

FAXED

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

LATHAM & WATKINS LLP
Brook B. Roberts (SBN: 214794)
(brook.roberts@lw.com)
12670 High Bluff Drive
San Diego, California 92130
Telephone: (858) 523-5400
Facsimile: (858) 523-5450

Attorneys for Plaintiffs
[Additional Counsel Listed on Signature Page]

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

MAR 09 2021

BY *[Signature]*
DEILONZO BOARD, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

SAN MANUEL BAND OF MISSION
INDIANS;
SAN MANUEL ENTERTAINMENT
AUTHORITY,

Plaintiffs,

v.

WESTPORT INSURANCE
CORPORATION;
CRUM & FORSTER SPECIALTY
INSURANCE COMPANY;
WESTERN WORLD INSURANCE
COMPANY;
IRONSHORE SPECIALTY INSURANCE
COMPANY;
QBE SPECIALTY INSURANCE
COMPANY;
STARR SURPLUS LINES INSURANCE
COMPANY;
ATEGRITY SPECIALTY INSURANCE
COMPANY;
TOKIO MARINE AMERICA INSURANCE
COMPANY;
LANDMARK AMERICAN INSURANCE
COMPANY;
THE PRINCETON EXCESS AND
SURPLUS LINES INSURANCE
COMPANY;
HOMELAND INSURANCE COMPANY OF
NEW YORK;
ALLIED WORLD NATIONAL
ASSURANCE COMPANY;
EMPIRE INDEMNITY INSURANCE

CASE NO. **CIV SB 2106759**
**COMPLAINT FOR DECLARATORY
RELIEF AND BREACH OF CONTRACT**

Jury Trial Demanded

SC-2021-17859 08
\$435.00

1 COMPANY;
2 CERTAIN UNDERWRITERS AT
3 LLOYD'S, LONDON AS SUBSCRIBED TO
4 POLICY NUMBERS PTNAM1903486,
5 PTNAM1901045, PTNAM1903490,
6 PTNAM1902551, AND PTNAM1901055—
7 PTNAM1903491;
8 SYNDICATE NO. 1414 ASC;
9 SYNDICATE NO. 1919 APL;
10 SYNDICATE NO. 2623 AFB;
11 SYNDICATE NO. 2988 BRIT;
12 SYNDICATE NO. 4444 CNP;
13 LIRMA H5100;
14 SYNDICATE NO. 0510 KLN;
15 SYNDICATE NO. 2003 XLC;
16 SYNDICATE NO. 1200 AMA;
17 SYNDICATE NO. 1183 TAL;
18 SYNDICATE NO. 0609 AUW;
19 SYNDICATE NO. 0382 HDU;
20 SYNDICATE NO. 2015 CHN;
21 SYNDICATE NO. 4020 ARK;
22 SYNDICATE NO. 1886 QBE;
23 SYNDICATE NO. 3902 NOA;
24 DOES 1 THROUGH 100,

Defendants.

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 This suit concerns the refusal by certain insurance companies to comply with their
2 obligations to Plaintiffs the San Manuel Band of Mission Indians (the “Tribe”) and the San Manuel
3 Entertainment Authority (“SMEA” and, collectively, the “Plaintiffs”). In exchange for substantial
4 premiums, the Defendant All Risk Insurers (as defined below) issued insurance policies that
5 provided “*all risk*” coverage for the Tribe and its insured locations, including the San Manuel
6 Casino (“the Casino”). This is the broadest form of first-party insurance coverage available in the
7 marketplace. Under these all risk policies, the insurers pledged to cover risks “except those
8 excluded under the terms of the insuring contract.” *Vardanyan v. AMCO Ins. Co.*, 243 Cal. App.
9 4th 779, 792 n.3 (2015). Put differently, “the limits of coverage are defined by the exclusions.”
10 *Id.*

11 Repudiating the broad coverage promised to the Tribe, the Defendant All Risk Insurers
12 have refused to pay for the business interruption at the Casino caused by the imminent or actual
13 property damage from the ubiquitous presence of the novel coronavirus formally known as SARS-
14 CoV-2 and the disease it causes: COVID-19. While damage from the spread of SARS-CoV-2 and
15 the COVID-19 pandemic have ravaged every aspect of the economy, perhaps no sector has been
16 hit harder than gaming and hospitality, which requires the very type of indoor, in-person
17 congregation and interaction that closure orders and other limitations prohibit. As a result, the
18 Tribe has suffered significant business interruption losses at the Casino and its related properties,
19 which through the course of the pandemic have mounted to more than \$300 million and are
20 continuing. Yet despite the Tribe paying more than \$6 million in premiums to secure a top of the
21 line, all-risk policy portfolio affording more than \$1.6 billion in coverage limits, the Defendant All
22 Risk Insurers refused to honor their obligations when the Tribe needed its insurers the most. To
23 date, the insurers have not paid a single penny of the Tribe’s losses. This failure has had significant
24 financial ramifications for the Tribe, as Casino gaming revenue represents the Tribe’s most
25 valuable business asset and the primary means to meet the objectives for the tribal government and
26 its citizens.

27 Accordingly, for their causes of action against the defendant insurers, Plaintiffs allege as
28 follows:

1 5. Plaintiffs did not, however, stand idle during this shutdown period, working instead
2 to create a reopening plan for operations at the Casino during the COVID-19 pandemic to mitigate
3 the physical loss or damage to its property and maintain the health and safety of its employees and
4 patrons. These guidelines—including reduced capacity, cleaning and sanitation protocols, health
5 screenings, social distancing and face covering, and other safety procedures—have been in place
6 at the Casino since it reopened for limited operations in June 2020, and are continually updated
7 with modifications as new information arises about SARS-CoV-2 and its impacts to the Casino’s
8 intended use and purpose.

9 6. Indeed, the Casino’s reopening has received significant praise in the industry for
10 being “top to bottom” one of the best and safest for entertainment venues nationwide.¹ The Casino
11 became Sharecare Health Security VERIFIED® with Forbes Travel Guide based on the property’s
12 compliance with expert-validated best practices that minimize the risk and impact of SARS-CoV-
13 2 and COVID-19.²

14 7. The Casino continues to take a vigilant stance on providing a safe physical
15 environment for its guests and team members by implementing health checks, incorporating a team
16 of hundreds of health screeners, and employing guest safety concierges to enforce mask wearing
17 and social distancing. Other steps, including closing restaurants for in service dining (or altogether
18 in some cases), closing or reducing occupancy in retail stores, converting the Casino to a non-
19 smoking facility, reducing the number of available gaming spaces in both slots and table games,
20 and reducing overall occupancy of the Casino, greatly affected Casino operations. Yet even
21 operating with these significant limitations and adopting world-class mitigation techniques, the
22 risk and impact of SARS-CoV-2 and COVID-19 persists.

23 8. As of this filing, Plaintiffs’ estimated losses stemming from the presence of SARS-
24 CoV-2 and COVID-19—first from the compulsory closure of the Casino and then the subsequent
25 implementation of restricted and limited operations—exceed \$300 million (along with related
26

27 ¹ See [https://www.reviewjournal.com/business/casinos-gaming/is-nevada-the-gold-standard-
for-casino-coronavirus-response-2068397/](https://www.reviewjournal.com/business/casinos-gaming/is-nevada-the-gold-standard-for-casino-coronavirus-response-2068397/)

28 ² http://content.sanmanuel.com/sites/default/files/2021-01/forbes_verified_hotelpr_011121.pdf

1 mitigation expenses), and will continue to mount until the Casino can resume its normal business
2 activity.

3 9. To protect itself from these very types of catastrophic business interruption losses,
4 the Tribe bought insurance from several companies (the “All Risk Insurers”) that provide the Tribe
5 and its affiliates with \$1.6 billion in total coverage under a group of similar, but not identical, “all
6 risk” policies (the “All Risk Policies”) that specifically cover the Casino and other properties.
7 Coverage at this amount and under such a broad policy is very expensive: the Tribe paid over \$6
8 million in premiums for the policy year of April 1, 2019 to April 1, 2020, and over \$43 million for
9 coverage over the last ten years.³

10 10. The purpose and nature of the business interruption coverage provided in “all risk”
11 property policies is to protect policyholders (like the Tribe) against losses arising from an inability
12 to continue normal business operations due to circumstances precisely like those presented by the
13 COVID-19 pandemic, unless this type of peril is expressly excluded. *See Leslie Salt Co. v. St.*
14 *Paul Mercury Ins. Co.*, 637 F.2d 657, 660 (9th Cir. 1981) (“[R]ecovery under an ‘all risk’ policy
15 will be allowed for all fortuitous losses not resulting from misconduct or fraud, unless the policy
16 contains a specific provision expressly excluding the loss from coverage.”). When the Tribe
17 sustains physical loss or damage to its properties causing business interruption losses, the All Risk
18 Policies pay up to the respective policy limits to preserve the continuity of the Tribe’s business.
19 Yet defendants (collectively, the “Defendant All Risk Insurers”) have steadfastly refused to pay
20 for these devastating losses.

21 11. Plaintiffs are entitled to indemnification under many of the All Risk Policies’ broad
22 and overlapping coverages because SARS-CoV-2 and COVID-19 cause physical loss or damage
23 of the type insured. It is widely accepted by the scientific community that two of the primary ways
24 COVID-19 spreads involve transmission from an infected person to tangible objects to another
25 person, or from infected persons to other persons through the air, with particular susceptibility for
26 transmission occurring in indoor spaces where large numbers of people are present. The presence
27

28 ³ In April 2020, the Tribe renewed its insurance at a comparable level of policy limits for
approximately \$8.7 million in premiums, an increase of 15% from the previous policy period.

1 or suspected presence of SARS-CoV-2 and COVID-19 causes physical loss and damage because,
2 among other things, physical droplets containing the SARS-CoV-2 reside in (and attach to) the air
3 and on the fixtures and surfaces of the Casino and other properties, thus altering, damaging, and
4 rendering the physical property unfit and unsafe for its intended use if not mitigated.

5 12. These risks associated with viruses, communicable diseases, and pandemics have
6 been known to the insurance industry for a century and have been evident in recent decades through
7 outbreaks and pandemics involving SARS, MERS, H1N1 and Zika. Because these risks are well
8 known, there are exclusions in common usage in the insurance industry that specifically reference
9 losses caused by viruses, communicable diseases and pandemics. In fact, many of the most
10 common “boilerplate” insurance policies covering businesses include this exclusionary language,
11 which largely prevent recovery due to losses incurred by pandemics such as the one caused by
12 SARS-CoV-2.

13 13. Here, however, the Tribe’s “all risk” policy wording is a unique or “manuscripted”
14 program designed specifically for the risks associated with the Tribe’s property (the “Policy
15 Form”). The Policy Form includes no such virus or communicable disease exclusion. All of the
16 highly sophisticated insurance companies issuing the All Risk Policies had multiple opportunities
17 to review the Policy Form. Each insurance company could either sign on to cover Plaintiffs under
18 the Policy Form wording or make changes, including carving out coverage through exclusions,
19 creating policy sublimits, or adding, editing, or eliminating endorsements.

20 14. Indeed, anticipating the type of risk, loss, and damages posed by a virus such as
21 SARS-CoV-2 or the COVID-19 pandemic, two of the Tribe’s All Risk Insurers added
22 endorsements—modifying the Policy Form—to exclude losses caused by a virus or communicable
23 disease. Those two All Risk Insurers are not named here as defendants. All of the Tribe’s other
24 All Risk Insurers did not include such exclusions and, therefore, expressly agreed to cover such
25 losses as part of their insurance policies.

26 15. The Tribe bought \$1.6 billion of insurance for business income losses precisely to
27 cover catastrophic situations at its properties. Despite the obvious purpose and intent of the All
28 Risk Policies and the unique coverages for lost income in those policies, Defendant All Risk

1 Insurers have refused to honor their obligations and pay for the Tribe's devastating losses. This
2 ongoing failure has compelled Plaintiffs to commence this Lawsuit.

3
4 **THE PARTIES**

5 16. Plaintiff San Manuel Band of Mission Indians is a federally recognized Indian tribe
6 located on the San Manuel Indian Reservation near Highland, California. The Tribe exercises its
7 inherent sovereign right of self-governance and provides essential services for its citizens by
8 building infrastructure, maintaining civil services; and promoting social, economic and cultural
9 development. As Indigenous people of the San Bernardino highlands, passes, valleys, mountains
10 and high deserts, the Tribe has called this area home since time immemorial and is committed to
11 remaining a productive community partner in the San Bernardino region.

12 17. Plaintiff San Manuel Entertainment Authority is an unincorporated instrumentality
13 of the Tribe. Under the San Manuel Entertainment Authority Act, the SMEA exercises the Tribe's
14 ownership and management of the San Manuel Casino and related businesses.

15 18. Upon information and belief, Defendant Westport Insurance Corporation
16 ("Westport") is an insurance company organized and existing under the laws of the State of
17 Missouri with its principal place of business in Missouri. Defendant Westport issued an all-risk
18 insurance policy covering Plaintiffs and at issue in this lawsuit, policy number NAP 0452276 09.

19 19. Upon information and belief, Defendant Crum & Forster Specialty Insurance
20 Company ("C&F") is an insurance company organized and existing under the laws of the State of
21 Delaware with its principal place of business in New Jersey. Defendant C&F issued an all-risk
22 insurance policy covering Plaintiffs and at issue in this lawsuit, policy number SRS-100102.

23 20. Upon information and belief, Defendant Western World Insurance Company
24 ("Western World") is an insurance company organized and existing under the laws of the State of
25 New Hampshire with its principal place of business in New Jersey. Defendant Western World
26 issued an all-risk insurance policy covering Plaintiffs and at issue in this lawsuit, policy number
27 SSC0000093.

28 21. Upon information and belief, Defendant Ironshore Specialty Insurance Company

1 (“Ironshore”) is an insurance company organized and existing under the laws of the State of
2 Arizona with its principal place of business in Massachusetts. Defendant Ironshore issued an all-
3 risk insurance policy covering Plaintiffs and at issue in this lawsuit, policy number 001965605—
4 001965705.

5 22. Upon information and belief, Defendant QBE Specialty Insurance Company
6 (“QBE”) is an insurance company organized and existing under the laws of the State of North
7 Dakota with its principal place of business in Wisconsin. Defendant QBE issued an all-risk
8 insurance policy covering Plaintiffs and at issue in this lawsuit, policy number CFE0933521.

9 23. Upon information and belief, Defendant Starr Surplus Lines Insurance Company
10 (“Starr”) is an insurance company organized and existing under the laws of the State of Texas with
11 its principal place of business in New York. Defendant Starr issued an all-risk insurance policy
12 covering Plaintiffs and at issue in this lawsuit, policy number SLSTPTY11159019.

13 24. Upon information and belief, Defendant Ategrity Specialty Insurance Company
14 (“Ategrity”) is an insurance company organized and existing under the laws of the State of
15 Delaware with its principal place of business in Arizona. Defendant Ategrity issued an all-risk
16 insurance policy covering Plaintiffs and at issue in this lawsuit, policy number 01-B-XP-
17 P00000187-0.

18 25. Upon information and belief, Defendant Tokio Marine America Insurance
19 Company (“Tokio Marine”) is an insurance company organized and existing under the laws of the
20 State of New York with its principal place of business in New York. Defendant Tokio Marine
21 issued an all-risk insurance policy covering Plaintiffs and at issue in this lawsuit, policy number
22 LCP6480538-07.

23 26. Upon information and belief, Defendant Landmark American Insurance Company
24 (“Landmark”) is an insurance company organized and existing under the laws of the State of New
25 Hampshire with its principal place of business in Georgia. Defendant Landmark issued an all-risk
26 insurance policy covering Plaintiffs and at issue in this lawsuit, policy number LHD424346.

27 27. Upon information and belief, Defendant The Princeton Excess and Surplus Lines
28 Insurance Company (“Princeton”) is an insurance company organized and existing under the laws

1 of the State of Delaware with its principal place of business in New Jersey. Defendant Princeton
2 issued an all-risk insurance policy covering Plaintiffs and at issue in this lawsuit, policy number
3 78-A3-XP-0000455-02.

4 28. Upon information and belief, Defendant Homeland Insurance Company of New
5 York (“OneBeacon”) is an insurance company organized and existing under the laws of the State
6 of New York with its principal place of business in Minnesota. Defendant OneBeacon issued an
7 all-risk insurance policy covering Plaintiffs and at issue in this lawsuit, policy number 795009536-
8 0000.

9 29. Upon information and belief, Defendant Allied World National Assurance
10 Company (“Allied World”) is an insurance company organized and existing under the laws of the
11 State of New Hampshire with its principal place of business in New York. Defendant Allied World
12 issued an all-risk insurance policy covering Plaintiffs and at issue in this lawsuit, policy number
13 0307-4360-1N.

14 30. Upon information and belief, Defendant Empire Indemnity Insurance Company
15 (“Arrowhead”) is an insurance company organized and existing under the laws of the State of
16 Oklahoma with its principal place of business in Oklahoma. Defendant Arrowhead issued an all-
17 risk insurance policy covering Plaintiffs and at issue in this lawsuit, policy number XPP0153073.

18 31. Upon information and belief, Defendant Certain Underwriters at Lloyd’s, London
19 (“Lloyd’s”) is an unincorporated association organized under the laws of Great Britain for
20 providing infrastructure for the international insurance market.

21 32. Upon information and belief, Lloyd’s itself does not insure any risk, but rather, it
22 consists of individual underwriters known as “members” or “syndicates” that assume all or a
23 portion of the risk underwritten. Upon information and belief, the members are either individuals
24 or corporations, with different or multiple residences or principal places of business.

25 33. Seventeen syndicates at Lloyd’s have subscribed to the All Risk Policies at issue in
26 this case. These syndicates have subscribed to policy numbers PTNAM1903486,
27 PTNAM1901045, PTNAM1903490, PTNAM1902551, and PTNAM1901055—
28 PTNAM1903491. All have given the following address for service of suit in the United States:

1 Lloyd's America, Inc., Attn: Legal Department, 280 Park Ave., East Tower, 25th Floor, New York,
2 NY 10017

3 34. Upon information and belief, Certain Underwriters at Lloyd's, London, known as
4 Syndicate No. 1414 ASC ("Ascot") is a syndicate member of Lloyd's.

5 35. Upon information and belief, Certain Underwriters at Lloyd's, London, known as
6 Syndicate No. 1919 APL ("Apollo") is a syndicate member of Lloyd's.

7 36. Upon information and belief, Certain Underwriters at Lloyd's, London, known as
8 Syndicate No. 2623 AFB ("Beazley") is a syndicate member of Lloyd's.

9 37. Upon information and belief, Certain Underwriters at Lloyd's, London, known as
10 Syndicate No. 2988 BRIT ("Brit") is a syndicate member of Lloyd's.

11 38. Upon information and belief, Certain Underwriters at Lloyd's, London, known as
12 Syndicate No. 4444 CNP ("Canopus") is a syndicate member of Lloyd's.

13 39. Upon information and belief, Certain Underwriters at Lloyd's, London, known as
14 LIRMA H5100 ("HCC") is a syndicate member of Lloyd's.

15 40. Upon information and belief, Certain Underwriters at Lloyd's, London, known as
16 Syndicate No. 0510 KLN ("Tokio") is a syndicate member of Lloyd's.

17 41. Upon information and belief, Certain Underwriters at Lloyd's, London, known as
18 Syndicate No. 2003 XLC ("XL") is a syndicate member of Lloyd's.

19 42. Upon information and belief, Certain Underwriters at Lloyd's, London, known as
20 Syndicate No. 1200 AMA ("Argo") is a syndicate member of Lloyd's.

21 43. Upon information and belief, Certain Underwriters at Lloyd's, London, known as
22 Syndicate No. 1183 TAL ("Talbot") is a syndicate member of Lloyd's.

23 44. Upon information and belief, Certain Underwriters at Lloyd's, London, known as
24 Syndicate No. 0609 AUW ("Atrium") is a syndicate member of Lloyd's.

25 45. Upon information and belief, Certain Underwriters at Lloyd's, London, known as
26 Syndicate No. 0382 HDU ("CNA") is a syndicate member of Lloyd's.

27 46. Upon information and belief, Certain Underwriters at Lloyd's, London, known as
28 Syndicate No. 2015 CHN ("Channel") is a syndicate member of Lloyd's.

