SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

MUCKLESHOOT INDIAN TRIBE, a federally recognized Indian Tribe, Plaintiff, v. AFFILIATED FM INSURANCE COMPANY, a foreign corporation, Defendant.	NO. COMPLAINT FOR DECLARATORY RELIEF AND FOR MONETARY DAMAGES

I. PARTIES

1. Plaintiff Muckleshoot Indian Tribe ("MIT" or "Plaintiff") is a federally recognized Indian Tribe which owns/operates business properties insured by defendant, which properties are physically located on tribal land on the Muckleshoot Indian Reservation in Auburn, Washington, in King County, and which were insured through insurance sold, issued and delivered in King County by defendant.

2. Defendant Affiliated FM Insurance Company ("AFM" or "Defendant") is an insurance company headquartered in, and a citizen of, Rhode Island. Defendant is authorized to conduct insurance transactions in the State of Washington, and conducted insurance transactions within the meaning of RCW 48.01.020 and 48.01.060 both in Washington, and

Ashbaugh Beal
701 FIFTH AVE., SUITE 4100
SEATTLE, WA 98104
T. 206.386.5900 F. 206.344.7400

more specifically in King County. Further, Defendant issued insurance to Plaintiff pursuant to RCW Title 48.

II. JURISDICTION AND VENUE

3. Defendant does business within King County, conducted "insurance transactions" as defined in RCW 48.01.020 and RCW 48.01.060 at its offices in Bellevue, Washington, and committed acts breaching its contract with Plaintiff and committing tortious acts described herein from its Bellevue, Washington, offices. The amount in dispute is within the subject matter jurisdictional limits of this court, in the tens of millions of dollars.

III. INSURANCE TRANSACTIONS

4. Defendant issued a contract of insurance to Plaintiff bearing the policy number TO324. Plaintiff fully paid the premium for the policy, and Defendant accepted same.

5. The policy lists various insured locations including the Muckleshoot Bingo Hall and the Muckleshoot Casino located across the street, both operating d/b/a's of MIT.

6. The policy expressly recognized that a peril Defendant called "Communicable Disease" was capable of causing "Property Damage" under the policy. It did so on p. 3 of 14 of form PRO S-1 4100 (01/17) of its policy by providing $100,000 of "additional coverage" for "Communicable Disease---Property Damage"

7. The policy was written in a format recognized throughout the insurance industry as an "all risk" policy in which perils recognized in the policy as being capable of causing "direct physical loss or damage," which are not expressly excluded, are covered. The policy expressly insured "ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded…"

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8. The peril described in the policy as "Communicable Disease" does not appear in any list of exclusions in the policy.

9. The policy distinguishes between two separate perils described in the policy as "Communicable Disease" and "Contamination."

10. In the original list of exclusions contained in the policy, the following language preceded a group of exclusions which contained the Contamination exclusion. The original contamination exclusion states:

"This policy excludes… Contamination."

11. By endorsement, Defendant *deleted* the exclusion which read "This policy excludes…contamination."

12. Defendant replaced this exclusion with an exclusion stated to apply in only two circumstances:

> GROUP II This policy excludes loss or damage caused by any of the following excluded events as set forth in 1 through 12 below. Loss or damage will be considered to have been caused by an excluded event if that event:
>
> i. Directly and solely results in loss or damage; or
> ii. Initiates a sequence of events that results in loss or damage, regardless of the nature of any intermediate or final event in that sequence.

13. Defendant's policy contains the following promise regarding limits of the policy:

> **C. POLICY LIMIT:**
>
> This Company's total limit of liability, including any insured Business Interruption loss, will not exceed the Policy Limit of $500,000,000 as a result of any one **occurrence** subject to the respective sub-limits of liability shown elsewhere in this Policy.

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14. The AFM policy also contains a provision called "Sublimits." That provision provides that losses caused by certain perils are subject to "sublimits" less than the $500 million policy limit:

> **F. SUB-LIMITS:**
>
> Unless otherwise stated below or elsewhere in this Policy, the following sub-limits of liability, including any insured Business Interruption loss, will be the maximum payable and will apply on a per **occurrence** basis.
>
> The sub-limits stated below or elsewhere in this Policy are part of and not in addition to the Policy Limit.
>
> When a limit of liability applies to a **location** or property, such limit of liability will be the maximum amount payable for all loss or damage.

The peril identified in the policy as "Communicable Disease" does not appear anywhere in the section of the policy entitled "Sublimits."

IV. PLAINTIFF'S CLAIM FOR POLICY BENEFITS

15. On April 13, 2020, Plaintiff made claim for policy benefits to Defendant. On April 16, 2020, Defendant acknowledged plaintiff's claim to Defendant for policy benefits related to direct physical loss and property damage initiated by the communicable disease known as Covid 19. The communicable disease Covid 19 was physically present at Plaintiff's insured premises during the policy period. Plaintiff suffered a physical deprivation of insured property as a result of Covid 19 during the policy period.

16. Plaintiff's claim was eventually assigned to AFM adjuster DiAnna Webber.

17. On information and belief, Plaintiff alleges that at all times after Ms. Webber became involved as an adjuster regarding Plaintiff's claim, it was both the policy of Defendant and Ms. Webber's own practice to conduct a fair and impartial investigation into

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Plaintiff's claim, at no time placing the interests of her company ahead of the interests of the insured.

18. From the first day Ms. Webber reviewed the policy Defendant issued to plaintiff, Ms. Webber was aware of the language on p. 3 of 14 of form PRO S-1 4100 (01/17) of the policy providing $100,000 of "additional coverage" for "Communicable Disease---Property Damage." From that point on, Ms. Webber knew that the policy considered the peril of "Communicable Disease" as capable of causing "Property Damage."

19. From the first point when Ms. Webber learned that the AFM policy considered "Communicable Disease" as being capable of causing "Property Damage" both Defendant as a company and Ms. Webber as an adjuster realized that AFM had a significant financial interest in *refusing* to recognize what its own policy recognized: that the policy contemplated that "Communicable Disease" was capable of causing "Property Damage" as that term was used in the policy.

20. From the first point Ms. Webber reviewed the AFM policy issued to Plaintiff, she knew the policy referred to "Communicable Disease" and "Contamination" as separate terms and as separate perils.

21. Plaintiff alleges on information and belief that from the first point Ms. Webber reviewed the list of exclusions (as modified by the Washington Endorsement in the policy issued to Plaintiff) she recognized that "Communicable Disease" was nowhere in the list of exclusions.

22. On information and belief, Plaintiff alleges Ms. Webber knew from her experience as a property insurance adjuster that the premium charged to Plaintiff and paid by Plaintiff reflected the fact the AFM policy issued to Plaintiff was an "all risk" policy in

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which any peril recognized by the policy as a peril capable of causing "Property Damage" was considered a covered peril unless it was in the list of exclusions in the policy.

23. On information and belief, Plaintiff alleges that from the first time Ms. Webber reviewed the "Sublimits" provision of the policy issued to Plaintiff, she knew that the peril described elsewhere in the policy as "Communicable Disease" was not in the list of perils identified in the section entitled "Sublimits."

24. On information and belief Plaintiff alleges that from the first time Ms. Webber reviewed the Additional Coverages section in the policy, she saw the words "Additional Coverages" and recognized each of those coverages to be "additional" to the $500 million of business interruption coverage provided previously in the policy issued to Plaintiff.

25. At all times before Ms. Webber began writing Plaintiff's representative concerning the MIT claim, Ms. Webber was extremely familiar with the AFM property insurance form issued to Plaintiff, and had adjusted and investigated many, many claims containing that form and also containing the "Washington Amendatory" Endorsement, .She knew from this experience that the list of "Group Three" exclusions in the policy (which contain the phrase "This policy excludes" and an exclusion entitled "Contamination") had been *deleted* by the Washington Amendatory Endorsement.

26. On July 31, 2020, Ms. Webber wrote to MIT disclaiming coverage for losses involving the coronavirus pursuant to a contamination exclusion she knew had been deleted from the policy by the Washington Amendatory Endorsement:

> Please note that the Policy excludes coverage for contamination. The presence of a virus, pathogen or disease causing or illness causing agent such as COVID-19 is a form of contamination as defined in the Policy, which is excluded. The relevant provisions, in part, are set forth below: **Group III:** This Policy excludes:

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* * *

> **8. contamination**, and any cost due to **contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy. If **contamination** due only to the actual not suspected presence of **contaminant(s)** directly results from other physical damage not excluded by this Policy, then only physical damage caused by such **contamination** may be insured. This exclusion does not apply to radioactive contamination which is excluded elsewhere in this Policy.
>
> The Policy defines contamination under DEFINITIONS on Page 42: **contamination** means any condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold or mildew.
>
> Consequently, based on the limited information provided at this time, the coverage potentially available under our Policy for losses arising from COVID-19 is found in our Communicable Disease coverages, assuming the conditions of those coverages are satisfied.

27. The portion of Ms. Webber's July 31, 2020 letter excerpted above constitutes an unreasonable denial of coverage as provided in RCW 48.30.015 (1) and a violation of WAC 284-30-330 (1).

28. On March 25, 2021, MIT wrote to Ms. Webber complaining that AFM improperly relied on a version of the Contamination exclusion which had been deleted by the Washington Amendatory Endorsement.

In the March 25 letter, MIT also inquired why AFM was attempting to apply the limit of the "Additional Coverages" for Communicable Disease to the $500 million limits of business interruption coverage provided under the Limits provision of the policy.

29. Having already based its denial of coverage on the ground of an exclusion which had been deleted by the policy, on April 9, 2021, AFM decided to place its own interests in "mending the hold" of its previous denial of coverage to include additional reasons for denial of coverage beyond the "Additional Coverages" for Communicable

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Disease. AFM purported to add a loss of use exclusion, and a contamination exclusion from the Washington Amendatory Endorsement. At no point in the April 9 letter did Ms. Webber claim her July 31, 2020 reliance on the deleted Contamination exclusion was inadvertent, or that her previous decision not to rely on a loss of use exclusion was inadvertent.

30. Ms. Webber knew when she signed the April 9, 2021 letter that it was not in the interests of MIT that she add exclusions to the ground of denial contained in her July 31, 2020 letter rejecting coverage other than under the "Additional Coverages" for Communicable Disease.

31. When Ms. Webber "mended the hold" on April 9 by adding the modified "contamination" exclusion from the Washington Amendatory Endorsement, she knew that exclusion had been narrowed from the deleted "Group Three" exclusions cited in her July 31, 2020 letter, so that it only applied in two circumstances:

> **GROUP II:** This policy excludes loss or damage caused by any of the following excluded events as set forth in 1 through 12 below. Loss or damage will be considered to have been caused by an excluded event if that event:
> **i.** Directly and solely results in loss or damage; or
> ii. Initiates a sequence of events that results in loss or damage, regardless of the nature of any intermediate or final event in that sequence.

32. Nowhere in her April 9 letter did Ms. Webber take the position that "Contamination" was the only peril in the policy that "resulted in loss or damage." She knew this because she agreed that her company would pay for business interruption loss and property damage caused by a separately identified peril under the policy, namely a "Communicable Disease" called Covid 19.

33. Neither was there anywhere in her April 9 letter where Ms. Webber took the position that "Contamination" initiated itself. She knew that a non-excluded peril ("communicable disease") had initiated a sequence of events which resulted in virus

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contamination recognized and acknowledged by her company, and for which it paid a small portion.

34. Ms. Webber also failed in her April 9 letter to explain why AFM was applying the "Additional Coverage" limit as a "Sublimit" to the $500 million of business interruption coverage when "Communicable Disease" is neither excluded in the policy nor included in the "Sublimit" section of the policy. AFM's use of the "Additional Coverage" limits as a substitute for not having put a "Sublimit" on Communicable Disease is unreasonable within the meaning of RCW 48.30.015 (1).

35. On June 8, 2021, MIT wrote back to Ms. Webber, pointing out that the policy itself recognizes that "Communicable Disease" can cause "Property Damage" and that in fact acknowledged that such damage had occurred at MIT's Bingo Hall. At no point after receiving the June 8 letter did AFM ever explain why it has denied coverage on the ground that "Communicable Disease" is not capable of causing "Property Damage" when its own policy language specifically contains coverage for such an event.

36. In the June 8 letter, MIT pointed out that the AFM policy does not exclude the peril identified in its policy as "Communicable Disease." At no point following that letter up to the present, has AFM claimed that the peril identified in the policy as "Communicable Disease" appears in the list of policy exclusions.

37. In 1986, the Washington Supreme Court adopted the efficient proximate cause doctrine. In 1989, the Court ruled in *Safeco v. Hirschmann* that an insurer may not "contractually circumvent" the rule. Ms. Webber has investigated and adjusted many, many property insurance claims under Washington's efficient proximate cause rule. On information and belief, Plaintiff alleges Ms. Webber knew the initiating cause of the "direct

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SEATTLE, WA 98104
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physical loss or damage" suffered by MIT was the Communicable Disease known as Covid 19.

38. Ms. Webber knew that virus contamination at MIT at covered MIT premises did not cause itself, but instead was initiated by Covid 19. At no point did Ms. Webber or AFM deny Plaintiff's claim on the ground "Contamination" was the efficient proximate cause of AFM's loss.

39. Throughout AFM's investigation of Plaintiff's claim for policy benefits, AFM was motivated by its own financial interests in avoiding coverage for business interruption from property damage and direct physical loss or damage caused by a communicable disease, both under policies issued to Plaintiff, and under similar or identically worded policies issued to other insureds throughout Washington State. AFM's investigation was neither fair nor impartial, and its denial of coverage for property damage and direct physical loss caused by Covid 19 (and ensuing business interruption) was a result of its one sided investigation and its strong desire not to pay Covid related business interruption claims.

CAUSES OF ACTION

FIRST CAUSE OF ACTION—BREACH OF CONTRACT

40. Plaintiffs reallege paragraphs 1-39 as though fully set forth herein.

41. The conduct of Defendant constitutes a breach of the policy it issued to the Muckleshoot Indian Tribe. Plaintiffs have been damaged directly and consequentially in an amount to be proven at trial, expected to be in the tens of millions of dollars.

SECOND CAUSE OF ACTION—NEGLIGENCE

42. Plaintiffs reallege paragraphs 1-41 as though fully set forth herein.

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43. It was reasonably forseeable to AFM that its failure to conduct a fair and impartial investigation and to timely pay benefits due under the policy would harm and damage the plaintiffs. The failure of AFM to use reasonable care in providing a fair and impartial investigation led directly to its failure to honor its policy obligations to Plaintiff, proximately resulting in damages in an amount to be proven at trial, expected to be in the tens of millions of dollars.

THIRD CAUSE OF ACTION—VIOLATION OF CONSUMER PROTECTION ACT

44. Plaintiff realleges paragraphs 1-43 as though fully set forth herein.

45. Each of the acts and omissions described herein were committed in the course of trade and commerce conducted within the State of Washington.

46. The acts and omissions pled herein include per se and/or non per se unfair and deceptive acts or practices pursuant to the Washington Consumer Protection Act, and/or had the capacity to deceive. In particular, the specific acts and omissions committed by AFM include violations of WAC 284-30-330 (1), (3), (4), (6), (7), (13), WAC 284-30-360(1), (3) (4), and 370.

47. Each of the acts or omissions described herein impacts the public interest.

48. The acts or omissions described herein have caused injury/damage to Plaintiff in its business/property.

49. Plaintiffs are entitled to recover trebled damages up to the statutory maximum against Defendant.

FOURTH CAUSE OF ACTION—DECLARATORY RELIEF

50. Plaintiffs reallege Paragraphs 1-49 as though fully set forth herein.

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51. There is an actual and justiciable controversy between Plaintiff and Defendant concerning certain respective rights and obligations inter se. Pursuant to RCW 7.24, Plaintiff seeks declaratory judgment as more specifically pled herein.

52. Plaintiffs herein seeks declaratory relief including but not limited to the following:

A. An adjudication of whether Defendant committed breaches of WAC 284-30-330(1), (3), (4), (6), (7) and/or (13);

B. Whether Defendant, either individually, collectively, and/or through their members or agents, breached RCW 48.01.030;

C. Whether Defendant, either individually, collectively or through their members or agents, violated WAC 284-30-360 (1), (3) and or (4);

D. Whether certain policy provisions constitute a deliberate violation of the rule of *Safeco v. Hirschmann* that an insurer may not "contractually circumvent" the rule of efficient proximate cause;

E. Whether "Communicable Disease," and "Contamination," are contractually distinct perils under the AFM policy;

F. Whether "Communicable Disease" is an excluded peril under the AFM policy;

G. Whether "Communicable Disease" is contained on the list of perils subject to the "Sublimits" section of the policy;

H. Whether the "Additional Coverages" under the policy are "additional" to the $500 million of coverage for business interruption resulting from non-excluded direct physical loss or damage;

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701 FIFTH AVE., SUITE 4100
SEATTLE, WA 98104
T. 206.386.5900 F. 206.344.7400

I. Whether "Contamination" as defined in the Washington Amendatory Endorsement can legally cause itself without having been initiated by some other non-excluded ort excluded peril;

J. Whether Defendant breached its contract of insurance with Plaintiff;

K. Whether Plaintiff's denial of benefits for losses initiated by Covid 19 is unreasonable within the meaning of RCW 48.30.015 (1);

L. For such other declaratory relief as the Court may find appropriate.

RESERVATION OF CLAIM PURSUANT TO RCW 48.30.015

Contemporaneously with the filing of this complaint, Plaintiff is serving notice on Defendant as required under RCW 48.30.015 (8) of its intent to make claim under Washington's Insurance Fair Conduct Act. Plaintiff therefore reserves the right to join such a claim upon the expiration of the statutory period.

IX. PRAYER FOR RELIEF

WHEREFORE, having stated its Complaint for monetary damages and declaratory relief, plaintiffs pray for relief as follows:

1. For money damages in an amount to be proven at trial;

2. For declaratory relief as requested herein, and expedited trial pursuant to CR 57;

3. For prejudgment interest authorized by statute and law;

4. For treble damages as allowed by statute;

5. For attorney's fees and other costs, as allowed under applicable law, statute, and/or recognized grounds of equity;

6. For such other and further relief as the court may deem just and equitable.

Ashbaugh Beal
701 FIFTH AVE., SUITE 4100
SEATTLE, WA 98104
T. 206.386.5900 F. 206.344.7400

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ASHBAUGH BEAL LLP

By: s/ Richard T. Beal, Jr.

Richard T. Beal, Jr., WSBA #9203
rbeal@ashbaughbeal.com
Khalid Aziz, WSBA #57409
kaziz@ashbaughbeal.com
Attorneys for Plaintiffs

Ashbaugh Beal
701 FIFTH AVE., SUITE 4100
SEATTLE, WA 98104
T. 206.386.5900 F. 206.344.7400