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KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE #: 22-2-10007-9 SEA

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

SWINOMISH INDIAN TRIBAL
COMMUNITY d/b/a SWINOMISH CASINO
& LODGE,

Plaintiff,

v.

AFFILIATED FM INSURANCE
COMPANY,

Defendant.

NO. _____

COMPLAINT FOR (1) DECLARATORY
JUDGMENT, (2) BREACH OF
CONTRACT, (3) INSURANCE BAD
FAITH, (4) VIOLATIONS OF THE
WASHINGTON CONSUMER
PROTECTION ACT, AND (5)
VIOLATIONS OF THE INSURANCE
FAIR CONDUCT ACT

Plaintiff Swinomish Indian Tribal Community d/b/a Swinomish Casino & Lodge bring this action against Affiliated FM Insurance Company and allege as follows:

I. PARTIES

1.1 The Swinomish Indian Tribal Community (the "Tribe") is a federally recognized Indian tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476, which occupies the Swinomish Indian Reservation located on Fidalgo Island in Skagit County, Washington. The Tribe does business as the Swinomish Casino & Lodge in Anacortes, Washington.

1.2 Defendant Affiliated FM Insurance Company ("AFM") is an insurance company incorporated in the State of Rhode Island. AFM is licensed to sell, and does sell, insurance in the State of Washington, including the insurance policy that is the subject of this lawsuit.

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II. JURISDICTION AND VENUE

2.1 This Court has subject matter jurisdiction over this action pursuant to RCW 2.08.010 and RCW 7.24.020.

2.2 This Court has personal jurisdiction over AFM because AFM conducts business in Washington, including issuing the insurance policy at issue.

2.3 Venue is proper in this Court pursuant to RCW 48.05.220. Venue is also proper under RCW 4.12.025 because AFM maintains an office in Bellevue, King County, Washington.

III. FACTUAL BACKGROUND

3.1 The Tribe owns and operates the Swinomish Casino & Lodge in Anacortes, Washington. The Swinomish Tribe opened its Casino overlooking the Swinomish Slough and Padilla Bay in July 1994. In 2012, the Tribe expanded its facilities, adding a hotel. The Swinomish Casino & Lodge is a full-service entertainment destination with 98-luxury rooms, six restaurants, bars, and coffee shops, a 9,000 square-foot multipurpose event center, and a gaming floor with approximately 900 slot machines and gaming tables. The Tribe also operates an RV-park adjacent to the Casino & Lodge.

3.2 AFM issued the Tribe one or more insurance policies, including Policy No. TO328, with an effective date from January 1, 2020 to January 1, 2021 (the "Policy").

3.3 The Policy's named insureds are "Swinomish Indian Tribal Community[,] Swinomish Casino & Lodge[,] and its wholly or majority owned subsidiaries and any interest which may now exist or hereinafter be created or acquired which are owned, controlled or operated by any one or more of those named insureds."

3.4 The Policy's per occurrence limit is \$142,400,000, subject to certain sub-limits of liability expressly identified in the Policy.

3.5 The Policy is an "all-risk" policy that provides broad property and business interruption coverage for "ALL RISKS OF PHYSICAL LOSS OR DAMAGE" except where specifically excluded. The Policy also provides additional coverages, including Communicable

1 Disease Property Damage and Business Interruption, Civil or Military Authority, and
2 Decontamination Costs.

3 3.6 The Policy's Business Interruption Coverage "insures Business Interruption loss,
4 as provided in the Business Interruption Coverage, as a direct result of physical loss or damage"
5 to insured property.

6 3.7 The Business Interruption Coverage Extension for Communicable Disease
7 provides:

8 If a **described location** owned, leased or rented by the Insured has the actual not
9 suspected presence of communicable disease and access to such **described location** is
10 limited, restricted, or prohibited by:

11 a) An order of an authorized governmental agency regulating such presence of
12 **communicable disease**; or

13 b) A decision of an Officer of the Insured as a result of the presence of such
14 **communicable disease**.

15 3.8 The Policy defines "**communicable disease**" as "disease which is: 1.
16 Transmissible from human to human by direct or indirect contact with an affected individual or
17 the individual's discharges, or 2. Legionellosis."

18 3.9 The Policy's Washington Amendatory Endorsement excludes "loss or damage
19 caused by ... 10. **Contamination**, and any cost due to **contamination** including the inability to
20 use or occupy property or any cost of making property safe or suitable for use or occupancy;
21 nor will the foregoing constitute direct physical loss or damage insured by this policy." The
22 Policy defines "**contamination**" as "any condition of property due to the actual or suspected
23 presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin,
24 pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent,
25 fungus, mold or mildew."
26

1 3.10 The Tribe paid all premiums for the coverage when due. All conditions under the
2 Policy have been satisfied, discharged, and/or excused.

3 3.11 On or about January 2020, the United States saw its first cases of persons infected
4 by COVID-19, which has since been designated as a worldwide pandemic.

5 3.12 COVID-19 is highly contagious and remains stable in aerosols for up to three
6 hours and up to two to three days on certain surfaces. COVID-19 is spread by breathing, talking,
7 singing, and touching shared or common objects or surfaces. Persons infected with COVID-19
8 can be asymptomatic. To stop or slow the spread of COVID-19, the United States Center for
9 Disease Control and Prevention (“CDC”) has recommended avoiding indoor activities, avoiding
10 crowded and congested areas, limiting contact with commonly touched surfaces in public spaces,
11 and maintaining social distance of at least six feet from other people not within the same
12 household.

13 3.13 On February 29, 2020, the Governor of the State of Washington (“Governor
14 Inslee”) issued a proclamation declaring a State of Emergency. Governor Inslee issued additional
15 proclamations on March 11, 2020 and March 15, 2020 that significantly limited public events
16 throughout the State of Washington, including King and Skagit Counties.

17 3.14 The Swinomish Senate, the elected governing body of the Tribe, is the sole
18 government with civil authority over the Casino & Lodge. In response to the emerging threat of
19 COVID-19, the Senate passed Resolution No. 2020-03-42, A Resolution Declaring a Public
20 Health Emergency on March 9, 2020.

21 3.15 On March 17, 2020, the Senate passed resolution No. 2020-03-71, A Resolution
22 Regarding the Temporary Closure of the Swinomish Casino & Lodge Due to the COVID-19
23 Public Health Emergency, requiring that the Casino & Lodge be closed between March 17, 2020
24 through March 31, 2020.

25 3.16 On March 23, 2020, Governor Inslee issued a “stay home” order that prohibited
26 public gatherings and directed Washington citizens to stay home until at least April 6, 2020,

1 except for essential activities. Following Governor Inslee's proclamation, the Senate passed a
2 resolution declaring a "Stay Home" order for Swinomish residents on March 24, 2020. Following
3 Governor Inslee's extension of the stay home order on April 2, 2020, on April 6, 2020, the Senate
4 passed a resolution further extending the Swinomish stay home order for another month, until
5 May 4, 2020. Governor Inslee issued a subsequent extension to the stay home order on April 29,
6 2020; the Swinomish Senate issued a proclamation on April 30, 2020 and again on April 14,
7 2020 extending the Swinomish stay home order.

8 3.17 On May 26, 2020, the Senate issued a proclamation designating the Casino &
9 Lodge an essential business and allowing it to reopen, via Resolution No. 2020-05-119, A
10 Resolution Updating the Tribe's COVID-19 Precautionary Orders and Initiating A Limited
11 Reopening of the Swinomish Economy. The Casino & Lodge reopened with limited capacity and
12 operating restrictions on May 27, 2020.

13 3.18 Due to the COVID-19 closure resolutions passed by the Swinomish Senate, the
14 Casino & Lodge experienced significant losses, including business interruption losses. These
15 losses total in the millions of dollars.

16 3.19 The Casino & Lodge promptly reported its losses to AFM.

17 3.20 AFM acknowledged the claim on March 19, 2020 and indicated that coverage
18 may exist under a lone Additional Coverage for Communicable Disease with a coverage sublimit
19 of \$100,000. AFM requested identification of specific individuals and specific locations that had
20 tested positive for COVID 19, copies of positive test results, and proof that employees were
21 present at the locations that tested positive. This information, however, was not available as
22 testing was not widely available in Skagit County until substantially after the Tribe submitted its
23 claim. The Tribe informed AFM that it did not have this information, but nevertheless provided
24 information about the number of employees who reported submitted health insurance claims
25 between January and March 2020. AFM did not acknowledge the applicability of the Policy's
26

1 Business Interruption Coverage with limits exceeding \$45 Million, or other potential coverages,
2 and has not done so to date, resulting in an effective denial of the Tribe's claim.

3 3.21 On October 25, 2021, the Tribe notified AFM of a King County Superior Court
4 decision in *Snoqualmie Entertainment Authority et al v. Affiliated FM*, Case No. 21-2-03194-0
5 SEA where the court held that coverage existed under an identical AFM policy for losses arising
6 from the closure of the Snoqualmie Tribe's casino and hotel due to COVID-19 closure orders.
7 Because the Court in *Snoqualmie Entertainment Authority* found coverage for identical losses
8 under the same policy language, Plaintiff's losses are covered. AFM never responded to the Tribe
9 acknowledging that this decision established coverage, or even acknowledging the possibility of
10 coverage for their claim, resulting in an effective and continuing denial of the Swinomish's claim.

11 IV. CLAIM ONE: DECLARATORY JUDGMENT

12 4.1 Plaintiff realleges and incorporate by reference the allegations in Paragraph 1.1.
13 through 3.21.

14 4.2 Under the Policy, AFM has a duty to pay Plaintiff for direct physical loss or
15 damage to insured property occurring during the policy term.

16 4.3 AFM breached its duty to pay by failing to reimburse Plaintiff for its COVID-
17 related losses in response to Plaintiff's tenders and by refusing to acknowledge that Plaintiff's
18 losses are the result of a covered cause of loss under the all-risk Policy within AFM's duty to pay
19 under the Policy.

20 4.4 AFM has acted in bad faith and violated various insurance claim handling
21 regulations and statutes by denying coverage based on unreasonable, frivolous, or unfounded
22 interpretations of the Policy, by failing to deal fairly with Plaintiff and give equal consideration
23 to Plaintiff's financial interests, by putting its own financial interests ahead of Plaintiff's, and by
24 failing to conduct a full, fair, and prompt investigation at its own expense.

25 4.5 An actual controversy of a justiciable nature presently exists between Plaintiff and
26 AFM regarding the proper construction of the Policy and the rights and obligations of the parties

1 with respect to Plaintiff's claims. Issuance of declaratory relief by this Court will terminate the
2 existing and future controversies between the parties.

3 4.6 Plaintiff seeks a declaratory judgment declaring that: (a) Plaintiff's losses and
4 expenses resulting from the interruption of their business are covered by the AFM Policy; (b)
5 AFM is responsible for timely and fully paying all such claims; (c) AFM breached the Policy
6 and violated various insurance claims handling regulations and statutes, and (d) AFM is obligated
7 to pay Plaintiff's reasonable attorney fees, costs, and disbursements in obtaining coverage.

8 **V. CLAIM TWO: BREACH OF CONTRACT**

9 5.1 Plaintiff realleges and incorporate by reference the allegations in Paragraph 1.1.
10 through 4.6.

11 5.2 The Policy constitutes a valid contract between Plaintiff and AFM for insurance
12 coverage for covered losses. AFM breached the Policy by failing to acknowledge that Plaintiff's
13 COVID-related losses constitute "physical loss or damage" to covered property and are covered
14 under the Policy and by failing to fully reimburse Plaintiff for its covered losses.

15 5.3 As a direct and proximate result of AFM's breach of its insurance contract,
16 Plaintiff has been deprived of the benefits of its insurance coverage with respect to its COVID-
17 related losses.

18 5.4 As another direct and proximate result of AFM's breach of the Policy, Plaintiff
19 has been forced to incur attorneys' fees and other expenses in order to prosecute this action.

20 **VI. CLAIM THREE: INSURANCE BAD FAITH**

21 6.1 Plaintiff realleges and incorporate by reference the allegations in Paragraph 1.1.
22 through 5.4.

23 6.2 AFM owes Plaintiff a duty of good faith and fair dealing. Pursuant to that duty,
24 AFM was obligated to refrain from taking any action that is unreasonable or unfounded. AFM
25 was, likewise, required to conduct a full, fair, and prompt its investigation at its own expense
26

1 before denying Plaintiff's claim. AFM was also required to deal fairly with Plaintiff and give
2 equal consideration to (and not put its own interests ahead of) Plaintiff's financial interests.

3 6.3 AFM breached its duty of good faith and fair dealing in its handling of Plaintiff's
4 claim for insurance benefits.

5 6.4 As a direct and proximate result of this conduct, Plaintiff has suffered damages in
6 an amount to be proven at trial.

7 **VII. CLAIM FOUR: VIOLATIONS OF THE WASHINGTON CONSUMER**
8 **PROTECTION ACT, RCW 19.86**

9 7.1 Plaintiff realleges and incorporate by reference the allegations in Paragraph 1.1.
10 through 6.4.

11 7.2 Washington has adopted the Unfair Claims Settlement Practices Act under
12 Chapter 284-30, *et seq.* of the WAC. AFM violated WAC 284-30 *et seq.*

13 7.3 Violations of WAC 284-30 *et seq.* are *per se* violations of the Washington
14 Consumer Protection Act, RCW 19.86, entitling Plaintiff to exemplary damages, attorneys fees
15 and costs. AFM also committed *non-per se* violations of the Consumer Protection Act.

16 7.4 As a direct and proximate result of AFM's conduct, Plaintiff suffered damages in
17 an amount to be proven at trial.

18 **VIII. CLAIM FIVE: VIOLATION OF THE INSURANCE FAIR CONDUCT ACT,**
19 **RCW 48.030.015**

20 8.1 Plaintiff realleges and incorporate by reference the allegations in Paragraph 1.1.
21 through 7.4.

22 8.2 On February 16, 2022, Plaintiff filed a 20-day IFCA Notice with the Office of the
23 Insurance Commissioner in accordance with RCW 48.30.015. This written notice, along with the
24 bases for Plaintiff's IFCA cause of action, was provided to AFM. AFM did not respond to
25 Plaintiff's IFCA Notice and therefore failed to resolve the bases for Plaintiff's IFCA cause of
26 action within the 20-day notice period under IFCA.

1 8.3 AFM has unreasonably denied Plaintiff's claims for coverage and/or payment of
2 benefits under its Policy and has violated IFCA and WAC 284-30 *et seq.* as described above.
3 AFM's actions and omissions entitle Plaintiff to actual, compensatory, and multiplied damages,
4 attorneys fees, and costs.

5 8.4 As a direct and proximate result of AFM's conduct, Plaintiff suffered damages in
6 an amount to be proved at trial.

7 **IX. PRAYER FOR RELIEF**

8 Plaintiff prays for the following relief:

9 9.1 Entry of a declaratory judgment as stated above;

10 9.2 Award Plaintiff the full benefit of the Policy and recovery for all of their
11 contractual and extracontractual damages arising from AFM's breach of the Policy;

12 9.3 Award Plaintiff its costs and attorneys' fees incurred pursuant to *Olympic*
13 *Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37 (1991) and its progeny, the Washington
14 Consumer Protection Act, the Insurance Fair Conduct Act, or under any other basis permitted by
15 law or equity;

16 9.4 Award Plaintiff treble damages, up to \$25,000, under the Consumer Protection
17 Act;

18 9.5 Award Plaintiff its actual, compensatory, and multiplied damages under the
19 Insurance Fair Conduct Act;

20 9.6 Award Plaintiff pre-judgment interests on the amount of the insurance benefits
21 awarded; and

22 9.7 Grant Plaintiff such other relief as may be just, legal, and proper.

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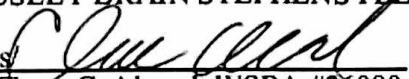
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DATED this 29th day of June, 2022.

TOUSLEY BRAIN STEPHENS PLLC

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