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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

NATIONAL FROZEN FOODS
CORPORATION, a Washington Corporation;

Plaintiffs,

v.

BERKLEY ASSURANCE COMPANY, an
Iowa Corporation;

Defendant.

NO.

COMPLAINT FOR DECLARATORY
RELIEF AND DAMAGES

National Frozen Foods Corporation (“NFF”) alleges as follows:

I. INTRODUCTION

1. **Summary of Action.** This is an action for declaratory judgment, breach of contract, common law bad faith, violation of the Washington Administrative Code (“WAC”), and violation of Washington’s Consumer Protection Act (“WCPA”), seeking:

(a) A declaration of the rights and duties of the parties under a commercial property policy issued to NFF by Berkley Assurance Company (“Berkley”);

(b) Damages for breach of Berkley’s contractual duties under the Policy and common law extra-contractual duties;

1 (c) Actual and compensatory damages, including multiplied damages and
2 attorneys' fees, for Berkley's violations of the WAC and the WCPA; and
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4

5 (d) All attorneys' fees and costs incurred by NFF in asserting this coverage
6 claim and prosecuting this action, pursuant to the rule in *Olympic Steamship Co., Inc. v.*
7 *Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), and its progeny.
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10 11 **II. THE PARTIES**

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13 2. **Plaintiff NFF.** NFF is a corporation organized under the laws of the State of
14 Washington and has its principal place of business in King County, Washington. NFF has been
15 in existence for 105 years and is one of the largest suppliers of frozen vegetables in the United
16 States. In its 105-year history, NFF has been subject to only two recalls of its products; one of
17 those recalls is the subject of this insurance coverage dispute, and the other is tangentially
18 connected.
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25 3. **Defendant Berkley.** Upon information and belief, Berkley is a corporation
26 organized under the laws of the State of Iowa, with its principal place of business in Scottsdale,
27 Arizona.
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30 31 **III. JURISDICTION AND VENUE**

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33 4. **Jurisdiction.** This Court has subject matter jurisdiction under RCW 2.08.010 and
34 RCW 7.24.020. It has personal jurisdiction because Berkley conducts business in King County
35 and contracted to insure risks located within the State of Washington. *See* RCW 4.28.185.
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37 Jurisdiction is also proper under RCW 48.18.200.
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41 5. **Venue.** Venue in this Court is proper pursuant to RCW 4.12.025, 48.05.220, and
42 48.15.150.
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3 **IV. STATEMENT OF FACTS**

4 **A. The Contaminated Products Policy and Associated Policy Application.**

5 6. NFF paid a premium to Berkley and in exchange Berkley sold to NFF
6 Contaminated Products Insurance Policy No. BGCP006401 (“Policy”). The Policy period is
7 May 1, 2016 to May 1, 2017. A copy of the Policy is attached as **Exhibit A**, and incorporated
8 herein by reference.
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13 7. The Policy, along with all endorsements and attachments, was sold to NFF, which
14 was, at all relevant times, located and conducting business in the State of Washington.
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17 8. The Policy has policy limits of \$10,000,000 per occurrence. *See* Policy
18 Declarations.
19

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21 9. The Policy obligates Berkley to “reimburse the **insured** for **loss**, in excess of the
22 applicable **self-insured retention** not to exceed the Limits of Insurance, arising out of any of the
23 following **insured occurrences** first discovered during the Policy Period.”
24

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27 10. “Insured Occurrences” is defined to include “Accidental Contamination” and
28 “Government Recall.” *See* Policy §V.K (as modified by Endorsement 7).
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31 11. An “Accidental Contamination” is “Any inadvertent or unintentional
32 contamination ... of an **insured product(s)** that occurs during or as a direct result of its
33 production, preparation, manufacture, packaging or distribution, and the use or consumption of
34 an **insured product(s)** has resulted in or would result in **bodily injury** or **property damage.**”
35
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37 *See* Policy, §I.A.
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41 12. A “Government Recall” is:

- 42
43 1. the recall of **insured product(s)** which has been initiated
44 either (a) voluntarily by the **Insured**; or (b) as a result of an
45 order by a national, regional, or local government food

safety regulatory agency (regulatory bodies); and the regulatory bodies classify the recall as Class I or Class II; or

- 2. the recall arises directly from a determination by the regulatory bodies that there is an unreasonable risk of serious injury or death to humans or animals caused by the use or consumption of the insured product(s) and the recall is classified as Class A or B, or Class I or II.

See Endorsement 7.

13. When NFF applied for the Policy in April 2015, it submitted and signed an Application Form (“Application”). In the Application, NFF responded “No” to the following questions:

8.1: Have you, your premises, product or processes been the subject of recommendations or complaints made by any regulatory body, internal third party audit over the past 5 years? If yes, please provide details: _____.

8.2: In the last ten years, have you been withdrawn or recalled any products or have you been responsible for the cost incurred by any third party arising from the withdrawal or recall of any products regardless of any subrogation? If yes, please provide the CV Starr claims supplemental form, as attached[.]

See Application, § 8. A copy of the Application is attached as Exhibit B, and incorporated herein by reference.

14. The Application contains the following Notices: “ALL WRITTEN STATEMENTS AND MATERIALS FURNISHED TO THE INSURER IN CONJUNCTION WITH THIS APPLICATION ARE HEREBY INCORPORATED BY REFERENCE INTO THIS APPLICATION AND MADE A PART HEREOF” and “It is agreed that this Application shall be the basis of the contract if a policy is issued, and shall be deemed to be attached to, incorporated into and become a part of the policy.” See Application, § 10.

1 15. The Policy contains a Condition providing “all information contained in the
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3 written application(s) and in documents supplied in support of such application(s) is full, true
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5 and complete. Further, you [i.e., NFF] agree that all such information is material and forms the
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7 basis of this insurance.” *See* Policy, § VII.A.2.
8

9 16. Among the documents submitted to Berkley in connection with NFF’s
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11 Application were NFF’s loss runs. Those loss runs, which “bec[a]me part of the policy”
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13 pursuant to the Application, showed NFF had been subject to a customer-initiated recall of
14
15 774,900 pounds of Italian green beans contaminated with *Listeria monocytogenes* (“*Listeria*
16
17 *mono*”) in 2015. The subject green beans had been processed at NFF’s processing facility in
18
19 Albany, Oregon.
20

21 **B. NFF Suffers a Loss Covered by the Policy**
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23 17. On or about June 9, 2015, a production lot of frozen peas being processed at
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25 NFF’s processing facility in Moses Lake, WA, tested positive for *Listeria* at the genus level (not
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27 *Listeria mono*). In accordance with NFF’s practices—and industry accepted practices—the lot
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29 was repurposed for a customer that engages in secondary processing before the peas are
30
31 delivered to the end-consumer (e.g., a soup maker, whose cooking process would necessarily kill
32
33 the *Listeria* bacterium).
34

35 18. In February 2016, through human oversight, the tote containing the *Listeria*-
36
37 positive peas was inadvertently sent to one of NFF’s customers in Mexico. That customer
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39 promptly (within 11 days) notified NFF it received a tote that was not on its order. NFF tracked
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41 down the error, reimbursed the customer, and instructed the customer to destroy the tote. The
42
43 customer obliged and the tote of *Listeria*-positive peas was destroyed in Mexico. Unfortunately,
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1 NFF's warehouse records were not updated to reflect the location and destruction of the tote;
2 those records still showed the tote as being on hold in the Moses Lake warehouse.
3

4
5 19. On or about May 13, 2016, during a routine review of NFF inventory records,
6 NFF employee B. McDowell noticed internal records showing a list of totes on hold in NFF's
7 Moses Lake facility. The list was sent to NFF's Quality Assurance Department for review of
8 hold status.
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13 20. Prior to the 2015 Italian green bean recall, NFF's protocol was to test each lot to
14 the Listeria Genus level. If the lot failed, the product was repurposed into programs with
15 secondary cooking process and/or cooking instructions. NFF's protocol was voluntarily changed
16 in August 2015 after the green bean recall. The new protocol required positive Listeria Genus
17 lots to be tested to the Listeria Mono level.
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23 21. NFF's Quality Assurance Department, upon review of the list of "on hold" totes,
24 saw that the subject tote (which had long since been destroyed in Mexico) had tested positive for
25 Listeria Genus in June 2015. Rather than seeking to locate the actual tote, the Quality Assurance
26 Department located a duplicate, leftover lot test sample from the now-destroyed tote. That
27 duplicate test sample should have been destroyed contemporaneously with the destroyed tote, but
28 through human error that destruction never took place. The error was compounded when the test
29 sample was erroneously tested under the new testing protocol rather than the old testing protocol
30 (which was in place when the lot was processed).
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39 22. The test, which occurred on May 27, 2016, came back positive for Listeria mono.
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41 23. Even though the actually-contaminated peas had long since been destroyed, the
42 positive test required NFF to contact the U.S. Food and Drug Administration ("FDA"). The
43 FDA advised NFF to conduct a Class-2 voluntary recall of approximately 470,000 pounds of
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45

1 frozen peas. NFF initiated a recall on June 10, 2016, and published a recall notice on June 13,
2
3 2016.

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5 24. The value of the recalled peas is approximately \$3.5 million.

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7 25. On June 14, 2016, NFF notified Berkley of the recall and sought coverage under
8
9 the Policy.

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11 26. NFF subsequently discovered/pieced-together the record-keeping error associated
12
13 with the destruction of the contaminated peas in Mexico.

14
15 27. NFF has suffered an insured loss under the Policy's coverage for "Accidental
16
17 Contamination" and/or "Government Recall."

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19 28. NFF requested that Berkley assign Bill Johnstone as the independent adjuster for
20
21 the pea recall claim. Mr. Johnstone is the same independent adjuster assigned to NFF's 2015
22
23 recall of Italian green beans.

24
25 29. NFF's responses on the Application were not made with any intent to deceive
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27 Berkley, as evidenced by the fact NFF disclosed the Italian green bean recall on its loss runs and
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29 requested Berkley assign the same adjuster to the pea recall claim as to the bean recall claim.
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31 These actions are entirely inconsistent with the notion of intentional deception.

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33 **C. Berkley has refused to acknowledge coverage for the Loss.**

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35 30. Berkley sent two coverage letters to NFF, dated July 20 and December 5, 2016.
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37 Berkley's letters demonstrate that its refusal to adjust and pay NFF's loss is based on the
38
39 following purported coverage defenses:

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41
 - NFF, allegedly with intent, failed to disclose the green bean recall in the

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43 Application.

- At inception of the Policy, NFF allegedly knew of undisclosed facts and circumstances that increased the possibility of a loss under the Policy—namely, the 2015 positive Listeria genus test on the destroyed tote of peas. In other words, the insured occurrence was first discovered before the Policy incepted.
- NFF allegedly had knowledge of a circumstance likely to result in contamination of peas, but NFF nonetheless failed to take corrective action so as to avoid the contamination.

31. NFF has repeatedly explained to Berkley that Berkley’s coverage defenses are not well-founded. To date, Berkley has yet to indicate any willingness to adjust or pay NFF’s claim.

32. NFF has complied with all conditions precedent to, and as may be required under the terms of the Policy, as a predicate to bringing this action.

V. FIRST CLAIM: DECLARATORY JUDGMENT

33. **Incorporation by Reference.** The allegations of paragraphs 1 through 32 are incorporated by reference, as if fully set forth herein.

34. **Coverage Under the Policy.** A real and justiciable controversy exists over the coverage provided by the Policy issued by Berkley to NFF. The controversy existing between NFF and Berkley exists as to: (1) whether coverage exists for the pea recall loss; (2) whether any Policy exclusions or conditions limit or preclude coverage; and (3) whether NFF made any written misrepresentation or warranty on the Application with the intent to deceive Berkley.

35. **Declaratory Relief.** NFF is entitled to a declaration by this court that coverage exists under the terms of the Policy and that the pea recall loss should be paid in accordance with the provisions of the Policy.

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VI. SECOND CLAIM: BREACH OF CONTRACT

36. **Incorporation by Reference.** The allegations of paragraphs 1 through 35 are incorporated by reference, as if fully set forth herein.

37. **Breach of Contract.** Berkley breached the contract of insurance at issue by failing or refusing to pay for the pea recall loss.

38. **Damages.** As a direct and proximate result of Berkley's breach of the insurance contract, NFF has been deprived of the benefits of its insurance coverage under the Policy. NFF is entitled to a money judgment against Berkley for the loss of the peas, and any and all other damages and reimbursements to which NFF is entitled under the provisions of the Policy (*e.g.*, business interruption costs, recall costs, rehabilitation expenses, and/or consultant and advisor costs). The current estimated loss to date exceeds \$3 million.

39. **Additional Damages.** As another direct and proximate result of Berkley's breach of the Policy, NFF has been forced to incur attorneys' fees and other expenses in order to prosecute this action and is entitled to reimbursement of these fees and expenses in accordance with the principles announced in *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 11 P.2d 673 (1991), and its progeny.

VII. THIRD CLAIM: INSURANCE BAD FAITH AND BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

40. **Incorporation by Reference.** The allegations of paragraphs 1 through 39 are incorporated by reference, as if fully set forth herein.

41. **Duty of Good Faith and Fair Dealing.** Berkley owes the NFF a duty of good faith and fair dealing. Pursuant to that duty, Berkley is obliged to refrain from taking any action

1 that is unreasonable or unfounded. Berkley is likewise required to deal fairly with NFF and give
2
3 equal consideration to (and not put its own interests ahead of) NFF's financial interests.
4

5 42. **Berkley Acted in Bad Faith.** Berkley breached its duty of good faith and fair
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7 dealing by unreasonably failing or refusing to pay for the pea recall loss where principles of
8
9 policy construction, statutes, and governing case law dictate that Berkley's coverage position is
10
11 incorrect.

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13 43. **Damages.** As a direct and proximate result of Berkley's breach of the covenant
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15 of good faith and fair dealing, NFF has suffered damages in an amount to be proven at trial.
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17 **VIII. FOURTH CLAIM: VIOLATION OF THE WASHINGTON UNFAIR**
18 **CLAIMS SETTLEMENT PRACTICES ACT (WAC 284-30, et seq.)**
19 **AND THE WASHINGTON CONSUMER PROTECTION ACT (RCW 19.86)**
20

21 44. **Incorporation by Reference.** The allegations of paragraphs 1 through 43 are
22
23 incorporated by reference, as if fully set forth herein.
24

25 45. **Violation of WAC 284-30, et seq.** Washington has adopted an Unfair Claims
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27 Settlement Practices Act under Chapter 284-30, *et seq.* of the WAC. Berkley violated the Unfair
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29 Claims Settlement Practices Act by:

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31 (a) Misrepresenting pertinent facts or insurance policy provisions in violation
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33 of WAC 284-30-330(1) and WAC 284-30-350;
34

35 (b) Failing to acknowledge and act reasonably promptly upon
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37 communications with respect to claims arising under insurance policies in violation of WAC
38
39 284-30-330(2); and
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41 (c) Refusing to pay NFF's claim without conducting a reasonable
42
43 investigation in violation of WAC 284-30-330(4).
44
45

1 46. **Damages.** The violation of one provision of the Unfair Claims Settlement
2
3 Practices Act is a violation of the WCPA entitling NFF to the exemplary damages set forth in the
4
5 WCPA for each and every violation, along with attorneys' fees and costs.
6

7 47. **Reservation of Rights.** NFF reserves its right to amend its complaint to assert
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9 that Berkley's actions set forth above, as well as Berkley's unreasonable denial of coverage for
10
11 the pea recall loss, constitutes a violation of Washington's Insurance Fair Conduct Act.
12

13 **IX. PRAYER FOR RELIEF**

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15 WHEREFORE, NFF prays for the following relief:

16
17 **A. Declaratory Judgment.** That this court declare and decree that coverage exists
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19 for NFF under the terms of the Policy issued by Berkley.
20

21 **B. Bad Faith, WAC Violations, and WCPA Violations.** That this court declare
22
23 and decree that Berkley breached the covenant of good faith and fair dealing and violated the
24
25 Washington Administrative Code 284-30, *et seq.* and the Unfair Claims Settlement Practices
26
27 Act, which constitutes a violation of Washington's Consumer Protection Act.
28

29 **C. Money Damages.** That NFF be awarded money damages in its favor and against
30
31 Berkley for the pea recall loss, and any and all other damages and reimbursements to which NFF
32
33 is entitled under the provisions of the Policy, at common law, or by statute, together with pre-
34
35 judgment and post-judgment interest.
36

37 **D. Compensatory Damages.** That NFF be awarded compensatory damages for
38
39 Berkley's breach of the Washington Consumer Protection Act, including treble damages and
40
41 attorneys' fees.
42

43 **E. Attorneys' Fees and Costs of Suit.** That NFF be awarded its reasonable
44
45 attorneys' fees and costs, including, without limitation, actual attorneys' fees pursuant to

1 *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991) and the
2
3 WCPA.
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5 **F. Other Relief.** For such further relief as the Court deems just, proper, and
6
7 equitable.
8

9 DATED this 2nd day of February, 2017.
10

11 **GORDON TILDEN THOMAS & CORDELL LLP**
12 Attorneys for Plaintiff National Frozen Foods Corporation
13

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