No. 861158

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TULALIP TRIBES OF WASHINGTON, federally recognized Indian Tribes, and TULALIP GAMING ORGANIZATION, an instrumentality and enterprise of Tulalip Tribes of Washington,

Appellants,

v.

LEXINGTON INSURANCE COMPANY, et al.,

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

Appellants Tulalip Tribes of Washington and Tulalip Gaming Organization (together, "the Tribes") seek to hold their property insurers responsible for a risk not covered by the policies they bought. The Tribes allege they lost income because of the COVID-19 pandemic and temporary government shutdown of their businesses. But their policies would cover that loss only if it resulted from some physical damage or loss to property that required the Tribes to suspend their operations while they repaired, rebuilt, or replaced that property. While the COVID-19 virus has certainly harmed *people*, it has not physically harmed any of the Tribes' property.

The Tribes' claims are foreclosed by the Washington Supreme Court's decision in *Hill & Stout, PLLC v. Mutual of Enumclaw Insurance Co.*, 200 Wn.2d 208, 219 (2022). There, the Court held that the insistence in property policies on some direct physical loss or damage requires that "something physically happened" to property. This decision aligns with the "national

consensus"—from dozens upon dozens of state and federal appellate courts—"that COVID-19 and related governmental orders do not cause physical loss of or damage to a property and do not trigger coverage under" similar property insurance policies. *Id.* at 224.

In an effort to evade this adverse authority, the Tribes suggest that under Washington law, "direct physical loss or damage" does not require tangible injury to property and may instead happen when property is rendered unfit for its intended purpose due to the presence of the virus. As the Tribes see it, the alleged presence of the virus on their properties satisfies the physicality requirement recognized in *Hill & Stout*. But this theory has been rejected by appellate courts across the country. *See, e.g.*, *Starr Surplus Lines Ins. Co. v. Eighth Jud. Dist. Ct. in& for Cnty. of Clark*, 535 P.3d 254, 264-66 (Nev. 2023); *Conn. Dermatology Grp., PC v. Twin City Fire Ins. Co.*, 288 A.3d 187, 203 (Conn. 2023); *Or. Clinic v. Fireman's Fund Ins. Co.*, 75 F.4th 1064, 1072-73 (9th Cir. 2023). As these courts have explained, the COVID-19 virus does not trigger

property coverage because it doesn't harm property and may be wiped away with disinfectant or left to dissipate on its own.

Because nothing physically happened to their property, the Tribes are really pursuing claims for loss of *use* of their property. And those claims are foreclosed by Washington precedent. The Washington Supreme Court held in *Hill & Stout* that there is no property coverage simply because a policyholder could not use its property in the ways it would have preferred. *Id.* at 224-25. And in *Seattle Tunnel Partners v. Great Lakes Reinsurance (UK) PLC*, 200 Wn.2d 315, 342 (2022), the Court underscored that when a property policy requires "direct physical loss or damage" to property, there must be some physical dispossession or "physical injury to the insured property" for coverage to apply. Because the COVID-19 virus does not physically injure property, the Tribes' claims are not covered under their property policies.

The Court should affirm the judgment.

II. STATEMENT OF THE CASE

A. The Tribes Buy Property Insurance.

The Tulalip Tribes of Washington are a federally recognized Indian tribe, and the Tulalip Gaming Organization is the Tribes' corporate arm, which operates several businesses, including casinos, in Tulalip, Washington. CP 925 ¶ 2. The Tribes bought property insurance for these businesses from Lexington Insurance Company and various other excess insurers[1] through a nationwide insurance program. CP 930 ¶ 21. Each insurer's policy

[1] The insurer respondents are Lexington Insurance Company; Subscribing Underwriters at Lloyd's – Syndicates: ASC1414, XLC 2003, TAL 1183, MSP 318, ATL 1861, KLN 510 AGR 3268; Underwriters at Lloyd's Syndicate: CNP 4444; Aspen Specialty Insurance Company; Aspen Insurance UK. Ltd.; Homeland Insurance Company of NY (One Beacon); Hallmark Specialty Insurance Company; Underwriters at Lloyd's Syndicates: KLN 0510, ATL 1861, ASC 1414, QBE 1886, MSP 0318, APL 1969, CHN 2015, XLC 2003; Underwriters at Lloyd's Syndicate: BRT 2987; Endurance Worldwide Insurance LTD t/as Sompo International; Underwriters at Lloyd's – Syndicates: KLN 0510, TMK 1880, BRT 2987, BRT 2988, CNP 4444, ATL 1861, Neon Worldwide Property Consortium, AUW 0609, TAL 1183, AUL 1274; Arch Specialty Insurance Company; Evanston Insurance Company; and Allied World National Assurance Company.

incorporates the same master policy form setting forth the terms, conditions, and exclusions of coverage. CP 928, 933, 897.

The policies provide six types of coverage at issue here: Business Interruption, Extra Expense, Interruption by Civil Authority, Ingress/Egress, Contingent Time Element, and Tax Revenue Interruption or Extended Period of Indemnity. CP 150-52, 897-98. Each of those applies only if the policyholder has suffered some physical loss or damage to property.

First, the policies cover business income lost as a result of an "interruption of business . . . caused by direct physical loss or damage . . . to real and/or personal property insured by this Policy." CP 150. This coverage is available only during the "period of restoration", which "begin[s] on the date direct physical loss occurs and interrupts normal business operations and ends on the date that the damaged property should have been repaired, rebuilt or replaced". CP 154. So, for example, if the Tribes' casinos were damaged in a hailstorm and had to suspend operations, the policies would likely cover the business income lost from the date of the

storm until the date that the storm damage should have been repaired.

Second, coverage for lost business income "is extended to cover the necessary and reasonable expenses" incurred by the policyholder "following damage to or destruction of covered property". CP 150. Continue with the above example: If hail damaged the Tribes' casino roof and windows, the policies would likely cover the extra expense of, say, renting new office space for the Tribes' employees while the casino's hail-damaged property was being fixed.

The third type of coverage, like the second, is an extension that follows from "damage or destruction" of nearby property, rather than the insured property itself. CP 151. The policies provide coverage for up to 30 days if a "civil authority"—that is, a government—"specifically prohibit[s]" "access to the covered property" because of "damage to or destruction" of property within 10 miles. CP 151. This coverage would likely apply if, say, a wildfire destroyed the office buildings surrounding one of the

Tribes' casinos and the County responded by ordering all residents and workers to evacuate the casino and by specifically prohibiting access to the casino.

Fourth, the policies provide coverage where "ingress to or egress from the covered property" is "prevented" "as a direct result of physical loss or damage" to property within 10 miles. CP 151. To continue with the wildfire example: If the fire physically damaged buildings surrounding the Tribes' casino and the resulting debris rendered the Tribes' casino physically inaccessible as a result, the policies' Ingress/Egress coverage would likely apply.

The remaining coverages likewise are not triggered unless something physically happens to covered property. Contingent Time Element coverage requires a "loss directly resulting from physical damage to property . . . at direct supplier . . . that prevents a supplier of goods and/or services . . . from supplying such goods and/or services". CP 151. Similarly, Tax Revenue Interruption coverage requires "physical damage" to or "destruction" of property "not operated by [the insured]" that "prevent[s]" the

generation of tax revenue. CP 152. And the Extended Period of Indemnity provision extends Business Interruption, Extra Expense, and Tax Interruption coverage "for the additional length of time required to restore the business", and is therefore dependent on those coverages. CP 152.

All of the coverages at issue therefore have a common denominator: There must be some physical loss or damage to property, whether that of the policyholder or someone else. Without that physical loss or damage, there can be no coverage.

B. The Tribes Temporarily Close Their Properties To Slow The Spread Of COVID-19, Then Submit Insurance Claims.

In early 2020, state, local, and tribal governments across the country ordered businesses to suspend or limit their operations in an effort to slow the spread of COVID-19. CP 954-55. The Tribes did the same, temporarily closing their properties to the public on March 16, 2020. CP 837. Ten days later, the Tulalip Tribes Board of Directors issued a stay-at-home order to slow the spread of the

virus and protect human health. CP 955 ¶ 102. In light of these temporary closures, the Tribes lost business income. CP 962 ¶ 136.

The Tribes submitted insurance claims for this lost business income to Lexington on May 5, 2020. CP 962 ¶ 137. Lexington promptly acknowledged receiving the claim and began investigating. CP 965 ¶¶ 151-52.

At some point in 2020, the Tribes resumed operating their casinos (despite the presumed presence of the COVID-19 virus), with millions of customers visiting the casinos from reopening through the end of the year. CP 953-54 ¶¶ 94-96. Specifically, in 2020, after the reopening, "a total of 26,524 customers visited the Tulalip Tribes Bingo location . . . [with] an estimated 35 visits from customers infectious with COVID-19", a "total of 1,164,135 customers visited the Tulalip Tribes Quil Ceda location . . . [with] an estimated 1471 visits from customers infectious with COVID-19," and "a total of 1,742,256 customers visited the Tulalip Tribes Casino . . . [with] an estimated 2144 visits from customers infectious with COVID-19". CP 953-54 ¶¶ 94-96.

C. The Tribes Sue, And The Insurer Defendants Successfully Move To Dismiss The Complaint.

In July 2020, before the insurers could complete their claims investigation, the Tribes sued their insurers. CP 1857-60. While litigation was ongoing, the insurers completed their investigation and denied the Tribes' claims. CP 966 ¶ 159.

The Tribes eventually filed their third amended complaint, the operative complaint, claiming the pandemic and the "statistically certain or near-certain presence" of the COVID-19 virus "set into motion a chain of events which resulted in direct physical loss [or damage] to covered properties" and the interruption of the Tribes' businesses. CP 957 ¶¶ 112-13; CP 960-61 ¶¶ 129, 135. The Tribes allege their insurers wrongly denied their insurance claims, and they are entitled to coverage under their property policies. CP 962-63 ¶¶ 136-40; CP 966 ¶ 156. In light of this denial, the Tribes further allege the insurers breached their duty of good faith and fair dealing and violated the Washington Consumer Protection Act and Washington Insurance Fair Conduct Act. CP 963-71 ¶¶ 141-83.

In support of their bid for property-insurance coverage, the Tribes allege "the presence of the Covid-19 virus in and on property, including in indoor air, on surfaces, and on objects, causes direct physical loss or damage to property". CP 947 ¶ 75. The Tribes also allege the presence of the virus "transforms everyday surfaces, materials, and objects into fomites", which they define as "physical objects or materials that carry and are capable of transmitting infectious agents". CP 944 ¶ 71, CP 947 ¶ 76. Moreover, according to the Tribes, the COVID-19 virus "adheres to surfaces and objects", and "becom[es] a part of their surface", making physical contact with property "unsafe or unfit for their ordinary and customary use". CP 947 ¶ 77. The Tribes further allege the COVID-19 virus is "much more resilient to cleaning than other respiratory viruses tested," and "survives up to 4 hours on copper, up to 24 hours on cardboard, and up to 3 days on plastic and stainless steel", as well as "up to 28 days at room temperature . . . on a variety of surfaces". CP 945-46 ¶ 73; CP 949-50 ¶ 85; CP 957 ¶ 114.

Given these characteristics of the virus, the Tribes allege the presence of the COVID-19 virus "in and on [insured] property, including in indoor air and on surfaces", caused "direct physical loss or damage" to insured properties by "transforming" property into "fomites" and "render[ing] the property no longer safe or fit for its normal and intended use". CP 960 ¶¶ 125-128.

The Tribes do not identify any particular contamination event at any of their properties that caused closure, or otherwise allege that any employee or patron tested positive for the virus and entered any of the Tribes' properties, resulting in the closure of that property. Instead, the Tribes allege it was "statistically certain or near-certain" that COVID-19 was present at their properties between the March 2020 closure and the end of 2020 because thousands of potentially infectious customers visited the Tribes' casinos during that time. CP 950-54 ¶¶ 87-96; CP 957 ¶ 112.

The insurers moved to dismiss the complaint, explaining that the Tribes are not entitled to coverage because neither the "loss of use" of property nor the mere presence of the COVID-19 virus

constitutes "direct physical loss or damage" to property as a matter of Washington law. CP 885-918. In support of that argument, the insurers cited the Washington Supreme Court's decision in *Hill & Stout*, which makes clear that policies demanding "direct physical loss or damage" require some actual tangible harm to property and do not cover intangible harms like loss of use. CP 900-02. In this case, the insurers explained, the alleged presence of the COVID-19 virus did not cause "direct physical loss or damage" to property that required some sort of repair, rebuilding, or replacement, because the virus does not physically alter property and can be removed with simple cleaning and otherwise dissipates on its own. CP 904-08.

The insurers also provided an independent reason to dismiss the complaint: The Tribes had not alleged that the actual presence of the virus at insured properties *caused* their closures and the Tribes' resulting business losses. CP 912. The insurers explained that the closure and reopening of the Tribes' business operations were untethered to the presence and subsequent removal of the

COVID-19 virus, with the Tribes ultimately reopening and continuing operations during the pandemic despite the ubiquity of the virus. CP 127-28, 912.

Finally, the insurers argued for the dismissal of the Tribes' extra-contractual claims, explaining that if the insurers were correct in denying coverage, they could not have breached any duty of good faith or violated state statutes. CP 914-17.

Following briefing and oral argument, the Honorable Richard J. Okrent, who sat by designation in *Hill & Stout*, granted Lexington's motion to dismiss in September 2023, and the excess carriers' joinders to Lexington's motion to dismiss in November 2023. CP 27-32, 76-78. The court held that the policies here are unambiguous, require actual tangible harm to property, and do not cover the temporary closure of business absent such physical loss or damage to property. Verbatim Report of Proceedings at 56:2-9. Looking to *Hill & Stout* and *Seattle Tunnel Partners*, the superior court explained that "damage to the property must be real and tangible in nature", which "means that there must be physical damage which

causes repair, [re]building, or replacement". *Id.* at 56:4-5; 56:9-11. The court also distinguished the COVID-19 virus from noxious substances like ammonia, gasoline, and methamphetamine residue, explaining that unlike those contaminants, which "render[] . . . properties uninhabitable or unusable", the COVID-19 virus "dissipates on the property". *Id.* at 56:12-21. Because "COVID does not harm the property", and because the Tribes did not allege any other physical loss or damage to property, the court granted the insurers' motions to dismiss. *Id.* at 57:10-59:23; CP 16-19.

III. STANDARD OF REVIEW

This Court reviews a superior court's order granting a motion to dismiss de novo. *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 843 (2015). Dismissal is proper when "the plaintiff cannot prove any set of facts consistent with the complaint that would entitle the plaintiff to relief". *Id.* Although "[a]ll facts alleged in the plaintiff's complaint are presumed true", dismissal is warranted when a "plaintiff's claim remains legally insufficient even under his or her proffered hypothetical facts". *Id.* Legal

conclusions in a complaint should be disregarded. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120 (1987).

In an insurance coverage dispute, "[t]he insured bears the burden of showing that coverage exists" under its policy. *Hill & Stout*, 200 Wn.2d at 218 (internal quotations and citation omitted). Courts, in interpreting an insurance policy, must construe the policy "as a whole". *Id.* Undefined terms are given their "plain, ordinary, and popular meaning". *Id.* When policy language is "clear and unambiguous", the court "must enforce it as written" and "may not modify it or create ambiguity where none exists". *Id.*

IV. ARGUMENT

Policyholders across the country have filed thousands of lawsuits seeking insurance coverage for business income lost during the pandemic, under policy provisions materially identical to those at issue here. Courts in Washington and elsewhere have almost uniformly rejected those claims, holding that pandemic-related financial losses are not covered under property policies like the Tribes'. The result here should be the same.

As in those other cases, every type of coverage sought by the Tribes requires some physical loss or damage to property, whether belonging to the Tribes themselves or to someone else. And as in those other cases, there was no such physical loss or damage to property here as a matter of law. The Tribes, like plaintiffs in a long list of pandemic insurance cases, theorize that the COVID-19 virus physically harms and transforms property, causing physical property loss or damage. But the Tribes' allegations about how the COVID-19 virus interacts with property do not, as a matter of law, satisfy the policies' requirement of "direct physical loss or damage", because COVID-19 does not physically harm or destroy property and dissipates on its own without requiring any repair, rebuilding, or replacement of property. Simply put, the COVID-19 virus harms people, not property. The virus therefore cannot serve as a basis for coverage under property policies requiring direct physical loss or damage to *property*.

Because nothing physical happened to the Tribes' property, the Tribes' claim is one for loss of use of property, which the

Washington Supreme Court has held does not constitute direct physical loss or damage to property as a matter of law. Applying this precedent, the superior court properly dismissed the Tribes' claims. This Court should affirm the judgment.

A. The Tribes' Policies Do Not Cover Their Claimed Losses.

Like many policyholders affected by the pandemic, the Tribes seek coverage primarily under their policies' Business Interruption provision. That provision covers a policyholder's business income lost because of a suspension of business caused by direct physical loss or damage to insured property, until such property is repaired, rebuilt, or replaced. CP 897. Intangible harms, like the inability to use property as intended, do not trigger coverage. That is all the Tribes have alleged—that they were unable to use their casinos in the way they wanted in the early days of the pandemic.

1. The Policies Require "Direct Physical Loss Or Damage" To Property, Which Means That There Is No Coverage Unless Something *Physically* Happens To Property.

Washington courts have long recognized that "to recover under a property insurance policy for physical loss of or damage to the property, something *physically* must happen to the property". *Hill & Stout*, 200 Wn.2d at 222 (citing *Wolstein v. Yorkshire Ins. Co.*, 97 Wn. App. 201, 211-12 (1999); *Fujii v. State Farm Fire & Cas. Co.*, 71 Wn. App. 248, 250-51 (1993)). That is, property "must sustain actual damage or be physically lost" to trigger coverage. *Wolstein*, 97 Wn. App. 201, 212 (1999). Intangible or solely economic harms are not enough.

Applying this rule, numerous state and federal courts in Washington—including the Washington Supreme Court—have held that "COVID-19 and related government closures" do not amount to direct physical loss or damage to property as a matter of law. *Hill & Stout*, 200 Wn.2d at 224. As these courts have explained, because the phrase "direct physical loss or damage" is

unambiguous and requires that there "be some *physical* effect on the property", intangible harms such as the inability to use property due to government orders or the pandemic cannot satisfy this trigger for coverage. *Id.*

This physicality requirement, courts have explained, is underscored by a common policy provision that limits lost business income to a "period of restoration", which is defined as the time needed for physically lost or damaged property to be "repaired, rebuilt or replaced". CP 897. When read in context with the phrase "direct physical loss or damage" to property, as Washington law requires, the terms "repair", "rebuild", and "replace" indicate that the loss or damage contemplated by the policies must be physical in nature. As the Washington Supreme Court in *Hill & Stout* explained, "[i]f there were no physical changes or danger in regard to the property, there would be nothing to repair, rebuild, or replace". 200 Wn.2d at 225. Any other policy construction would render the "period of restoration" provision superfluous and would violate well-established rules of contract interpretation under

Washington law. *See id.* at 218 ("We construe the policy as a whole 'so that the court can give effect to every clause in the policy.'") (citation omitted); *see also Worthy Hotels, Inc. v. Fireman's Fund Ins. Co.*, 2024 WL 1526745, at *1 (9th Cir. Apr. 9, 2024) (no physical loss or damage to property as a matter of Washington law because virus did not physically damage property).

Washington is not alone in its interpretation of "direct physical loss or damage". "[T]he national consensus is that COVID-19 and related governmental orders do not cause physical loss of or damage to property and do not trigger coverage under similar policy language". *Hill & Stout*, 200 Wn.2d at 224. For example:

- The Supreme Court of Oklahoma examined the exact policy form at issue here and concluded that "direct physical loss or damage" means "the immediate and actual, material, or tangible deprivation or destruction of property" and "precludes those intangible losses involving detrimental economic impact unaccompanied by a 'distinct,

demonstrable, physical damage to property.'" *Cherokee Nation v. Lexington Ins. Co.*, 521 P.3d 1261, 1268 (Okla. 2022).

- The Supreme Court of Iowa similarly explained that the word "physical" in the phrase "direct physical loss or damage" "has to mean something"—it indicates that there must be a "physical aspect to the loss of the property" to satisfy a property policy's requirement for direct physical loss or damage. *Wakonda Club v. Selective Ins. Co. of Am.*, 973 N.W.2d 545, 552 (Iowa 2022).
- And the Ninth Circuit, interpreting materially identical policy language, reached the same conclusion, finding support in the policy's "period of restoration" provision, which limits coverage to the time until property should be reasonably "repaired, rebuilt or replaced". *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 892 (9th Cir. 2021). As the court explained, that coverage "extends only until covered property is repaired, rebuilt, or replaced . . . suggests

the Policy contemplates providing coverage only if there are physical alterations to the property". *Id.*

In fact, dozens of appellate courts across the country—including every regional federal court of appeals and nearly every state appellate court to consider the issue—have held that property policies don't cover lost business income when, as in this case, property remains physically unharmed and in the policyholder's possession.[2] This national consensus is driven by basic principles

[2] *SAS Int'l, Ltd. v. Gen. Star Indem. Co.*, 36 F.4th 23 (1st Cir. 2022); *10012 Holdings, Inc. v. Sentinel Ins. Co.*, 21 F.4th 216 (2d Cir. 2021); *Wilson v. USI Ins. Servs.*, 57 F.4th 131 (3d Cir. 2023); *Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926 (4th Cir. 2022); *Q Clothier New Orleans, LLC v. Twin City Fire Ins. Co.*, 29 F.4th 252 (5th Cir. 2022); *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398 (6th Cir. 2021); *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327 (7th Cir. 2021); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141 (8th Cir. 2021); *Goodwill Indus. of Cent. Okla. Inc. v. Philadelphia Indem. Ins. Co.*, 21 F.4th 704 (10th Cir. 2021); *SA Palm Beach, LLC v. Certain Underwriters at Lloyd's London*, 32 F.4th 1347 (11th Cir. 2022); *Wakonda Club v. Selective Ins. Co. of Am.*, 973 N.W.2d 545 (Iowa 2022); *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266 (Mass. 2022); *Colectivo Coffee Roasters, Inc. v. Soc'y Ins.*, 974 N.W.2d 442 (Wis. 2022); *Tapestry, Inc. v. Factory Mut. Ins. Co.*, 286 A.3d 1044 (Md. 2022); *Neuro-Communication Servs., Inc. v. Cincinnati Ins. Co.*, 219 N.E.3d 907 (Ohio 2022); *Sullivan Mgm't, LLC v. Fireman's Fund Ins. Co.*, 879 S.E.2d 742 (S.C. 2022); *Starr Surplus Lines Ins. Co. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 535 P.3d 254 (Nev. 2023); *Cajun*

of contract interpretation that are consistent across jurisdictions. Because "other states follow essentially the same rules for interpreting contracts", including "giv[ing] unambiguous words their ordinary meaning", it is "quite unlikely" that "the 'average' Kentuckian would interpret the phrase 'direct physical loss' in an insurance policy differently from, say, the average Ohioan, New Yorker, or Iowan". *Estes v. Cincinnati Ins. Co.*, 23 F.4th 695, 701 (6th Cir. 2022). So too the average Washingtonian.

2. Washington Supreme Court Precedents Foreclose The Tribes' Claims, Which Boil down To Claims For The "Loss Of Use" Of Property.

Like many policyholders in similar COVID-19 coverage cases, the Tribes contend that even if their property remained intact and in their possession, they nevertheless lost the *use* of that

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Conti LLC v. Certain Underwriters at Lloyd's London, 359 So.3d 922 (La. 2023); *Conn. Dermatology Grp., PC v. Twin City Fire Ins. Co.*, 288 A.3d 187 (Conn. 2023); *Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Co.*, 302 A.3d 67 (N.H. 2023); *AC Ocean Walk, LLC v. Am. Guarantee & Liab. Ins. Co.*, 307 A.3d 1174 (N.J. 2024); *Consol. Rest. Operations, Inc. v. Westport Ins. Corp., No. 7*, --- N.E.3d ---, 2024 WL 628047 (N.Y. Feb. 15, 2024).

property due to closure orders and the alleged presence of the COVID-19 virus. The Tribes try (*e.g.*, AOB at 24-26) to fit that loss of use within a category of cases in which the Washington Supreme Court held policyholders might be entitled to coverage—those in which property lost all "functionality" because it became "uninhabitable". *Hill & Stout*, 200 Wn.2d at 221-22. But the problem here is the same as the problem in *Hill & Stout* itself: there was "no *physical* loss of functionality to the *property*". *Id.* at 221. The Tribes are therefore pressing the same sort of claim for loss of use that the Supreme Court rejected in *Hill & Stout* and that other courts have also consistently rejected.

In addressing a COVID-19-related property-insurance claim similar to the Tribes' here, the Washington Supreme Court in *Hill & Stout* held that "the loss of [an insured's] intended use of [its] property . . . is not covered under the plain language of [a] policy" requiring direct physical loss or damage to property. 200 Wn.2d at 225. There, the plaintiff alleged it suffered a "direct physical loss" of property when it was unable to fully use its dental offices due to

COVID-19-related government orders. *Id.* at 214-15, 219. The Court disagreed, explaining that a "physical loss of property" occurs only when property has been "*physically* destroyed" or "one is deprived of . . . the property [in that it] is no longer physically in their possession". *Id.* at 219 (emphasis added).

Although the Court noted that a physical loss may occur when an insured is "physically incapable of using [its] property", the Court clarified that there still "must be some *physical* effect on the property" for coverage to apply. 200 Wn.2d at 223-24. Thus, while the inability to use property due to "theft or total destruction" may constitute a direct physical loss (because the insured is physically incapable of exercising control over its property), the mere inability to use property as intended due to government orders or COVID-19 does not. *Id.* The Court noted that the plaintiff was "still able to *physically* use the property at issue", the property was "in [its] possession", "was still functional", and the plaintiff was "not prevented from entering the property". *Id.* at

220. The Court thus held that the plaintiff had not suffered a "direct physical loss". *Id.*

The Court acknowledged in dicta that there may be cases where there is a "direct physical loss" of property, even absent physical alteration to the property, "under a theory of loss of functionality". 200 Wn.2d at 221-24. But the Court explained that even under this theory, "there must be some *physical* effect on the property". *Id.* at 224. Applying that test, courts have held that property was physically lost when asbestos "*nearly eliminated or destroyed*" the function of property, rendering it "useless", or when gasoline soaked the foundation of a church and made it unsafe and uninhabitable. *Id.* at 220-21. The Supreme Court distinguished those cases in *Hill & Stout*, explaining that the plaintiff had not alleged facts showing that its property had become uninhabitable and useless. The plaintiff "was not able to use the property in the way that it wanted", but that loss was not "physical"; it was instead "more akin to an abstract or intangible loss". *Id.* at 220.

The Supreme Court reaffirmed this holding in *Seattle Tunnel*—a non-COVID-19 coverage decision concerning a builder's all-risk insurance policy. There, the insured suffered losses when its tunnel-boring machine stopped working and temporarily paused the insured's tunnel-excavation project. 200 Wn.2d at 319. The insured alleged it "suffered direct physical loss" of the "tunneling works"—the tunnel itself, plus the machine used to excavate it—because it was unable to use them and complete construction. *Id.* at 319. In rejecting this claim, the Court explained that while "direct physical loss or damage" may include the "deprivation or dispossession of or injury to the insured property", such "deprivation, dispossession, or injury must be physical". *Id.* at 339. "[T]he loss must have a material existence, *be tangible*, or be perceptible by the senses". *Id.* (emphasis added). The Court cited with approval decisions requiring some "physical injury" to property for coverage under policies requiring "physical" loss. *Id.* at 341-42. Because the insured "[did] not allege the tunneling works itself suffered any loss or damage that is physical", but only that "it

was deprived of *its use* of the tunneling works", the court denied coverage. *Id.* at 339, 344.

Both *Hill & Stout* and *Seattle Tunnel* reaffirm the long-standing principle in Washington that the inability to use property as intended does not, as a matter of law, constitute "direct physical loss or damage to property". There must be some tangible physical harm to property, or actual physical loss of property.

That is exactly what is missing here. Like the insured in *Hill & Stout*, the Tribes ask the Court to find coverage under their property policy for economic losses arising from their inability to *use* property as intended. That makes this case like not just *Hill & Stout*, but many others premised on the theory that the COVID-19 virus renders property useless or uninhabitable. *See, e.g.*, *Wilson v. USI Ins. Service LLC*, 57 F.4th 131, 142 (3d Cir. 2023) (COVID-19 does not render property useless); *Sagome, Inc. v. Cincinnati Ins. Co.*, 56 F.4th 931, 937 (10th Cir. 2023) (distinguishing presence of virus from accumulation of gasoline that rendered property uninhabitable).

As in *Hill & Stout*, the Tribes were "still able to *physically* use the property at issue"—the casinos remained "in [the Tribes'] possession, the property was still functional and able to be used, and [the Tribes were] not prevented from entering the property". *Hill & Stout*, 200 Wn.2d at 220. Although the Tribes may "not [have been] able to use the property in the way [they] wanted" for part of 2020, "this alleged 'loss' is not 'physical,'" and is "more akin to an abstract or intangible loss". *Id.* That the Tribes were able to reopen in the middle of the pandemic and host millions of customers—many of whom the Tribes allege were infected with COVID-19, *see* CP 953-54 ¶¶ 94-96—and did not have to repair, rebuild, or replace any property, despite the ubiquity of the virus during this time, underscores that the Tribes' properties were not physically lost or damaged in any way.

Without any property that was "actual[ly] damage[d] or . . . physically lost", the Tribes are ineligible for coverage under their property policy. *Wolstein*, 97 Wn. App. at 212.[3]

B. Nothing About This Case Warrants A Departure From The Many Decisions Rejecting Claims Just like The Tribes'.

The Tribes suggest this case is distinguishable from *Hill & Stout* because the "statistically certain or near-certain" presence of the virus at their property physically harmed it by "adhering" to property and "transforming" property into "fomites". CP 947 ¶¶ 76-77; CP 950-57 ¶¶ 87-113; CP 960 ¶¶ 127-28. But such allegations do not amount to direct physical loss or damage to property under Washington law. Absent such physical loss or damage, the Tribes' claim ultimately remains one for the loss of use of property, which is not covered by their property policies.

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[3] The Court should decline the Tribes' request to take judicial notice of the King County Superior Court's order in *Board of Regents of University of Washington v. Employers Insurance Company of Wausua* under Evidence Rule 201 because Rule 201 is limited to adjudicative facts. AOB 33-34. A superior court's order in another matter is also not legal authority, and the Court should not rely on it here. RAP 10.3(a)(6); GR 14.1.

1. The COVID-19 Virus Does Not Cause Direct Physical Loss Or Damage To Property.

In an effort to distinguish its claims from those in *Hill & Stout*, the Tribes contend they have satisfied their policies' physicality requirement because the alleged presence of the COVID-19 virus purportedly made property "unsafe for its intended purpose". AOB at 28; CP 947 ¶¶ 76-77; CP 960 ¶127. But COVID-19 does not physically harm property. And even if the virus could physically harm property (it cannot), the Tribes' allegations defeat the necessary causal link between the presence of the virus at their properties and their losses.

a) COVID-19 Does Not Physically Harm Property.

The Tribes' losses do not fit within the plain meaning of "direct physical loss or damage" to property because nothing tangible happened to the Tribes' properties here.

Faced with this reality—and the lack of insurance coverage it implies—the Tribes have focused their arguments on the presumed presence of the COVID-19 virus on their properties and

contend the virus physically harmed property. The Tribes point to allegations that the COVID-19 virus "adheres" to property, turns property into "fomites", and makes property "unsafe for [its] intended purpose". CP 945-50 ¶¶ 73, 76-77, 85; CP 957 ¶ 114; CP 960 ¶¶ 127-28. Such allegations fail to establish that the virus causes direct physical loss or damage to property, as those terms are ordinarily understood under Washington law.

For example, that a property is a "fomite" does not mean it is physically damaged or lost. As the Tribes concede, a "fomite" is simply a fancy term for a "physical object[] . . . that carr[ies], and [is] capable of transmitting infectious agents". CP 944 ¶ 71. In other words, a fomite is *any object* that has not been sanitized and is therefore capable of transmitting infectious agents such as viruses—like those that cause the common cold, the flu, and COVID-19. But the fact that property is temporarily capable of spreading disease does not mean it is damaged. If property were considered damaged simply because it is a "fomite", most property would be considered "damaged" nearly all the time, apart from the

moment immediately after it's cleaned. As the Nevada Supreme Court recently put it in addressing similar "fomite" allegations, "evidence that the virus remains harmful while in the air or [on contaminated objects like] 'fomites' is . . . unconvincing because it does not demonstrate that the virus is harmful *to the property*". *Starr Surplus Lines Ins. Co. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 535 P.3d 254, 264 (Nev. 2023). Such "[f]omite-based transmission instead typifies another way the virus 'pos[es] health risk to humans,' as opposed to property". *Id.* at 264-65 (citation omitted).

The Tribes also contend the COVID-19 virus "physically transformed the content of the air" at insured properties, "rendering the air unsafe for individuals to breathe". AOB at 27-28; CP 960 ¶ 125. Air, however, is not "property" as that term is ordinarily understood in a property policy. *See Tapestry*, 286 A.3d at 1059. Moreover, the insuring clause in the Tribes' policies limits coverage "to real and/or personal property"—neither of which can be reasonably interpreted to encompass air, which flows in and out of insured property, and exists all around. CP 897.

In any event, even if air could qualify as property and could be damaged, it would make no difference because the Tribes do not allege facts that show the presence of the COVID-19 virus did damage the air at their properties. The Tribes never explain "how the entry of Coronavirus particles into the air", and its mixture with the "many other kinds of particles already traveling in the same air", where they remain until they are further dispersed or ultimately deposited onto a surface, "physically damages" air over which the Tribes have possessory rights. *Tapestry*, 482 286 A.3d at 1060. Like the Tribes' fomite allegations, "[a]t most, [the COVID-19 virus's] virality in the air is evidence of harm imperiling people, not property". *Starr Surplus*, 535 P.3d at 264. And property is all that the policies insure.

In rejecting the Tribes' argument that the COVID-19 virus itself causes physical damage, courts across the country have distinguished the virus, which doesn't harm property, from noxious substances like gasoline, smoke, or methamphetamine vapors, which do. For example:

- The "[p]resence of a physical virus on the property, even if it 'attaches to' [or adheres to] the property, does not give rise to the necessary transformative element of something like 'fire, water, or smoke.'" *Starr Surplus*, 535 P.3d at 264 (citation omitted).
- Unlike noxious substances that impact a physical characteristic of property that must be repaired, or otherwise renders property completely uninhabitable, the COVID-19 virus is untethered to property, and may be "rendered less harmful through practices unrelated to the property, such as social distancing, vaccination, and the use of masks". *United Talent Agency v. Vigilant Ins. Co.*, 77 Cal. App. 5th 821, 838 (2022).
- The COVID-19 virus "is not the type of physical contaminant that creates the risk of a direct physical loss, because once a contaminated surface is cleaned or simply left alone for a few days, it no longer poses any physical threat to occupants". *Conn. Dermatology*, 288 A.3d at 203.

Although the Tribes contend the COVID-19 virus is "much more resilient to cleaning than other respiratory viruses", the Tribes' own sources establish the virus may nonetheless be wiped away with disinfectant. CP 957 ¶ 114, n. 66 (alcohol is effective); *see also* CP 958 ¶ 117, n. 71 (bleach also works). The Tribes also allege that even without cleaning, the COVID-19 virus ultimately dissipates on its own. CP 945 ¶ 73; CP 949-50 ¶ 85 (COVID-19 virus can survive "up to 4 hours on copper, up to 24 hours on cardboard, and up to 3 days on plastic and stainless steel"). Accordingly, no cleaning, and certainly no repair, rebuilding, or replacement, is necessary to return property to its pre-COVID-19 state. All that is required is time. While the virus may affect how people interact with and within a particular space, it does not physically harm property or render it useless.

The Tribes' allegations, then, establish that (1) property contaminated with the COVID-19 virus may be characterized as a "fomite" because it can transmit disease, (2) the COVID-19 virus, like other viruses belonging to the coronavirus family, is more

resilient to cleaning than other respiratory viruses, but (3) it ultimately dissipates on its own. CP 945-50 ¶¶ 73, 76-77, 85; CP 957 ¶ 114; CP 960 ¶¶ 127-28. This trio of allegations doesn't establish direct physical loss or damage to property requiring repair, rebuilding, or replacement, as contemplated by the Tribes' property policies. As the Supreme Court of New Hampshire observed in addressing similar allegations of physical loss or damage, even if "the virus can linger on surfaces for as long as 28 days, the fact that the virus will eventually dissipate on its own is significant to the question of whether the property has been changed in a distinct and demonstrable way" because "[p]roperty that has been [physically] changed . . . will not be changed back simply by the passage of time". *Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Co.*, 302 A.3d 67, 78 (N.H. 2023).

Adopting the Tribes' "broad definition would seem to extend coverage to any situation where material matter is added to a surface, even a sneeze". *Or. Clinic*, 75 F.4th at 1072; *see also Starr Surplus*, 535 P.3d at 264 (rejecting theory that presence of the virus

causes direct physical loss or damage, because that would "render[] every sneeze, cough, or even exhale a qualifying harm") (citation omitted); *Circle Block Partners, LLC v. Fireman's Fund Ins. Co.*, 44 F.4th 1014, 1023 (7th Cir. 2022) (same). No reasonable person would interpret the phrase "direct physical loss or damage" in a property policy so expansively.

The unreasonableness of the Tribes' theory is reflected in the near-unanimous rejection of similar contamination theories by every regional federal court of appeals and nearly every state appellate court to address the issue. This consensus is rooted in the plain meaning of the terms used in property-insurance policies.

Eleven state supreme courts have rejected claims premised on the Tribes' theory that the virus physically harms property:

1. The Supreme Judicial Court of Massachusetts explained that the "[e]vanescent presence of a harmful airborne substance that will quickly dissipate on its own [like COVID-19], or surface-level contamination that can be removed by simple cleaning, does

not physically alter or affect property". *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266, 1276 (Mass. 2022).

2. The Wisconsin Supreme Court explained that "the presence of COVID-19 does not constitute a physical loss of or damage to property because it does not 'alter the appearance, shape, color, structure, or other material dimension of the property". *Colectivo Coffee Roasters, Inc. v. Society Ins.*, 974 N.W.2d 442, 447 (Wis. 2022) (citation omitted). The virus "does not necessitate structural 'repairs or remediation'; it can be removed from a surface with a disinfectant". *Id.* at 448. At the end of the day "the danger of the virus is to 'people in close proximity to one another,' not to the real property itself". *Id.*

3. The South Carolina Supreme Court held that "the pandemic impacts human health and human behavior, not physical structures". *Sullivan Mgmt., LLC v. Fireman's Fund Ins. Co.*, 879 S.E.2d 742, 745 (S.C. 2022).

4. The New Hampshire Supreme Court held the same: "The fact that the property could become a vector for transmission

of a virus that poses a risk to human health due to the presence of [the COVID-19 virus] is not relevant to the question of whether there has been 'physical loss of or damage to property,' because the policies insure property not people". *Schleicher*, 302 A.3d at 77. While the virus "presents a mortal hazard to humans, [it does] but little or none to buildings which remain intact and available for use once the human occupants no longer present a health risk to one another". *Id.* (citation omitted).

5. The Ohio Supreme Court similarly concluded that "regardless of whether Covid particles exist on property only temporarily" or for longer, "the mere existence of Covid particles on [property] does not involve any physical alteration of the property". *Neuro-Communication Servs., Inc. v. Cincinnati Ins. Co.*, 219 N.E.3d 907, 915 (Ohio 2022).

6. The Maryland Supreme Court rejected the theory that the presence of the virus "in the air and on surfaces" at insured properties causes "'physical loss or damage' as that phrase is used in [property policies]": the mere fact "[t]hat particles rested for

some period of time on [property] surfaces . . . simply does not constitute damage to property". *Tapestry*, 286 A.3d at 1060-61.

7. New York's highest court held that allegations that the virus renders property "unusable", "attach[es] to and cause[s] harm to property", and "can survive on surfaces for days and even weeks", were insufficient to establish direct physical loss or damage to property as a matter of law. *Consol. Rest. Operations, Inc. v. Westport Ins. Corp., No. 7*, --- N.E.3d ---, 2024 WL 628047, at *6-7 (N.Y. Feb. 15, 2024).

8. The Supreme Court of New Jersey held that even if the COVID-19 virus was present at the insured casino and properties, the insured failed to allege a physical loss or damage to property, "given that the properties were 'intact and functional' and were 'not destroyed in whole or in part.'" *AC Ocean Walk, LLC v. Am. Guarantee & Liab. Ins. Co.*, 307 A.3d 1174, 1187-88 (N.J. 2024) (citation omitted).

9. The Nevada Supreme Court held that the "[p]resence of a physical virus on the property, even if it 'attaches to' the property,

does not give rise to the necessary transformative element" needed for direct physical loss or damage. *Starr Surplus*, 535 P.3d at 264.

10. The Louisiana Supreme Court held that "COVID-19 [does] not cause damage or loss that [is] physical in nature", and therefore does not satisfy a policy's requirement for direct physical loss or damage to property. *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, 359 So. 3d 922, 928-29 (La. 2023).

11. The Supreme Court of Connecticut held that "the virus is not the type of physical contaminant that creates the risk of a direct physical loss because, once a contaminated surface is cleaned or simply left alone for a few days, it no longer poses any physical threat to occupants". *Conn. Dermatology*, 288 A.3d at 203.

Numerous federal appellate courts have likewise joined the consensus that the COVID-19 virus does not harm property.[4]

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[4] *See, e.g.*, *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, 36 F.4th 29 (1st Cir. 2022); *10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd.*, 21 F.4th 216 (2d Cir. 2021); *Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926 (4th Cir. 2022); T*erry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, 22 F.4th 450 (5th Cir. 2022); *Circle Block*, 44 F.4th 1014 (7th Cir. 2022); *Olmsted Med. Center v. Continental Cas. Co.*, 65 F.4th 1005

In short, the COVID-19 virus "is a virus that injures people, not property". *Or. Clinic*, 75 F.4th at 1072 (citation omitted). It therefore cannot form the basis for coverage under the Tribes' property insurance policies.

b) The Tribes Have Not Established A Causal Link Between Their Business Closures And The Presence Of The COVID-19 Virus.

There is an independent reason to reject the Tribes' theory that the COVID-19 virus caused their business-income losses: Coverage under the Tribes' policies for business income lost and extra expenses incurred would still not be available because the Tribes have not shown that the presence of the virus at any particular property caused their losses.

Although the Tribes generally allege the COVID-19 virus was present on their properties, and that they "confirmed the actual presence of the COVID-19 virus at or within insured premises" "in March of 2020", AOB 15, the Tribes stop short of alleging the virus

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(8th Cir. 2023); *SA Palm Beach, LLC v. Certain Underwriters at Lloyd's London*, 32 F.4th 1347 (11th Cir. 2022).

was present at properties *before* closure, or that any stopping or resuming of the Tribes' business operations was tied to the presence and subsequent removal of the virus from property.

Apart from vague allegations that the virus was generally present in March of 2020, the Tribes point to statistical evidence to show the likelihood of the virus's presence at their casinos. CP 950-54 ¶¶ 87-96. But the Tribes' statistical evidence, which addresses the virus's likely presence at the casinos "[b]etween March 17, 2020 and December 31, 2020", establishes only that the virus was likely present at the casinos *after* their initial closure on March 16, 2020, and was very much still around when the Tribes reopened their properties later that year. CP 953-54 ¶¶ 94-96. So the Tribes' allegations do not show the presence of the COVID-19 virus at insured properties *caused* the cessation of any business operations. If anything, the allegations illustrate the opposite—that despite the presumed presence of the virus at the casinos, the Tribes were able to reopen and continue operations during the

pandemic, with about three million customers coming to the casinos after reopening in 2020 alone. CP 953-54 ¶¶ 94-96.

Nor do the Tribes allege the reopening of the casinos during this period was predicated on the removal of the virus from their property—let alone the "repair, rebuild[ing] or replace[ment]" of property that the policy calls for. Although the Tribes suggest decontaminating their property and "redesigning interior spaces" amount to "repairs," AOB 29, courts across the country have consistently rejected that same argument, explaining that "[a] lay person would not say that cleaning or sterilizing [property] . . . is a 'repair.'" *Cajun Conti*, 359 So.3d at 927. As the Nevada Supreme Court put it, preventative measures to curb the spread of COVID-19, like plexiglass installation or cleaning, "do not aim to 'repair, rebuild or replace' property; they aim to redress the way people pose harm to one another by carrying and transmitting the virus". *Starr Surplus*, 535 P.3d at 265.

The Tribes' allegations suggest their losses were instead the result of COVID-19-related government orders. The Tribes allege

that in the wake of the pandemic, Washington and tribal governments issued various orders to protect public health. CP 954-55 ¶¶ 97-105. As part of this series of orders, the Tulalip Tribes Board of Directors issued an emergency stay-at-home order from March 26, 2020, to May 25, 2020. CP 955 ¶¶ 102, 105. Sometime in 2020 after these orders were lifted, the Tribes reopened their casinos, and were able to host millions of customers through the end of the year, notwithstanding the statistically likely presence of the virus. CP 953-54 ¶¶ 94-96.

Appellate courts across the country have addressed causation problems like the one here. For example, the California Court of Appeal in *Inns-by-the-Sea v. California Mutual Insurance Co.* explained that "the lack of a causal connection between the alleged physical presence of the virus on [the insured's] premises and the suspension of [the insured's] operations can be best understood by considering what would have taken place if [the insured] had thoroughly sterilized its premises to remove any trace of the virus after the [closure orders] were issued". 71 Cal. App. 5th 688, 704

(2021). In that case, the court explained, the insured "would *still* have continued to incur a suspension of operations because the [closure orders] would *still* have been in effect and the normal functioning of society *still* would have been curtailed". *Id.*

The same is true here. The suspension of the Tribes' operations was not the result of any particular physical loss or damage to property, caused by the presence of the virus, that needed to be repaired, rebuilt, or replaced. The closure and reopening of the Tribes' properties was not tied to the presence and removal of the virus from those properties. The Tribes do not allege that the reopening of their properties depended on the removal of the virus—to the contrary, the Tribes reopened and continued to operate their businesses throughout the pandemic, *despite* the ubiquity of the virus. CP 953-54 ¶¶ 94-96. If anything, the Tribes' own allegations demonstrate the COVID-19 virus was far more prevalent later in 2020 than in March. CP 954 (cataloging sharp rise in cases in Snohomish County throughout the year). But the ongoing spread of the virus did not stop the Tribes from

operating their casinos during that time. CP 953-54 ¶¶ 94-96. The Tribes therefore cannot establish a correlation (let alone a causal relationship) between the "statistically likely" presence of the COVID-19 virus in and around their properties, on one hand, and the ability to operate their businesses, on the other.

2. The Lack Of A Virus Exclusion In The Policies Is Irrelevant.

Despite the requirement in their policies that property be physically harmed or lost—something the COVID-19 virus cannot cause—the Tribes nonetheless suggest that the absence of a virus exclusion in their policies somehow implies the existence of coverage for viruses. AOB at 29, 42-46. This is not an accepted way to interpret an insurance policy. Where a loss is not covered by the insuring clause of a policy, the inquiry ends there. *See Am. States Ins. Co. v. Ranch San Marcos Props., LLC*, 123 Wn. App. 205, 209 (2004). Any analysis under any exclusion is unnecessary. *Id.*; *see also Hill & Stout*, 200 Wn.2d at 225 (noting the court "need not examine the issue of . . . the virus exclusion" because there was no coverage under the policy's coverage provision). Because the

Tribes have not established any direct physical loss or damage to property, as required for coverage under the plain terms of their property insurance policies, there is no coverage. The existence or lack of a virus exclusion in the policies is irrelevant.

In rejecting a similar argument, the Seventh Circuit explained that focusing on the lack of an exclusion "gets things backward. Analysis of exclusions does not come into play unless these costs are encompassed within [the insurer's] basic coverage grant in the first instance; an insurance policy does not need to exclude coverage for something that it does not cover to begin with". *Sigler v. GEICO Cas. Co.*, 967 F.3d 658, 660 (7th Cir. 2020). That is why, for example, the California Court of Appeals concluded that the absence of an exclusion in a policy like the one here made no difference. *Inns-by-the-Sea*, 71 Cal. App. 5th at 709 (collecting authorities holding that a plaintiff cannot "rely on the absence of an exclusion to create ambiguity in an otherwise unambiguous insuring clause"). That is also why courts deciding COVID-19 insurance cases often decline to address virus exclusions even when

the challenged policies contain them. *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 893-94 (9th Cir. 2021) (district court declined to address virus exclusion because there was no coverage); *see also, e.g.*, *Santo's*, 15 F.4th at 406 (same).

Relying on *Berg v. Hudesman*, 115 Wn.2d 657, 667-68 (1990), the Tribes nonetheless argue that the Court should examine extrinsic evidence of virus exclusions in other policies to "aid in ascertaining the parties' intent". AOB at 42-43. This argument ignores that the Washington Supreme Court has since clarified on numerous occasions that *Berg* does not authorize the "unrestricted use of extrinsic evidence in contract analysis". *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503 (2005) (quoting *Hollis v. Garwall, Inc.*, 137 Wn.2d 683 (1999)). While extrinsic evidence may be admissible to discern the intent of the parties when a contract is unclear, it may not be used to "show an intention independent of the instrument," or to "vary, contradict or modify the written [policy]". *Id.*

Instead, "Washington continues to follow the objective manifestation theory of contracts". *Hearst*, 154 Wn.2d at 503. Under this approach, the meaning of contracts is conveyed by their "actual words" of the policy, given their "ordinary, usual, and popular meaning", "unless the entirety of the agreement clearly demonstrates a contrary intent". *Id.* at 504. The Tribes' property policies are clear: There must be some "physical loss or damage to property" for coverage to apply. CP 897-98. The Washington Supreme Court has held this phrase unambiguously requires that something physical happen to property—whether that be physical damage to property or a physical loss of property. *Hill & Stout*, 200 Wn.2d at 219. It does not encompass mere intangible losses, such as the inability to use property as intended. *Id.* at 220. The Tribes may not use extrinsic evidence to vary or contradict this plain meaning to create coverage where there is none.

3. Washington Pleading Standards Also Do Not Save The Tribes' Claims.

Like policyholders in many of these cases, the Tribes attempt to fall back on pleading standards to save their claim. AOB at 21,

23, 47. Because Washington is a notice-pleading state, the Tribes argue their allegations about the virus and its effects on property must be taken as true, however implausible they might be, and that those allegations are sufficient to establish "direct physical loss or damage" to their insured property for purposes of surviving a motion to dismiss. AOB at 20-21, 23-24, 27-29, 47. But even when taken as true, the Tribes' factual allegations about the virus and its impact on property do not establish "direct physical loss or damage" to property as a matter of Washington law.

The gist of the Tribes' allegations is that the COVID-19 virus "adheres" to property and may be transmitted through contaminated property known as "fomites", but may be cleaned from property and otherwise dissipates on its own:

- The COVID-19 virus is a respiratory disease that is "mainly [spread] between people who are in close contact with each other", but may also be transmitted through by air, as well as through fomite transmissions. CP 941-44 ¶¶ 63-70; CP 950 ¶ 86.

- Physical objects or materials contaminated with the COVID-19 virus are considered "fomites". CP 944 ¶¶ 71-72.
- "Fomites" are physical objects or materials that "carry, and are capable of transmitting infectious agents", such as viruses or bacteria. CP 944 ¶ 71.
- The COVID-19 virus "adheres to surfaces and objects". CP 947 ¶ 77.
- Like other coronaviruses, the COVID-19 virus is "much more resilient to cleaning than other respiratory viruses", but can ultimately be removed through disinfection. CP 957-59 ¶¶ 114-19.
- The virus can survive on surfaces and objects for anywhere from a few hours (for example, "up to 4 hours on copper or 24 hours on cardboard") to a few weeks ("up to 28 days at room temperature" on some surfaces). CP 945-46 ¶ 73; CP 949-50 ¶ 85.

- The COVID-19 virus may be reintroduced to property by an infected person who enters the property. CP 959 ¶ 122.

These allegations do not establish that the COVID-19 virus physically harms property in any way. That property contaminated with the COVID-19 virus (or any other virus or bacteria) is considered a "fomite" does not mean that property is physically damaged or lost. Nor does the allegation that the virus is more resilient to cleaning demonstrate physical harm to property — particularly when the virus dissipates on its own. Thus, while the Tribes' allegations may establish that the COVID-19 virus is harmful to people, they do not establish that the virus affects property in a manner that can fairly be characterized as physical loss or damage to property. Washington pleading standards simply do not save the Tribes' claims.

As the California Court of Appeal explained in considering materially similar pleading-standard arguments, "the general principle requiring *factual* allegations to be accepted as true . . . [does

not] obligate[] [the court] to ignore that those allegations do not, as a matter of law, meet the applicable definition triggering coverage". *Endeavor Operating Co. v. HDI Glob. Ins. Co.*, 96 Cal. App. 5th 420, 442 (2023). That panel of the California Court of Appeal further expressly disagreed with *Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Insurance Co.*, 81 Cal. App. 5th 96 (2022),[5] and *Shusha, Inc. v. Century National Insurance Co.*, 87 Cal. App. 5th 250 (2022) — the two California Court of Appeal decisions the Tribes rely on here. AOB at 36-38. The court explained that although *Marina Pacific* and *Shusha* are correct that, at the pleading stage, a court is required to "accept as a scientific fact" the insured's allegations of how the COVID-19 virus interacts with property, it nevertheless rejected the insured's contamination theory because "the type of viral interaction with surfaces alleged by [the insured] (and accepted as true) does not, as a matter of law, satisfy the default definition of

[5] *Marina Pacific* was ultimately resolved in favor of the insurer following a jury's finding that the COVID-19 virus did not cause direct physical loss or damage to insured property. *Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Ins. Co.*, 2023 WL 3807502 (Cal. Super. May 30, 2023).

'direct physical harm or loss to property.'" *Id.* In doing so, the court joined other divisions of the California Court of Appeal and courts across the country that have rejected as a matter of law allegations that the mere presence of the virus constitutes direct physical loss or damage to property. *Id.* at 441.

Other courts, including numerous state supreme courts, have likewise directed the dismissal of similar claims under notice-pleading standards like Washington's. For example, in *Colectivo Coffee*, the Wisconsin Supreme Court reversed a trial court's denial of a motion to dismiss a similar COVID-19-related property-insurance claim. 974 N.W.2d at 444, 446. The court explained that while it accepted as true all factual allegations in the complaint, the court drew its "own legal conclusions regarding how [those facts] apply to the [insured's] policy". *Id.* at 446. Accepting the insured's allegations about the COVID-19 virus as true, the court held that the "presence of COVID-19 particles" on insured properties still did not constitute physical loss or damage to property as a matter

of law—and therefore directed the trial court to dismiss the case. *Id.* at 447-48, 450.

The Massachusetts Supreme Judicial Court likewise upheld an order granting an insurer's motion to dismiss under a notice-pleading standard, explaining that the presence of the COVID-19 virus does not amount to physical loss or damage to property. *Verveine Corp.* 184 N.E.3d at 1276. As the court explained, "[e]ven accepting the plaintiffs' premise that the suspension of their business was caused by the 'presence' of the virus on surfaces and in the air . . . mere 'presence' does not amount to loss or damage to the property", because the "[e]vascent presence of a harmful airborne substance that will quickly dissipate on its own . . . does not physically alter or affect property". *Id.*

Most recently, New York's highest court held that functionally identical allegations regarding the presence and characteristics of the COVID-19 virus were insufficient to establish direct physical loss or damage to property under notice-pleading standards. *Consol. Rest.*, 2024 WL 628047, at *6-7 (N.Y. Feb. 15,

2024). Like the Tribes, the insured there alleged that the presence of COVID-19 at its restaurants rendered them "unusable", requiring it to "suspend" or modify business operations. *Id.* at *6. The insured also alleged that the virus physically altered property, transforming it into "fomites"; that the virus can "attach to and cause harm to property"; and that the virus can "survive on surfaces for days and even weeks". *Id.* at *7. The court decided that wasn't enough. Even "generously construed to allege that various surfaces in restaurants became vectors for transmission of the coronavirus", the complaint did not demonstrate physical loss or damage to property as a matter of law. *Id.* No property was actually damaged or had to be replaced, "[n]othing stopped working", and "the allegations themselves confirm that the presence of the coronavirus was temporary". *Id.* The court therefore affirmed the lower court's order granting the insurer's motion to dismiss.

The same is true here. The Tribes' allegations do not establish that the COVID-19 virus physically harms or impacts property in any way. Because the Tribes' claims "remain legally

insufficient under [their] hypothetical facts", the claims do not satisfy Washington pleading standards. *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 843 (2015). The superior court appropriately dismissed the complaint.

C. The Superior Court Also Properly Dismissed The Tribes' Remaining Claims.

1. The Tribes' Claimed Losses Are Not Covered Under Other Provisions Of Their Policies.

The Tribes' policies require physical loss or damage not just for coverage of lost business income, but also for all the other types of coverage the Tribes seek—under the Extra Expense, Interruption by Civil Authority, Ingress/Egress, Continent Time Element, Tax Revenue Interruption, and Extended Period of Indemnity provisions. CP 150-52. Because neither the inability to use property as intended nor the mere presence of the COVID-19 virus on property amounts to physical loss or damage to property, and because the Tribes identify no property that was otherwise physically lost or damaged, the Tribes cannot satisfy the trigger for coverage under any other policy provision.

In addition, with respect to coverage under the Interruption of Civil Authority provision, the Tribes are not entitled to coverage because they do not allege that an order of civil authority "specifically prohibited" access to their insured properties. Nor could they. None of the government orders identified in the Tribes' complaint specifically references the Tribes' insured properties at all. CP 954-55 ¶¶ 97, 101-05; *see also, e.g.*, *Colectivo Coffee*, 944 N.W.2d at 449 (no civil-authority coverage where orders "did not prohibit access" to insured property).

There is an independent reason the Tribes are not entitled to coverage under the Ingress/Egress provision as well: They allege no facts that show their properties were physically inaccessible in any way, let alone *because of* physical loss or damage to neighboring property. CP 954-62; *see also, e.g.*, *Torgerson Properties, Inc. v. Continental Cas. Co.*, 38 F.4th 4, 6 (8th Cir. 2022) (no ingress/egress coverage where insured failed to establish causal link between physical loss or damage to neighboring property and shutdown of business).

2. The Trial Court Also Correctly Dismissed The Tribes' Extra-Contractual Claims.

Because the Tribes are not entitled to coverage under their property policies, the Tribes also may not pursue their remaining claims for beach of the duty of good faith and fair dealing and the violation of Washington's Consumer Protection Act and Washington's Insurance Fair Conduct Act. *Nguyen v. Travelers Cas. Ins. Co. of Am.*, 541 F. Supp. 3d 1200, 1224 (W.D. Wash. 2021).

There is another reason to affirm the dismissal of these claims: The Tribes forfeited them by failing to address them in their opening brief. *Dickson v. U.S. Fid. & Guar. Co.*, 77 Wn.2d 785, 787-88 (1970); *Samra v. Singh*, 15 Wn. App. 2d 823, 834 n.30 (2020). Having abandoned these extra-contractual claims, the Tribes may not raise them for the first time on reply. *Dickson*, 77 Wn.2d at 787-88 ("Contentions may not be presented for the first time in the reply brief").

V. CONCLUSION

The Court should affirm the judgment.

I certify that this brief contains 11,107 words in compliance with RAP *18.17.*

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