Hon. Catherine Shaffer
Noted for Hearing: August 27, 2021, 9:00 a.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

SNOQUALMIE ENTERTAINMENT AUTHORITY d/b/a SNOQUALMIE CASINO and SACRED FALLS LLC d/b/a SALISH LODGE & SPA, Plaintiffs, v. AFFILIATED FM INSURANCE COMPANY, Defendant.	NO. 21-2-03194-0 SEA PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: COVERAGE GRANT

I. INTRODUCTION

Plaintiffs Snoqualmie Entertainment Authority and Sacred Falls LLC (collectively, "Snoqualmie") own and operate the Snoqualmie Casino and the Salish Lodge & Spa. Snoqualmie suffered devastating business interruption losses over the past 14 months after it was unable to host customers on its properties due to Washington's governmental response and the Snoqualmie Indian Tribe's governmental response to the COVID-19 pandemic. Defendant Affiliated FM Insurance Company ("AFM") has denied coverage for Snoqualmie's business interruption losses under its insurance policy, claiming that Snoqualmie's coverage is not

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triggered because it did not incur "physical loss or damage" when the closure orders forced the Casino and Lodge to close their doors to the public.

Snoqualmie brings this motion for partial summary judgment for a ruling on the threshold issue of whether Snoqualmie suffered a "physical loss" because of the COVID-19 closure orders that triggers coverage for its business interruption losses. Snoqualmie is entitled to a ruling as a matter of law on this narrow issue for the following reasons:

- Washington law requires insuring agreements to be liberally construed for the purpose of providing maximum coverage to the insured. To trigger the insuring agreement, the insured does not need to show that its interpretation is any more reasonable than the insurer's, but only that the policy language is susceptible to more than one reasonable interpretation.
- Snoqualmie's interpretation of the undefined phrase "all risks of physical loss or damage" is reasonable according to the "plain, ordinary and popular meaning" of those terms as understood by the average purchaser of insurance. Consistent with the dictionary definition of each word, the phrase "all risks of physical loss or damage" reasonably includes the risk that Snoqualmie be deprived of the ability to use its physical space for its intended function of hosting and serving customers on its premises.
- The only two Washington state courts to have addressed this issue in the context of COVID-19 closure orders have agreed that the policy interpretation presented by the insureds—which is the same as Snoqualmie's interpretation here—is reasonable and consistent with Washington law.

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- AFM's anticipated reliance on out-of-state and federal court decisions does not change the conclusion that, under applicable Washington law, Snoqualmie sustained a "physical loss."

For these reasons, described in further detail below, it is reasonable to interpret the phrase "all risks of physical loss or damage" to include the risk that Snoqualmie be deprived of the ability to use its physical property for its intended function of hosting and serving customers on the premises. Because this is precisely what occurred when the State and Tribal governmental closure orders forced Snoqualmie's properties to close their doors to the public, Snoqualmie asks the Court to grant partial summary judgment in its favor on this narrow, threshold issue and hold that the Policy's insuring agreement is triggered by the "physical loss" to Snoqualmie's properties as a result of the closure orders.

II. FACTS

A. The Plaintiffs

Plaintiff Snoqualmie Entertainment Authority is an unincorporated governmental component and a subordinate instrumentality of the Snoqualmie Indian Tribe ("Tribe"), a federally-recognized sovereign Indian tribe and signatory to the Treaty of Point Elliott of 1855, with reserved rights thereunder, that is formed under the laws of the Tribe. Declaration of Mary Lou Patterson at ¶ 2 ("Patterson Decl."). The Snoqualmie Entertainment Authority wholly owns and operates, and does business as, among other businesses and enterprises, the Snoqualmie Casino ("Casino"). *Id.* The Casino is a Tribal business enterprise located on the Tribe's Reservation in King County, Washington. *Id.* at ¶ 3. The 170,000 square-foot Casino features eight restaurants, lounges and bars, an 11,000 square-foot ballroom, and a 51,000 square-foot gaming floor. *Id.*

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Plaintiff Sacred Falls LLC, a Washington State LLC managed by the Tribe, owns, operates, and does business as the Salish Lodge & Spa ("Lodge"), which is located on Tribally-owned fee land that is sacred to the Tribe, but is not located on the Tribe's Reservation. Declaration of Alan Stephens at ¶¶ 2-3 ("Stephens Decl."). The Tribe is the sole member of Sacred Falls LLC. *Id.* The Lodge is a resort overlooking Snoqualmie Falls that offers luxury accommodations, including 86 guest rooms, fine dining and spa services, and serves as a location for weddings, corporate functions, and other special events. *Id.* at ¶ 3.

Both in the hospitality business, the Casino and Lodge's business operations depend on the ability to host and serve customers at their locations. *Id.*; Patterson Decl. at ¶ 3.

B. Snoqualmie's Business Interruption Losses

On February 29, 2020, in response to the COVID-19 pandemic, Governor Jay Inslee issued Proclamation 20-5 declaring a state of emergency throughout Washington. Patterson Decl., Ex. 2. Shortly thereafter, Governor Inslee issued additional proclamations that significantly limited public events throughout the State of Washington. *Id.* at ¶ 5. In response to Governor Inslee's proclamations, the Snoqualmie Tribal Council—the elected governing body with sole authority over the Casino[1]—declared a Tribal State of Emergency on March 11, 2020. *Id.*, Ex. 3. On March 16, 2020, Proclamation 20-13, "Statewide Limits: Food and Beverage Services, Areas of Congregation," prohibited the onsite consumption of food and/or beverages in a public venue, including restaurant, bars, or other similar venues in which people congregate for the consumption of food or beverages. Stephens Decl., Ex. 1. That same day, the Tribal Council

[1] *See, e.g., Worcester v. Georgia*, 31 U.S. 515, 557 (1832) (holding Indian Tribes are "distinct political communities, having territorial boundaries, within which their authority is exclusive . . . which is not only acknowledged, but guaranteed by the United States").

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passed Resolution 44-2020, which directed the immediate closure of the Casino due to the COVID-19 pandemic. Patterson Decl., Ex. 4. As a result, the Casino closed on March 18. *Id.* at ¶ 7.

As the pandemic wore on, Governor Inslee issued additional proclamations extending the closure orders, and the Tribal Council passed corresponding resolutions requiring the Casino to remain closed. *Id.* at ¶ 8. As a result, it was not until June 1, 2020 that the Casino was finally able to reopen with limited capacity. *Id.* Even after the Casino was permitted to reopen, the imposed restrictions significantly reduced the amount of space available at the Casino for providing hospitality services to its guests. *Id.* at ¶ 9. These restrictions required the Casino to limit its Table Game and Slot Machine offerings, to reduce the occupancy in its restaurants, gift shops, and elevators, and to cease providing valet services to its guests. *Id.* Prohibited from hosting customers or conducting business on its property for several months, and subject to significant restrictions thereafter, the Casino experienced significant losses, including Business Interruption losses. *Id.* To date, these losses total in the tens of millions of dollars. *Id.*

Although the Lodge is not subject to the Tribe's closure resolutions because it is not located on the Snoqualmie Indian Tribe's Reservation, it was nonetheless subject to Governor Inslee's COVID-19 proclamations. Stephens Decl. at ¶ 5. And, even after the Lodge was permitted to reopen with limited capacity, Governor Inslee later reintroduced restrictions in November of 2020 that required a cessation of indoor dining and significantly limited retail capacity and indoor gathering of all kinds at the Lodge. *Id.* at ¶ 7. These restrictions included the closure of the Lodge's most popular casual restaurant, reduced hours of operation, limits on occupancy in its retail outlets, and reduced Spa services offered to guests. *Id.* at ¶ 8. As a result of these limitations, which were in effect until December 14, 2020, the Lodge was prevented

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from conducting business on its property and suffered Business Interruption losses that totaled millions of dollars. *Id.*

C. The AFM Insurance Policy

AFM sold Snoqualmie Policy No. TO287, effective November 1, 2019 to November 1, 2020 ("Policy"). Patterson Decl., Ex. 1. The Policy's "Named Insured" is "Snoqualmie Entertainment Authority, 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." *Id.*, Ex. 1 at p. 16.[2] The Policy's Location Schedule lists both the Lodge and Casino as covered property. *Id.* The Policy provides coverage to Snoqualmie Entertainment Authority, the Casino, Sacred Falls LLC, and the Lodge. *See id.* at ¶ 2; Stephens Decl. at ¶ 2.

An "all-risk" policy, the Policy provides broad property and Business Interruption coverage, expressly stating that it "covers property, as described in this Policy, against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded, while located as described in this Policy." Patterson Decl., Ex. 1 at pp. 14, 27. The Business Interruption coverage limits total over $150 million. *Id.* at p. 17. Under the broad coverage provided for Business Interruption, the Policy states in relevant part:

> This Policy insures Business Interruption loss, as provided in the Business Interruption Coverage, as a direct result of ***physical loss or damage*** of the type insured:
>
> 1. To property as described elsewhere in this Policy and not otherwise excluded by this Policy;
> 2. Used by the Insured;
> 3. While at a **location** or while in transit as provided by this Policy; and

[2] The page numbers cited on Exhibit 1 correspond to the page numbers in the bottom-right hand corner of the Patterson Declaration.

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4. During the Period of Liability as described elsewhere in this Policy.

Id. at p. 45 (emphasis added). Accordingly, the key trigger for Snoqualmie's Business Interruption coverage is "physical loss or damage," a phrase that is not defined under the Policy.

D. AFM's Coverage Denial

The Lodge and the Casino sought coverage from AFM for the losses they sustained as a result of the closure orders and resolutions issued by Governor Inslee and the Tribe. *Id.* at ¶¶ 10-11. In response, AFM refused to provide the Lodge or the Casino with the up to $150 million in the Business Interruption coverage for the losses that the Casino and Lodge sustained as a result of the closure orders and resolutions. *Id.*, Ex. 5. AFM based its denial on the assertion that Snoqualmie's properties had not sustained "any physical loss or damage" required to trigger coverage. *Id.*

Despite AFM's contention that "no physical loss or damage" had occurred at Snoqualmie's properties, it nonetheless determined that the Policy's Communicable Disease Extension—which has a sublimit of only $100,000—***did*** provide coverage for the Lodge and the Casino's losses. *See id.* AFM agreed to cover this small fraction of Snoqualmie's losses only after Snoqualmie provided evidence the Casino and Lodge temporarily closed after they had reopened with limited capacity when a few of their employees tested positive for COVID-19. *Id.* at ¶¶ 10-11.

AFM has continued to allege that no "physical loss or damage" ever occurred at Snoqualmie's properties as a result of Governor Inslee's closure orders or the Tribe's closure resolutions. *See* Defendant Affiliated FM Insurance Company's Answer to Plaintiffs' First Amended Complaint at p. 9.

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III. STATEMENT OF ISSUE

Did the State governmental closure orders and Tribe's closure resolutions cause Snoqualmie to sustain a "physical loss," which triggered coverage under the AFM policy?

IV. EVIDENCE RELIED UPON

This motion relies upon the declarations of Mary Lou Patterson, Alan Stephens, and Kasey D. Huebner, as well as the files and records herein.

V. ARGUMENT

A. Insurance Policy Interpretation.

Determining insurance coverage is a two-step process. First, the insured must show that the loss falls within the scope of the policy's insured losses. Second, to avoid coverage the insurer has the burden of proving that specific policy language excludes the loss. *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 731, 837 P.2d 1000 (1992). This motion is directed at step one: whether the Lodge and the Casino sustained "physical loss or damage" covered by the Policy. The interpretation of "physical loss or damage" in the Policy is a question for law for the Court. *See id.* at 730.

The key terms triggering coverage—physical, loss, and damage—are all undefined in the policy. This means they must be interpreted "as [they] would be understood by the average lay person." *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 876, 784 P.2d 507 (1990). Insuring provisions must be interpreted liberally to provide coverage whenever possible. *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145 Wn. App. 687, 694, 186 P.3d 1188 (2008). Insurance policies are construed in favor of coverage because: "the purpose of insurance is to insure." *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 68, 659 P.2d 509 (1983). Washington courts thus adhere to the "Hornbook law that where a clause in an insurance policy is ambiguous,

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the meaning and construction most favorable to the insured must be applied, even though the insurer may have intended another meaning." *Queen Anne Park Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 183 Wn.2d 485, 491, 352 P.3d 790 (2015).

To establish that a term in an insurance policy is ambiguous, "[the insured] does not need to show that his list of possible interpretations, or any one of them, is more reasonable than that espoused by [the insurer], but ***only that there is more than one reasonable interpretation***." *Kaplan v. Nw. Mut. Life Ins. Co.*, 115 Wn. App. 791, 808, 65 P.3d 16 (2003) (emphasis added). Washington courts thus routinely find coverage where an undefined term is subject to multiple, reasonable definitions. For example, in *Holden v. Farmers Insurance Co. of Washington*, 169 Wn.2d 750, 756-57, 239 P.3d 344 (2010), the undefined term "fair market value" was subject to more than one reasonable definition because it had been applied differently to different claims. Because the term was "at least ambiguous," the court concluded the "[policyholder's] reasonable interpretation of the policy must be accepted." *Id.* at 760. In *Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 688, 871 P.2d 146 (1994), the term "acquisition" was ambiguous where the insurer had failed to define the term and had "more precise language" readily available to it that "would have put the matter beyond reasonable question." In *Robbins v. Mason Cty. Title Ins. Co.* 195 Wn.2d 618, 633, 462 P.3d 430 (2020), the undefined term "easement" was ambiguous where "Washington case law, in conjunction with persuasive authority, creates uncertainty in the law." Similarly, in *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 410-11, 229 P.3d 693 (2010), the lack of Washington authority, together with out-of-state case law supporting coverage, meant that an exclusion was ambiguous and was construed in favor of coverage.

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As set forth below, each of these fundamental principles of Washington law support Snoqualmie's interpretation of the undefined term "physical loss."

B. Snoqualmie sustained a "physical loss" to its properties as a result of the closure orders.

Snoqualmie purchased broad property and Business Interruption coverage to insure the Lodge and Casino against "ALL RISKS OF PHYSICAL LOSS OR DAMAGE." Under Washington law, one reasonable interpretation of the undefined phrase "physical loss" is that it includes the risk that the Lodge and the Casino's properties cannot be physically used for their primary function because of the COVID-19 closure orders. This interpretation is reasonable according to the standard English dictionary definitions of both "physical" and "loss," which illustrate that "physical loss" occurs when an insured is deprived of the ability to use tangible property for its primary function. AFM's anticipated argument that "physical loss or damage" strictly requires Snoqualmie's property to be permanently dispossessed or physically damaged is not only contrary to the "plain, ordinary, and popular meaning" of these undefined terms, but rests on easily distinguished case law. Indeed, the only two Washington state courts to address this very issue in the context of COVID-19 closure orders have already rejected AFM's arguments and agreed that the insureds' interpretations— which were the same as Snoqualmie's here—are reasonable and consistent with Washington law.

For each of these reasons, discussed in detail below, Snoqualmie is entitled to judgment as a matter of law that the Policy's insuring agreement is triggered by the COVID-19 State closure orders and Tribal resolutions that deprived the Casino and the Lodge of the ability to use their properties for their primary function of hosting and serving customers.

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1. The Casino and the Lodge's property sustained "physical loss" as the average purchaser of insurance would understand it.

The Policy covers Snoqualmie's property for "ALL RISKS OF PHYSICAL LOSS OR DAMAGE." Although undefined, the "plain, ordinary, and popular meaning" of this phrase reasonably includes the risk that the Lodge and the Casino's properties cannot be physically used for their primary function because of the COVID-19 closure orders. *See Boeing*, 113 Wn.2d at 876-87 ("To determine the ordinary meaning of an undefined term, our courts look to standard English language dictionaries."). "Physical" is defined as "Of or relating to material things." *Physical*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, https://www.ahdictionary.com/word/search.html?q=physical (last visited July 27, 2021); *Physical,* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "physical" to include "[o]f, relating to, or involving material things; pertaining to real, tangible objects"). In turn, "loss" is defined to include "[t]he condition of being ***deprived . . . of something*** or someone." Loss, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, https://www.ahdictionary.com/word/search.html?q=loss (last visited July 27, 2021) (emphasis added).

These definitions illustrate that property suffers "physical loss" when an insured is deprived of the ability to use tangible property for its primary function. Not only is this interpretation consistent with the "plain, ordinary, and popular meaning" of each term as defined by the English dictionary, it properly gives force and effect to the meaning of both "physical" and "loss." *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 94, 882 P.2d 703 (1994) (rejecting interpretation that would render "sudden" superfluous). It does so by requiring not only that Snoqualmie be deprived of the use of property, but that Snoqualmie be

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deprived of "physical" property—*i.e.*, property that is material or tangible in nature. Snoqualmie's interpretation thus properly gives effect to each word by accounting for the fact that the term "physical loss" would not include the deprivation of intangible property, such as intellectual property or electronic currency. *See, e.g., In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, 20 C 02005, -- F.Supp.3d --, 2021 WL 679109, at *9 (N.D. Ill. Feb. 22, 2021) ("the pandemic-caused shutdown orders do impose a *physical* limit: the restaurants are limited from using much of their physical space. It is not as if the shutdown orders imposed a *financial* limit on the restaurants by, for example, capping the dollar-amount of daily sales that each restaurant could make.") (emphasis in original).

This interpretation of "physical loss" is consistent with—indeed directly supported by—*Nautilus Grp., Inc. v. Allianz Glob. Risks US*, C11-5281BHS, 2012 WL 760940 (W.D. Wash. Mar. 8, 2012). In *Nautilus*, the insured suffered a loss of income after the director of its Shanghai branch retained certain documents after he was terminated that were required for the company to conduct business in China. *Id.* at *2-3. These documents included the company's business license and "chop"—an individualized, carved ink stamp that China requires to conduct business and financial transactions. *Id.*, n. 1. The director "acknowledged that he had the items in his possession, but he refused to provide them." *Id.* After the insured sought Business Interruption coverage under its policy that covered "all risks of direct physical loss or damage to Insured Property," the insurer argued coverage was not triggered unless the property was "physically altered." *See id.* at *6-7. The court rejected this argument under Washington law, holding that "physical loss" is distinct from "damage" to covered property:

> [I]f "physical loss" was interpreted to mean "damage," then one or the other would be superfluous. The fact that they are both included in the grant of

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> coverage evidences an understanding that ***physical loss means something other than damage.***

Id. at *7 (emphasis added).

Nautilus thus directly supports two key aspects of Snoqualmie's interpretation under Washington law. First, that "physical loss or damage" does not require, as AFM asserts, any physical alteration or damage to the insured's property. Second, that an insured does not need to be *permanently* dispossessed of property in order to suffer a "physical loss"; it was enough that the insured was temporarily deprived of tangible items and documents required to conduct business in China. Accordingly, *Nautilus* is consistent with Snoqualmie's interpretation that an insured's property suffers "physical loss" when it is temporarily deprived of the ability to utilize its tangible property for its primary function.

Courts across the country have reached similar conclusions in the context of COVID-19 closure orders. As the District Court of Cherokee County, Oklahoma recently held in granting an insured casino's motion for partial summary judgment to establish that its property suffered "direct physical loss or damage" as a result of its temporary closure, the insured's interpretation was the *only* reasonable interpretation:

> ***Applying these definitions reveals that the ordinary meaning of the phrase 'direct physical loss' includes the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions.***

Cherokee Nation v. Lexington Ins. Co., No. CV-20-150, 2021 WL 506271, at *5 (Dist. Ct. Cherokee Cty., Okla. Jan. 29, 2021) (quoting *North State Deli, LLC, et al. v. Cincinnati Insurance Co.*, et al., 20-CVS-02569 (Durham Cnty., N.C. Oct. 9, 2020)) (emphasis in original). Moreover, the court noted that even if the insurer's interpretation were reasonable, which it was not, the policy language would still trigger coverage because (1) the matter presented a question

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of first impression for the courts of Oklahoma [*id.* at *3]; (2) the insurer had failed to specifically define "physical loss" despite the fact "courts have begged carriers to define the phrase to avoid the precise issue" [*id.*]; and (3) courts across the country had already reached competing interpretations in the context of COVID-19 closure orders [*id.* at *4].

Washington courts routinely have held that policy language is ambiguous for these very same reasons. *See Robbins*, 195 Wn.2d at 633 ("uncertainty in the law must be construed in favor of the insured and coverage under the policy agreement."); *American Best Food, Inc.*, 168 Wn.2d at 410-11; *Lynott v*, 123 Wn.2d at 688. Accordingly, it is reasonable under Washington law that the undefined phrase "physical loss" includes Snoqualmie's inability to physically use its properties to host and serve customers as a result of the governmental closure orders and the Tribe's closure resolutions.

That is exactly what occurred here. The Casino was prohibited from conducting any business on its property between March 18 and June 1 of 2020 after the Tribal Council's resolutions forced the Casino to close its doors. The Lodge was similarly unable to use its property as a result of Governor Inslee's orders. The Lodge was prevented not only from serving customers in its restaurants, but also from hosting weddings, corporate functions and other in-person events that the Lodge depends upon to conduct business. And, although the properties eventually were permitted to reopen with limited capacity, the capacity restrictions nonetheless deprived the Casino and Lodge of the ability to use the vast majority of their physical space for hosting customers, shrinking the space available for use and rendering the bulk of their accommodations inoperable. These deprivations trigger Business Interruption coverage under the AFM Policy because the Lodge and the Casino's inability to utilize their physical property as a result of the COVID-19 closure orders and proclamations constitutes "physical loss."

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2. The Washington case law upon which AFM is expected to rely is inapplicable.

The Lodge and the Casino expect AFM to assert that Washington law requires their property either to be permanently dispossessed or physically damaged before coverage is triggered. To begin, AFM's expected citations to non-Washington authorities are not binding on this Court's interpretation of Washington law, which is a matter of first impression in the State's appellate courts. At best, these competing interpretations from outside of Washington reveal that there is a patent ambiguity in the phrase "physical loss or damage," which AFM declined to specifically define in the Policy. *See Robbins*, 195 Wn.2d at 633; *Lynott*, 123 Wn.2d at 688. Indeed, the two cases upon which AFM is expected to focus on from the state's appellate courts are easily distinguished.

The first case on which AFM is expected to rely is *Wolstein v. The Yorkshire Insurance Company*, 97 Wn. App. 201, 985 P.2d 400 (1999). In *Wolstein*, a company hired to build a yacht abandoned the project and subsequently declared bankruptcy. The buyer sued the company's marine insurer as an additional insured to recover lost charter fees, repairs, expenses, and cost overruns incurred as a result of the yacht builder's abandonment of the project. *Id.* at 208. The court found no coverage for these losses because the policy excluded coverage for "[d]elay or disruption of any type whatsoever, including, but not limited to, loss of earnings or use of the Vessel, however caused . . . ." *Id.* at 210. There also was no coverage for repair and cost overruns caused by the yacht builder's abandonment of the project because the yacht itself had not been physically damaged or physically lost. *Id.* at 211-212.

Wolstein does not support AFM's argument. There the court held that coverage for "physical loss of or damage to the Vessel" did not occur because the yacht builder's "financial

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difficulties, while prolonging completion of the [yacht] and increasing the costs of her completion, did not inflict physical damage to the [yacht] or result in the physical loss of the yacht." *Id.* at 212. The yacht builder's financial difficulties thus did not inflict physical damage or deprive the insured of the ability to use its property for its intended function; the insured could have simply hired another ship builder to complete the work. For that reason alone, the case is distinguishable. Here, the closure orders *actually* deprived Snoqualmie of the ability to host and serve customers. *Wolstein*'s reasoning accordingly does not apply here, and the *Nautilus* court similarly found its analysis to be inapplicable. *Nautilus*, 2012 WL 760940, at *6 ("[*Wolstein*] is factually distinguishable because Nautilus alleges that the covered property was physically lost."). Moreover, the *Wolstein* court noted "[t]he language 'physical loss or damage' strongly implies that there was an initial satisfactory state that was changed by some external event into an unsatisfactory state [.]" *Wolstein*, 97 Wn. App. at 213 (quoting *Trinity Indus., Inc. v. Insurance Co. of North Am.*, 916 F.2d 267, 270-71 (5th Cir. 1990)). That is exactly what occurred here: the Lodge and the Casino's properties were in a satisfactory state and functioned as intended until the State and Tribal governmental shut down requirements changed the covered property to an unsatisfactory state, a state in which the properties could not be used for their intended function of hosting customers and providing accommodations.

The second case upon which AFM is expected to rely is *Fujii v. State Farm Fire & Casualty Co.*, 71 Wn. App. 248, 857 P.2d 1051 (1993). The insureds in *Fujii* filed a claim under their homeowners policy, arguing that their dwelling sustained "direct physical loss" due to a landslide upslope from the home that had undermined its lateral support. *Id.* at 249. The court rejected the insureds' argument because, although the insureds argued that soil destabilization

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threatened "likely" damage to their dwelling, they made no argument that there was a current, actual loss of functionality. *See id.*

The facts here are fundamentally different from *Fujii*. The Tribal Council and Governor Inslee did not merely threaten the closure orders, they actually imposed them and prohibited Snoqualmie from hosting customers on its properties. *Fujii* is thus distinguishable because the Casino and Lodge are not seeking coverage for a potential, future "physical loss"; they are seeking coverage for "physical loss" that actually occurred when they were deprived of the ability to utilize the properties to host and serve customers. Indeed, *Nautilus* wisely distinguished *Fujii* for this very same reason. *See Nautilus*, 2012 WL 760940, at *7 ("While this case may have been applicable if Mr. Xu had conveyed that he was likely to steal or misappropriate the Property, it is factually distinguishable and inapplicable to the alleged facts.").

In sum, the two Washington appellate cases upon which AFM is expected to rely are easily distinguished. They provide no support for AFM's overly narrow interpretation of "physical loss," which does not require, as AFM contends, Snoqualmie's property to be permanently dispossessed or physically damaged.

3. The only Washington state courts to decide the issue have concluded that Snoqualmie's interpretation is reasonable.

Although Washington's appellate courts have not yet addressed the threshold question here—the scope of the undefined term "physical loss or damage" in the context of COVID-19 closure orders—the State's superior courts have already held that Snoqualmie's interpretation is reasonable and consistent with Washington law. Both courts rejected the notion that

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Snoqualmie's property must be permanently dispossessed or physically damaged to trigger coverage.

In *Perry Street Brewing Co. v. Mut. of Enumclaw Ins. Co.*, the owner of a brewery and bar moved for partial summary judgment to establish that its Business Interruption coverage was triggered after it suffered "direct physical loss" because of Governor Inslee's closure orders. No. 20-2-02212-32, 2020 WL 7258116 (Spokane Cty. Super. Ct. Nov. 23, 2020).[3] In response, the insurer argued that coverage was triggered only if the insured's property needed to be repaired, rebuilt, or replaced as a result of the closure orders. The court rejected the insurer's argument and determined that the undefined term "direct physical loss" reasonably included the *deprivation* of the insured's *physical* property:

> Accordingly, one reasonable interpretation of 'direct physical loss of' property at premises is that the interruption of PSBC's business operations as a result of the proclamations was a direct physical loss of PSBC's property because ***PSBC's property could not physically be used for its intended purpose***, i.e., PSBC suffered a loss of its property because it was deprived from using it.

Id. at p. 6 (emphasis added). The court thus granted partial summary judgment to the insured, concluding as a matter of law that the closure orders triggered the insured's Business Interruption coverage. *Id.*

King County Superior Court Judge Susan Amini reached a similar conclusion in *Hill & Stout PLLC v. Mut. of Enumclaw Ins. Co.* after the insurer filed a motion to dismiss to establish that the insured dental offices did not suffer "direct physical loss" as a result of Governor Inslee's closure orders. No. 20-2-07925-1 SEA, 2020 WL 6784271 (King Cty. Super. Ct. Nov.

[3] Huebner Decl., Ex. 1.

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13, 2020).[4] Consistent with Snoqualmie's interpretation above, the Court concluded that the undefined term was at best ambiguous in the context of the COVID-19 closure orders:

> In applying the ordinary meaning of "deprivation", the Court finds that the Plaintiff's position that the dental practice had a "direct physical deprivation" of its property when they were unable to see patients and practice dentistry is a reasonable interpretation by the average lay person.

Id. at p. 4. The court denied the insurer's motion to dismiss, concluding that the insurer's interpretation was overly narrow and contrary to the "plain, ordinary, and popular meaning" of "direct physical loss of" as understood by the average lay person. *Id.* (citing *Boeing*, 113 Wn.2d at 877).

Although *Perry Street* and *Hill & Stout* are trial court decisions, the reasoning applied by both courts is undoubtedly consistent with Washington law. Both courts properly recognized that the undefined term "physical loss" must be interpreted in accordance with its "plain, ordinary, and popular meaning" found in the standard English dictionary. *See Boeing*, 113 Wn.2d at 877. Both courts applied Washington law in holding that the average lay person would reasonably interpret the phrase "physical loss" to include the deprivation of the insured's ability to use its physical property for its intended function due to the closure orders. These opinions illustrate that Snoqualmie's interpretation is reasonable and consistent with fundamental principles of Washington policy interpretation.

C. The Out-of-State and Washington District Court Decisions Upon Which AFM Is Expected to Rely Do Not Change the Fact that Snoqualmie Experienced a "Physical Loss" Under Washington Law.

Snoqualmie anticipates AFM will rely on (1) various cases applying the law of other states that reach a conclusion favorable to AFM, and (2) an order out of the Western District of

[4] Huebner Decl., Ex. 2.

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Washington in *Nguyen v. Travelers Cas. Ins. Co. of America*, No. 2:20-cv-00597-BJR, 2021 WL 2184878 (W.D. Wash. May 28, 2021). Reliance on either does not undermine the fact that Snoqualmie sustained a "physical loss" to covered property as a result of the State and Tribal closure orders.

First, this is an issue of Washington law in a Washington state court: Washington authority addressing insurance coverage controls. The fact that other courts in other states have reached differing conclusions (both for and against each party's position) underscores the point that the Policy's language is ambiguous at best. Under black-letter Washington law, where there is no Washington precedent specifically interpreting the undefined policy term or phrase, and courts from other jurisdictions have interpreted the phrase in a manner that supports coverage, the undefined term is ambiguous and must be construed in favor of coverage. *See Robbins*, 195 Wn.2d at 633; *see also American Best Food*, 168 Wn.2d at 410-11. Here, although there is no binding precedent from Washington's appellate courts, there is ample persuasive authority from Washington's trial courts,[5] as well as federal district courts across the country,[6] that supports

[5] Huebner Decl., Exs. 1-2.

[6] *See e.g.*, *N. State Deli, LLC v. Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281507, at *2-3 (N.C. Super. Ct. Oct. 9, 2020) ("Plaintiffs were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured. These decrees resulted in the immediate loss of use and access without any intervening conditions. In ordinary terms, this loss is unambiguously a 'direct physical loss,' and the Policies afford coverage."); *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, No. 1:20 CV 1239, 2021 WL 168422, at *12-13 (N.D. Ohio Jan. 19, 2021) ("And because there is more than one interpretation, the Policy must be construed liberally in Plaintiffs' favor"); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 801 (W.D. Mo. 2020) ("physical loss may occur when the property is uninhabitable or unusable for its intended purpose"—denying insurer's motion to dismiss); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867, 873-74 (W.D. Mo. 2020) (interpreting "loss" as "deprivation" and denying insurer's motion to dismiss); *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Co.*, 506 F. Supp. 3d 360, 373, 376 (E.D. Va. 2020) (holding "direct physical loss" is ambiguous, because it "has been subject to a spectrum of interpretations" and "the Court finds that it is plausible that a fortuitous 'direct physical loss' could mean that the property is uninhabitable, inaccessible, or dangerous to use because of intangible, or non-structural, sources"); *Smile Savers Dentistry v. CNA*, NO. GD-20-006544, 2021 WL 1164836, at *6 (Pa.Com.Pl.

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Snoqualmie's interpretation of the undefined phrase "physical loss" in the unique context of governmental closure orders due to the COVID-19 pandemic.

Second, in *Nguyen*, the district court neglected to apply the rules announced by the Washington Supreme Court for evaluating undefined terms in an insurance policy. *See supra* Sections IV., A-B. Although the court acknowledged its duty to apply Washington substantive law to the coverage questions before it, the court instead focused on what "most of the federal courts" have concluded with regard to coverage for property losses arising from governmental orders related to the COVID-19 pandemic. *See, e.g., Nguyen*, 2021 WL 2184878, at *5, 8, 10-11, 14, & n.4. When confronted with cases applying Washington law that were favorable to the insureds' coverage positions, the *Nguyen* court either refused to apply them, ignored them, or rejected their analysis.

For example, the *Nguyen* court declined to apply *American Best Food, Inc. v. Alea London, Ltd.*, which is binding Washington Supreme Court authority on the issue of policy ambiguity. *See Nguyen*, 2021 WL 2184878, at *8, n.11. In addition, the district court did not even mention *Nautilus Group., Inc. v. Allianz Global Risks US*, although the insureds addressed that case in their opposition briefs, explaining how it supported their contention that they had sustained a "physical loss" as a result of the closure orders. Finally, the *Nguyen* court found *Perry Street* and *Hill & Stout*—***the only Washington state decisions to have addressed the issue of "physical loss" resulting from the governmental orders issued during the COVID-19 pandemic***—"unpersuasive" based solely on the assertion that "[t]he reasoning that 'loss' could plausibly mean something akin to 'deprivation of use' discounts the preceding term 'physical.'"

2021) ("the most reasonable definition of 'loss' is one that focuses on the act of losing possession and/or deprivation of property instead of one that encompasses various forms of damage to property, i.e., destruction and ruin.").

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Id. at *12. However, this conclusion overlooks that fact that the orders in both *Perry Street*[7] and *Hill & Stout*[8] expressly discussed, rather than discounted, that the term "physical" precedes the term "loss." But instead of applying or analyzing these cases interpreting Washington coverage law, the *Nguyen* court placed greater emphasis on falling in line with how other federal courts have addressed these issues under the laws of other states. As a result, *Nguyen's* holding is neither persuasive nor dispositive of this Court's interpretation of the policy language under Washington law.

VI. CONCLUSION

There are no Washington state authorities that support AFM's interpretation or negate the reasonableness of Snoqualmie's interpretation of the undefined term "physical loss." Instead, the only Washington state courts that have decided this issue in this very context have agreed with Snoqualmie and concluded that the undefined term "physical loss" includes the risk that the insured is deprived of the ability to use its covered property for its intended function as a result of the governmental closure orders. To the extent non-Washington or federal courts have applied their own state-specific laws to reach competing interpretations in this unique context, this serves as further evidence that the Policy is susceptible to more than one reasonable interpretation. *See Robbins*, 195 Wn.2d at 633 ("uncertainty in the law must be construed in favor of the insured and coverage under the policy agreement."). For each of these reasons, the Policy must be construed in Snoqualmie's favor. *See Kaplan*, 115 Wn. App. at 808 ("[The Insured] does not need to show that his list of possible interpretations, or any one of them, is

[7] Huebner Decl., Ex. 1 at pp. 4-6.

[8] Huebner Decl., Ex. 2 at pp. 4-5.

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more reasonable than that espoused by [the Insurer], but only that there is more than one reasonable interpretation."). Snoqualmie asks the Court to grant its motion for partial summary judgment on this narrow, threshold issue, and hold that the Lodge and Casino suffered "physical loss" as a result of the COVID-19 State and Tribal closure orders.

I certify that this memorandum contains 6,517 words, in compliance with the Local Civil Rules.

DATED this 30th day of July, 2021.

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CERTIFICATE OF E-SERVICE

I, Ellen R. Evans, certify that I initiated electronic service of the foregoing document on the parties listed below who have consented to accept electronic service via the King County eFiling Application. Service was initiated this 30th day of July, 2021 on:

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