe, Plaintiff, vs. AFFILIATED FM INSURANCE COMPANY, Defendant.	Case No. 22-2-01335-31 COMPLAINT JURY DEMANDED

Plaintiff, Angel of the Winds Casino, an instrumentality and wholly-owned enterprise of the Stillaguamish Tribe of Indians, a federally recognized Indian Tribe (the "Casino," "Plaintiff," or the "Insured"), brings this insurance coverage action seeking damages arising out of Affiliated FM Insurance Company's ("Affiliated FM") wrongful failure to pay in excess of $12,000,000 to the Casino under an "ALL RISKS" insurance policy that included extended coverage for business interruption losses.

I. PARTIES

1. The Casino is an instrumentality and wholly-owned enterprise of the Stillaguamish Tribe of Indians, a federally recognized Indian Tribe (the "Tribe"), which was insured under an insurance policy issued by Affiliated FM and purchased by the Tribe to insure the Tribe and multiple instrumentalities of the Tribe, including the Casino. The Casino's insured

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property is located within the boundaries of Snohomish County, Washington ("Snohomish County").

2. Affiliated FM is a subsidiary of Factory Mutual Insurance Company ("Factory Mutual").

3. Factory Mutual is a multi-national insurance company that is commonly referred to as FM Global. According to the company website, FM Global maintains an office in Bellevue, Washington. The Policy and Binder issued to the Tribe and Casino identify a Bellevue, Washington underwriter and claims manager.

4. Upon information and belief, the Washington office of FM Global underwrites and handles claims under insurance policies issued by Affiliated FM to policyholders throughout the State of Washington (the "State" or "Washington"), including policyholders in Snohomish County.

5. Affiliated FM is incorporated and headquartered in the State of Rhode Island.

6. Affiliated FM is registered with the Washington Office of the Insurance Commissioner.

7. Affiliated FM transacts substantial and continuous business in Washington, including by purposefully directing activities at businesses, such as the Casino, in Snohomish County, and insuring property in Snohomish County.

II. JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction pursuant to RCW 2.08.010 because some of the actions giving rise to this lawsuit occurred in Snohomish County, and because Affiliated FM advertised, marketed, sold, and distributed policies of insurance to Washington businesses to insure Washington properties, including the insurance policy insuring the Casino.

9. This Court has general jurisdiction over Affiliated FM because it transacts substantial and continuous business within the State and purposefully avails itself of the benefits and protections of the State and Snohomish County, by transacting business with the Casino,

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insuring property in Snohomish County, assuming continuing obligations to the Casino in Snohomish County, and purposefully directing activities at the Casino in Snohomish County.

10. This Court also has specific personal jurisdiction over Affiliated FM because it insured property located in Washington, transacted business in Washington, and upon information and belief committed tortious acts in Washington, such that the exercise of jurisdiction by this Court is proper.

11. Venue is proper under RCW 4.12 because the causes of action and injuries complained of in this lawsuit arose in Snohomish County.

III. FACTS

12. The Casino is located in Snohomish County at 3438 Stoluckquamish Lane, Arlington, Washington 98223.

13. The Casino includes a hotel, bowling alley, event center, several restaurants and bars, and other spaces open to the public, all of which are located on the reservation of the Stillaguamish Tribe of Indians.

14. A Board of Directors governs the Tribe and its businesses, including the Casino.

Affiliated FM Marketed the Policy as an "All Risks" Policy with Broad Coverage

15. To protect its business property and income, the Tribe purchased an "All Risks" "proVision 4100" property policy with a Policy Limit of $260,300,000, Policy No. T0288, from Affiliated FM for the policy period October 1, 2019 through October 1, 2020, insuring among other things the Casino and its property (the "Policy"). The Casino is a named insured on the Policy.

16. An insurance policy that covers "All Risks," such as the proVision 4100, is intended to be broader and provide more coverage than an "enumerated perils" property insurance policy that provides coverage for only certain specified causes of loss.

17. In 2008, Donald S. Malecki, an insurance expert and former underwriter for insurance companies, warned in a Risk Management magazine article that courts had interpreted

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the phrase "risks of physical loss or damage" expansively to include situations where only the threat of physical loss or damage existed, and he recommended that insurers amend their policies to remove the word "risk."

18. In 2013, in direct response to court decisions interpreting "All Risks" policy language broadly to include the "threat" of loss or damage, the Insurance Services Office removed the term "risks" from its property insurance policy forms.

19. On information and belief, Affiliated FM was at all relevant times aware of Malecki's recommendations, the court decisions referenced above, and the availability of policy language in Insurance Services Office forms that would not cover "All Risks," but Affiliated FM nevertheless chose to provide broad coverage for "All Risks," or threats of loss, in the Policy issued to the Casino.

20. Affiliated FM marketed the proVision 4100 policy form to large commercial property owners such as the Casino as an "easy to read and navigate" "platinum-level" insurance policy with "broad coverage," justifying a higher premium.

21. Based on Affiliated FM's marketing representations regarding its proVision 4100 "All Risks" Policy, the Casino reasonably understood the Policy to provide coverage for threats of loss or damage.

22. Consequently, the Tribe paid substantial premiums to purchase the Policy, which Affiliated FM accepted, insuring the Casino as an insured along with the Casino's property. Therefore, the Policy is a valid and enforceable contract between the Casino and Affiliated FM.

The Policy Provides Broad Coverage for All Risks of Physical Loss or Damage including Communicable Disease

23. Among other things, the Policy covers real and personal property at or within 1,000 feet of an insured location "against ALL RISKS OF PHYSICAL LOSS OR DAMAGE," unless specifically excluded, with a maximum limit of liability of $260,300,000 per occurrence.

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24. In addition to the Policy's common coverage for "All Risks" of physical loss or damage to property, the Policy contains several additional coverage extensions that expand the scope of coverage, which the Casino reasonably understood to extend coverage in the case of an unexpected catastrophe.

25. First, Affiliated FM expanded the Policy's property damage coverage to include "Communicable Disease Coverage," which extends additional coverage of $100,000 in the aggregate if an insured location "has the actual not suspected presence of communicable disease and access to such described location is limited, restricted or prohibited by: (a) An order of an authorized governmental agency regulating such presence of communicable disease; or (b) A decision of an Officer of the Insured as a result of such presence of communicable disease." This extension provides coverage for the "reasonable and necessary costs incurred . . . for the (a) Cleanup, removal and disposal of such presence of communicable disease from insured property."

26. In addition, the Policy covers "reasonable and necessary costs" incurred to (a) temporarily repair or replace; and (b) expedite the permanent repair or replacement of, "Insured Property that has sustained insured physical loss or damage."

27. The Policy also expands property damage coverage for "the reasonable and necessary costs" incurred for actions to "temporarily protect or preserve insured property; provided such actions are necessary due to actual, or to prevent immediately impending, insured physical loss or damage to such insured property."

The Policy Also Expands Coverage for Business Interruption Losses, including Losses from Communicable Disease and Civil Authority Actions

28. The Policy also includes several extensions of coverage for business interruption losses, including up to $96,791,048 of coverage for "Business Interruption loss . . . as a direct result of physical loss or damage of the type insured."

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29. The Policy's business interruption extension also includes "Communicable Disease Coverage," which extends additional coverage of $100,000 in the aggregate for business income losses if an insured location "has the actual not suspected presence of communicable disease and access to such described location is limited, restricted or prohibited by: (a) An order of an authorized governmental agency regulating such presence of communicable disease; or (b) A decision of an Officer of the Insured as a result of such presence of communicable disease."

30. The Policy defines "communicable disease" as "a disease which is: 1. Transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges, or 2. Legionellosis."

31. In addition, the Policy's business interruption coverage includes "Civil or Military Authority" coverage for up to 30 days of "Business Interruption Coverage loss incurred by the Insured during the Period of Liability if an order of civil or military authority prohibits access to a location provided such order is the direct result of physical damage of the type insured at a location or within five (5) statute miles of it."

32. The Policy provides extra coverage for business interruption losses incurred due to the necessary interruption of the Insured's business when ingress to or egress from a described location(s) is physically prevented, either partially or totally, as a direct result of physical loss or damage of the type insured to property of the type insured whether or not at a described location."

33. The Policy also includes a business interruption coverage extension of up to $5,000,000 attributable to "the reasonable and necessary extra expense incurred by the Insured to "a) Temporarily continue as close to normal the conduct of the Insured's business; and b) Temporarily use the property or facilities of the Insured or others."

34. The Policy also provides other coverages, terms and conditions that may be relevant to, and support coverage for, the losses sustained by the Casino as described herein.

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As Affiliated FM's Parent Company Has Admitted, the Policy Language Is Ambiguous

35. The Policy does not define the words "risks," "physical," "loss," or "damage," which are all, at most, ambiguous as used in the Policy.

36. Affiliated FM's parent company, Factory Mutual, stated in previous litigation that the term "'physical loss or damage" when undefined in an "All Risks" policy like the Policy here is "[a]t best . . . susceptible of more than one reasonable interpretation and is therefore ambiguous and must be construed against the [issuing insurer]." *See* Dkt. 127, Plaintiff Factory Mutual Motion *in Limine* No. 5 RE Physical Loss or Damage, at 3, n.1, *Factory Mut. Ins. Co. as Assignee of Albany Molecular Rsch., Inc. and OSO Biopharmaceuticals Mfg., LLC) v. Fed. Ins. Co.,* No. 1:17-cv-00760-GJF-LF (D.N.M. Nov. 19, 2019).

37. Standard American dictionaries define "risks" as "possibilities."

38. Standard American dictionaries define "physical" as something "having material existence," or "of or relating to that which is material."

39. Standard American dictionaries define "loss" as the "state of not having something that you had" and "deprivation."

40. Standard American dictionaries define "damage" as "loss or harm from injury to person, property, or reputation…"

41. The world "contamination" in the Policy is also, at most, ambiguous.

42. Instead of including the widely-available and conspicuous "Exclusion of Loss Due to Virus Or Bacteria Endorsement" released by the Insurance Services Office to the insurance industry in 2006, the only reference to "virus" in the Policy here is buried within a definition in the "contamination exclusion," which is commonly understood to apply only to cases involving "traditional environmental pollution."

43. Upon information and belief, in the course of seeking regulatory approval for the policy forms used in the Policy, Affiliated FM and/or its parent company, Factory Mutual, represented to state insurance regulators that the contamination exclusion used in the Policy,

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which includes the word "virus," applied only to cases involving "traditional environmental pollution," and did not apply to cases involving a pandemic.

The Spread of the Covid-19 Virus

44. In December of 2019, the novel coronavirus referred to as SARS-CoV-2 (the "virus" or "Covid-19 virus") began to spread in China. The World Health Organization (the "WHO") later named the disease caused by the virus "COVID-19."

45. COVID-19 is a severe infectious disease caused by the Covid-19 virus. COVID-19 can cause serious systemic illness and death.[1] On or around May of 2021, the Centers for Disease Control and Prevention ("CDC") recorded over 159 million confirmed cases of COVID-19 (over 32.4 million of them in the U.S. alone) and over 2.6 million deaths worldwide.[2] Due to the pervasive spread and presence of the Covid-19 virus and COVID-19 across the planet, during the height of their spread both were presumed to be present or imminently present everywhere.[3]

46. The existence and/or presence of the Covid-19 virus and COVID-19 is not simply reflected in reported cases or individuals' positive test results. For example, at one point the CDC estimated the number of people in the U.S. who have been infected with the Covid-19 virus is likely to be 10 times higher than the number of reported cases.[4] Additionally, at one point at least 40 percent of people infected with the Covid-19 virus were asymptomatic.[5] Moreover,

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[1] Tianna Hicklin, *Immune cells for common cold may recognize SARS-COV-2*, NAT. INST. OF HEALTH (Aug. 18, 2020), https://www.nih.gov/news-events/nih-research-matters/immune-cells-common-cold-may-recognize-sars-cov-2 (last visited March 3, 2022).

[2] *Coronavirus Disease 2019 (COVID-19),* CDC, updated Mar. 20, 2021, https://covid.cdc.gov/covid-data-tracker/#datatracker-home (last visited March 3, 2022); *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 March 3, 2022).

[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 March 3, 2022).

[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 March 3, 2022).

[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 March 3, 2022).

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COVID-19 includes a pre-symptomatic incubation period of up to 14 days, during which time infected people can transmit the Covid-19 virus to people, into the air and onto surfaces without having experienced symptoms and without realizing that they are infected.[6]

47. Studies demonstrated that pre-symptomatic individuals have an even greater ability to transmit the Covid-19 virus than other infected people because they carry the greatest "viral load."[7] The National Academy of Sciences concluded that "the majority of transmission is attributable to people who are not exhibiting symptoms, either because they are still in the pre-symptomatic stage, or the infection is asymptomatic."[8]

48. On or about January 2020, the United States saw its first documented cases of people infected with the Covid-19 virus and people becoming ill with the disease caused by the virus, known as COVID-19. ***These first documented cases were in Snohomish County, where the Casino is located.***

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

50. On March 11, 2020, the Director of the WHO declared the rapidly spreading COVID-19 disease a worldwide pandemic.

51. The Covid-19 virus is highly contagious, uniquely resilient, and (prior to the development and distribution of effective vaccines) potentially deadly for many sectors of the

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[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 March 3, 2022); Minghui Yang , Liang Li , Ting Huang, Shaxi Li, Mingxia Zhang, Yang, Yujin Jiang, 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 March 3, 2022).

[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 March 3, 2022); Lirong Zou, M.Sc., *et al., SARS-CoV-2 Viral Load in Upper Respiratory Specimens of Infected Patients,* NEW ENG. J. OF MED. (Mar. 19, 2020), https://www.nejm.org/doi/full/10.1056/NEJMc2001737 (last visited March 3, 2022).

[8] Meagan C. Fitzpatrick, Alison P. Galvani, Seyed M. Moghadas, Abhishek Pandey, Pratha Sah, Affan Shoukat, and 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 March 3, 2022).

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population. The degree to which an infectious disease is contagious is measured by R^0, a term that defines how many other people will become infected by one person with that disease. At one point, studies concluded that one person infected with the Covid-19 virus will infect up to 5.7 others ($R^0 \approx 5.7$), which is much higher than seasonal influenza, for example, where on average, one person will infect only 1.3 others ($R^0 \approx 1.3$).[9]

52. The Covid-19 virus can remain infectious for "much longer time periods than generally considered possible."[10] In the Journal of Virology, researchers demonstrated that the Covid-19 virus can survive up to 28 days at room temperature (68ºF) on a variety of surfaces including glass, steel, vinyl, plastic, and paper.[11] A CDC report from March 27, 2020 stated that the Covid-19 virus was identified on surfaces of the cabins on the Diamond Princess cruise ship 17 days after the cabins were vacated but before they were disinfected.[12] Numerous other scientific studies and articles identified the persistence of the Covid-19 virus on doorknobs, toilets, faucets, and other high-touch points, as well as on commonly overlooked surfaces such as floors.[13]

53. The WHO stated that "[t]he disease spreads primarily from person to person through small droplets from the nose or mouth, which are expelled when a person with COVID-19 coughs, sneezes, or speaks . . . . People can catch COVID-19 if they breathe in these droplets from a person infected with the virus . . . . These droplets can land on objects and surfaces

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[9] M. Cevik, C.C.G. Bamford, A. Ho, *COVID-19 pandemic-a focused review for clinicians*, 26 CLIN MICROBIOL INFECT. 7, 842-47 (July 2020), https://www.clinicalmicrobiologyandinfection.com/article/S1198-743X(20)30231-7/fulltext (last visited March 3, 2022).

[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 March 3, 2022).

[11] *Id*.

[12] Leah F. Moriarty, Mateusz M. Plucinski, Barbara J. Marston, et al., *Public Health Responses to COVID-19 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 March 3, 2022).

[13] Zhen-Dong Guo, Zhong-Yi Wang, Shou-Feng Zhang, Xiao Li, Lin Li, Chao Li, Yan Cui, Rui-Bin Fu, Yun-Zhu 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 March 3, 2022).

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around the person such as tables, doorknobs and handrails. People can become infected by touching these objects or surfaces, then touching their eyes, nose or mouth."[14]

54. Early in the course of the spread of the Covid-19 virus, testing was extremely limited, and thus potentially thousands more people were infected than were reported.[15] Using the limited testing that was available at that time, local positivity rates confirmed the pervasiveness of the Covid-19 virus throughout Snohomish County, where the Casino is located.

55. Epidemiologists explained that "the percent positive is a critical measure because it gives us an indication of how widespread infection is in the area where the testing is occurring."[16] It is a crucial indicator of whether a business can safely remain open. As a threshold for the percent positive being "too high," the WHO stated that the percent positive should remain below 5 percent for at least two weeks before re-opening.[17]

56. At the end of February 2022, the CDC reported that over 78,000,000 people had contracted COVID-19 and over 930,000 people had died from COVID-19.[18]

The Covid-19 Virus Is Transmitted through Droplets, Air, and Fomites

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

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[14] *Q&A on coronaviruses (COVID-19)*, World Health Organization, 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 March 3, 2022).

[15] *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), https://nytimes.com/2020/04/23/us/coronavirus-early-outbreaks-cities.html (last visited March 3, 2022).

[16] 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 (last visited March 3, 2022).

[17] *Id.*

[18] *See* CDC COVID Data Tracker, https://covid.cdc.gov/covid-data-tracker/#datatracker-home (Feb. 21, 2022).

[19] *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 March 3, 2022).

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58. In addition to being found in air samples,[20] the Covid-19 virus remains stable in body secretions (respiratory, urine, feces), on surfaces, and in sewage, particularly at lower temperatures.[21]

59. Respiratory transmission of the Covid-19 virus occurs through exposure to an infected person's respiratory particles, such as from saliva or mucus.[22] Respiratory transmission of the Covid-19 virus is commonly divided into droplets (larger particles that have a transmission range of about six feet) and airborne (smaller particles that can remain suspended in the air for prolonged periods of time) modes of transmission. Though convenient, this binary division is an oversimplification that underscores transmission risk.[23] Humans produce a wide range of particle sizes when coughing, sneezing, talking, singing, or otherwise dispersing droplets, with pathogens predominating in the smallest particles.[24] Respiratory particles produced by the average person can travel almost 20 feet by sneezing.[25] An M.I.T. researcher found that virus-laden "clouds" containing clusters of droplets can travel 23 to 27 feet.[26]

60. Airborne transmission involves the spread of the infectious agent caused by the dissemination of droplet nuclei (aerosols) from, for example, exhaled breath, that remain infectious when suspended in the air over long distances and time.[27] These tiny particles can

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[20] Zhen-Dong Guo, Zhong-Yi Wang, Shou-Feng Zhang, Xiao Li, Lin Li, Chao Li, Yan Cui, Rui-Bin Fu, Yun-Zhu 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 March 3, 2022).

[21] 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 March 3, 2022).

[22] *Id.*

[23] 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)30323-4/fulltext (last visited March 3, 2022).

[24] *Id.*

[25] *Id.*

[26] 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 March 3, 2022).

[27] *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 March 3, 2022); Ramon Padilla & Javier Zarracina, *WHO agrees with more than 200 medical experts that COVID-*

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remain suspended "for indefinite periods unless removed by air currents or dilution ventilation."[28] As a result, the risk of disease transmission increases substantially in enclosed environments as compared to outdoor settings.[29]

61. The WHO and the scientific community studied the spread of the Covid-19 virus through aerosols in indoor settings via air circulation systems. For example, the CDC published a research letter concluding that a restaurant's air conditioning system triggered the transmission of the Covid-19 virus, spreading it to people who sat at separate tables downstream of the restaurant's airflow.[30] Moreover, a study detected the Covid-19 virus inside the HVAC system connected to hospital rooms of patients sick with COVID-19. The study found the Covid-19 virus in ceiling vent openings, vent exhaust filters and ducts located as much as 56 meters (over 183 feet) from the rooms of the sick COVID-19 patients.[31]

62. Additionally, the CDC reported that "under certain conditions, people with COVID-19 seem to have infected others who were more than 6 feet away" and infected people who entered a space shortly after the person with COVID-19 left.[32] A February 2021 study of airborne transmission of the Covid-19 virus corroborated the CDC's concerns and recommended

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19 may spread via the air, (last updated Sept. 21, 2020), www.usatoday.com/in-depth/news/2020/04/03/coronavirusprotection-how-masks-might-stop-spread-throughcoughs/5086553002/ (last visited March 3, 2022); 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), https://www.sciencedirect.com/science/article/pii/S0360132320302183 (last visited March 3, 2022).

[28] 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)30323-4/fulltext (last visited March 3, 2022).

[29] 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 March 3, 2022).

[30] 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 May 13, 2021); *see also* Keun-Sang Kwon, Jung-Im Park, Young Joon Park, Don-Myung Jung, Ki-Wahn Ryu, and Ju-Hyung Lee, *Evidence of Long-Distance Droplet Transmission of SARS-CoV-2 by Direct Air Flow in a Restaurant in Korea*, 35 J. KOREAN MED. SCI. 46 (Nov. 2020), https://doi.org/10.3346/jkms.2020.35.e415 (last March 3, 2022).

[31] Karolina Nissen, Janina Krambrich, Dario Akaberi, Tobe Hoffman, Jiaxin Ling, Ake Lundkvist, Lennart Svensson & 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 March 3, 2022).

[32] CDC, *How COVID-19 Spreads* (last updated May 10, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (last visited March 3, 2022).

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procedures to improve ventilation of indoor air environments to decrease bioaerosol concentration and reduce the viral spread.[33]

63. Occupancy of indoor spaces is reported to be a major risk factor for transmission of the Covid-19 virus. Investigation of over 7,000 COVID-19 cases found that all outbreaks involving three or more people occurred indoors.[34] The airborne Covid-19 virus RNA has been detected inside indoor spaces at distances over 50 meters from its source and in outdoor air in crowded areas outside of buildings.[35]

64. At one point the CDC recommended "ventilation interventions" to help reduce exposure to the airborne Covid-19 virus in indoor spaces, including increasing airflow and air filtration (such as with high-efficiency particulate air ("HEPA") fan/filtration systems).[36] These and other remedial measures can be implemented, at high cost and extra expense, to reduce the presence of the Covid-19 virus in a space and attempt to make property safe for its intended use. And even then, those interventions, at most, reduce—but do not eliminate—the aerosolized Covid-19 virus in an indoor space.

65. These extreme measures demonstrate that the Covid-19 virus and COVID-19 cause direct physical loss, damage or destruction.

66. The Covid-19 virus is also transmitted to people from physical objects, materials, or surfaces. "Fomites" are physical objects that carry and are capable of transmitting infectious

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[33] 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 RSCH. 110612, 1-6 (Feb. 2021), https://www.sciencedirect.com/science/article/pii/S0013935120315097?dgcid=rss_sd_all (last visited March 3, 2022).

[34] Hua Qian et al., *Indoor transmission of SARS-CoV-2*, INDOOR AIR (Oct. 31, 2020), https://pubmed.ncbi.nlm.nih.gov/33131151/ (last visited March 3, 2022).

[35] 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 March 3, 2022).

[36] 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 March 3, 2022).

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agents, altering the objects to become vectors of disease.[37] Fomite transmission is a highly-efficient method of transmitting viruses, both from object to hand and from hand to mouth.[38]

67. The WHO described fomite transmission as follows:

> Respiratory secretions or droplets expelled by infected individuals can contaminate surfaces and objects, creating fomites (contaminated surfaces). **Viable SARS-CoV-2 virus and/or RNA detected by RT-PCR can be found on those surfaces for periods ranging from hours to days**, depending on the ambient environment (including temperature and humidity) and the type of surface, in particular at high concentration in health care facilities where COVID-19 patients were being treated. Therefore, transmission may also occur indirectly through touching surfaces in the immediate environment or objects contaminated with virus from an infected person . . . .[39] (emphasis added).

68. In addition to studies cited by the WHO,[40] numerous other studies and scientific articles discussed how the Covid-19 virus impacts and alters physical property, including fomite transmission as a mode of virus transmission, including, but not limited to:

a) A study of a COVID-19 outbreak published by the CDC identifying elevator buttons and restroom taps as possible causes of the "rapid spread of SARS-CoV-2" in a shopping mall in China.[41]

b) A National Institutes of Health (NIH) study published in the New England Journal of Medicine, finding that the Covid-19 virus survives up to 4 hours on copper, up to 24 hours on cardboard, and up to 3 days on plastic and stainless steel, and suggesting that people may acquire the virus through the air and after touching contaminated objects.[42]

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[37] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/fomite (last visited March 3, 2022).
[38] 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), https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article (last visited March 3, 2022).
[39] *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 March 3, 2022).
[40] *Id.*
[41] 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), https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article (last visited March 3, 2022).
[42] 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 March 3, 2022).

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An insurance company, Zurich, republished the NIH study on its website and restated the study's conclusion when discussing the fomite transmission of the Covid-19 virus in a workplace.[43]

c) An American Society for Microbiology article discussing fomite infection as involving both porous and non-porous surfaces, and occurring through a fomite's contact with bodily secretions, hands, aerosolized virus from talking, sneezing, coughing, etc., or other airborne viral particles that settle after a disturbance of a fomite (*e.g.*, shaking a contaminated textile such as clothing merchandise).[44] According to the researchers, once "a fomite is contaminated, the transfer of infectious virus may readily occur between inanimate and animate objects, or vice versa, and between two separate fomites (if brought together)."[45] Frequently-touched surfaces can become highly transmissive fomites.[46]

d) A CDC research letter reporting that the Covid-19 virus can remain viable on polystyrene plastic, aluminum, and glass for 96 hours in indoor living spaces.[47]

e) A *Journal of Hospital Infection* article citing studies revealing that human coronaviruses persist on inanimate surfaces like metal, glass, or plastic for up to 9 days.[48]

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[43] 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 March 3, 2022).

[44] 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) https://aem.asm.org/content/73/6/1687 (last visited March 3, 2022).

[45] *Id.*

[46] *Id.*

[47] 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 March 3, 2022).

[48] 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), https://www.journalofhospitalinfection.com/action/showPdf?pii=S0195-6701%2820%2930046-3 (last visited March 3, 2022).

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69. The Covid-19 virus can be transmitted to objects and surfaces from symptomatic, pre-symptomatic, and asymptomatic individuals.[49] Fomites transform the surface of property into a deadly transmission device. A study published in the Journal of Epidemiology and Infection demonstrated that after lockdown in the United Kingdom, Covid-19 virus transmission via fomites may have caused up to 25 percent of deaths in that region.[50]

The Covid-19 Virus Physically Alters Property and Renders Property Dangerous and Incapable of Functional Use

70. The presence of the Covid-19 virus in and on property, including in indoor air, on surfaces, and on objects, causes direct physical loss or damage to property by causing physical harm to property, physically altering property, and otherwise making physical property incapable of being used for its intended purpose.

71. Among other things, the presence of the Covid-19 virus transforms everyday surfaces and objects into fomites, causing a tangible change of the property into a transmission vehicle for disease from one host to another. The WHO's description of fomite transmission of the virus expressly recognizes this physical alteration of property, describing viral droplets as "*creating* fomites (contaminated surfaces)"[51] (emphasis added). "Creating" involves making or bringing into existence something new,[52] such as something that is in an altered state from what it was before the Covid-19 virus was present on, in, and around the property.

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[49] *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 March 3, 2022); Minghui Yang , Liang Li , Ting Huang, Shaxi Li, Mingxia Zhang, Yang, Yujin Jiang, 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 March 3, 2022).

[50] A. Meiksin, *Dynamics of COVID-19 transmission including indirect transmission mechanisms: a mathematical analysis*, 148 EPIDEMIOLOGY & INFECTION e257, 1-7 (Oct. 2020), https://www.cambridge.org/core/journals/epidemiology-and-infection/article/dynamics-of-covid19-transmission-including-indirect-transmission-mechanisms-a-mathematical-analysis/A134C5182FD44BEC9E2BA6581EF805D3 (last visited March 3, 2022).

[51] *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 March 3, 2022).

[52] *See, e.g.*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/create (last visited

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

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

The Covid-19 Virus Cannot be Eliminated from Property with Routine Cleaning

74. A number of studies demonstrate that the Covid-19 virus is "much more resilient to cleaning than other respiratory viruses so tested."[53] The measures that must be taken to remove the Covid-19 virus from property are significant, and extend far beyond ordinary or routine cleaning.

75. The efficacy of decontaminating agents for viruses is based on a number of factors, including the initial amount of virus present, contact time with the decontaminating agent, dilution, temperature, and pH, among many others. Detergent surfactants are not recommended as single agents, but rather in conjunction with complex disinfectant solutions.[54]

76. Additionally, it can be challenging to accurately determine the efficacy of decontaminating agents. The toxicity of an agent may inhibit the growth of cells used to determine the presence of virus, making it difficult to determine if lower levels of infectious virus are actually still present on treated surfaces.[55]

March 3, 2022).

[53] *Id.*

[54] *Id.*

[55] *Id.*

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77. To be effective, cleaning and decontamination procedures require strict adherence to protocols not necessarily tested under "real life" or practical conditions, where treated surfaces or objects may not undergo even exposure or adequate contact time.[56] Studies of coronaviruses have demonstrated viral RNA persistence on objects despite cleaning with 70 percent isopropyl alcohol.[57]

78. When considering disinfection and decontamination, the safety of products and procedures must be considered as well, due to the risks of harmful chemical accumulation, breakdown of treated materials, flammability, and potential for allergen exposure.[58]

79. The Covid-19 virus can also survive on, and be transferred from, fabrics to skin and other surfaces.[59] Given the inadequacy of conventional cleaning procedures, disinfection and decontamination measures for the Covid-19 virus include, but are not limited to: the use of harsh chemicals to perform deep disinfection; the removal and disposal of porous materials like clothing, cloth and other fabrics; changes to air filtration systems; and the redesigning, remodeling, or reconfiguration of interior spaces, all performed at great cost and expense to property owners. These measures, among others, demonstrate that the Covid-19 virus causes physical loss or damage to property.

80. Many of the surfaces and materials discussed in the studies and articles cited above are used throughout the Casino's operations, including plastics, glass, metals, and cloth and fabrics such as upholstery.

81. Moreover, in addition to the impact of Covid-19 on objects and surfaces, the *aerosolized* Covid-19 virus particles permeate and change the air space and cannot be eliminated

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[56] *Id.*

[57] 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 March 3, 2022).

[58] *Id.*

[59] 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 March 3, 2022).

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by routine cleaning. Cleaning surfaces in an indoor space will not remove the aerosolized Covid-19 virus particles from the air. In this respect, the loss and damage caused by Covid-19 is similar to asbestos. Like attempted cleaning of Covid-19 from air, the attempted cleaning of friable asbestos particles from a surface will not remove, or prevent the loss or damage caused by, the friable asbestos particles suspended in the air.

82. Given the pervasiveness of the Covid-19 virus, no amount of cleaning or ventilation intervention will prevent a person infected and contagious with the Covid-19 virus from entering an indoor space and exhaling millions of additional Covid-19 virus particles into the air, further: (a) filling the air with the aerosolized Covid-19 virus that can be inhaled, sometimes with deadly consequences; and (b) depositing Covid-19 virus particles on the surfaces, physically altering and transforming those surfaces into disease-transmitting fomites.

Washington Was the Epicenter for the Covid-19 Virus

83. On January 20, 2020, health officials reported that a resident of Snohomish County was the first-known United States resident infected by the virus.

84. The first reported COVID-19 death in the United States occurred in King County, Washington, on or around February 28, 2020.

85. Within weeks of the first reported case in Snohomish County, on February 28, 2020, Snohomish County reported the second known case in the United States and the first that was determined to be "community acquired." Thereafter, the transmission rates and positive test results in Snohomish County soared. The first death in Snohomish County occurred on March 2, 2020.

86. Washington State became an epicenter of the disease and experienced an exceptionally high positivity rate: as of March 31, 2020, Washington had a 7-day moving positivity average rate of 9.3%.[60] Washington's positivity rate remained consistently over 5

[60] *Daily State-By-State- Testing Trends*, JOHNS HOPKINS UNIV.MED. (last updated June 28, 2021), https://coronavirus.jhu.edu/testing/individual-states/washington (last visited March 3, 2022).

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percent until dropping below this figure in February 2021, demonstrating the need for continuing health and safety measures.[61]

87. The Washington Department of Health reported over 398,000 confirmed cases and over 5,700 deaths in Washington State as of the end of May 2021.[62]

88. The economic impact of the Covid-19 virus has also been staggering. The unemployment rate in Washington more than tripled from 5.1 percent before the wide spread of the Covid-19 virus to 15.4 percent in April 2020.[63] Washington has also suffered substantial revenue declines as a result of COVID-19's impact on Washington's economy. Washington's budget shortfall is projected at $1 billion per year for 2020, 2021, and 2022.[64]

The Washington Governor and Tribe Issue Closure Orders or Resolutions to Prevent Loss or Damage Caused by the Covid-19 Virus

89. There is no question that the Covid-19 virus was present at the Casino—in the air and on surfaces—prior the Casino's suspension of operations in March 2020. The presence of the Covid-19 virus at the Casino in March 2020 and thereafter was statistically certain based on statistical modeling of the known incidences of infection and other information generally used in epidemiology, despite the lack of commercially-available tests for fomites or the aerosolized Covid-19 virus, and despite the shortage of tests that could have otherwise been administered to every individual who was on-site at the relevant times.[65]

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[61] *COVID-19 Data Dashboard*, Washington Department of Health (updated May 8, 2021), https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard (last visited March 3, 2022).
[62] *See* Washington State Department of Health COVID-19 Data Dashboard, https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard (last visited March 3, 2022).
[63] Jim Camden, *Washington lost a half-million jobs in April; unemployment reaches 15%*, The Spokesman-Review (May 20, 2020) (last visited March 3, 2022).
[64] *State Budget Watch*, Center on Budget and Policy Priorities (Nov. 6, 2020), https://www.cbpp.org/research/state-budget-and-tax/states-grappling-with-hit-to-tax-collections (last visited March 3, 2022).
[65] *See, e.g.*, Aroon Chande, Seolha Lee, Mallory Harris, Quan Nguyen, Stephen J. Beckett, Troy Hilley, Clio Andris, & 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 March 3, 2022).

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90. Local, state, and federal government officials issued a series of orders in response to the significant, likely risk of transmission of the Covid-19 virus via, among other things, properties open to the public such as the Casino's properties.

91. On February 29, 2020, Washington State Governor Jay Inslee issued Proclamation 20-05, proclaiming that a State of Emergency existed in all Washington counties due to the rapid transmission of COVID-19 between Washington residents.

92. On March 11, 2020, Governor Inslee issued Proclamation 20-07, which recognized that Covid-19 "remains a public disaster affecting life, health, [and] property," and contacted the Tribe's Board of Directors to request assistance in implementing measures to counteract the spread of Covid-19 virus.

93. Although not bound by the Governor's Proclamations or Orders, on March 11, 2020, the Tribe's Board of Directors issued Resolution 2020/035, which declared a public health emergency for Covid-19 (the "Tribal Resolution").

94. The Tribal Resolution recognized that the spread of Covid-19 created an "extreme public health risk" that significantly impacts "life, health, property and the public peace."

95. On March 17, 2020, the Casino suspended operations by closing, in response to the Tribal Resolution and the prevalence and harm arising from the Covid-19 virus, which at the time of the closure had spread to no less than 300 individuals in Snohomish County, and as the Governor's Proclamations and Tribal Resolution acknowledged, significantly impacts "life, health, property and the public peace."

It Is Statistically Certain that the Covid-19 Virus Was on the Casino's Property and Caused Physical Loss or Damage under the Policy

96. The presence of and spread of the Covid-19 virus is a natural disaster.

97. The Casino includes numerous buildings with common areas in which large numbers of people congregate or pass through.

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98. Given the high percentage of persons infected by the Covid-19 virus who were asymptomatic, it is certain that a significant number of individuals, including both patrons and employees, entered the Casino properties infected with the Covid-19 virus and thereby introduced the Covid-19 virus into the Casino's properties.

99. It is statistically certain that the Covid-19 virus was actually present at the Casino beginning in early March 2020, and thereafter, because of the number of patrons, employees, and others who regularly entered the Casino; the highly contagious nature of the Covid-19 virus; the reported rate of infection throughout Washington (including in the vicinity of the Casino); scientific knowledge regarding the underreporting of the virus in the early months of the wide spread of the Covid-19 virus; the high number of asymptomatic individuals infected by the Covid-19 virus; and other factors.

100. The impact of the presence of the Covid-19 virus and risks of its presence on the Casino's operations, as described above, was immediate and dramatic.

The Casino Incurred Expenses to Clean and Physically Alter Its Premises and Lost Significant Business Income Covered by the Policy

101. The wide spread and presence of the Covid-19 virus made it necessary for the Casino to suspend operations, incur extra expense, and to undertake costly efforts to protect and preserve property from further damage or loss, including by making physical alterations to its property.

102. The suspension of operations caused significant business income loss through the loss of Casino patrons, food and beverage sales, and loss of other income generated by the Casino.

103. The business income loss to the Casino reduced or eliminated certain payments regularly made by the Casino to the Tribe, causing the Tribe to have to lay off or furlough many of its employees. The tremendous economic impact of Casino's business income loss was felt by Tribal and non-Tribal members.

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104. In addition, due to the physical loss or damage described above, the Casino was required to make physical changes to its locations, and purchase and alter business personal property, to prevent further physical loss or damage, to minimize the suspension of its operations, and to preserve and protect its property.

105. Among other things, the Casino's staff conducted specialized cleaning, incurring in excess of $20,000 in costs.

106. In further response to the presence of the Covid-19 virus, the Casino physically altered the Casino by, among other things, installing partitions, adding plexi-glass barriers, and modifying its layout to facilitate social distancing.

107. Despite cleaning efforts, the risk of, or actual continuous dispersal of the Covid-19 virus into the air and onto physical surfaces and other property, rendered standard cleaning practices ineffective at removing the virus from surfaces and from the air inside the Casino properties, requiring physical and other changes to insured property, policies, practices, and operations; it also created apprehension about the imminent presence of the Covid-19 virus on insured property and awareness of the risk of the presence of the Covid-19 virus on insured property.

108. The presence of the Covid-19 virus in, on, and around the Casino properties caused risks of direct physical loss or damage to property, and direct physical loss or damage to property, leading to the necessary suspension of operations at insured locations, which resulted in business income loss and other loss covered by the Policy.

109. In the alternative, the Tribal Resolution made the Casino's insured property unusable, inaccessible, and caused the loss of functional use of the Casino property, in whole or in part; limited the use of all or portions of the Casino property by requiring social distancing and other measures; dispossessed the Casino of its insured property; and required the Casino to undertake physical alterations, causing physical loss or damage to the Casino properties insured under the Policy and resulting in business income loss and other loss covered by the Policy.

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110. In the additional alternative, the Tribal Resolution is an order of civil or military authority that prohibits partial or total access to an insured location as a direct result of physical damage to an insured location or within five "statute miles" of it, triggering coverage under the Policy's "Civil or Military Authority" extension of business interruption coverage.

111. In addition to the coverages specifically listed above, the physical loss or damage described above, and the impact of that physical loss or damage on the Casino and its property, potentially triggers multiple other business interruption coverages under the Policy, including without limitation: "Communicable Disease," "Ingress/Egress," "Protection and Preservation of Property," and "Research and Development."

112. In addition, the physical loss or damage described above and the impact of that physical loss or damage on the Casino, including expenditures undertaken by the Casino, triggers multiple other coverages in the Policy listed under "Property Damage," including without limitation: "Communicable Disease," "Decontamination Costs," "Demolition and Increased Cost of Construction;" "Expediting Expenses," "Law and Ordinance;" and "Protection and Preservation of Property."

Affiliated FM Failed to Investigate, and Summarily Denied, the Casino's Insurance Claim

113. The Casino timely tendered a claim to Affiliated FM under the Policy.

114. Without conducting any investigation, Affiliated FM quickly issued a reservation of rights letter taking the position that only the Policy's "Communicable Disease" coverage was even potentially applicable.

115. Based on its narrow interpretation of the Policy's "Communicable Disease" coverage, Affiliated FM advised the Casino that the "Communicable Disease" coverage would apply only if the Casino presented it with documentary medical proof that someone on the insured premises was infected by the Covid-19 virus and/or suffered from the COVID-19 disease.

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116. Although the Casino provided information showing that the presence of the Covid-19 virus at the Casino was a statistical certainty, Affiliated FM denied coverage.

117. Despite the Casino's efforts to get Affiliated FM to change its position, Affiliated FM maintained its denial of any coverage whatsoever under the Policy, based on a self-serving interpretation of policy terms including "direct physical loss or damage," "actual not suspected," and the "contamination exclusion" in the Policy.

118. On information and belief, Affiliated FM's denial of coverage was based on scripted "Talking Points" that were distributed by Affiliated FM and/or its parent company, Factory Mutual. Regardless of the distinct facts of a particular claim, these "Talking Points" instructed employees to deny coverage for any loss involving the Covid-19 virus other than "Communicable Disease" and/or cleaning coverage triggered by the "actual not suspected" presence of the virus, and then only if the insured presented written medical evidence that an employee or customer had tested positive, despite (a) the lack of testing available in and around March, 2020; (b) the fact that the Policy does not define "actual not suspected" in such narrow terms; (c) the fact that Affiliated FM had previously, when it was to its financial advantage, adopted an interpretation of "direct physical loss or damage" under which coverage would have been afforded to the Casino; (d) the Policy's failure to define the phrase "direct physical loss or damage;" (e) the Policy's contemplation that "communicable disease" can cause "loss or damage;" and (f) the fact that the "contamination exclusion" is, at most, ambiguous in light of the communicable disease coverage provided by the Policy and for other reasons.

119. Upon information and belief, the Talking Points instruct claims personnel to follow the above directives without regard to the facts of each claim and without undertaking an individual investigation of a particular claim, which all but ensures that Affiliated FM claims handlers never arrive at an independent coverage decision.

120. At no point did Affiliated FM interview or request to interview any Casino employee or officer, visit the Casino, request data about the Casino's customers or employees

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that might have been relevant to an analysis of the likely or actual presence of the Covid-19 virus on insured property, or enter into a good faith negotiation over the potential for coverage under the Policy.

121. Affiliated FM also unreasonably ignored or failed to change its position upon being informed of historical precedent recognizing that bacteria, smoke, and other substances can cause physical loss or damage to insured premises and disregarded Washington court decisions rejecting or calling into question Affiliated FM's interpretations of certain phrases or terms in the Policy.

IV. CAUSES OF ACTION

FIRST CAUSE OF ACTION: BREACH OF CONTRACT

122. The Casino realleges and incorporates by reference the allegations in each paragraph above, as if fully set forth herein.

123. Affiliated FM received substantial premiums in consideration for Affiliated FM's promise to pay the Casino's claims for business income loss and other losses covered by the Policy. The Policy constitutes a contract between the parties.

124. The Casino complied with all conditions to coverage under the Policy with regard to the losses claimed in this Complaint, excepting any that were waived or excused.

125. Affiliated FM breached its express and implied duties under the Policy by, among other things, denying coverage under the Policy for the covered losses claimed by the Casino in this lawsuit.

126. As a result of Affiliated FM's breach of the Policy, the Casino has been damaged in an amount to be proven at trial, but not less than $12,000,000.

SECOND CAUSE OF ACTION: COMMON LAW BAD FAITH

127. The Casino realleges and incorporates by reference the allegations in each paragraph above, as if fully set forth herein.

128. Affiliated FM owes a duty of good faith and fair dealing to the Casino.

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129. Affiliated FM committed bad faith through multiple acts and omissions, including but not limited to: failing to conduct a reasonable claim investigation; unreasonably failing to connect the controlling and persuasive law and language of the Policy to the facts of the loss; failing to put the Casino's interests on a par with its own; and unreasonably denying the Casino contractually-owed insurance benefits. Affiliated FM's unreasonable acts and omissions constitute bad faith under Washington common law.

130. Affiliated FM's bad faith acts and omissions directly and proximately caused (and continue to cause) the Casino to suffer damages in an amount to be proven at trial.

131. The Casino's damages include, but are not limited to, the deprivation of benefits owed to the Casino under the Policy and the costs associated with pursuing this insurance coverage lawsuit, including court costs and attorney fees.

THIRD CAUSE OF ACTION: WASHINGTON CONSUMER PROTECTION ACT

132. The Casino realleges and incorporates by reference the allegations in each paragraph above as if fully alleged herein.

133. Affiliated FM's acts and omissions, as described above, violated multiple "unfair claims settlement practices" set forth in WAC 284-30-330, including, but not limited to: WAC 284-30-330(4) (refusing to pay claims without conducting a reasonable investigation); WAC 284-30-330(7) (compelling a first party claimant to initiate or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings); and WAC 284-30-330(13) (failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement). These violations are *per se* violations of RCW 19.86, Washington's Consumer Protection Act (the "CPA").

134. Affiliated FM's acts and omissions, as pled above, also constitute non-*per se* violations of the CPA because Affiliated FM's unreasonable acts and omissions were unfair or

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deceptive, occurred in trade or commerce, and affected Washington's policyholders and the public interest.

135. Affiliated FM's unfair or deceptive acts or omissions directly and proximately caused, and continue to cause, the Casino to suffer damages in an amount to be proven at trial. These damages include, but are not limited to, the deprivation of benefits owed to the Casino under the Policy and the costs associated with bringing this insurance coverage action, including court costs and attorney fees.

136. The Casino is also entitled to recovery of its actual damages, attorney fees, litigation costs, and treble damages up to $25,000, pursuant to RCW 19.86.090.

FOURTH CAUSE OF ACTION: DECLARATORY JUDGMENT

137. The Casino realleges and incorporates by reference the allegations in each paragraph above as if fully alleged herein.

138. This is a cause of action for declaratory judgment pursuant to the Uniform Declaratory Judgment Act (RCW 7.24.010 *et seq.*), which vests this Court with the right to declare the rights, duties, and other legal relations of the parties to this dispute.

139. An actual and justiciable controversy has arisen between the Casino and Affiliated FM as to their respective rights and duties under the Policy. Resolution of the dispute over the parties' respective rights and duties under the Policy is necessary.

140. The Casino alleges and contends that it is entitled to insurance coverage under one or more of the coverage extensions in the Policy.

141. Affiliated FM denied coverage for the Casino's losses under all of the coverage extensions set forth in the Policy.

142. The Casino seeks a declaratory judgment declaring that (1) Affiliated FM breached the Policy; (2) the Casino's losses described above are covered by the Policy; and (3) that Affiliated FM is responsible for full and timely adjustment and payment of the Casino's losses described above under the Policy.

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RESERVATION TO ASSERT CLAIM UNDER

INSURANCE FAIR CONDUCT ACT

143. The Casino intends to give notice to Affiliated FM pursuant to RCW 48.30.015(8). In the event that Affiliated FM fails to resolve the Casino's claims within the statutory period, the Casino reserves the right to amend this Complaint to assert claims under Washington's Insurance Fair Conduct Act ("IFCA").

V. PRAYER FOR RELIEF

WHEREFORE, the Casino requests the following relief:

1. Damages in an amount to be proven at trial, but not less than $12,000,000;
2. Declaratory relief as pled above;
3. An award of attorney fees, expert costs, and other costs incurred in bringing this action;
4. Prejudgment interest accruing until the date judgment is entered, plus post-judgment interest at the statutory rate;
5. Treble damages under the Consumer Protection Act up to the statutory maximum; and,
6. Such other further relief as the Court deems equitable, just and proper.

DATED: March 10, 2022.

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Angel of the Winds Casino, an instrumentality and enterprise of the Stillaguamish Tribe of Indians, a federally recognized Indian Tribe

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