

STATE OF MINNESOTA**IN DISTRICT COURT****COUNTY OF CARLTON****SIXTH JUDICIAL DISTRICT**

Fond du Lac Management, Inc.,

COMPLAINT

Plaintiff,

File No.: _____

v.

Case Type: Contract/Civil Other

Lexington Insurance Company; Certain Underwriters at Lloyd's, London Subscribing to Policy #PJ193647; Certain Underwriters at Lloyd's, London Subscribing to Policy #PJ1900131; Certain Underwriters at Lloyd's, London Subscribing to Policy #PJ1933021; Certain Underwriters at Lloyd's, London Subscribing to Policy #PJ1900067; Underwriters at Lloyd's, London – Aspen Specialty Insurance Company; Homeland Insurance Company of NY (One Beacon); Hallmark Specialty Insurance Company; Endurance Worldwide Insurance Ltd. t/as Sompo International; Arch Specialty Insurance Company; Evanston Insurance Company; Allied World National Assurance Company,

The Honorable _____

Defendants.

COMPLAINT

Plaintiff Fond du Lac Management, Inc. files this Complaint against Lexington Insurance Company and related carriers (listed in Paragraph 6) (collectively “Defendants”) and alleges as follows:

INTRODUCTION

Beginning in March of 2020, the Plaintiff's businesses were forced to shut down because of the COVID-19 pandemic. These closures were a response to the Coronavirus and necessary to protect the Fond du Lac Band of Lake Superior Chippewa (the “Band”) and its members.

Furthermore, the closures were ordered by governments who required the Plaintiff's businesses to close and their workers and customers to remain at home and abide by strict social distancing guidelines. The Band issued corresponding orders in order to ensure the safety of its members. The closures of most of The Band's businesses and reduction of business at the others resulted in millions of dollars of losses.

To protect their business (and employees) from having to make difficult choices in situations like this one, the Plaintiff purchased insurance from Defendants that included coverage for business interruption. The Plaintiff's policy expressly provide coverage for "Lost Business Income" and the consequences of actions by "Civil Authority." Accordingly, the Plaintiff understandably believed that this policy would help protect its businesses in the unlikely event that the government ever ordered it to stop or severely restrict operations in connection with a pandemic or any other covered peril.

Notwithstanding, and contrary to, the coverage provisions in its policy with Defendants and the obligations Defendants undertook in exchange for the Plaintiff's insurance premium payments, when Plaintiff submitted claims with Defendants for coverage, Defendants summarily denied their claims. These denials were part of a premeditated strategy by Defendants to deny all claims related to COVID-19. They were untethered to the facts of the claims and the specific coverage provided by the Plaintiff's policy, and were therefore illegal.

PARTIES

I. Plaintiff

1. Plaintiff Fond du Lac Management, Inc. is the corporate business committee for the Fond du Lac Band of Lake Superior Chippewa, a federally recognized sovereign Indian tribe that maintains a government-to-government relationship with the United States, and whose governing body is recognized by the Secretary of the Interior. *See* Indian Entities Recognized by

and Eligible to Receive Services From the United States Bureau of Indian Affairs, 85 Fed. Reg. 5462, 5464 (Jan. 30, 2020).

2. Plaintiff's principal address is 1720 Big Lake Road, Cloquet, MN 55720.

3. The Band's 101,000-acre reservation is located in Carlton and St. Louis Counties.

The Band has approximately 4,208 enrolled members, of whom approximately 1,800 live within or near the reservation.

4. Plaintiff operates businesses including Black Bear Casino Resort, Black Bear Golf Course, and Fond Du Luth Casino.

II. Defendants

5. Lexington Insurance Company is a Delaware Corporation with its principal place of business in Boston, Massachusetts. Lexington Insurance Company is the insurer on Plaintiff's insurance policy described in this Complaint.

6. The following Defendants are carriers for the insurance policy at issue in this Complaint:

- a. Certain Underwriters at Lloyd's, London Subscribing to Policy #PJ193647;
- b. Certain Underwriters at Lloyd's, London Subscribing to Policy #PJ1900131;
- c. Certain Underwriters at Lloyd's, London Subscribing to Policy #PJ1933021;
- d. Certain Underwriters at Lloyd's, London Subscribing to Policy #PJ1900067;
- e. Underwriters at Lloyd's, London – Aspen Specialty Insurance Company;
- f. Homeland Insurance Company of NY (One Beacon);
- g. Hallmark Specialty Insurance Company;
- h. Endurance Worldwide Insurance Ltd. t/as Sompo International;
- i. Arch Specialty Insurance Company;
- j. Evanston Insurance Company; and

k. Allied World National Assurance Company.

JURISDICTION AND VENUE

7. This Court has jurisdiction because the Defendants conduct business in Minnesota and intentionally avail themselves of markets within Minnesota to conduct business, and because the acts and omissions giving rise to this action occurred in substantial part in Minnesota.

8. Venue is proper in Carlton County because the Defendants conduct business in this County and because the acts and omissions giving rise to this action occurred in substantial part in this County.

FACTUAL BACKGROUND

I. The Rapid Spread of Coronavirus

9. COVID-19 is an infectious disease caused by a recently discovered novel coronavirus known as SARS-CoV-2 (“Coronavirus” or “COVID-19”). The first instances of the disease spreading to humans were diagnosed in or around December 2019.

10. According to the World Health Organization (“WHO”): “People can catch COVID-19 from others who have the virus. The disease can spread from person to person through small droplets from the nose or mouth which are spread when a person with COVID-19 coughs or exhales. These droplets land on objects and surfaces around the person. Other people then catch COVID-19 by touching these objects or surfaces, then touching their eyes, nose or mouth. People can also catch COVID-19 if they breathe in droplets from a person with COVID-19 who coughs out or exhales droplets.”

11. This is problematic, *inter alia*, because a human sneeze can expel droplets of mucus and saliva that travel at nearly a hundred miles an hour and can spread up to 27 feet.

12. According to a report in the New York Times, “[a]n infected person talking for five minutes in a poorly ventilated space can also produce as many viral droplets as one infectious cough.”¹ The more people in a conversation, the more droplets are dispersed.

13. Although these droplets are smaller and less visible than rust, mold, or paint, they are physical objects which can travel to other objects and cause harm.

14. These droplets can spread Coronavirus when they reach humans directly, or when they land on habitable surfaces where they can survive until that surface is touched by a potential human host.

15. Droplets containing Coronavirus infect a variety of surfaces and objects for a period of hours, days, or weeks, if not longer. After inspecting a cruise ship inhabited by passengers carrying the Coronavirus, the CDC reported that Coronavirus was detectable on various surfaces inside the cruise ship up to 17 days after passengers had vacated the cabins.

16. Recent scientific evidence shows that Coronavirus can survive and remain virulent on stainless steel and plastic for three to six days, on glass and banknotes for three days, and on wood and cloth for 24 hours.

17. Testing involving similar viruses in the Coronavirus family shows that Coronavirus can likely survive on ceramics, silicon rubber, or paper for up to five days if not longer.

¹ See Yuliya Pashina-Kottas, et al., “This 3-D Simulation Shows Why Social Distancing Is So Important, *The New York Times* (Apr. 21, 2020), <https://www.nytimes.com/interactive/2020/04/14/science/coronavirus-transmission-cough-6-feet-ar-ul.html> (last visited June 24, 2022).

18. When public areas containing such surfaces may have been exposed to Coronavirus, a number of countries including China, Italy, France, and Spain have required such areas to be fumigated prior to re-opening.

19. This Coronavirus spread throughout Minnesota and the United States.

20. American Indians are disproportionately affected by COVID-19. A recent scientific study concluded that despite the fact “that American Indian and Alaska Native patients had lower comorbidity risk scores than those observed among Black or White patients . . . American Indian and Alaska Native patients were significantly more likely to die in the hospital of COVID-19 than Black or White patients at every level of comorbidity risk.”²

21. The Band is particularly vulnerable to COVID-19 because at least 318 enrolled Band members receiving health care on the reservation are either elderly or living with chronic health conditions such as chronic obstructive pulmonary disease (COPD), high blood pressure, or diabetes. Additionally, the Band’s businesses are popular with tourists, and therefore pose significant risk of spreading COVID-19.

II. Governments Country Order Everyone to Shelter in Place

22. As the virus spread in Minnesota, state and local officials began discussing wide scale business closures.

23. On March 13, 2020, President Trump declared the COVID-19 outbreak a national emergency.

² Leslie A. Musshafen et al., *In-Hospital Mortality Disparities Among American Indian and Alaska Native, Black, and White Patients With COVID-19*, 2022 *Jama Network Open* 5, <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2790506>.

24. Also, on March 13, 2020, Governor Tim Walz issued Emergency Executive Order 20-01, declaring a peacetime emergency and announcing plans to coordinate Minnesota's strategy to protect its residents from COVID-19. **Exhibit 1** at 2.³

25. On March 16, 2020, the Centers for Disease Control and Prevention, and members of the national Coronavirus Task Force issued to the American public guidance, styled as "30 Days to Slow the Spread" concerning measures to slow the spread of COVID-19. This guidance advocated for far-reaching social distancing measures, such as working from home, avoiding shopping trips and gatherings of more than 10 people, and staying away from bars, restaurants, and food courts.

26. Following this advice, and recognizing that there had been numerous confirmed cases of COVID-19 in their jurisdictions, many state government administrations across the nation recognized the need to take steps to protect their residents from the spread of COVID-19. As a result, many governmental administrations entered civil authority orders suspending or severely curtailing business operations of non-essential businesses that interact with the public and provide gathering places for the individuals.

27. On March 16, 2020, Governor Walz issued Emergency Executive Order 20-04 requiring that "places of public accommodation" close "to ingress, egress, use, and occupancy by members of the public." *Id.* at 6. Order 20-04 defined "places of public accommodation" to include "[r]estaurants . . . and other places of public accommodation offering food or beverage for on-premises consumption," "[b]ars . . . and other places of public accommodation offering alcoholic beverages for on-premises consumption," "indoor and outdoor performance venues,"

³ This and all other Orders discussed in this Complaint are attached as **Exhibit 1**. All page numbers in this Complaint refer to the page number of the PDF document, including the cover sheet.

and “recreational or entertainment facilities.” *Id.* Order 20-04 required such places of public accommodation to close “no later than March 17, 2020 at 5:00 pm, and continuing until March 27, 2020 at 5:00 pm.” *Id.* This closure period was later extended to May 1, 2020.

28. On March 25, 2020, Governor Walz issued Emergency Executive Order 20-20 directing “all persons currently living within the state of Minnesota . . . to stay at home or in their place of residence.” *Id.* at 10. Order 20-20 did not apply to “[a]ctivities by tribal members within the boundaries of their tribal reservations.” *Id.* at 12.

29. On March 28, 2020, the United States Department of Homeland Security issued a memorandum concerning the “Identification of Essential Critical Infrastructure Workers During Covid-19 Response.” *Id.* at 21. This memorandum provided guidance for the implementation and standardization of all state shelter in place orders and the restrictions they place on different essential and non-essential businesses.

30. Local governments throughout Minnesota and the country have experienced confirmed infections in their jurisdictions, required large scale business closures, and imposed other limitations on customer and employee movement that prevent businesses from operating and/or force them to suffer losses.

31. The Plaintiff's businesses are located in Carlton County and St. Louis County.

32. As a federally recognized sovereign Indian tribe that maintains a government-to-government relationship with the United States, the Band monitors state and local regulations that may impact its members. In addition to compelling the closure of its businesses, the preceding orders from the state of Minnesota did have such an effect. To ensure that all elements of these orders were followed, and to avoid unnecessary conflicts over state and local rights to regulate the Band, the Band (as it often does) issued parallel regulations to ensure that the state

and local regulations were fully implemented. As Virginia Hedrick of the California Consortium for Urban Indian Health explained "[i]t's important that messages [about social distancing] come from tribal leadership" to ensure that tribal citizens trust the guidance.⁴

33. The Band declared a state of emergency on March 13, 2020. **Exhibit 1** at 30. The Band took further governmental action consistent with the state restrictions and recommendations from the Centers for Disease Control and World Health Organization. On March 27, 2020, the Band approved Resolution #1119/20 directing "all Indians currently living on Fond du Lac tribal trust land to stay at home or in their place of residence except to engage in necessary activities and work." *Id.* at 31. The stay-at-home order was originally supposed to remain in effect through April 10, 2020, later extended to May 3, 2020.

34. On April 22, 2020, the Band approved Resolution #1169/20 forbidding "public gatherings of 5 or more" and extending the stay-at-home order "until further notice." *Id.* at 34.

35. Collectively, the above-referenced orders of the State of Minnesota and the Band are referred to herein as the "Orders."

36. The Orders were issued due to direct physical loss of and/or direct physical damage to properties. In each jurisdiction, there were numerous individuals who tested positive for COVID-19. Further, COVID-19 was and is present in these areas because, for example, it has attached to properties and surfaces on, at, or within properties; and because COVID-19 was and is being transmitted in or between properties throughout these areas, including but not limited to transmission through the air, through ventilation systems, or through contact with contaminated surfaces. The presence of COVID-19 resulted in and continues to result in direct

⁴ Laura Klivans, "How One Northern California Tribe Is Protecting Its Community from COVID-19", KQED (Apr. 27, 2020), <https://www.kqed.org/science/1963054/how-one-native-american-group-is-protecting-its-community-from-covid-19> (last visited June 24, 2022).

physical loss, including but not limited to Coronavirus attaching itself to surfaces and spreading throughout business property. The Orders were issued by governmental entities due to these types of direct physical loss of, and/or direct physical damage to, properties within their respective jurisdictions.

37. To the extent the Orders were issued to reduce future infections, reducing property damage is and was part-in-parcel of that strategy, because the spread of Coronavirus onto surfaces in high-traffic areas is an important vector for disease spread.

III. The Plaintiff's Businesses Close

38. As Coronavirus spread, the areas in which the Plaintiff's businesses are located became breeding grounds for the disease. At least hundreds of people in each county tested positive for Coronavirus as it was assuredly being transmitted in or between properties throughout the areas near the Plaintiff's businesses, including but not limited to transmission through the air, shared buildings and facilities, through ventilation systems, or through contact with contaminated surfaces.

39. Members of the Band have been exposed to and contracted Coronavirus, and on information and belief, have then entered onto the premises of some of the Plaintiff's businesses at issue in this Complaint. Since March 2020, at least 233 residents of the Reservation tested positive for COVID-19 on the tribal lands surrounding the businesses at issue in this Complaint. This number does not include people who did not seek medical treatment or testing, and it does not include employees of the businesses who are not enrolled members of the Band.

40. The Coronavirus and its pernicious spread created inherently dangerous conditions where the Plaintiff's businesses and property within them were at immediate and imminent risk of exposure to the Coronavirus. This rendered most of the Plaintiff's businesses

untenantable and forced the Plaintiff to close them. Plaintiff's gas stations remained open, but saw significant reductions in business due to Coronavirus.

41. Based on the preceding conditions, and confirmed instances of infections near the businesses by persons who were likely to visit the businesses (or come into contact with persons who visited the businesses) it is likely that customers, employees, vendors, or other persons infected with or carrying Coronavirus particles entered the businesses, or that Coronavirus otherwise infected surfaces, air, or people at the businesses. This caused physical damage to or loss of property.

42. Under the Orders by recognized civil authorities and the ongoing and worsening pandemic, the Plaintiff was forced to close the Black Bear Casino Resort, Black Bear Golf Course, and Fond Du Luth Casino to the public on March 18, 2020, thereby prohibiting access to, use of, and operations at the businesses.

43. Under the Orders, customers were prohibited by social distancing guidelines from accessing and utilizing the Plaintiff's businesses, thereby prohibiting access to, use of, and operations at the businesses.

44. Under the Orders, the Plaintiff's businesses' employees were prohibited from traveling to work and from working in close proximity to each other, thereby prohibiting access to, use of, and operations at the Plaintiff's businesses. This includes, but is not limited to, social distancing requirements and other safety requirements that are not compatible with professional use of business facilities like kitchens, securities facilities, and storage areas.

45. As a result, most of the Plaintiff's businesses were rendered untenable and suffered and continue to suffer substantial lost business income and other financial losses. Those losses amount to millions of dollars.

46. The Plaintiff's businesses were forced to close early in the pandemic period following the Orders.

47. Even after the Plaintiff was able to re-open the Black Bear Casino Resort and Fond Du Luth Casino, it was physically deprived of its property. Specifically, the Plaintiff was forced to shut a portion of the gaming floor in the casinos to the public, and it was not allowed to use its dining facilities at full capacity. These physical deprivations further caused the Plaintiff to suffer a loss of business income.

48. These extraordinary losses of business income (and concern for their employees' welfare) are precisely why the Plaintiff took out an insurance policy with Defendants that included business interruption coverage, which were meant to cover these losses.

IV. The Plaintiff's Losses Are Covered Losses

49. The Plaintiff purchased an insurance policy from Defendants that included business interruption (and other related) insurance coverage. Business interruption policies promise to indemnify the policyholder for actual business losses incurred when business operations are suspended, interrupted, curtailed, when public access is prohibited because of direct physical loss or damage to the property, or by a civil authority order that restricts or prohibits access to the property.

50. The Plaintiff purchased an insurance policy from Defendants through Alliant Underwriting Solutions' Tribal Property Insurance Program (the "Policy"). The Policy covered Black Bear Casino Resort, Black Bear Golf Course, and Fond Du Luth Casino. The Policy is attached as **Exhibit 2**.

51. The Plaintiff has promptly and dutifully paid premiums and complied with all other elements of its agreements with Defendants.

52. In many countries, property insurance is sold on a specific peril basis. Such policies only cover losses from causes that are expressly covered like an earthquake, fire, or terrorist attack. Most property policies sold in the United States are all-risk property damage policies which cover losses from all causes that are not expressly excluded. Business interruption coverage is standard in most all-risk commercial property insurance policies.

53. The Policy is an all-risk property damage policy because its terms indicate that it covers all risks which can cause harm to physical property except for risks that are expressly and specifically excluded. Section IV.A., titled "Perils Covered," provides, "Subject to the terms, conditions and exclusions stated elsewhere herein, this Policy provides insurance against all risk of direct physical loss or damage occurring during the period of this Policy." *Id.* at 68.

54. The Policy provides business interruption coverage "[a]gainst loss resulting from interruption of business, services or rental value." *Id.* at 63. The loss must be "caused by direct physical loss or damage." *Id.* Under the Policy, in the event of such business interruption, the Defendants are obligated to pay "for the actual loss sustained by the Named Insured for gross earnings as defined herein and rental value as defined herein resulting from such interruption of business, services, or rental value; less all charges and expenses which do not necessarily continue during the period of restoration." *Id.* The Policy also covers "extra expenses" incurred "in order to continue as nearly as practicable the normal operation of the Named Insured's business." *Id.*

55. The Policy includes coverage for interruption by civil authority. "This Policy is extended to include the actual loss sustained by the Named Insured, as covered hereunder during the length of time, not exceeding 30 days, when as a direct result of damage to or destruction of property by a covered peril(s) occurring at a property located within a 10 mile radius of covered

property, access to the covered property is specifically prohibited by order of a civil authority."

Id. at 64.

56. The presence of the Coronavirus and the Orders prohibited certain physical access to, use of, and operations at and by the Plaintiff's businesses, their employees, and their customers. This includes, among other things, loss of the ability to offer the physical dining experience of eating at the restaurant, loss of the ability to offer physical access to the casino, loss of the ability to offer jet boat rentals, loss of the ability to offer RV park services, and use any of the physical property associated with these activities. As a result of the presence of the Coronavirus and the Orders, physical components of the Plaintiff's businesses became unusable, damaged, and/or lost the ability to generate income.

57. As a result of this physical loss or damage, Plaintiff's businesses were forced to close, lost business income, and suffered other related covered losses (including but not limited to extended business income and extra expenses). Plaintiff has suffered a direct physical loss of and damage to their property because Plaintiff has been unable to use its property for its intended purpose.

58. The losses are also covered by the Policy's coverage for Interruption by Civil Authority. The presence of COVID-19 resulted in and continues to result in direct physical loss, including but not limited to loss of use of properties, as well as direct physical damage to properties, and this direct physical loss and/or direct physical damage prompted the issuance of the Orders. Underscoring this, prior to the issuance of the Orders, government authorities had been limiting access to other properties on the basis of the Coronavirus, including (but not limited to) sporting arenas, concert venues, and other places where large numbers of people may gather.

59. The prohibitions and limitations imposed by the Orders prohibited access to, use of, and operations at and by the Plaintiff's businesses, their employees, and their customers. As a result of the Orders, components of the Plaintiff's businesses became unusable and/or lost the ability to generate income.

60. As a result, the Plaintiff lost business income and suffered other related covered losses (including but not limited to extended business income and extra expenses).

61. The Policy includes coverage for tax revenue interruption. "Except as hereinafter or heretofore excluded, this Policy insures against loss resulting directly from necessary interruption of sales, property or other tax revenue, including but not limited to Tribal Incremental Municipal Services Payments collected by or due the Named Insured caused by damage, or destruction by a peril not excluded from this Policy to property which is not operated by the Named Insured and which wholly or partially prevents the generation of revenue for the account of the Named Insured." *Id.* at 65.

62. COVID-19 and the associated closures and reductions in business resulted in the Plaintiff's collection of transient occupancy tax being wholly prevented. Significant reductions in sales at the Plaintiff's Fuel Marts due to COVID-19 resulted in Plaintiff's collection of alcohol and sales taxes being partially prevented.

63. The Policy also includes coverage for prevention of ingress or egress. "This Policy is extended to insure the actual loss sustained during the period of time not exceeding 30 days, when as a direct result of physical loss or damage caused by a covered peril(s) specified by this Policy and occurring at a property located within a 10 mile radius of covered property, ingress to or egress from the covered property covered by this Policy is prevented." *Id.* at 64.

64. The presence of COVID-19 has prevented and continues to prevent ingress to the Plaintiff's businesses.

65. COVID-19 is a peril covered under the Policy.

66. The Policy include certain exclusions to the business interruption coverage. The exclusions concern the cessation of leases, licenses, contracts, and orders and damage to media, records or exclusions. *Id.* at 66. Some business interruption policies include exclusions for losses due to viruses or pandemics, but the Policy at issue in this action does not. The Policy's General Conditions include additional exclusions, but do not exclude losses due to viruses or pandemics.

67. The Insurance Services Office ("ISO") is a company that drafts standard policy language for use in insurance contracts used by insurers around the country.

68. In 2006, the ISO drafted a new endorsement, CP 01 40 07 06, acknowledging that claims for business interruption losses would be filed under existing policy language for losses resulting from the presence of disease-causing agents. Endorsement CP 01 40 07 06, which other insurers have since incorporated in policies, provides that the insurer "will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."

69. When preparing CP 01 40 07 06, ISO, circulated a statement to state insurance regulators that included the following acknowledgement:

Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses. Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing

on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case.

70. The insurance industry has thus recognized that the presence of virus or disease can constitute physical damage to property since at least 2006.

71. Defendants intentionally chose not to include CP 01 40 07 06 or similar language in the Policy.

72. The Policy contains exclusions for any loss caused by acts of biological terrorism, including “malicious use of pathogenic or poisonous biological or chemical materials.” *Id.* at 70. These exclusions are not applicable to the losses suffered by the Plaintiff described herein.

73. Defendants chose not to include similar language in the Policy that would cover catastrophic disease outbreaks that are unrelated to terrorism, like pandemics.

74. Defendants are aware of contractual force majeure clauses that suspend duties to perform in the event of a global pandemic.

75. Defendants chose not to use force majeure clauses in the Policy.

76. In mid-2020, Defendants added a “Communicable Disease Exclusion” to the Policy. This exclusion states:

This policy, subject to all applicable terms, conditions and exclusions, covers losses attributable to direct physical loss or physical damage occurring during the period of insurance. Consequently and notwithstanding any other provision of this policy to the contrary, this policy does not insure any loss, damage, claim, cost, expense or other sum, directly or indirectly arising out of, attributable to, or occurring concurrently or in any sequence with a Communicable Disease or the fear or threat (whether actual or perceived) of a Communicable Disease.

Exhibit 3.

77. The fact that Defendants chose to add the Communicable Disease Exclusion to the Policy after the spread of COVID-19 in early 2020 further demonstrates their awareness that the Policy covers damage or loss caused by the Coronavirus, as Plaintiff submits is the case here.

V. Defendants' Denial of the Plaintiff's Insurance Claims

78. On or around February 22, 2021, the Plaintiff requested coverage under the Policy from Crawford & Company ("Crawford"), the claims adjuster authorized to represent Defendants in the investigation and adjustment of any loss or damage under the Policy. *See id.* at 82.

79. Crawford requested that the Plaintiff fill out and submit a "COVID Claim Questionnaire," which the Plaintiff did on or around March 12, 2021. In its formal request for coverage, the Plaintiff asserted that it "suffered a physical loss of its premises due to the pandemic." **Exhibit 4** at 2.

80. On or around July 6, 2021, Crawford informed the Plaintiff that "there is no . . . potential source of coverage in [the Policy] for [the Band's] losses." **Exhibit 5** at 3. The letter further stated that "Fond du Lac Management's claim for loss of income is not covered under the Policy" because "there is no evidence that the closure of the casinos and golf course or the continued reduced capacity issues at the casinos were the result of physical loss or damage to property." *Id.* at 9–10. Crawford concluded that the "denial" of coverage would "remain effective unless we notify you in writing of a change in our position." *Id.* at 10.

81. The July 6, 2021 denial letter requested that the Plaintiff provide additional information regarding its "claim for accidental contamination coverage." *Id.* at 9. The Plaintiff provided the requested information on or around July 27, 2021. **Exhibit 6**. On or around March 15, 2022, Crawford issued a written denial of the Plaintiff's claim for accidental contamination coverage. **Exhibit 7**.

82. Defendants accepted the premiums paid by the Plaintiff with no intention of providing lost business income, physical damage, civil authority, or other applicable coverage for claims like those submitted by the Plaintiff and denied by Defendant.

83. Defendants' rejection of the Plaintiff's claims was part of a policy by Defendants to limit their losses during this pandemic, notwithstanding that the Policy provides coverage for losses due to loss of use of property and from closure orders issued by civil authorities (among other coverage).

84. Although industry trade groups have argued that insurance companies do not have the funds to pay claims related to the Coronavirus and will require government assistance, the reality is that insurers are simply trying to minimize their exposure. "According to data from ratings firm A.M. Best Co., the insurance industry as a whole has \$18.4 billion in net reserves for future payouts."⁵

85. Defendants appear to be categorically denying claims brought by businesses ordered to close following the Coronavirus, including those brought by the Plaintiff. This deliberate strategy and common policy, and the insurance industry's public requests for government assistance, suggest strongly that their true goal is minimizing payments by any means necessary.

86. Defendants' wrongful denials of the Plaintiff's claims were not isolated incidents. Rather, on information and belief, Defendants have engaged in the same misconduct, alleged herein with respect to the Plaintiff, in connection with claims submitted by numerous of

⁵ Leslie Scism, "U.S. Businesses Gear Up for Legal Disputes with Insurers over Coronavirus Claims," *Wall Street Journal* (Mar. 6, 2020), <https://www.wsj.com/articles/u-s-businesses-gear-up-for-legal-disputes-with-insurers-over-coronavirus-claims-11583465668> (last visited June 24, 2022).

Defendants' insureds who have suffered losses related to the Coronavirus pandemic and submitted claims which were categorically denied.

87. Plaintiff's claims arise from a single course of conduct by Defendants: systematic and blanket refusal to provide any coverage for business losses related to the COVID-19 pandemic and the related actions taken by civil authorities to suspend business operations.

88. Defendants' wrongful conduct alleged herein has caused significant damage, and if left unchecked will continue to cause significant damage to the Plaintiff.

89. Defendants' categorical treatment, failure to investigate in good faith, and denial of Plaintiff's claims appears to be part of a broader strategy being employed by the insurance industry generally, to broadly deny claims for business interruption coverage related to the Coronavirus pandemic, as has been widely reported by the media and resulted in numerous lawsuits brought by businesses against property insurance companies throughout the country.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

Breach of Contract

90. Plaintiff re-alleges and incorporates by reference into this cause of action all allegations set forth in paragraphs 1–89 of this Complaint.

91. At all times relevant herein, Plaintiff has paid all premiums and fulfilled or performed all obligations it has to Defendants, including those under the relevant insurance policy described in this Complaint.

92. Defendants had contractual duties to provide Plaintiff with insurance coverage, as alleged herein.

93. By their conduct alleged herein, including denying Plaintiff's insurance claims and refusing to perform under the contract, Defendants breached those duties.

94. As a result of Defendants' breaches, Plaintiff has been damaged in the amount of coverage to which they are entitled their insurance agreements, the premiums they paid, and in an amount to be proved at trial. Plaintiffs seek compensatory damages with interest thereon.

95. Plaintiff has been unable to mitigate the losses of income.

SECOND CAUSE OF ACTION
Breach of Covenant of Good Faith and Fair Dealing

96. Plaintiff re-alleges and incorporates by reference into this cause of action all allegations set forth in paragraphs 1–89 of this Complaint.

97. When Defendants entered their agreements with Plaintiff, Defendants undertook and were bound to covenants implied by law that they would deal fairly and in good faith with Plaintiff, and not engage in any acts, conduct, or omissions that would diminish the rights and benefits due Plaintiff or defeat the reasonable expectations of Plaintiff under their agreements with Defendants.

98. By their conduct alleged herein, Defendants breached the implied covenant of good faith and fair dealing arising out of their agreements with Plaintiff including but not limited to by: (a) unreasonably and in bad faith denying Plaintiff insurance coverage to which it is entitled; (b) failing and refusing to perform a fair, objective, good faith, and thorough investigation of the claims; (c) asserting coverage defenses that were legally and/or factually invalid and thereby delaying resolution of Plaintiff's claims; and (d) placing unduly restrictive interpretations on the terms of its insurance policy for the purpose of denying coverage due.

99. In committing their breaches, Defendants have acted with malice, shown a reckless and outrageous indifference to a highly unreasonable risk of harm, and acted with a conscious indifference to Plaintiff's rights and welfare, thereby entitling Plaintiff to punitive and exemplary damages against the Defendants. As a direct and proximate result of the above-

referenced breach, Plaintiff has had to retain attorneys to enforce their rights to the insurance coverage to which they are entitled and have thereby been injured and damaged.

100. Plaintiff, therefore, is entitled to recover and seek in connection with this Cause of Action: (a) an award of general damages and other monetary damages, including all foreseeable consequential and incidental damages for diminution in value, loss of use, and other incidental damages and out-of-pocket expenses, plus interest, in an amount to be determined at trial; (b) punitive and exemplary damages in an amount to be determined at trial; (c) costs of suit; and (d) reasonable attorney's fees in connection with this action.

THIRD CAUSE OF ACTION
Declaratory Relief

101. Plaintiff re-alleges and incorporates by reference into this cause of action all allegations set forth in paragraphs 1–89 of this Complaint.

102. The Court may declare rights, duties, statuses, and other legal relations, regardless of whether further relief is or could be claimed.

103. An actual controversy has arisen between Plaintiff and Defendants as to their respective rights and duties under Plaintiff's insurance policy.

104. Resolution of the parties' respective rights and duties under Plaintiff's insurance policy by declaration of the Court is necessary, as there exists no adequate remedy at law.

105. Plaintiff alleges and contends, with respect to Plaintiff's Civil Authority coverage, that the above-described orders trigger that coverage because (a) they are orders of a civil authority, (b) the orders specifically prohibit access to the premises in question, including prohibiting potential on-premises customers and workers from accessing the premises in question, (c) such access prohibition has been continuous and ongoing since the orders were issued, such that the prohibited access has not subsequently been permitted, (d) the orders

prohibit access as the direct result of direct physical loss of or damage to property, other than at the premises in question, caused by or resulting from a covered peril (e) no coverage exclusions or limitations apply to exclude or limit coverage, (f) Plaintiff has suffered actual and covered loss of Business Income in an amount to be determined at trial, and (g) coverage should begin as of dates to be determined at trial.

106. Plaintiff alleges and contends that Plaintiff's lost Business Income coverage is triggered because (a) Plaintiff has sustained actual loss of Business Income due to the closure of its businesses and reduction in sales at its gas stations, (b) this loss has been and is caused by direct physical loss of or physical damage to property at the premises in question, including personal property in the open (or in a vehicle) within 10 miles of the premises in question, due to the presence of Coronavirus, (c) the presence of Coronavirus is a Covered Cause of Loss, and (d) some or all of the periods of the Plaintiff's closures and other losses are within the period of restoration under their insurance policy.

107. Plaintiff alleges and contends that Plaintiff's tax revenue interruption coverage is triggered because (a) Plaintiff's generation of tax revenue has been wholly or partially prevented, and (b) said loss is the result of damage caused by the presence of Coronavirus, which is a covered peril.

108. Plaintiff alleges and contends that Plaintiff's Ingress/Egress coverage is triggered because (a) Plaintiff has sustained actual loss due to closure because of ingress to its businesses being prevented, (b) said loss is the direct result of physical loss or damage caused by the presence of Coronavirus, which is a covered peril, and (c) Coronavirus has been present within a 10 mile radius of Plaintiff's businesses, preventing ingress into said businesses.

109. Plaintiff alleges and contends that exclusions concerning “contamination” do not apply to COVID-19 and the causes of loss that harmed Plaintiff and that there are no exclusions which apply to any of the above coverage.

110. Plaintiff alleges and contends that Defendants wrongly denied coverage with respect to all the foregoing provisions, as to Plaintiff.

111. Upon information and belief, Plaintiff alleges that Defendants dispute and deny each of Plaintiff’s contentions set forth in this Cause of Action.

112. Plaintiff, therefore, seeks a declaratory judgment regarding each of the contentions set forth in this Cause of Action. A declaratory judgment determining that Plaintiff is due coverage under its insurance policy, as set forth above, will help to ensure the survival of these businesses during this prolonged closure made necessary by the orders and by the presence of Coronavirus around the businesses during this global pandemic.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment in their favor and against Defendants, as follows:

- a. For a declaration adopting each of Plaintiff’s contentions set forth in the above Cause of Action for Declaratory Relief;
- b. For injunctive relief enjoining and restraining Defendants' unlawful, unfair, and/or deceptive conduct as alleged herein, including but not limited to its unlawful, unfair, and/or deceptive business practices and its wrongful denials of coverage under Plaintiff’s insurance policy;
- c. For specific performance of the insurance policy;
- d. For general and compensatory damages, restitution, and disgorgement, in an amount to be determined at trial;

- e. For exemplary and punitive damages in an amount to be determined at trial;
- f. For costs of suit;
- g. For reasonable attorney's fees incurred in this action pursuant to statute or as otherwise recoverable;
- h. For pre-judgment and post-judgment interest; and
- i. For such other relief as the Court may deem proper.

JURY TRIAL DEMAND

Plaintiff demands a trial by jury on all issues properly triable to a jury.

Dated: June 29, 2022

/s/ Dan Drachler
Dan Drachler

Dan Drachler (State Bar No. 0205849)

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* *Pro hac vice* application forthcoming

Attorneys for Plaintiff

ACKNOWLEDGMENT

The undersigned acknowledges that: I am familiar with the terms of Minn. Stat. § 549.211, and that costs, disbursements and reasonable attorney and witness fees may be awarded to the opposing party pursuant to subd. 2 in the event a party or an attorney acts in bad faith; asserts a claim or defense that is frivolous and that is costly to another party; asserts an unfounded position solely to delay the order and course of the proceedings or to harass; or commits a fraud upon the court.

Dated: June 29, 2022

/s/ Dan Drachler
Dan Drachler

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