

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

ST. PAUL FIRE & MARINE  
INSURANCE COMPANY

Appellant,

v.

NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA.;  
ROOF DECK ENTERTAINMENT, LLC,  
D/B/A MARQUEE NIGHTCLUB,

Respondents.

Supreme Court No: 81344

District Court Case No: A758902

Electronically Filed  
Feb 19 2021 02:01 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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**APPENDIX TO APPELLANT'S OPENING BRIEF  
VOLUME II of XVI**

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*Attorneys for Appellant*

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1	Redacted Complaint	I	AA000001-AA000014
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78	Transcript 2019-10-08	XIV	AA002753- AA002776
83	Transcript 2019-10-15	XIV	AA002840- AA002894

**CERTIFICATE OF SERVICE**

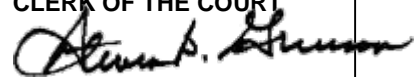
I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on the 18<sup>th</sup> day of February, 2021 the foregoing ***APPENDIX TO APPELLANT'S OPENING BRIEF VOLUME II of XVI*** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list below:

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*/s/ Bobbie Benitez*

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An employee of Hutchison & Steffen, PLLC



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*Attorneys for Aspen Specialty Insurance*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

ST. PAUL FIRE & MARINE INSURANCE  
COMPANY

Case No. A-17-758902-C  
Dept. No. XXVI

Plaintiffs,

vs.

**DECLARATION OF MICHAEL UZENSKI  
IN SUPPORT OF ASPEN SPECIALTY  
INSURANCE COMPANY'S MOTION TO  
DISMISS PLAINTIFF ST. PAUL FIRE &  
MARINE INSURANCE COMPANY'S  
COMPLAINT**

ASPEN SPECIALTY INSURANCE  
COMPANY; NATIONAL UNION FIRE  
INSURANCE COMPANY OF  
PITTSBURGH PA; ROOF DECK  
ENTERTAINMENT, LLC d/b/a  
MARQUEE NIGHTCLUB; and DOES 1-  
25; inclusive,

Defendants.

I, Michael Uzenski, declare as follows:


1. I am the Senior Vice President of Claims at Aspen Specialty Insurance Company. I am authorized to make their declaration on behalf of Aspen Specialty Insurance Company.



1 2. Attached hereto as Exhibit A is a true and correct copy of Aspen Specialty Insurance Company  
2 policy number CRASXYD11, effective October 6, 2011 to October 6, 2012, issued to The  
3 Restaurant Group, et al., with premium information redacted.

4 I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is  
5 true and correct.  
6

7 DATED this 13 day of December, 2017.  
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10   
11 MICHAEL UZENSKI  
12 Senior Vice President of Casualty Claims  
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ASPEN SPECIALTY INSURANCE COMPANY  
POLICY NUMBER: CRA8XYD11  
RENEWAL OF: NEW



## COMMON POLICY DECLARATIONS

<b>ASPEN SPECIALTY INSURANCE COMPANY</b> c/o Aspen Specialty Insurance Management, Inc. 590 Madison Avenue, 7th Floor New York, NY 10022	AMWINS INSURANCE BROKERAGE OF CA 601 S. FIGUEROA STREET LOS ANGELES, CA 90017
NAMED INSURED: THE RESTAURANT GROUP ETAL	
MAILING ADDRESS: 888 7TH AVENUE, 34TH FLOOR NEW YORK, NY 10106	
POLICY PERIOD: FROM 10/06/2011 TO 10/06/2012 AT 12:01 A.M. STANDARD TIME AT YOUR MAILING ADDRESS SHOWN ABOVE.	

BUSINESS DESCRIPTION	
----------------------	--

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

THIS POLICY CONSISTS OF THE FOLLOWING COVERAGE PARTS FOR WHICH A PREMIUM IS INDICATED. THIS PREMIUM MAY BE SUBJECT TO ADJUSTMENT.

	PREMIUM
COMMERCIAL GENERAL LIABILITY COVERAGE PART	\$ [REDACTED]
COMMERCIAL PROPERTY COVERAGE PART	\$ [REDACTED]
LIQUOR LIABILITY COVERAGE PART	\$ [REDACTED]
TERRORISM PREMIUM	\$ [REDACTED]
TOTAL ADVANCE PREMIUM DUE AND PAYABLE AT INCEPTION	\$ [REDACTED]
Minimum retained audit prem: \$100%	Minimum retained premium: \$ [REDACTED]

FORMS APPLICABLE TO ALL COVERAGE PARTS:

AS PER SCHEDULE OF APPLICABLE FORMS

NEW YORK: The insurer(s) named herein is (are) not licensed by the state of New York, not subject to its supervision, and in the event of the insolvency of the insurer(s), not protected by the New York State Security Funds. The policy may not be subject to all the regulations of the insurance department pertaining to policy forms.

Surplus Lines Broker Name: AMWINS INSURANCE BROKERAGE OF CA  
Surplus Lines Broker Address: 601 S. FIGUEROA STREET  
LOS ANGELES, CA 90017  
Surplus Lines Broker License No.: EX-1053628-R

*Jaime E. DeCantillon*  
Authorized Representative

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Page 1 of 1

**ASPEN SPECIALTY INSURANCE COMPANY****POLICY NUMBER:**CRA8XYD11**RENEWAL OF:** NEW**COMMERCIAL GENERAL LIABILITY DECLARATIONS**

<b>ASPEN SPECIALTY INSURANCE COMPANY</b> c/o Aspen Specialty Insurance Management, Inc. 590 Madison Avenue, 7th Floor New York, NY 10022	<b>AMWINS INSURANCE BROKERAGE OF CA</b> 601 S. FIGUEROA STREET LOS ANGELES, CA 90017
---	--

NAMED INSURED: THE RESTAURANT GROUP ETAL

MAILING ADDRESS: 888 7TH AVENUE, 34TH FLOOR  
NEW YORK, NY 10106POLICY PERIOD: FROM 10/06/2011 TO 10/06/2012 AT 12:01 A.M. TIME AT  
YOUR MAILING ADDRESS SHOWN ABOVE.**IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS  
POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.****LIMITS OF INSURANCE**

EACH OCCURRENCE LIMIT	\$ 1,000,000	
DAMAGE TO PREMISES RENTED TO YOU LIMIT	\$ 100,000	Any one premises
MEDICAL EXPENSE LIMIT	\$ N/A	Any one person
PERSONAL & ADVERTISING INJURY LIMIT	\$ 1,000,000	Any one person or organization
GENERAL AGGREGATE LIMIT		\$ 2,000,000
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT		\$ 2,000,000

**DESCRIPTION OF BUSINESS****FORM OF BUSINESS:**

- ☐ INDIVIDUAL      ☐ PARTNERSHIP      ☐ JOINT VENTURE      ☐ TRUST
- ☐ LIMITED LIABILITY COMPANY      ☒ ORGANIZATION, INCLUDING A CORPORATION (BUT NOT  
INCLUDING A PARTNERSHIP, JOINT VENTURE OR LIMITED  
LIABILITY COMPANY)
- ☐ OTHER

**BUSINESS DESCRIPTION:****ALL PREMISES YOU OWN, RENT OR OCCUPY****LOCATION NUMBER**

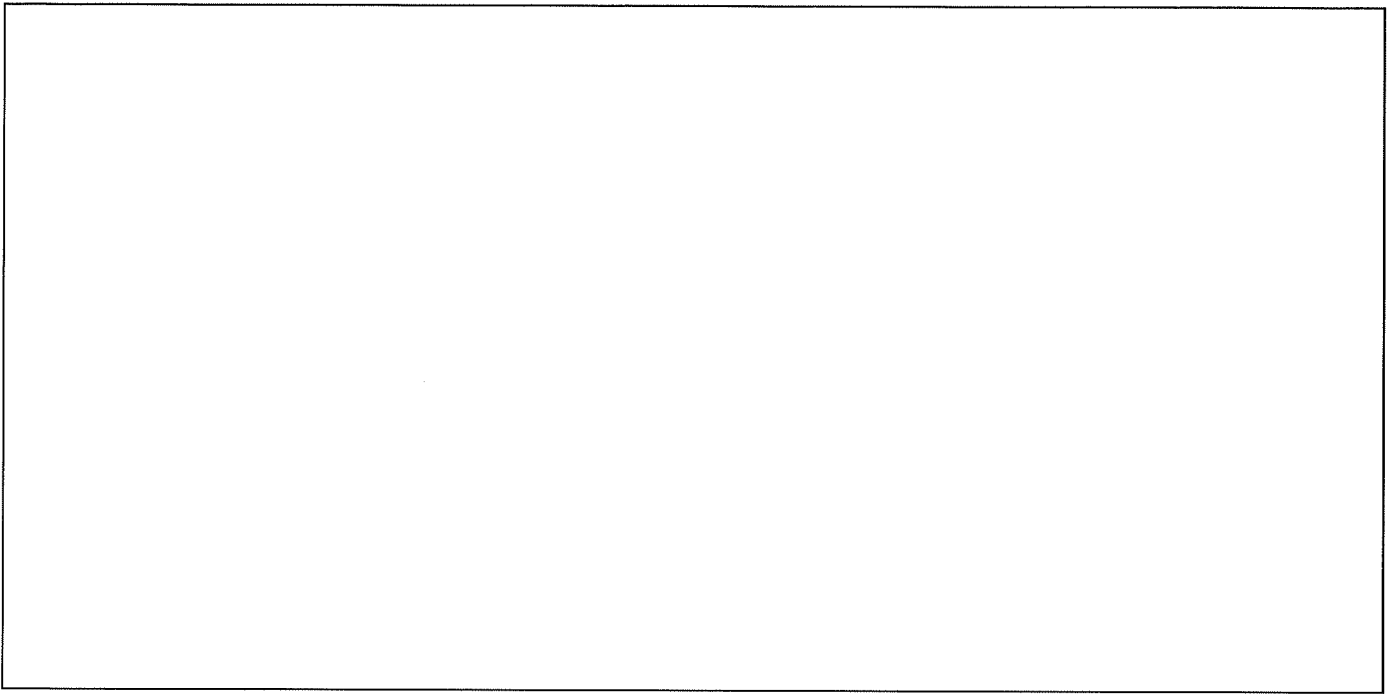
SEE FORM #CG2144

CLASSIFICATION AND PREMIUM							
LOCATION NUMBER	CLASSIFICATION	BASE	EXPOSURE	RATE/1000		ADVANCE PREMIUM	
				Prem/ Ops	Prod Comp Ops	Prem/ Ops	Prod Comp Ops
	COMPOSITE RATE ALL OPERATIONS	GROSS SALES	\$175,000,000	\$3.00	INCL.	\$ [REDACTED]	INCL.
ADVANCE PREMIUM DUE AND PAYABLE AT INCEPTION (SUBJECT TO AUDIT) \$ [REDACTED] MINIMUM RETAINED AUDIT PREMIUM \$ [REDACTED] MINIMUM RETAINED PREMIUM \$ [REDACTED]							
AUDIT PERIOD (IF APPLICABLE)		<input checked="" type="checkbox"/> ANNUALLY	<input type="checkbox"/> SEMI-ANNUALLY	<input type="checkbox"/> QUARTERLY		<input type="checkbox"/> MONTHLY	

<b>ENDORSEMENTS</b>
ENDORSEMENTS ATTACHED TO THIS POLICY: <u>SEE SCHEDULE OF APPLICABLE FORMS</u> <hr/> <hr/> <hr/>

THESE DECLARATIONS, TOGETHER WITH THE COMMON POLICY CONDITIONS AND COVERAGE FORM(S) AND ANY ENDORSEMENT(S), COMPLETE THE ABOVE NUMBERED POLICY.

  
 Authorized Representative



ASPEN SPECIALTY INSURANCE COMPANY  
POLICY NUMBER: CRA8XYD11  
RENEWAL OF: NEW



## LIQUOR LIABILITY DECLARATIONS

### COMMERCIAL GENERAL LIABILITY

<b>ASPEN SPECIALTY INSURANCE COMPANY</b> c/o Aspen Specialty Insurance Management, Inc. 590 Madison Avenue, 7th Floor New York, NY 10022	<b>AMWINS INSURANCE BROKERAGE OF CA</b> 601 S. FIGUEROA STREET LOS ANGELES, CA 90017
---	--

NAMED INSURED: THE RESTAURANT GROUP ETAL

MAILING ADDRESS: 888 7TH AVENUE, 34TH FLOOR  
NEW YORK, NY 10106

POLICY PERIOD: FROM 10/06/2011 TO 10/06/2012 AT 12:01 A.M. TIME AT  
YOUR MAILING ADDRESS SHOWN ABOVE.

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

LIMITS OF INSURANCE	
EACH COMMON CAUSE LIMIT	\$ 1,000,000
AGGREGATE LIMIT	\$ 2,000,000

DESCRIPTION OF BUSINESS	
FORM OF BUSINESS:	
<input type="checkbox"/> INDIVIDUAL	<input type="checkbox"/> PARTNERSHIP <input type="checkbox"/> JOINT VENTURE
<input type="checkbox"/> LIMITED LIABILITY COMPANY	<input checked="" type="checkbox"/> ORGANIZATION, INCLUDING A CORPORATION (BUT NOT INCLUDING A PARTNERSHIP, JOINT VENTURE OR LIMITED LIABILITY COMPANY)
<input type="checkbox"/> OTHER	
BUSINESS DESCRIPTION:	

ALL PREMISES YOU OWN, RENT OR OCCUPY	
LOCATION NUMBER	ADDRESS OF ALL PREMISES YOU OWN, RENT OR OCCUPY
	SEE FORM # CG2144

**NEW YORK:** The insurer(s) named herein is (are) not licensed by the state of New York, not subject to its supervision, and in the event of the insolvency of the insurer(s), not protected by the New York State Security Funds. The policy may not be subject to all the regulations of the insurance department pertaining to policy forms.

Surplus Lines Broker Name: AMWINS INSURANCE BROKERAGE OF CA  
Surplus Lines Broker Address: 601 S. FIGUEROA STREET  
LOS ANGELES, CA 90017  
Surplus Lines Broker License No.: EX-1053628-R  
Surplus Lines State Taxes were filed: New York

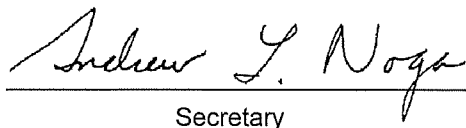
CLASSIFICATION AND PREMIUM				
CLASSIFICATION	CODE NO.	PREMIUM BASE	RATE	ADVANCE PREMIUM
COMPOSITE RATE ALL OPERATIONS	FLAT	\$ FLAT	\$ FLAT	\$ INCL.
ADVANCE PREMIUM DUE AND PAYABLE AT INCEPTION (SUBJECT TO AUDIT) \$ <span style="background-color: black; color: black;">████</span> MINIMUM RETAINED AUDIT PREMIUM \$ <span style="background-color: black; color: black;">████</span> MINIMUM RETAINED PREMIUM \$ <span style="background-color: black; color: black;">████</span> (IF POLICY PERIOD IS MORE THAN ONE YEAR AND PREMIUM IS PAID IN ANNUAL INSTALLMENTS)				
AUDIT PERIOD (IF APPLICABLE)	<input type="checkbox"/> ANNUALLY	<input type="checkbox"/> SEMI-ANNUALLY	<input type="checkbox"/> QUARTERLY	<input type="checkbox"/> MONTHLY

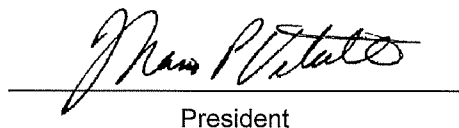
ENDORSEMENTS
ENDORSEMENTS ATTACHED TO THIS POLICY:
<u>SEE SCHEDULE OF APPLICABLE FORMS</u>

THESE DECLARATIONS, TOGETHER WITH THE COMMON POLICY CONDITIONS AND COVERAGE FORM(S) AND ANY ENDORSEMENT(S), COMPLETE THE ABOVE NUMBERED POLICY.

  
Authorized Representative

IN WITNESS WHEREOF, the Insurer has caused this Policy to be signed by its President and Secretary and countersigned where required by law on the Declarations page by it's duly Authorized representative.

  
Secretary

  
President



## COMMON POLICY CONDITIONS

All Coverage Parts included in this policy are subject to the following conditions.

### A. Cancellation

1. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.
2. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:
  - a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
  - b. 30 days before the effective date of cancellation if we cancel for any other reason.
3. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.
4. Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.
5. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.
6. If notice is mailed, proof of mailing will be sufficient proof of notice.

### B. Changes

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

### C. Examination Of Your Books And Records

We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward.

### D. Inspections And Surveys

1. We have the right to:
  - a. Make inspections and surveys at any time;

- b. Give you reports on the conditions we find; and

- c. Recommend changes.

2. We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:

- a. Are safe or healthful; or

- b. Comply with laws, regulations, codes or standards.

3. Paragraphs 1. and 2. of this condition apply not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.

4. Paragraph 2. of this condition does not apply to any inspections, surveys, reports or recommendations we may make relative to certification, under state or municipal statutes, ordinances or regulations, of boilers, pressure vessels or elevators.

### E. Premiums

The first Named Insured shown in the Declarations:

1. Is responsible for the payment of all premiums; and
2. Will be the payee for any return premiums we pay.

### F. Transfer Of Your Rights And Duties Under This Policy

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **CALCULATION OF PREMIUM**

**THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:**

BOILER AND MACHINERY COVERAGE PART  
CAPITAL ASSETS PROGRAM (OUTPUT POLICY) COVERAGE PART  
COMMERCIAL AUTOMOBILE COVERAGE PART  
COMMERCIAL GENERAL LIABILITY COVERAGE PART  
COMMERCIAL INLAND MARINE COVERAGE PART  
COMMERCIAL PROPERTY COVERAGE PART  
CRIME AND FIDELITY COVERAGE PART  
EMPLOYMENT-RELATED PRACTICES LIABILITY COVERAGE PART  
FARM COVERAGE PART  
LIQUOR LIABILITY COVERAGE PART  
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART  
POLLUTION LIABILITY COVERAGE PART  
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART  
PROFESSIONAL LIABILITY COVERAGE PART  
RAILROAD PROTECTIVE LIABILITY COVERAGE PART

The following is added:

The premium shown in the Declarations was computed based on rates in effect at the time the policy was issued. On each renewal, continuation, or anniversary of the effective date of this policy, we will compute the premium in accordance with our rates and rules then in effect.

## SCHEDULE OF APPLICABLE FORMS

### COMMERCIAL GENERAL LIABILITY

NAMED INSURED: THE RESTAURANT GROUP ETAL

POLICY NUMBER: CRA8XYD11

### FORMS AND ENDORSEMENTS MADE PART OF THIS POLICY AT TIME OF ISSUE:

#### FORM NUMBER AND TITLE:

ASPL074 DEC 0511	Common Policy Declarations
ASPL075 DEC 0511	Commercial General Liability Declarations
ASPL007 DEC 0511	Liquor Liability Declarations
ASPL020 0511	Signature Page
IL 00 17 11 98	Common Policy Conditions
IL 00 03 07 02	Calculation of Premium
ASPL006 0104	Schedule of Applicable Forms
CG 00 01 12 07	Commercial General Liability Coverage Form Occurrence
CG 00 33 12 04	Liquor Liability Coverage Form
ASPL001 0104	Asbestos Exclusion Endorsement
ASPL003 0104	Total Lead Exclusion
ASPL004 0104	Additional Named Insured
ASPL007 0104	Silica Exclusion Endorsement
ASPL019 0404	Contractual Liability - Amendments
ASPL035 0504	Hired Auto and Non-Owned Auto Liability
ASPL044 0504	Amendment - Common Policy Conditions
ASPL050 0604	Electromagnetic Fields {EMF's} Exclusion
ASPL057 1004	Garagekeepers Coverage
ASPL071 0305	Bodily Injury Property Damage Personal and Advertising Injury Liability Deductible Per Occurrence
ASPL098 0406	Discrimination Exclusion
ASPL133 0807	Amendment - Cross Suits
ASPL001 0204	Common Policy Conditions Amendment Minimum Retained Premium
ASPL002 0110	General Service of Suit Endorsement
ASPL002 0304	Liquor Liability Minimum Retained Audit Premium
CG 00 62 12 02	War Liability Exclusion
CG 00 68 05 09	Recording and Distribution of Material or Information in Violation of Law Exclusion
CG 04 35 02 02	Employee Benefits Liability Coverage
CG 20 11 01 96	Additional Insured - Managers Or Lessors Of Premises
CG 20 18 11 85	Additional Insured - Mortgagee Assignee Or Receiver
CG 20 28 07 04	Additional Insured - Lessor Of Leased Equipment
CG 21 16 07 98	Exclusion - Designated Professional Services
CG 21 35 10 01	Exclusion - Coverage C - Medical Payments
CG 21 44 07 98	Limitation Of Coverage To Designated Premises Or Project
CG 21 47 07 98	Employment - Related Practices Exclusion
CG 21 54 01 96	Exclusion - Designated Operations Covered By A Consolidated Wrap-Up Insurance Program
CG 21 65 12 04	Total Pollution Exclusion With A Building Heating Equipment Exception And A Hostile Fire Exception
CG 21 67 04 02	Fungi Or Bacteria Exclusion
CG 21 75 12 02	Exclusion Of Certified Acts Of Terrorism And Other Acts Of Terrorism
CG 22 43 07 98	Exclusion - Engineers Architects or Surveyors Professional Liability
CG 24 07 01 96	Products/Completed Operations Hazard Redefined
CG 25 04 03 97	Designated Locations General Aggregate Limit
IL 00 21 07 02	Nuclear Energy Liability Exclusion Endorsement
IL 12 01 11 85	Policy Changes
IL 12 01 11 85/2	Policy Changes
ASPL139 0811	Policyholder's Guide to Reporting a Casualty Claim

## COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V – Definitions.

### SECTION I – COVERAGES

#### COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

##### 1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

- b. This insurance applies to "bodily injury" and "property damage" only if:
- (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

- (2) The "bodily injury" or "property damage" occurs during the policy period; and

- (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

- c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

- d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

- (1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;
- (2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or
- (3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

- e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

##### 2. Exclusions

This insurance does not apply to:

###### a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting

from the use of reasonable force to protect persons or property.

**b. Contractual Liability**

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
  - (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
    - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
- (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

**c. Liquor Liability**

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

**d. Workers' Compensation And Similar Laws**

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

**e. Employer's Liability**

"Bodily injury" to:

- (1) An "employee" of the insured arising out of and in the course of:
  - (a) Employment by the insured; or
  - (b) Performing duties related to the conduct of the insured's business; or
- (2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Para-

graph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

**f. Pollution**

- (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":
  - (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:
    - (i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;
    - (ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or
    - (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";
  - (b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
  - (c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:
    - (i) Any insured; or
    - (ii) Any person or organization for whom you may be legally responsible; or
  - (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to

the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:

- (i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;
  - (ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or
  - (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".
- (e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".
- (2) Any loss, cost or expense arising out of any:
- (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
  - (b) Claim or "suit" by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of

such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

#### **g. Aircraft, Auto Or Watercraft**

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

- (1) A watercraft while ashore on premises you own or rent;
- (2) A watercraft you do not own that is:
  - (a) Less than 26 feet long; and
  - (b) Not being used to carry persons or property for a charge;
- (3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;
- (4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or
- (5) "Bodily injury" or "property damage" arising out of:
  - (a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged; or
  - (b) the operation of any of the machinery or equipment listed in Paragraph **f.(2)** or **f.(3)** of the definition of "mobile equipment".

#### **h. Mobile Equipment**

"Bodily injury" or "property damage" arising out of:

- (1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or
- (2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

**i. War**

"Bodily injury" or "property damage", however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

**j. Damage To Property**

"Property damage" to:

- (1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;
- (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody or control of the insured;
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III – Limits Of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

**k. Damage To Your Product**

"Property damage" to "your product" arising out of it or any part of it.

**l. Damage To Your Work**

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

**m. Damage To Impaired Property Or Property Not Physically Injured**

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

**n. Recall Of Products, Work Or Impaired Property**

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

**o. Personal And Advertising Injury**

"Bodily injury" arising out of "personal and advertising injury".

**p. Electronic Data**

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

**q. Distribution Of Material In Violation Of Statutes**

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act

(TCPA), including any amendment of or addition to such law; or

- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
- (3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

Exclusions c. through n. do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section III – Limits Of Insurance.

## **COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY**

### **1. Insuring Agreement**

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:
  - (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
  - (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

- b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

### **2. Exclusions**

This insurance does not apply to:

#### **a. Knowing Violation Of Rights Of Another**

"Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

#### **b. Material Published With Knowledge Of Falsity**

"Personal and advertising injury" arising out of oral or written publication of material, if done by or at

the direction of the insured with knowledge of its falsity.

#### **c. Material Published Prior To Policy Period**

"Personal and advertising injury" arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

#### **d. Criminal Acts**

"Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

#### **e. Contractual Liability**

"Personal and advertising injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

#### **f. Breach Of Contract**

"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement".

#### **g. Quality Or Performance Of Goods – Failure To Conform To Statements**

"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement".

#### **h. Wrong Description Of Prices**

"Personal and advertising injury" arising out of the wrong description of the price of goods, products or services stated in your "advertisement".

#### **i. Infringement Of Copyright, Patent, Trademark Or Trade Secret**

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your "advertisement".

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

#### **j. Insureds In Media And Internet Type Businesses**

"Personal and advertising injury" committed by an insured whose business is:

- (1) Advertising, broadcasting, publishing or telecasting;
- (2) Designing or determining content of web-sites for others; or
- (3) An Internet search, access, content or service provider.



However, this exclusion does not apply to Paragraphs 14.a., b. and c. of "personal and advertising injury" under the Definitions Section.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

**k. Electronic Chatrooms Or Bulletin Boards**

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

**l. Unauthorized Use Of Another's Name Or Product**

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

**m. Pollution**

"Personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

**n. Pollution-Related**

Any loss, cost or expense arising out of any:

- (1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
- (2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

**o. War**

"Personal and advertising injury", however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

**p. Distribution Of Material In Violation Of Statutes**

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or
- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
- (3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

**COVERAGE C MEDICAL PAYMENTS**

**1. Insuring Agreement**

a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

- (1) On premises you own or rent;
- (2) On ways next to premises you own or rent; or
- (3) Because of your operations;

provided that:

- (a) The accident takes place in the "coverage territory" and during the policy period;
- (b) The expenses are incurred and reported to us within one year of the date of the accident; and
- (c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

- (1) First aid administered at the time of an accident;
- (2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and
- (3) Necessary ambulance, hospital, professional nursing and funeral services.

**2. Exclusions**

We will not pay expenses for "bodily injury":

**a. Any Insured**

To any insured, except "volunteer workers".

**b. Hired Person**

To a person hired to do work for or on behalf of any insured or a tenant of any insured.

**c. Injury On Normally Occupied Premises**

To a person injured on that part of premises you own or rent that the person normally occupies.

**d. Workers Compensation And Similar Laws**

To a person, whether or not an "employee" of any insured, if benefits for the "bodily injury" are payable or must be provided under a workers' compensation or disability benefits law or a similar law.

**e. Athletics Activities**

To a person injured while practicing, instructing or participating in any physical exercises or games, sports, or athletic contests.

**f. Products-Completed Operations Hazard**

Included within the "products-completed operations hazard".

**g. Coverage A Exclusions**

Excluded under Coverage A.

**SUPPLEMENTARY PAYMENTS – COVERAGES A AND B**

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:
  - a. All expenses we incur.
  - b. Up to \$250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.
  - c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
  - d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to \$250 a day because of time off from work.
  - e. All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.
  - f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
  - g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:
  - a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";
  - b. This insurance applies to such liability assumed by the insured;
  - c. The obligation to defend, or the cost of the defense

of, that indemnitee, has also been assumed by the insured in the same "insured contract";

- d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;
- e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and
- f. The indemnitee:

**(1) Agrees in writing to:**

- (a)** Cooperate with us in the investigation, settlement or defense of the "suit";
- (b)** Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";
- (c)** Notify any other insurer whose coverage is available to the indemnitee; and
- (d)** Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and

**(2) Provides us with written authorization to:**

- (a)** Obtain records and other information related to the "suit"; and
- (b)** Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph 2.b.(2) of Section I – Coverage A – Bodily Injury And Property Damage Liability, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when we have used up the applicable limit of insurance in the payment of judgments or settlements or the conditions set forth above, or the terms of the agreement described in Paragraph f. above, are no longer met.

**SECTION II – WHO IS AN INSURED**

**1. If you are designated in the Declarations as:**

- a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
- b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the con-

duct of your business.

- c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
  - d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
  - e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.
2. Each of the following is also an insured:
- a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:
    - (1) "Bodily injury" or "personal and advertising injury":
      - (a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;
      - (b) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph (1)(a) above;
      - (c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs (1)(a) or (b) above; or
      - (d) Arising out of his or her providing or failing to provide professional health care services.
    - (2) "Property damage" to property:
      - (a) Owned, occupied or used by,
      - (b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose byyou, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you

are a limited liability company).

- b. Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.
  - c. Any person or organization having proper temporary custody of your property if you die, but only:
    - (1) With respect to liability arising out of the maintenance or use of that property; and
    - (2) Until your legal representative has been appointed.
  - d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.
3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:
- a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;
  - b. Coverage **A** does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and
  - c. Coverage **B** does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

### SECTION III – LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
- a. Insureds;
  - b. Claims made or "suits" brought; or
  - c. Persons or organizations making claims or bringing "suits".
2. The General Aggregate Limit is the most we will pay for the sum of:
- a. Medical expenses under Coverage **C**;
  - b. Damages under Coverage **A**, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard"; and
  - c. Damages under Coverage **B**.
3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage **A** for damages because of "bodily injury" and "property damage"

included in the "products-completed operations hazard".

4. Subject to Paragraph 2. above, the Personal and Advertising Injury Limit is the most we will pay under Coverage B for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.
5. Subject to Paragraph 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:
  - a. Damages under Coverage A; and
  - b. Medical expenses under Coverage Cbecause of all "bodily injury" and "property damage" arising out of any one "occurrence".
6. Subject to Paragraph 5. above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage A for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.
7. Subject to Paragraph 5. above, the Medical Expense Limit is the most we will pay under Coverage C for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

#### SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

##### 1. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

##### 2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

- a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
  - (1) How, when and where the "occurrence" or offense took place;
  - (2) The names and addresses of any injured persons and witnesses; and
  - (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
- b. If a claim is made or "suit" is brought against any insured, you must:

- (1) Immediately record the specifics of the claim or "suit" and the date received; and

- (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";

- (2) Authorize us to obtain records and other information;

- (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

- (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

##### 3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or

- b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

##### 4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

###### a. Primary Insurance

This insurance is primary except when Paragraph b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph c. below.

###### b. Excess Insurance

- (1) This insurance is excess over:

- (a) Any of the other insurance, whether primary, excess, contingent or on any other

basis:

- (i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
  - (ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;
  - (iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or
  - (iv) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I – Coverage A – Bodily Injury And Property Damage Liability.
- (b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.
- (2) When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.
- (3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:
- (a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
  - (b) The total of all deductible and self-insured amounts under all that other insurance.
- (4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

**c. Method Of Sharing**

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

**5. Premium Audit**

- a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.
- b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.
- c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

**6. Representations**

By accepting this policy, you agree:

- a. The statements in the Declarations are accurate and complete;
- b. Those statements are based upon representations you made to us; and
- c. We have issued this policy in reliance upon your representations.

**7. Separation Of Insureds**

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or "suit" is brought.

**8. Transfer Of Rights Of Recovery Against Others To Us**

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

**9. When We Do Not Renew**

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

**SECTION V – DEFINITIONS**

- 1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the

purposes of this definition:

- a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
  - b. Regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.
2. "Auto" means:
- a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or
  - b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.
- However, "auto" does not include "mobile equipment".
3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
4. "Coverage territory" means:
- a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
  - b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph a. above; or
  - c. All other parts of the world if the injury or damage arises out of:
    - (1) Goods or products made or sold by you in the territory described in Paragraph a. above;
    - (2) The activities of a person whose home is in the territory described in Paragraph a. above, but is away for a short time on your business; or
    - (3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication
- provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in Paragraph a. above or in a settlement we agree to.
5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.
7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.
8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:
- a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

- b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement.

9. "Insured contract" means:

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
- b. A sidetrack agreement;
- c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
  - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
  - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you

and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

**11. "Loading or unloading" means the handling of property:**

- a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";
- b. While it is in or on an aircraft, watercraft or "auto"; or
- c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

**12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:**

- a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
- b. Vehicles maintained for use solely on or next to premises you own or rent;
- c. Vehicles that travel on crawler treads;
- d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

- e. Vehicles not described in Paragraph a., b., c. or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

- f. Vehicles not described in Paragraph a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

**(1) Equipment designed primarily for:**

- (a) Snow removal;
- (b) Road maintenance, but not construction or resurfacing; or
- (c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

- (3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

**13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.**

**14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:**

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
- f. The use of another's advertising idea in your "advertisement"; or
- g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

**15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.**

**16. "Products-completed operations hazard":**

- a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any per-

son or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

b. Does not include "bodily injury" or "property damage" arising out of:

- (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;
- (2) The existence of tools, uninstalled equipment or abandoned or unused materials; or
- (3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

17. "Property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

- a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
- b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which

the insured submits with our consent.

19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

20. "Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

21. "Your product":

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(a) You;

(b) Others trading under your name; or

(c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and

(2) The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

22. "Your work":

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and

(2) The providing of or failure to provide warnings or instructions.



## LIQUOR LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the Company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V – Definitions.

### SECTION I – LIQUOR LIABILITY COVERAGE

#### 1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "injury" to which this insurance applies if liability for such "injury" is imposed on the insured by reason of the selling, serving or furnishing of any alcoholic beverage. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "injury" to which this insurance does not apply. We may, at our discretion, investigate any "injury" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments.

- b. This insurance applies to "injury" only if:

- (1) The "injury" occurs during the policy period in the "coverage territory"; and

- (2) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "injury" or claim, knew that the "injury" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "injury" occurred, then any continuation, change or resumption of such "injury" during or after the policy period will be deemed to have been known prior to the policy period.

- c. "Injury" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "injury" or claim, includes any continuation, change or resumption of that "injury" after the end of the policy period.

- d. "Injury" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "injury" or claim:

- (1) Reports all, or any part, of the "injury" to us or any other insurer;
- (2) Receives a written or verbal demand or claim for damages because of the "injury"; or
- (3) Becomes aware by any other means that "injury" has occurred or has begun to occur.

#### 2. Exclusions

This insurance does not apply to:

##### a. Expected Or Intended Injury

"Injury" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

##### b. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

### c. Employer's Liability

"Bodily injury" to:

- (1) An "employee" of the insured arising out of and in the course of:
  - (a) Employment by the insured; or
  - (b) Performing duties related to the conduct of the insured's business; or
- (2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the "injury".

### d. Liquor License Not In Effect

"Injury" arising out of any alcoholic beverage sold, served or furnished while any required license is not in effect.

### e. Your Product

"Injury" arising out of "your product". This exclusion does not apply to "injury" for which the insured or the insured's indemnitees may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

### f. Other Insurance

Any "injury" with respect to which other insurance is afforded, or would be afforded but for the exhaustion of the limits of insurance.

This exclusion does not apply if the other insurance responds to liability for "injury" imposed on the insured by reason of the selling, serving or furnishing of any alcoholic beverage.

### g. War

"Injury", however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

### SUPPLEMENTARY PAYMENTS

We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

1. All expenses we incur.
2. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
3. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to \$250 a day because of time off from work.
4. All costs taxed against the insured in the "suit".
5. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
6. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.
7. Expenses incurred by the insured for first aid administered to others at the time of an event to which this insurance applies.

These payments will not reduce the limits of insurance.

### SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:
  - a. An individual, you and your spouse are insureds.
  - b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
  - c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
  - d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

**2. Each of the following is also an insured:**

- a.** Your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" is an insured for:

**(1) "Injury":**

- (a)** To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), or to a co-"employee" while that co-"employee" is either in the course of his or her employment or performing duties related to the conduct of your business;
- (b)** To the spouse, child, parent, brother or sister of that co-"employee" as a consequence of Paragraph **(1)(a)** above; or
- (c)** For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs **(1)(a)** or **(b)** above.

**(2) "Property damage" to property:**

- (a)** Owned or occupied by, or
- (b)** Rented or loaned to that "employee", any of your other "employees", by any of your partners or members (if you are a partnership or joint venture), or by any of your members (if you are a limited liability company).

- b.** Any person or organization having proper temporary custody of your property if you die, but only:

- (1)** With respect to liability arising out of the maintenance or use of that property; and
- (2)** Until your legal representative has been appointed.

- c.** Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.

- 3.** Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:

- a.** Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier; and

- b.** Coverage does not apply to "injury" that occurred before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

**SECTION III – LIMITS OF INSURANCE**

- 1.** The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:

- a.** Insureds;
- b.** Claims made or "suits" brought; or
- c.** Persons or organizations making claims or bringing "suits".

- 2.** The Aggregate Limit is the most we will pay for all "injury" as the result of the selling, serving or furnishing of alcoholic beverages.

- 3.** Subject to the Aggregate Limit, the Each Common Cause Limit is the most we will pay for all "injury" sustained by one or more persons or organizations as the result of the selling, serving or furnishing of any alcoholic beverage to any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

**SECTION IV – LIQUOR LIABILITY CONDITIONS**

**1. Bankruptcy**

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

**2. Duties In The Event Of Injury, Claim Or Suit**

- a.** You must see to it that we are notified as soon as practicable of an "injury" which may result in a claim. To the extent possible, notice should include:

- (1)** How, when and where the "injury" took place;
- (2)** The names and addresses of any injured persons and witnesses; and
- (3)** The nature and location of any "injury".

- b. If a claim is made or "suit" is brought against any insured, you must:

- (1) Immediately record the specifics of the claim or "suit" and the date received; and
- (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

- c. You and any other involved insured must:

- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
- (2) Authorize us to obtain records and other information;
- (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
- (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of "injury" to which this insurance may also apply.

- d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

### 3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or
- b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

### 4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under this Coverage Part, our obligations are limited as follows:

#### a. Primary Insurance

This insurance is primary. Our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in b. below.

#### b. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

### 5. Premium Audit

- a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.
- b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.
- c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

### 6. Representations

By accepting this policy, you agree:

- a. The statements in the Declarations are accurate and complete;

- b. Those statements are based upon representations you made to us; and
- c. We have issued this policy in reliance upon your representations.

## 7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or "suit" is brought.

## 8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

## 9. When We Do Not Renew

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

## SECTION V – DEFINITIONS

1. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
2. "Coverage territory" means:
  - a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
  - b. International waters or airspace, but only if the "injury" occurs in the course of travel or transportation between any places included in a. above; or
  - c. All other parts of the world if the "injury" arises out of:
    - (1) Goods or products made or sold by you in the territory described in a. above; or
    - (2) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business

provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in a. above or in a settlement we agree to.
3. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
4. "Executive Officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.
5. "Injury" means all damages, including damages because of "bodily injury" and "property damage", and including damages for care, loss of services or loss of support.
6. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".
7. "Property damage" means:
  - a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
  - b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the occurrence that caused it.
8. "Suit" means a civil proceeding in which damages because of "injury" to which this insurance applies are alleged. "Suit" includes:
  - a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
  - b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.
9. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.
10. "Your product":
  - a. Means:
    - (1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
      - (a) You;
      - (b) Others trading under your name; or
      - (c) A person or organization whose business or assets you have acquired; and
    - (2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

**b. Includes:**

- (1)** Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product", and
- (2)** The providing of or failure to provide warnings or instructions.

**c. Does not include vending machines or other property rented to or located for the use of others but not sold.**

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**ASBESTOS EXCLUSION ENDORSEMENT**

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

1. The following Exclusion is added to SECTION I – COVERAGES, COVERAGE A. - BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. – EXCLUSIONS and SECTION I – COVERAGES, COVERAGE B. – PERSONAL AND ADVERTISING INJURY LIABILITY, 2. – EXCLUSIONS:
  1. Any liability for “bodily injury”, “property damage”, “personal injury”, “advertising injury”, occupational disease, disability, shock, mental anguish or mental injury, at any time arising out of the manufacture of, mining of, use of, sale of, installation of, removal of, distribution of, or exposure to asbestos, asbestos products, asbestos fibers or asbestos dust; or
  2. Any obligation of the “insured” to indemnify any party because of damages arising out of “bodily injury”, “property damage”, “personal injury”, “advertising injury”, occupational disease, disability, shock, mental anguish or mental injury, at any time as a result of the manufacture of, mining of, use of, sale of, installation of, removal of, distribution of, or exposure to asbestos, asbestos products, asbestos fibers or asbestos dust; or
  3. Any obligation to defend any “suit” or claim against the “insured” alleging bodily injury, “property damage”, “personal injury”, “advertising injury”, occupational disease, disability, shock, mental anguish or mental injury, resulting from or contributed to, by the manufacture of, mining of, use of, sale of, installation of, removal of, distribution of, or exposure to asbestos, asbestos products, asbestos fibers or asbestos dust.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**TOTAL LEAD EXCLUSION**

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

1. The following Exclusion is added to 2., Exclusions of the GENERAL LIABILITY COVERAGE FORM:

This Policy Does Not Apply To:

1. "Bodily Injury", "Property Damage", "Personal Injury", or "Advertising Injury" arising out of, resulting from, caused by or contributed to by the presence, ingestion, inhalation, or absorption of or exposure to lead, lead compounds, or lead contained in any materials;
2. Any cost or expense to abate, mitigate, remove, or dispose of lead, lead compounds or materials containing lead;
3. Any supervision, instruction, recommendations, warnings or advice given or which should have been given in connection with parts 1. or 2. above; or
4. Any obligation to share damages with or repay anyone else who must pay damages in connection with parts 1., 2., or 3. above.



**POLICY NUMBER:** CRA8XYD11

**INSURED NAME:** THE RESTAURANT GROUP ETAL

**ADDITIONAL NAMED INSURED ENDORSEMENT**

**THE NAMED INSURED IS HEREBY AMENDED TO INCLUDE THE FOLLOWING:**

- 1) Madison Entertainment Associates, LLC.
- 2) Asia Las Vegas, LLC.
- 3) Buddha Entertainment, LLC.
- 4) Buddha Beach, LLC.
- 5) Stripview Entertainment, LLC.
- 6) Roof Deck Entertainment, LLC.
- 7) 5 Chinese Brothers, LLC.
- 8) Tao Licensing, LLC.
- 9) RMNJ, LLC.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY**

**SILICA EXCLUSION ENDORSEMENT**

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

1. The following Exclusion is added to SECTION I - COVERAGES, COVERAGE A. - BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. - EXCLUSIONS and SECTION I - COVERAGES, COVERAGE B. - PERSONAL AND ADVERTISING INJURY LIABILITY, 2. - EXCLUSIONS:

1. Any liability for "bodily injury", "property damage", "personal injury", "advertising injury", occupational disease, disability, shock, mental anguish or mental injury, at any time arising out of the manufacture of, mining of, use of, sale of, installation of, removal of, distribution of, or exposure to silica, silicate, any silica material or any by-product, residue or compound containing silica or silicate; or
2. Any obligation of the "insured" to indemnify any party because of damages arising out of "bodily injury", "property damage", "personal injury", "advertising injury", occupational disease, disability, shock, mental anguish or mental injury, at any time as a result of the manufacture of, mining of, use of, sale of, installation of, removal of, distribution of, or exposure to silica or silicate, any silica material or any by-product, residue or compound containing silica or silicate; or
3. Any obligation to defend any "suit" or claim against the "insured" alleging bodily injury, "property damage", "personal injury", "advertising injury", occupational disease, disability, shock, mental anguish or mental injury, resulting from or contributed to, by the manufacture of, mining of, use of, sale of, installation of, removal of, distribution of, or exposure to silica, silicate, any silica material or any by-product, residue or compound containing silica or silicate.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**CONTRACTUAL LIABILITY – AMENDMENTS**

**THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:**

COMMERCIAL GENERAL LIABILITY COVERAGE PART

This insurance does not apply to any claim for damages resulting:

1. from the sole negligence of the indemnitee; or
2. from the ownership, maintenance or use of any aircraft;

arising out of any liability assumed under any "insured contract."

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY**

**HIRED AUTO AND NON-OWNED AUTO LIABILITY**

**THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:**

**COMMERCIAL GENERAL LIABILITY COVERAGE PART**

**SCHEDULE**

<b>Coverage</b>	<b>Limits of Insurance</b>	<b>Additional Premium</b>
Hired Auto Liability	\$ 1,000,000	\$INCL.
Non-Owned Auto Liability	\$ 1,000,000	\$INCL.

- A.** Insurance is provided only for those coverages for which a specific premium charge is shown in the Declarations or in this Schedule.

**1. HIRED AUTO LIABILITY**

The insurance provided under the Commercial General Liability Form, **SECTION I – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**, applies to "bodily injury" or "property damage" arising out of the maintenance or use of a "hired auto" by you or your "employees" in the course of your business.

**2. NON-OWNED AUTO LIABILITY**

The insurance provided under the Commercial General Liability Form, **SECTION I – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**, applies to "bodily injury" or "property damage" arising out of the use of any "non-owned auto" in your business by any person other than you.

- B.** For insurance provided by this endorsement only:

- 1.** The exclusions, under the Commercial General Liability Form, **SECTION I – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**, 2. Exclusions, e. and j. are deleted and replaced by the following:

- e. "Bodily injury" to:

- (1)** An "employee" of the insured arising out of and in the course of:
  - (a)** Employment by the insured; or
  - (b)** Performing duties related to the conduct of the insured's business; or
- (2)** The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph **(1)** above.

This exclusion applies:

- (1)** Whether the insured may be liable as an employer or in any other capacity; and
- (2)** To any obligation to share damages with or repay someone else who must pay damages because of injury.

This exclusion does not apply to:

- (1) Liability assumed by the insured under an "insured contract"; or
  - (2) "Bodily injury" arising out of and in the course of domestic employment by the insured unless benefits for such injury are in whole or in part either payable or required to be provided under any workers compensation law.
- j. "Property damage" to:
- (1) Property owned or being transported by, or rented or loaned to the insured; or
  - (2) Property in the care, custody or control of the insured,
2. **SECTION II – WHO IS AN INSURED** in the Commercial General Liability Form, is replaced by the following:

Each of the following is an insured under this endorsement to the extent set forth below:

- a. You
- b. Any other person using a "hired auto" with your permission
- c. For a "non-owned auto", any partner or "executive officer" of yours, but only while such "non-owned auto" is being used in your business; and
- d. Any other person or organization, but only for their liability because of acts or omissions of an insured under a., b. or c. above

None of the following is an insured:

- (1) Any person engaged in the business of his or her employer for "bodily injury" to any co-"employee" of such person injured in the course of employment, or to the spouse, child, parent, brother or sister of that co-"employee" as a consequence of such "bodily injury", or for any obligation to share damages with or repay someone else who must pay damages because of the injury.
- (2) Any partner or "executive officer" for any "auto" owned by such partner or officer or a member of his or her household;
- (3) Any person while employed in or otherwise engaged in duties in connection with an "auto business", other than an "auto business" you operate;
- (4) The owner or lessee (of whom you are a sublessee) of a "hired auto" or the owner of a "non-owned auto" or any agent or "employee" of any such owner or lessee;
- (5) Any person or organization for the conduct of any current or past partnership or joint venture that is not shown as a Named Insured in the Declarations.

C. The following additional definitions apply:

1. "Auto Business" means the business or occupation of selling, repairing, servicing, storing or parking "autos".
2. "Hired Auto" means any "auto" you lease, hire or borrow. This does not include any "auto" you lease, hire or borrow from any of your "employees" or members of their households, or from any partner or "executive officer" of yours.
3. "Non-Owned Auto" means any "auto" you do not own, lease, hire or borrow which is used in connection with your business. However, if you are a partnership, a "non-owned auto" does not include any "auto" owned by any partner.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

**THIS AMENDMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY**

**AMENDMENT – COMMON POLICY CONDITIONS**

**THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:**

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The Common Policy Conditions (IL 00 17 11/98) are amended by the addition of the following:

**G. Other Insurance with This Company**

If this policy contains two or more Coverage Parts providing coverage for the same "occurrence," "accident," "cause of loss," "loss" or offense, the maximum limit of insurance under all Coverage Parts shall not exceed the highest limit of insurance under any one Coverage Part.

If this policy and any other policy issued to you by us apply to the same "occurrence," "accident," "cause of loss," "injury," "loss" or offense, the maximum limit of insurance under all of the policies shall not exceed the highest limit of insurance under any one policy. This condition does not apply to any policy issued by us which specifically provides that the policy is to apply as excess insurance over this policy.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**ELECTROMAGNETIC FIELDS (EMF'S) EXCLUSION**

**THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:**

**COMMERCIAL GENERAL LIABILITY COVERAGE PART**

1. The following Exclusion is added to SECTION I – COVERAGES, COVERAGE A. - BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. – EXCLUSIONS:

Any liability for bodily injury or property damage, or any other loss, cost (including defense costs) or expense arising out of exposure to an electromagnetic field in any form, including but not limited to liability for the installation, operations, repair, sale or manufacture or distribution of any kind of equipment or products producing or in any way involving the effects of an electromagnetic field.

2. The following Definition is added to SECTION V – DEFINITIONS:

“Electromagnetic Field” means electric and magnetic fields generated by varying electrical current through any medium including but not limited to wires whether or not intended for the purpose of conducting electricity.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY**

**GARAGEKEEPERS COVERAGE**

**THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:**

**COMMERCIAL GENERAL LIABILITY COVERAGE PART**

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below.

Endorsement Effective:  Named Insured: THE RESTAURANT GROUP ETAL	Countersigned By:  (Authorized Representative)
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**SCHEDULE**

Location No.	Coverages	Limits of Insurance for Each Location	
<input type="checkbox"/>	Comprehensive	\$	PER LOCATION FOR ALL CUSTOMER'S AUTO MINUS A
	SIR \$25,000	\$	DEDUCTIBLE FOR EACH "CUSTOMER'S AUTO FOR LOSS" CAUSED BY THEFT OR MISCHIEF OR VANDALISM
ONE	SUBJECT TO \$		DEDUCTIBLE FOR ALL SUCH "LOSS" IN ANY ONE EVENT
<input checked="" type="checkbox"/>	Comprehensive	\$100,000	MINUS \$25,000 DEDUCTIBLE FOR EACH "CUSTOMER'S AUTO" FOR "LOSS" CAUSED BY THEFT OR MISCHIEF VANDALISM; OR
	Specified Causes	\$	MINUS \$ DEDUCTIBLE FOR ALL PERILS SUBJECT TO MAXIMUM DEDUCTIBLE FOR ALL SUCH "LOSS" IN ANY ONE
	Of Loss	\$	MINUS \$
	Collision	\$	MINUS \$ DEDUCTIBLE FOR EACH "CUSTOMER'S AUTO"
<input type="checkbox"/>	Comprehensive	\$	MINUS \$ DEDUCTIBLE FOR EACH "CUSTOMER'S AUTO" FOR "LOSS" CAUSED BY THEFT OR MISCHIEF VANDALISM; OR
	Specified Causes	\$	MINUS \$ DEDUCTIBLE FOR ALL PERILS SUBJECT TO MAXIMUM DEDUCTIBLE FOR ALL SUCH "LOSS" IN ANY ONE
	Of Loss	\$	MINUS \$
	Collision	\$	MINUS \$ DEDUCTIBLE FOR EACH "CUSTOMER'S AUTO"



**LOCATIONS WHERE YOU CONDUCT "GARAGE OPERATIONS"**

Location No.	Address State Your Main Business Location as Location No. 1
<input type="checkbox"/>	All locations where insured provides Valet Parking Services. Limit is subject to a policy aggregate limit of \$100,000
<input type="checkbox"/>	
<input type="checkbox"/>	

Premium For All Locations	
Comprehensive	\$
Specified Causes of Loss	\$
Collision	\$

**DIRECT COVERAGE OPTIONS**

Indicate below with "X" which, if any, Direct Coverage Option is selected.

☒ **EXCESS INSURANCE**

If this box is checked, Garage keepers Coverage remains applicable on a legal liability basis. However, coverage also applies without regard to your or any other "insured's" legal liability for "loss" to a "customer's auto" on an excess basis over any other collectible insurance regardless of whether the other insurance covers your or any other "insured's" interest or the interest of the "customer's auto's" owners.

☐ **PRIMARY INSURANCE**

If this box is checked, Garage keepers Coverage is changed to apply without regard to your or any other "insured's" legal liability for "loss" to a "customer's auto" and is primary insurance.

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

**A. This endorsement provides only those coverages:**

1. Where the Limit of Insurance and a premium are shown for that coverage in the Schedule:  
and
2. For the location shown in the Schedule.

**B. Coverage**

1. We will pay all sums the "insured" legally must pay as damages for "loss" to a "customer's auto" or "customer's auto" equipment left in the "insured's" care while the "insured" is attending, servicing, repairing, parking or storing it in your "garage operations" under:

**a. Comprehensive Coverage**

From any cause except:

- (1) The "customer's auto's" collision with another object; or
- (2) The "customer's auto's" overturn.

b. **Specified Causes Of Loss Coverage**

Cause by:

- (1) Fire, lightning or explosion;
- (2) Theft; or
- (3) Mischief or vandalism.

c. **Collision Coverage**

Caused by:

- (1) The "customer's auto's" collision with another object; or
- (2) The "customer's auto's" overturn.

2. We will have the right and duty to defend any "insured" against a "suit" asking for these damages. However, we have no duty to defend any "insured" against a "suit" seeking damages for "loss" to which this insurance does not apply. We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends for a coverage when the Limit of Insurance for that coverage has been exhausted by payment of judgments or settlements.

3. **Who Is An Insured**

The following are "insureds" for "loss" to "customer's autos".

- a. You.
- b. Your partner (if you are a partnership), or members (if you are a limited liability company), "employees", directors or shareholders while acting within the scope of their duties as such.

4. **Coverage Extensions**

The following applies as Supplementary Payments. In addition to the Limit of Insurance, we will pay for the "Insured":

- a. All expenses we incur.
- b. The costs of bonds to release attachments in any "suit" against an "insured" we defend, but only for bond amounts within our Limit of Insurance.
- c. All reasonable expenses incurred by the "insured" at our request, including actual loss of earnings up to \$250 a day because of time off from work.
- d. All costs taxed against the "insured" in any "suit" against an "insured" we defend.
- e. All interest on the full amount of any judgment that accrues after entry of the judgment in any "suit" against an "insured" we defend; but our duty to pay interest ends when we have paid, offered to pay, or deposited in court the part of the judgment that is within our Limit of Insurance.

C. **Exclusions**

1. This insurance does not apply to any of the following:

a. **Contractual Obligations**

Liability resulting from any agreement by which the "Insured" accepts responsibility for "loss".

b. **Theft**

"Loss due to theft or conversion caused in any way by you, "employees" or by your shareholders.

c. **Defective Parts**

Defective parts or materials.

d. **Faulty Work**

Faulty "work you performed".

2. We will not pay for "loss" to any of the following:

- a. Tape decks or other sound reproducing equipment unless permanently installed in a "customer's auto".
- b. Tapes, records or other sound reproducing devices designed for use with sound reproducing equipment.
- c. Sound receiving equipment designed for use as a citizen's band radio, two-way mobile radio or telephone or scanning monitor receiver, including its antennas and other accessories, unless permanently installed in the dash or console opening normally used by the "customer's auto" manufacturer for the installation of a radio.
- d. Any device designed or used to detect speed measurement equipment such as a radar or laser detectors and any jamming apparatus intended to elude or disrupt speed measurement equipment.

**D. Limit Of Insurance And Deductible**

1. Regardless of the number of "customer's auto", "insureds", premiums paid, claims made or "suits" brought, the most we will pay for each "loss" at each location is the Garage keepers Coverage Limit of Insurance shown in the Schedule for that location minus the applicable deductible for "loss" caused by collision, theft or mischief or vandalism.
2. The maximum deductible stated in the Schedule for Garage keepers Coverage Comprehensive or Specified Causes of Loss Coverage is the most that will be deducted for all "loss" in any one event caused by theft or mischief or vandalism.
3. Sometimes to settle a claim or "suit", we may pay all or any part of the deductible. If this happens you must reimburse us for the deductible or that portion of the deductible that we paid.

**E. Additional Definitions**

As used in this endorsement:

1. "Customer's auto" means a customer's land motor vehicle or trailer or semi trailer. This definition also includes any customer's auto while left with you for service, repair, storage or safekeeping. Customers include your employees, and members of their households who pay for services performed.
2. "Loss" means direct and accidental loss or damage and includes any resulting loss of use.

3. "Garage operations" means the ownership, maintenance or use of locations for the purpose or a business of selling, servicing, repairing, parking or storing "customer's autos" and that portion of the roads or other accesses that adjoin these locations. "Garage operations" also includes all operations necessary or incidental to the performance of garage operations.
4. "Work you performed" includes:
  - a. Work that someone performed on your behalf; and
  - b. The providing of or failure to provide warnings or instructions.

All other definitions, terms and conditions of this policy remain unchanged.

This endorsement is a part of your policy and takes effect on the effective date of your policy, unless otherwise stated.

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Authorized Representative

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**BODILY INJURY, PROPERTY DAMAGE, PERSONAL AND ADVERTISING INJURY LIABILITY  
DEDUCTIBLE ENDORSEMENT**

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

**SCHEDULE**

<b>Coverage</b>	<b>Amount and Basis of Deductible</b>
Bodily Injury Liability	\$25,000 per occurrence INCLUDING LOSS ADJUSTMENT EXPENSE
Property Damage Liability	\$25,000 per occurrence INCLUDING LOSS ADJUSTMENT EXPENSE
Personal Advertising Injury Liability (Personal Injury and Advertising Injury)	\$25,000 per occurrence INCLUDING LOSS ADJUSTMENT EXPENSE

**APPLICATION OF ENDORSEMENT**

Enter below any limitations on the application of this endorsement. If no limitation is entered, the deductibles apply to damages for all "bodily injury," property damage," "personal advertising injury," ("personal injury" and "advertising injury") however caused:

1. Our obligation under the Bodily Injury Liability, Property Damage Liability, Personal and Advertising Injury Liability (Personal Injury and Advertising Injury) Coverages to pay damages on your behalf applies only to the amount of damages in excess of any deductible amounts stated in the Schedule above as applicable to such coverages, and the Limits of Insurance applicable to Each Occurrence or offense for such coverages will be reduced by the amount of such deductible. Aggregate Limits for such coverages shall not be reduced by the application of such deductible amount.
2. The deductible amounts apply to damages and all legal and loss adjustment expenses.
3. The deductible amounts stated in the Schedule above apply, respectively:
  - a. Under the Bodily Injury Liability Coverage to all damages because of the "bodily injury" sustained by one person;
  - b. Under Property Damage Liability Coverage to all damages because of the "property damage" sustained by one person, any organization or association; or
  - c. Under Personal and Advertising Injury Liability (Personal Injury and Advertising Injury) Coverages to all damages sustained by one person as a result of one "occurrence" or offense.
4. The terms of this insurance, including those with respect to our right and duty to defend any "suits" seeking those damages and your duties in the event of an "occurrence," offense, claim or "suit", apply irrespective of the application of the deductible amount.
5. We may pay any part or all of the deductible amount to effect settlement of any claim or "suit" and, upon notification of the action taken, you shall promptly reimburse us for such part of the deductible amount as has been paid by us.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**EXCLUSION - DISCRIMINATION**

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

1. The following Exclusion is added to SECTION I – COVERAGES, COVERAGE A. - BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. – EXCLUSIONS and SECTION I – COVERAGES, COVERAGE B. – PERSONAL AND ADVERTISING INJURY LIABILITY, 2. – EXCLUSIONS:

This policy does not apply to:

**Discrimination**

Bodily injury, personal injury, or advertising injury liability that arises from discrimination based upon, but not limited to, race, creed, color, sex, age, disability, national origin, handicap, illness, religion or sexual preference.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**AMENDMENT - CROSS SUITS**

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

COMMERCIAL GENERAL LIABILITY COVERAGE PART  
PRODUCT/COMPLETED OPERATIONS LIABILITY COVERAGE PART

This policy does not afford coverage to claims for damages arising out of bodily injury, personal and advertising injury, or property damage as defined, initiated, alleged or caused to be brought about by a Named Insured covered by this policy against any other Named Insured covered by this policy.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**COMMON POLICY CONDITIONS AMENDMENT  
MINIMUM RETAINED PREMIUM**

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

**COMMON POLICY CONDITIONS**

Condition A – CANCELLATION, paragraph 5, is deleted and replaced by the following:

5. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, earned premium will be computed according to the customary short rate table and procedure, subject to a Minimum Retained Premium of \$[REDACTED]. The cancellation will be effective even if we have not made or offered a refund.



**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **GENERAL SERVICE OF SUIT ENDORSEMENT**

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

ALL COVERAGE PARTS IN THIS POLICY

Pursuant to any statute of any state or district of the United States of America which makes provision therefore, the insurer hereby designates the Commissioner, Superintendent or Director of Insurance or other officer specified for that purpose in the statute, and his or her successors in office, and duly authorized deputies in the state where this policy is issued, as the insurer's true and lawful attorney for service of legal process in action, suit or proceeding brought in the state where this policy is issued by or on behalf of an insured or beneficiary against the insurer arising out of the insurance issued under this policy.

The Company's registered forwarding address for purposes of receiving service from the Commissioner, Superintendent or Director of Insurance or other officer in each state shall be: Aspen Specialty Insurance Management, Inc., c/o General Counsel, 175 Capital Blvd., Rocky Hill, CT 06067; (860) 760-7758; Questions can be directed to: Compliance@aspenspecialty.com. In addition, please note state-specific instructions as follows:

In Arizona, service must be made on the Commissioner of Insurance, but a copy of any service of legal process should also be delivered or forwarded (for informational purposes only) to: Mr. John Rohwer, John Rohwer & Company, P.O. Box 2229, Phoenix, AZ 85002 or Gail Flock c/o CT Corporation System, 2394 East Camelback Road, Phoenix, AZ 85016.

In California, any service of legal process may also be delivered or forwarded to: Jere Keprios c/o CT Corporation, 818 West Seventh Street, Los Angeles, CA 90017.

In Colorado, any service of legal process may also be delivered or forwarded to: Christen Vinnola c/o The Corporation Company, 1675 Broadway, Suite 1200, Denver, CO 80202.

In Georgia, service must be made on the Commissioner of Insurance, but a copy of such service should also be delivered or forwarded (for informational purposes only) to: Dale W. Morris c/c CT Corporation System, 1201 Peachtree Street, NE, Atlanta, GA 30361.

In Hawaii, any service of legal process may also be delivered or forwarded to: Ronald V. Grant c/o CT Corporation Company, Inc. 900 Fort Street Mall, Suite 1800 Honolulu, HI 96813.

In Louisiana, any service of legal process may also be delivered or forwarded to: Lisa Uttech c/o CT Corporation Regional System, 5615 Corporate Blvd Suite 400B, Baton Rouge, LA 70808.

In Maine, service must be made on the Commissioner of Insurance, but a copy of such filing should also be delivered or forwarded (for informational purposes only) to: Peter B. Webster c/o CT Corporation System, 81 West Main Street, Yarmouth, ME 04096.

In Michigan, service of legal process may only be made on the Insurance Commissioner, but a copy of such filing should also be sent (for reference only) to: General Counsel, Aspen Insurance U.K. Limited c/o Aspen Specialty Insurance Management, Inc., 175 Capital Blvd., Rocky Hill, CT 06067.

In North Carolina, service of legal process may only be made on the Insurance Commissioner, but a copy of any service of legal process should also be delivered or forwarded (for reference only) to: Ron M. Strickland c/o CT Corporation System 150 Fayetteville Street Box 1011, Raleigh, NC 27601.

In Tennessee, any service of legal process may only be made on the Insurance Commissioner, but a copy of such filing should also be delivered or forwarded (for reference only) to: Mark Williams c/o CT Corporation System 800 S. Gay Street, Suite 2021, Knoxville, TN 37929.

In Texas, any service of legal process may only be made on the Insurance Commissioner, but a copy of such filing should also be delivered or forwarded (for reference only) to: Shirley Dillon c/o CT Corporation System, 350 North St. Paul Street, Dallas, TX 75201.

In Wyoming, any service of legal process should be made on the Insurance Commissioner, but a copy of such filing should also be delivered or forwarded (for reference only) to: Tammy Bellefeuille c/o CT Corporation System 1720 Carey Avenue, Cheyenne, WY 82001.

The foregoing designation of attorney for service of legal process upon the Company shall not constitute a waiver of the Company's rights to remove, remand, dismiss or transfer any suit or proceeding from any court, or to commence any suit or other proceeding in any court of competent jurisdiction.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**LIQUOR LIABILITY COVERAGE FORM CONDITIONS AMENDMENT  
MINIMUM RETAINED AUDIT PREMIUM**

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

LIQUOR LIABILITY COVERAGE FORM

**SECTION IV, LIQUOR LIABILITY CONDITIONS**, Paragraph 5, **Premium Audit**, subparagraph b, is deleted and replaced by the following:

- b.** Premium shown in this Coverage Part as Advance Premium is a deposit premium only. At the close of each audit period, we will compute the earned premium for that period. Audit premiums are due and payable upon notice to the First Named Insured. Premium Audit adjustments will be made to determine additional premiums only. You agree that there will be no downward adjustment of the Minimum Retained Audit Premium resulting from the Premium Audit provision of this policy.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## WAR LIABILITY EXCLUSION

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A. Exclusion **i.** under Paragraph 2., **Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability** is replaced by the following:

**2. Exclusions**

This insurance does not apply to:

**i. War**

"Bodily injury" or "property damage", however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war; or
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

- B. The following exclusion is added to Paragraph 2., **Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability**:

**2. Exclusions**

This insurance does not apply to:

**WAR**

"Personal and advertising injury", however caused, arising, directly or indirectly, out of:

- a. War, including undeclared or civil war; or
- b. Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- c. Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

- C. Exclusion **h.** under Paragraph 2., **Exclusions of Section I – Coverage C – Medical Payments** does not apply. Medical payments due to war are now subject to Exclusion **g.** of Paragraph 2., **Exclusions of Section I – Coverage C – Medical Payments** since "bodily injury" arising out of war is now excluded under Coverage **A.**

## RECORDING AND DISTRIBUTION OF MATERIAL OR INFORMATION IN VIOLATION OF LAW EXCLUSION

This endorsement modifies insurance provided under the following:

### COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A. Exclusion q. of Paragraph 2. **Exclusions** of Section I – Coverage A – Bodily Injury And Property Damage Liability is replaced by the following:

#### 2. Exclusions

This insurance does not apply to:

##### q. Recording And Distribution Of Material Or Information In Violation Of Law

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;
- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;
- (3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transaction Act (FACTA); or
- (4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

- B. Exclusion p. of Paragraph 2. **Exclusions** of Section I – Coverage B – Personal And Advertising Injury Liability is replaced by the following:

#### 2. Exclusions

This insurance does not apply to:

##### p. Recording And Distribution Of Material Or Information In Violation Of Law

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;
- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;
- (3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transaction Act (FACTA); or
- (4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **EMPLOYEE BENEFITS LIABILITY COVERAGE**

**THIS ENDORSEMENT PROVIDES CLAIMS-MADE COVERAGE.  
PLEASE READ THE ENTIRE ENDORSEMENT CAREFULLY.**

**THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:**

COMMERCIAL GENERAL LIABILITY COVERAGE PART

### **SCHEDULE**

Coverage		Limit Of Insurance		Deductible		Premium
Employee Benefits Programs		\$1,000,000	each employee	\$25,000	each employee	\$ [REDACTED]
		\$1,000,000	aggregaté			
Retroactive Date:	10/06/2011					

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

**A. The following is added to Section I – Coverages:**

### **COVERAGE – EMPLOYEE BENEFITS LIABILITY**

#### **1. Insuring Agreement**

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of any act, error or omission, of the insured, or of any other person for whose acts the insured is legally liable, to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages to which this insurance does not apply. We may, at our discretion, investigate any report of an act, error or omission and settle any "claim" or "suit" that may result.
- But:

- (1) The amount we will pay for damages is limited as described in Paragraph E. (Section III – Limits Of Insurance); and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments.

**b. This insurance applies to damages only if:**

- (1) The act, error or omission, is negligently committed in the "administration" of your "employee benefit program";
- (2) The act, error or omission, did not take place before the Retroactive Date, if any, shown in the Schedule nor after the end of the policy period; and
- (3) A "claim" for damages, because of an act, error or omission, is first made against any insured, in accordance with Paragraph c. below, during the policy period or an Extended Reporting Period we provide under Paragraph G. of this endorsement.

**c. A "claim" seeking damages will be deemed to have been made at the earlier of the following times:**

- (1) When notice of such "claim" is received and recorded by any insured or by us, whichever comes first; or

- (2) When we make settlement in accordance with Paragraph 1.a. above.

A "claim" received and recorded by the insured within 60 days after the end of the policy period will be considered to have been received within the policy period, if no subsequent policy is available to cover the claim.

- d. All "claims" for damages made by an "employee" because of any act, error or omission, or a series of related acts, errors or omissions, including damages claimed by such "employee's" dependents and beneficiaries, will be deemed to have been made at the time the first of those "claims" is made against any insured.

## 2. Exclusions

This insurance does not apply to:

### a. Dishonest, Fraudulent, Criminal Or Malicious Act

Damages arising out of any intentional, dishonest, fraudulent, criminal or malicious act, error or omission, committed by any insured, including the willful or reckless violation of any statute.

### b. Bodily Injury, Property Damage, Or Personal And Advertising Injury

"Bodily injury", "property damage" or "personal and advertising injury".

### c. Failure To Perform A Contract

Damages arising out of failure of performance of contract by any insurer.

### d. Insufficiency Of Funds

Damages arising out of an insufficiency of funds to meet any obligations under any plan included in the "employee benefit program".

### e. Inadequacy Of Performance Of Investment/Advice Given With Respect To Participation

Any "claim" based upon:

- (1) Failure of any investment to perform;
- (2) Errors in providing information on past performance of investment vehicles; or
- (3) Advice given to any person with respect to that person's decision to participate or not to participate in any plan included in the "employee benefit program".

## f. Workers' Compensation And Similar Laws

Any "claim" arising out of your failure to comply with the mandatory provisions of any workers' compensation, unemployment compensation insurance, social security or disability benefits law or any similar law.

## g. ERISA

Damages for which any insured is liable because of liability imposed on a fiduciary by the Employee Retirement Income Security Act of 1974, as now or hereafter amended, or by any similar federal, state or local laws.

## h. Available Benefits

Any "claim" for benefits to the extent that such benefits are available, with reasonable effort and cooperation of the insured, from the applicable funds accrued or other collectible insurance.

## i. Taxes, Fines Or Penalties

Taxes, fines or penalties, including those imposed under the Internal Revenue Code or any similar state or local law.

## j. Employment-Related Practices

Damages arising out of wrongful termination of employment, discrimination, or other employment-related practices.

## B. For the purposes of the coverage provided by this endorsement:

1. All references to Supplementary Payments – Coverages A and B are replaced by Supplementary Payments – Coverages A, B and Employee Benefits Liability.

2. Paragraphs 1.b. and 2. of the Supplementary Payments provision do not apply.

## C. For the purposes of the coverage provided by this endorsement, Paragraphs 2. and 4. of Section II – Who Is An Insured are replaced by the following:

2. Each of the following is also an insured:

- a. Each of your "employees" who is or was authorized to administer your "employee benefit program".
- b. Any persons, organizations or "employees" having proper temporary authorization to administer your "employee benefit program" if you die, but only until your legal representative is appointed.
- c. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Endorsement.

4. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if no other similar insurance applies to that organization. However:
- a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier.
  - b. Coverage under this provision does not apply to any act, error or omission that was committed before you acquired or formed the organization.
- D. For the purposes of the coverage provided by this endorsement, Paragraph 3. of **Section II – Who Is An Insured** does not apply.
- E. For the purposes of the coverage provided by this endorsement, **Section III – Limits Of Insurance** is replaced by the following:

**1. Limits Of Insurance**

- a. The Limits of Insurance shown in the Schedule and the rules below fix the most we will pay regardless of the number of:
  - (1) Insureds;
  - (2) "Claims" made or "suits" brought;
  - (3) Persons or organizations making "claims" or bringing "suits";
  - (4) Acts, errors or omissions; or
  - (5) Benefits included in your "employee benefit program".
- b. The Aggregate Limit is the most we will pay for all damages because of acts, errors or omissions negligently committed in the "administration" of your "employee benefit program".
- c. Subject to the Aggregate Limit, the Each Employee Limit is the most we will pay for all damages sustained by any one "employee", including damages sustained by such "employee's" dependents and beneficiaries, as a result of:
  - (1) An act, error or omission; or
  - (2) A series of related acts, errors or omissions negligently committed in the "administration" of your "employee benefit program".

However, the amount paid under this endorsement shall not exceed, and will be subject to, the limits and restrictions that apply to the payment of benefits in any plan included in the "employee benefit program".

The Limits of Insurance of this endorsement apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations of the policy to which this endorsement is attached, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits Of Insurance.

**2. Deductible**

- a. Our obligation to pay damages on behalf of the insured applies only to the amount of damages in excess of the deductible amount stated in the Schedule as applicable to Each Employee. The limits of insurance shall not be reduced by the amount of this deductible.
- b. The deductible amount stated in the Schedule applies to all damages sustained by any one "employee", including such "employee's" dependents and beneficiaries, because of all acts, errors or omissions to which this insurance applies.
- c. The terms of this insurance, including those with respect to:
  - (1) Our right and duty to defend any "suits" seeking those damages; and
  - (2) Your duties, and the duties of any other involved insured, in the event of an act, error or omission, or "claim"apply irrespective of the application of the deductible amount.
- d. We may pay any part or all of the deductible amount to effect settlement of any "claim" or "suit" and, upon notification of the action taken, you shall promptly reimburse us for such part of the deductible amount as we have paid.



F. For the purposes of the coverage provided by this endorsement, Conditions 2. and 4. of **Section IV – Conditions** are replaced by the following:

**2. Duties In The Event Of An Act, Error Or Omission, Or "Claim" Or "Suit"**

- a. You must see to it that we are notified as soon as practicable of an act, error or omission which may result in a "claim". To the extent possible, notice should include:
  - (1) What the act, error or omission was and when it occurred; and
  - (2) The names and addresses of anyone who may suffer damages as a result of the act, error or omission.
- b. If a "claim" is made or "suit" is brought against any insured, you must:
  - (1) Immediately record the specifics of the "claim" or "suit" and the date received; and
  - (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the "claim" or "suit" as soon as practicable.
- c. You and any other involved insured must:
  - (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "claim" or "suit";
  - (2) Authorize us to obtain records and other information;
  - (3) Cooperate with us in the investigation or settlement of the "claim" or defense against the "suit"; and
  - (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of an act, error or omission to which this insurance may also apply.
- d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation or incur any expense without our consent.

**4. Other Insurance**

If other valid and collectible insurance is available to the insured for a loss we cover under this endorsement, our obligations are limited as follows:

**a. Primary Insurance**

This insurance is primary except when **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in **c.** below.

**b. Excess Insurance**

- (1) This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis that is effective prior to the beginning of the policy period shown in the Schedule of this insurance and that applies to an act, error or omission on other than a claims-made basis, if:
  - (a) No Retroactive Date is shown in the Schedule of this insurance; or
  - (b) The other insurance has a policy period which continues after the Retroactive Date shown in the Schedule of this insurance.
- (2) When this insurance is excess, we will have no duty to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.
- (3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of the total amount that all such other insurance would pay for the loss in absence of this insurance; and the total of all deductible and self-insured amounts under all that other insurance.
- (4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Schedule of this endorsement.

**c. Method Of Sharing**

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limits of insurance of all insurers.

- G.** For the purposes of the coverage provided by this endorsement, the following Extended Reporting Period provisions are added, or, if this endorsement is attached to a claims-made Coverage Part, replaces any similar Section in that Coverage Part:

**EXTENDED REPORTING PERIOD**

- 1.** You will have the right to purchase an Extended Reporting Period, as described below, if:
  - a.** This endorsement is canceled or not renewed; or
  - b.** We renew or replace this endorsement with insurance that:
    - (1)** Has a Retroactive Date later than the date shown in the Schedule of this endorsement; or
    - (2)** Does not apply to an act, error or omission on a claims-made basis.
- 2.** The Extended Reporting Period does not extend the policy period or change the scope of coverage provided. It applies only to "claims" for acts, errors or omissions that were first committed before the end of the policy period but not before the Retroactive Date, if any, shown in the Schedule. Once in effect, the Extended Reporting Period may not be canceled.
- 3.** An Extended Reporting Period of five years is available, but only by an endorsement and for an extra charge.

You must give us a written request for the endorsement within 60 days after the end of the policy period. The Extended Reporting Period will not go into effect unless you pay the additional premium promptly when due.

We will determine the additional premium in accordance with our rules and rates. In doing so, we may take into account the following:

- a.** The "employee benefit programs" insured;

- b.** Previous types and amounts of insurance;

- c.** Limits of insurance available under this endorsement for future payment of damages; and

- d.** Other related factors.

The additional premium will not exceed 100% of the annual premium for this endorsement.

The Extended Reporting Period endorsement applicable to this coverage shall set forth the terms, not inconsistent with this Section, applicable to the Extended Reporting Period, including a provision to the effect that the insurance afforded for "claims" first received during such period is excess over any other valid and collectible insurance available under policies in force after the Extended Reporting Period starts.

- 4.** If the Extended Reporting Period is in effect, we will provide an extended reporting period aggregate limit of insurance described below, but only for claims first received and recorded during the Extended Reporting Period.

The extended reporting period aggregate limit of insurance will be equal to the dollar amount shown in the Schedule of this endorsement under Limits of Insurance.

Paragraph **E.1.b.** of this endorsement will be amended accordingly. The Each Employee Limit shown in the Schedule will then continue to apply as set forth in Paragraph **E.1.c.**

- H.** For the purposes of the coverage provided by this endorsement, the following definitions are added to the **Definitions** Section:

- 1.** "Administration" means:

- a.** Providing information to "employees", including their dependents and beneficiaries, with respect to eligibility for or scope of "employee benefit programs";
- b.** Handling records in connection with the "employee benefit program"; or
- c.** Effecting, continuing or terminating any "employee's" participation in any benefit included in the "employee benefit program".

However, "administration" does not include handling payroll deductions.

2. "Cafeteria plans" means plans authorized by applicable law to allow employees to elect to pay for certain benefits with pre-tax dollars.
3. "Claim" means any demand, or "suit", made by an "employee" or an "employee's" dependents and beneficiaries, for damages as the result of an act, error or omission.
4. "Employee benefit program" means a program providing some or all of the following benefits to "employees", whether provided through a "cafeteria plan" or otherwise:
  - a. Group life insurance; group accident or health insurance; dental, vision and hearing plans; and flexible spending accounts; provided that no one other than an "employee" may subscribe to such benefits and such benefits are made generally available to those "employees" who satisfy the plan's eligibility requirements;
  - b. Profit sharing plans, employee savings plans, employee stock ownership plans, pension plans and stock subscription plans, provided that no one other than an "employee" may subscribe to such benefits and such benefits are made generally available to all "employees" who are eligible under the plan for such benefits;
  - c. Unemployment insurance, social security benefits, workers' compensation and disability benefits;
  - d. Vacation plans, including buy and sell programs; leave of absence programs, including military, maternity, family, and civil leave; tuition assistance plans; transportation and health club subsidies; and
  - e. Any other similar benefits designated in the Schedule or added thereto by endorsement.
- I. For the purposes of the coverage provided by this endorsement, Definitions 5. and 18. in the **Definitions** Section are replaced by the following:
  5. "Employee" means a person actively employed, formerly employed, on leave of absence or disabled, or retired. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
  18. "Suit" means a civil proceeding in which damages because of an act, error or omission to which this insurance applies are alleged. "Suit" includes:
    - a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
    - b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **ADDITIONAL INSURED – MANAGERS OR LESSORS OF PREMISES**

**THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:**

COMMERCIAL GENERAL LIABILITY COVERAGE PART

### **SCHEDULE**

1. Designation of Premises (Part Leased to You): As required by written contract  
signed by both parties prior to a loss
2. Name of Person or Organization (Additional Insured):

3. Additional Premium:

(If no entry appears above, the information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule and subject to the following additional exclusions:

This insurance does not apply to:

1. Any "occurrence" which takes place after you cease to be a tenant in that premises.
2. Structural alterations, new construction or demolition operations performed by or on behalf of the person or organization shown in the Schedule.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**ADDITIONAL INSURED –  
MORTGAGEE, ASSIGNEE, OR RECEIVER**

**THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:**

COMMERCIAL GENERAL LIABILITY COVERAGE PART

**SCHEDULE**

**Name of Person or Organization:** As required by written contract signed by  
both parties prior to a loss

**Designation of Premises:**

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

1. WHO IS AN INSURED (Section II) is amended to include as an insured the person(s) or organization(s) shown in the Schedule but only with respect to their liability as mortgagee, assignee, or receiver and arising out of the ownership, maintenance, or use of the premises by you and shown in the Schedule.
2. This insurance does not apply to structural alterations, new construction and demolition operations performed by or for that person or organization.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## ADDITIONAL INSURED – LESSOR OF LEASED EQUIPMENT

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

### SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)
As required by written contract signed by both parties prior to a loss
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

**A. Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by your maintenance, operation or use of equipment leased to you by such person(s) or organization(s).

**B.** With respect to the insurance afforded to these additional insureds, this insurance does not apply to any "occurrence" which takes place after the equipment lease expires.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## EXCLUSION – DESIGNATED PROFESSIONAL SERVICES

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

### SCHEDULE

Description Of Professional Services:
1. ALL PROFESSIONAL SERVICES
2.
3.

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

With respect to any professional services shown in the Schedule, the following exclusion is added to Paragraph 2., **Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability** and Paragraph 2., **Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability**:

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" due to the rendering of or failure to render any professional service.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **EXCLUSION – COVERAGE C – MEDICAL PAYMENTS**

**THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:**

COMMERCIAL GENERAL LIABILITY COVERAGE PART

### **SCHEDULE**

**Description And Location Of Premises Or Classification:**

ALL LOCATIONS

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

With respect to any premises or classification shown in the Schedule:

- 1.** Section **I** – Coverage **C** – Medical Payments does not apply and none of the references to it in the Coverage Part apply: and

- 2.** The following is added to Section **I** – Supplementary Payments:

- h.** Expenses incurred by the insured for first aid administered to others at the time of an accident for "bodily injury" to which this insurance applies.



**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **LIMITATION OF COVERAGE TO DESIGNATED PREMISES OR PROJECT**

**THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:**

COMMERCIAL GENERAL LIABILITY COVERAGE PART

### **SCHEDULE**

**Premises:** 1) Lavo NY - 39 EAST 58TH STREET, NEW YORK, NY 10022

2) TAO Las Vegas - 3355 LAS VEGAS BLVD SOUTH, LAS VEGAS, NV 89109  
(INSIDE THE VENETIAN RESORT HOTEL)

3) Lavo Las Vegas - 3325 LAS VEGAS BLVD SOUTH, LAS VEGAS, NV 89109  
(LOCATED AT THE PALAZZO RESORT HOTEL)

4) Marquee Las Vegas - 3708 LAS VEGAS BLVD SOUTH, LAS VEGAS, NV 89109  
(INSIDE THE COSMOPOLITAN OF LAS VEGAS)

**Project:**

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

This insurance applies only to "bodily injury", "property damage", "personal and advertising injury" and medical expenses arising out of:

1. The ownership, maintenance or use of the premises shown in the Schedule and operations necessary or incidental to those premises; or
2. The project shown in the Schedule.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## EMPLOYMENT-RELATED PRACTICES EXCLUSION

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

### COMMERCIAL GENERAL LIABILITY COVERAGE PART

**A. The following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability:**

This insurance does not apply to:

"Bodily injury" to:

- (1) A person arising out of any:
  - (a) Refusal to employ that person;
  - (b) Termination of that person's employment; or
  - (c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed at that person; or
- (2) The spouse, child, parent, brother or sister of that person as a consequence of "bodily injury" to that person at whom any of the employment-related practices described in Paragraphs (a), (b), or (c) above is directed.

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

**B. The following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability:**

This insurance does not apply to:

"Personal and advertising injury" to:

- (1) A person arising out of any:
  - (a) Refusal to employ that person;
  - (b) Termination of that person's employment; or
  - (c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed at that person; or
- (2) The spouse, child, parent, brother or sister of that person as a consequence of "personal and advertising injury" to that person at whom any of the employment-related practices described in Paragraphs (a), (b), or (c) above is directed.

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **EXCLUSION – DESIGNATED OPERATIONS COVERED BY A CONSOLIDATED (WRAP-UP) INSURANCE PROGRAM**

**THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:**

COMMERCIAL GENERAL LIABILITY COVERAGE PART

### **SCHEDULE**

**Description and Location of Operation(s):**

ALL PROJECTS AND LOCATIONS FOR WHICH A CONSOLIDATED (WRAP-UP) INSURANCE PROGRAM HAS BEEN PROVIDED

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

The following exclusion is added to paragraph 2., Exclusions of COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I – Coverages):

This insurance does not apply to "bodily injury" or "property damage" arising out of either your ongoing operations or operations included within the "products-completed operations hazard" at the location described in the Schedule of this endorsement, as a consolidated (wrap-up) insurance program has been provided by the prime contractor/project manager or owner of the construction project in which you are involved.

This exclusion applies whether or not the consolidated (wrap-up) insurance program:

- (1)** Provides coverage identical to that provided by this Coverage Part;
- (2)** Has limits adequate to cover all claims; or
- (3)** Remains in effect.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**TOTAL POLLUTION EXCLUSION WITH A BUILDING HEATING, COOLING AND DEHUMIDIFYING  
EQUIPMENT EXCEPTION AND A HOSTILE FIRE EXCEPTION**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE PART**

Exclusion **f.** under Paragraph **2. Exclusions** of **Section I – Coverage A – Bodily Injury And Property Damage Liability** is replaced by the following:

This insurance does not apply to:

**f. Pollution**

- (1) "Bodily injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

This exclusion does not apply to:

- (a) "Bodily injury" if sustained within a building which is or was at any time owned or occupied by, or rented or loaned to, any insured and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests; or
- (b) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire" unless that "hostile fire" occurred or originated:
- (i) At any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste; or
- (ii) At any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations to test for, monitor, clean up, remove, contain, treat, detoxify, neutralize or in any way respond to, or assess the effects of, "pollutants".

- (2) Any loss, cost or expense arising out of any:

- (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
- (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## FUNGI OR BACTERIA EXCLUSION

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A.** The following exclusion is added to Paragraph 2., Exclusions of **Section I – Coverage A – Bodily Injury And Property Damage Liability**:

**2. Exclusions**

This insurance does not apply to:

**Fungi or Bacteria**

- a.** "Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.
- b.** Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.

This exclusion does not apply to any "fungi" or bacteria that are, are on, or are contained in, a good or product intended for consumption.

- B.** The following exclusion is added to Paragraph 2., Exclusions of **Section I – Coverage B – Personal And Advertising Injury Liability**:

**2. Exclusions**

This insurance does not apply to:

**Fungi or Bacteria**

- a.** "Personal and advertising injury" which would not have taken place, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury.
- b.** Any loss, cost or expense arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.

- C.** The following definition is added to the **Definitions** Section:

"Fungi" means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or byproducts produced or released by fungi.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## EXCLUSION OF CERTIFIED ACTS OF TERRORISM AND OTHER ACTS OF TERRORISM

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

COMMERCIAL GENERAL LIABILITY COVERAGE PART  
LIQUOR LIABILITY COVERAGE PART  
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART  
POLLUTION LIABILITY COVERAGE PART  
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART  
RAILROAD PROTECTIVE LIABILITY COVERAGE PART  
UNDERGROUND STORAGE TANK POLICY

**A.** The following exclusion is added:

This insurance does not apply to:

**TERRORISM**

"Any injury or damage" arising, directly or indirectly, out of a "certified act of terrorism" or an "other act of terrorism". However, with respect to an "other act of terrorism", this exclusion applies only when one or more of the following are attributed to such act:

1. The total of insured damage to all types of property exceeds \$25,000,000. In determining whether the \$25,000,000 threshold is exceeded, we will include all insured damage sustained by property of all persons and entities affected by the terrorism and business interruption losses sustained by owners or occupants of the damaged property. For the purpose of this provision, insured damage means damage that is covered by any insurance plus damage that would be covered by any insurance but for the application of any terrorism exclusions; or
2. Fifty or more persons sustain death or serious physical injury. For the purposes of this provision, serious physical injury means:
  - a. Physical injury that involves a substantial risk of death; or
  - b. Protracted and obvious physical disfigurement; or
  - c. Protracted loss of or impairment of the function of a bodily member or organ; or
3. The terrorism involves the use, release or escape of nuclear materials, or directly or indirectly results in nuclear reaction or radiation or radioactive contamination; or

4. The terrorism is carried out by means of the dispersal or application of pathogenic or poisonous biological or chemical materials; or

5. Pathogenic or poisonous biological or chemical materials are released, and it appears that one purpose of the terrorism was to release such materials.

With respect to this exclusion, Paragraphs 1. and 2. describe the thresholds used to measure the magnitude of an incident of an "other act of terrorism" and the circumstances in which the threshold will apply for the purpose of determining whether this exclusion will apply to that incident.

**B.** The following definitions are added:

1. For the purposes of this endorsement, "any injury or damage" means any injury or damage covered under any Coverage Part to which this endorsement is applicable, and includes but is not limited to "bodily injury", "property damage", "personal and advertising injury", "injury" or "environmental damage" as may be defined in any applicable Coverage Part.
2. "Certified act of terrorism" means an act that is certified by the Secretary of the Treasury, in concurrence with the Secretary of State and the Attorney General of the United States, to be an act of terrorism pursuant to the federal Terrorism Risk Insurance Act of 2002. The federal Terrorism Risk Insurance Act of 2002 sets forth the following criteria for a "certified act of terrorism":
  - a. The act resulted in aggregate losses in excess of \$5 million; and

- b.** The act is a violent act or an act that is dangerous to human life, property or infrastructure and is committed by an individual or individuals acting on behalf of any foreign person or foreign interest, as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.
- 3.** "Other act of terrorism" means a violent act or an act that is dangerous to human life, property or infrastructure that is committed by an individual or individuals and that appears to be part of an effort to coerce a civilian population or to influence the policy or affect the conduct of any government by coercion, and the act is not certified as a terrorist act pursuant to the federal Terrorism Risk Insurance Act of 2002. Multiple incidents of an "other act of terrorism" which occur within a seventy-two hour period and appear to be carried out in concert or to have a related purpose or common leadership shall be considered to be one incident.
- C.** In the event of any incident of a "certified act of terrorism" or an "other act of terrorism" that is not subject to this exclusion, coverage does not apply to any loss or damage that is otherwise excluded under this Coverage Part.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## **EXCLUSION – ENGINEERS, ARCHITECTS OR SURVEYORS PROFESSIONAL LIABILITY**

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

### COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2., **Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability** and Paragraph 2., **Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability**:

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of or failure to render any professional services by you or any engineer, architect or surveyor who is either employed by you or performing work on your behalf in such capacity.

Professional services include:

1. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; and
2. Supervisory, inspection, architectural or engineering activities.



**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **PRODUCTS/COMPLETED OPERATIONS HAZARD REDEFINED**

**THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:**

COMMERCIAL GENERAL LIABILITY COVERAGE PART  
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

### **SCHEDULE**

**Description of Premises and Operations:**

SEE FORM# CG2144

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

With respect to "bodily injury" or "property damage" arising out of "your products" manufactured, sold, handled or distributed:

1. On, from or in connection with the use of any premises described in the Schedule, or
2. In connection with the conduct of any operation described in the Schedule, when conducted by you or on your behalf,

Paragraph **a.** of the definition of "Products-completed operations hazard" in the DEFINITIONS Section is replaced by the following:

"Products-completed operations hazard":

- a.** Includes all "bodily injury" and "property damage" that arises out of "your products" if the "bodily injury" or "property damage" occurs after you have relinquished possession of those products.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## DESIGNATED LOCATION(S) GENERAL AGGREGATE LIMIT

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

### SCHEDULE

**Designated Location(s):**  
SEE FORM# CG2144

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

- A.** For all sums which the insured becomes legally obligated to pay as damages caused by "occurrences" under **COVERAGE A** (SECTION I), and for all medical expenses caused by accidents under **COVERAGE C** (SECTION I), which can be attributed only to operations at a single designated "location" shown in the Schedule above:
1. A separate Designated Location General Aggregate Limit applies to each designated "location", and that limit is equal to the amount of the General Aggregate Limit shown in the Declarations.
  2. The Designated Location General Aggregate Limit is the most we will pay for the sum of all damages under **COVERAGE A**, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard", and for medical expenses under **COVERAGE C** regardless of the number of:
    - a. Insureds;
    - b. Claims made or "suits" brought; or
    - c. Persons or organizations making claims or bringing "suits".
  3. Any payments made under **COVERAGE A** for damages or under **COVERAGE C** for medical expenses shall reduce the Designated Location General Aggregate Limit for that designated "location". Such payments shall not reduce the General Aggregate Limit shown in the Declarations nor shall they reduce any other Designated Location General Aggregate Limit for any other designated "location" shown in the Schedule above.
  4. The limits shown in the Declarations for Each Occurrence, Fire Damage and Medical Expense continue to apply. However, instead of being subject to the General Aggregate Limit shown in the Declarations, such limits will be subject to the applicable Designated Location General Aggregate Limit.

**B.** For all sums which the insured becomes legally obligated to pay as damages caused by "occurrences" under **COVERAGE A (SECTION I)**, and for all medical expenses caused by accidents under **COVERAGE C (SECTION I)**, which cannot be attributed only to operations at a single designated "location" shown in the Schedule above:

1. Any payments made under **COVERAGE A** for damages or under **COVERAGE C** for medical expenses shall reduce the amount available under the General Aggregate Limit or the Products-Completed Operations Aggregate Limit, whichever is applicable; and
2. Such payments shall not reduce any Designated Location General Aggregate Limit.

**C.** When coverage for liability arising out of the "products-completed operations hazard" is provided, any payments for damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard" will reduce the Products-Completed Operations Aggregate Limit, and not reduce the General Aggregate Limit nor the Designated Location General Aggregate Limit.

**D.** For the purposes of this endorsement, the **Definitions** Section is amended by the addition of the following definition:

"Location" means premises involving the same or connecting lots, or premises whose connection is interrupted only by a street, roadway, waterway or right-of-way of a railroad.

**E.** The provisions of Limits Of Insurance (**SECTION III**) not otherwise modified by this endorsement shall continue to apply as stipulated.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## NUCLEAR ENERGY LIABILITY EXCLUSION ENDORSEMENT

(Broad Form)

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

COMMERCIAL AUTOMOBILE COVERAGE PART  
COMMERCIAL GENERAL LIABILITY COVERAGE PART  
FARM COVERAGE PART  
LIQUOR LIABILITY COVERAGE PART  
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART  
POLLUTION LIABILITY COVERAGE PART  
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART  
PROFESSIONAL LIABILITY COVERAGE PART  
RAILROAD PROTECTIVE LIABILITY COVERAGE PART  
UNDERGROUND STORAGE TANK POLICY

**1. The insurance does not apply:**

**A. Under any Liability Coverage, to "bodily injury" or "property damage":**

- (1)** With respect to which an "insured" under the policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada or any of their successors, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or
- (2)** Resulting from the "hazardous properties" of "nuclear material" and with respect to which **(a)** any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or **(b)** the "insured" is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

**B. Under any Medical Payments coverage, to expenses incurred with respect to "bodily injury" resulting from the "hazardous properties" of "nuclear material" and arising out of the operation of a "nuclear facility" by any person or organization.**

**C. Under any Liability Coverage, to "bodily injury" or "property damage" resulting from "hazardous properties" of "nuclear material", if:**

- (1)** The "nuclear material" **(a)** is at any "nuclear facility" owned by, or operated by or on behalf of, an "insured" or **(b)** has been discharged or dispersed therefrom;
- (2)** The "nuclear material" is contained in "spent fuel" or "waste" at any time possessed, handled, used, processed, stored, transported or disposed of, by or on behalf of an "insured"; or
- (3)** The "bodily injury" or "property damage" arises out of the furnishing by an "insured" of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any "nuclear facility", but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion **(3)** applies only to "property damage" to such "nuclear facility" and any property thereat.

2. As used in this endorsement:

"Hazardous properties" includes radioactive, toxic or explosive properties.

"Nuclear material" means "source material", "Special nuclear material" or "by-product material".

"Source material", "special nuclear material", and "by-product material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof.

"Spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a "nuclear reactor".

"Waste" means any waste material **(a)** containing "by-product material" other than the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its "source material" content, and **(b)** resulting from the operation by any person or organization of any "nuclear facility" included under the first two paragraphs of the definition of "nuclear facility".

"Nuclear facility" means:

- (a)** Any "nuclear reactor";
- (b)** Any equipment or device designed or used for **(1)** separating the isotopes of uranium or plutonium, **(2)** processing or utilizing "spent fuel", or **(3)** handling, processing or packaging "waste";

**(c)** Any equipment or device used for the processing, fabricating or alloying of "special nuclear material" if at any time the total amount of such material in the custody of the "insured" at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235;

**(d)** Any structure, basin, excavation, premises or place prepared or used for the storage or disposal of "waste";

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations.

"Nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material.

"Property damage" includes all forms of radioactive contamination of property.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## POLICY CHANGES

Policy Change  
Number 001

<b>POLICY NUMBER:</b>  CRA8XYD11	<b>POLICY CHANGES EFFECTIVE:</b>  10/06/2011	<b>COMPANY:</b> Aspen Specialty Insurance Company
<b>NAMED INSURED:</b> THE RESTAURANT GROUP ETAL		<b>AUTHORIZED REPRESENTATIVE</b>
<b>COVERAGE PARTS AFFECTED:</b> COMMERCIAL GENERAL LIABILITY COVERAGE PART		

**CHANGES:**

Stop Loss Aggregate Endorsement - \$250,000 for sales up to \$175M/\$400k  
for sales excess of \$175M

TBD

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## POLICY CHANGES

Policy Change  
Number 002

<b>POLICY NUMBER:</b>  CRA8XYD11	<b>POLICY CHANGES EFFECTIVE:</b>  10/06/2011	<b>COMPANY:</b>  Aspen Specialty Insurance Company
<b>NAMED INSURED:</b> THE RESTAURANT GROUP ETAL		<b>AUTHORIZED REPRESENTATIVE</b>
<b>COVERAGE PARTS AFFECTED:</b> COMMERCIAL GENERAL LIABILITY COVERAGE PART		

**CHANGES:**

90 Day Notice of cancellation (except for non-payment of premium)

TBD

## **POLICYHOLDER'S GUIDE TO REPORTING A CASUALTY CLAIM**

**A.** As soon as you are aware of an event that will give rise to a claim being made against you (3rd Party Liability Claims), please be sure to quickly report the matter to both your agent/broker and Aspen Specialty Insurance Management, Inc. Be sure to include your policy number and the name of the insured as it is stated on the policy.

**B. New claims can be reported to ASPEN SPECIALTY INSURANCE COMPANY as follows:**

- 1. By Mail:**  
ASPEN SPECIALTY INSURANCE COMPANY  
c/o Aspen Specialty Insurance Management, Inc.  
Claims Department  
600 Atlantic Avenue, Suite 2100  
Boston, MA 02210  
Main Telephone No: 617-532-7300
- 2. By Fax:** 617-532-7342
- 3. By Dedicated Email:**  
3rd Party Liability Claims: [casualty.claims@aspenspecialty.com](mailto:casualty.claims@aspenspecialty.com)  
Claim Status Requests: [casualty.status@aspenspecialty.com](mailto:casualty.status@aspenspecialty.com)



## COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V – Definitions.

### SECTION I – COVERAGES

#### COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

##### 1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

- b. This insurance applies to "bodily injury" and "property damage" only if:
- (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

- (2) The "bodily injury" or "property damage" occurs during the policy period; and

- (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

- c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

- d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

- (1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;
- (2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or
- (3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

- e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

##### 2. Exclusions

This insurance does not apply to:

###### a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting

from the use of reasonable force to protect persons or property.

#### **b. Contractual Liability**

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
  - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
- (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

#### **c. Liquor Liability**

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

#### **d. Workers' Compensation And Similar Laws**

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

#### **e. Employer's Liability**

"Bodily injury" to:

- (1) An "employee" of the insured arising out of and in the course of:
  - (a) Employment by the insured; or
  - (b) Performing duties related to the conduct of the insured's business; or
- (2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Para-

graph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

#### **f. Pollution**

- (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":
  - (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:
    - (i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;
    - (ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or
    - (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";
  - (b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
  - (c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:
    - (i) Any insured; or
    - (ii) Any person or organization for whom you may be legally responsible; or
  - (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to

the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:

- (i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;
  - (ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or
  - (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".
- (e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".
- (2) Any loss, cost or expense arising out of any:
- (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
  - (b) Claim or "suit" by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of

such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

#### **g. Aircraft, Auto Or Watercraft**

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

- (1) A watercraft while ashore on premises you own or rent;
- (2) A watercraft you do not own that is:
  - (a) Less than 26 feet long; and
  - (b) Not being used to carry persons or property for a charge;
- (3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;
- (4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or
- (5) "Bodily injury" or "property damage" arising out of:
  - (a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged; or
  - (b) the operation of any of the machinery or equipment listed in Paragraph **f.(2)** or **f.(3)** of the definition of "mobile equipment".

#### **h. Mobile Equipment**

"Bodily injury" or "property damage" arising out of:

- (1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or
- (2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunt activity.

**i. War**

"Bodily injury" or "property damage", however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

**j. Damage To Property**

"Property damage" to:

- (1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;
- (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody or control of the insured;
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III – Limits Of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

**k. Damage To Your Product**

"Property damage" to "your product" arising out of it or any part of it.

**l. Damage To Your Work**

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

**m. Damage To Impaired Property Or Property Not Physically Injured**

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

**n. Recall Of Products, Work Or Impaired Property**

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

**o. Personal And Advertising Injury**

"Bodily injury" arising out of "personal and advertising injury".

**p. Electronic Data**

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

**q. Distribution Of Material In Violation Of Statutes**

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act

(TCPA), including any amendment of or addition to such law; or

- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
- (3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

Exclusions c. through n. do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section III – Limits Of Insurance.

## **COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY**

### **1. Insuring Agreement**

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:
  - (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
  - (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

- b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

### **2. Exclusions**

This insurance does not apply to:

#### **a. Knowing Violation Of Rights Of Another**

"Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

#### **b. Material Published With Knowledge Of Falsity**

"Personal and advertising injury" arising out of oral or written publication of material, if done by or at

the direction of the insured with knowledge of its falsity.

#### **c. Material Published Prior To Policy Period**

"Personal and advertising injury" arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

#### **d. Criminal Acts**

"Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

#### **e. Contractual Liability**

"Personal and advertising injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

#### **f. Breach Of Contract**

"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement".

#### **g. Quality Or Performance Of Goods – Failure To Conform To Statements**

"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement".

#### **h. Wrong Description Of Prices**

"Personal and advertising injury" arising out of the wrong description of the price of goods, products or services stated in your "advertisement".

#### **i. Infringement Of Copyright, Patent, Trademark Or Trade Secret**

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your "advertisement".

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

#### **j. Insureds In Media And Internet Type Businesses**

"Personal and advertising injury" committed by an insured whose business is:

- (1) Advertising, broadcasting, publishing or telecasting;
- (2) Designing or determining content of web-sites for others; or
- (3) An Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs **14.a., b. and c.** of "personal and advertising injury" under the Definitions Section.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

**k. Electronic Chatrooms Or Bulletin Boards**

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

**l. Unauthorized Use Of Another's Name Or Product**

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

**m. Pollution**

"Personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

**n. Pollution-Related**

Any loss, cost or expense arising out of any:

- (1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
- (2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

**o. War**

"Personal and advertising injury", however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

**p. Distribution Of Material In Violation Of Statutes**

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or
- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
- (3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

**COVERAGE C MEDICAL PAYMENTS**

**1. Insuring Agreement**

a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

- (1) On premises you own or rent;
- (2) On ways next to premises you own or rent; or
- (3) Because of your operations;

provided that:

- (a) The accident takes place in the "coverage territory" and during the policy period;
- (b) The expenses are incurred and reported to us within one year of the date of the accident; and
- (c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

- (1) First aid administered at the time of an accident;
- (2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and
- (3) Necessary ambulance, hospital, professional nursing and funeral services.

**2. Exclusions**

We will not pay expenses for "bodily injury":

**a. Any Insured**

To any insured, except "volunteer workers".

**b. Hired Person**

To a person hired to do work for or on behalf of any insured or a tenant of any insured.

**c. Injury On Normally Occupied Premises**

To a person injured on that part of premises you own or rent that the person normally occupies.

**d. Workers Compensation And Similar Laws**

To a person, whether or not an "employee" of any insured, if benefits for the "bodily injury" are payable or must be provided under a workers' compensation or disability benefits law or a similar law.

**e. Athletics Activities**

To a person injured while practicing, instructing or participating in any physical exercises or games, sports, or athletic contests.

**f. Products-Completed Operations Hazard**

Included within the "products-completed operations hazard".

**g. Coverage A Exclusions**

Excluded under Coverage A.

**SUPPLEMENTARY PAYMENTS – COVERAGES A AND B**

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:
  - a. All expenses we incur.
  - b. Up to \$250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.
  - c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
  - d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to \$250 a day because of time off from work.
  - e. All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.
  - f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
  - g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:
  - a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";
  - b. This insurance applies to such liability assumed by the insured;
  - c. The obligation to defend, or the cost of the defense

of, that indemnitee, has also been assumed by the insured in the same "insured contract";

- d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;
- e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and
- f. The indemnitee:

**(1) Agrees in writing to:**

- (a)** Cooperate with us in the investigation, settlement or defense of the "suit";
- (b)** Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";
- (c)** Notify any other insurer whose coverage is available to the indemnitee; and
- (d)** Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and

**(2) Provides us with written authorization to:**

- (a)** Obtain records and other information related to the "suit"; and
- (b)** Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph 2.b.(2) of Section I – Coverage A – Bodily Injury And Property Damage Liability, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when we have used up the applicable limit of insurance in the payment of judgments or settlements or the conditions set forth above, or the terms of the agreement described in Paragraph f. above, are no longer met.

**SECTION II – WHO IS AN INSURED**

**1. If you are designated in the Declarations as:**

- a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
- b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the con-

duct of your business.

- c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
  - d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
  - e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.
2. Each of the following is also an insured:
- a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:
    - (1) "Bodily injury" or "personal and advertising injury":
      - (a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;
      - (b) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph (1)(a) above;
      - (c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs (1)(a) or (b) above; or
      - (d) Arising out of his or her providing or failing to provide professional health care services.
    - (2) "Property damage" to property:
      - (a) Owned, occupied or used by,
      - (b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose byyou, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you

are a limited liability company).

- b. Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.
  - c. Any person or organization having proper temporary custody of your property if you die, but only:
    - (1) With respect to liability arising out of the maintenance or use of that property; and
    - (2) Until your legal representative has been appointed.
  - d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.
3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:
- a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;
  - b. Coverage **A** does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and
  - c. Coverage **B** does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

### SECTION III – LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
- a. Insureds;
  - b. Claims made or "suits" brought; or
  - c. Persons or organizations making claims or bringing "suits".
2. The General Aggregate Limit is the most we will pay for the sum of:
- a. Medical expenses under Coverage **C**;
  - b. Damages under Coverage **A**, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard"; and
  - c. Damages under Coverage **B**.
3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage **A** for damages because of "bodily injury" and "property damage"



included in the "products-completed operations hazard".

4. Subject to Paragraph 2. above, the Personal and Advertising Injury Limit is the most we will pay under Coverage B for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.
5. Subject to Paragraph 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:
  - a. Damages under Coverage A; and
  - b. Medical expenses under Coverage Cbecause of all "bodily injury" and "property damage" arising out of any one "occurrence".
6. Subject to Paragraph 5. above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage A for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.
7. Subject to Paragraph 5. above, the Medical Expense Limit is the most we will pay under Coverage C for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

#### SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

##### 1. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

##### 2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

- a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
  - (1) How, when and where the "occurrence" or offense took place;
  - (2) The names and addresses of any injured persons and witnesses; and
  - (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
- b. If a claim is made or "suit" is brought against any insured, you must:

- (1) Immediately record the specifics of the claim or "suit" and the date received; and

- (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";

- (2) Authorize us to obtain records and other information;

- (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

- (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

##### 3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or

- b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

##### 4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

###### a. Primary Insurance

This insurance is primary except when Paragraph b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph c. below.

###### b. Excess Insurance

- (1) This insurance is excess over:

- (a) Any of the other insurance, whether primary, excess, contingent or on any other

basis:

- (i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
  - (ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;
  - (iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or
  - (iv) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I – Coverage A – Bodily Injury And Property Damage Liability.
- (b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.
- (2) When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.
- (3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:
- (a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
  - (b) The total of all deductible and self-insured amounts under all that other insurance.
- (4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

#### c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

#### 5. Premium Audit

- a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.
- b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.
- c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

#### 6. Representations

By accepting this policy, you agree:

- a. The statements in the Declarations are accurate and complete;
- b. Those statements are based upon representations you made to us; and
- c. We have issued this policy in reliance upon your representations.

#### 7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or "suit" is brought.

#### 8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

#### 9. When We Do Not Renew

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

### SECTION V – DEFINITIONS

- 1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the

purposes of this definition:

- a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
- b. Regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

2. "Auto" means:

- a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or
- b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment".

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

4. "Coverage territory" means:

- a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
- b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph a. above; or
- c. All other parts of the world if the injury or damage arises out of:
  - (1) Goods or products made or sold by you in the territory described in Paragraph a. above;
  - (2) The activities of a person whose home is in the territory described in Paragraph a. above, but is away for a short time on your business; or
  - (3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication

provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in Paragraph a. above or in a settlement we agree to.

5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.
7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.
8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:
  - a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

- b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement.

9. "Insured contract" means:

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
- b. A sidetrack agreement;
- c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
  - (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
    - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
    - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
  - (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.
10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you

and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

**11. "Loading or unloading" means the handling of property:**

- a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";
- b. While it is in or on an aircraft, watercraft or "auto"; or
- c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

**12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:**

- a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
- b. Vehicles maintained for use solely on or next to premises you own or rent;
- c. Vehicles that travel on crawler treads;
- d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
  - (1) Power cranes, shovels, loaders, diggers or drills; or
  - (2) Road construction or resurfacing equipment such as graders, scrapers or rollers;
- e. Vehicles not described in Paragraph a., b., c. or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:
  - (1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or
  - (2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in Paragraph a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

- (1) Equipment designed primarily for:
  - (a) Snow removal;
  - (b) Road maintenance, but not construction or resurfacing; or
  - (c) Street cleaning;
- (2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

- (3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

**13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.**

**14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:**

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
- f. The use of another's advertising idea in your "advertisement"; or
- g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

**15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.**

**16. "Products-completed operations hazard":**

- a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
  - (1) Products that are still in your physical possession; or
  - (2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
    - (a) When all of the work called for in your contract has been completed.
    - (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
    - (c) When that part of the work done at a job site has been put to its intended use by any per-

son or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

b. Does not include "bodily injury" or "property damage" arising out of:

- (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;
- (2) The existence of tools, uninstalled equipment or abandoned or unused materials; or
- (3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

**17. "Property damage" means:**

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

**18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:**

- a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
- b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which

the insured submits with our consent.

**19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.**

**20. "Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.**

**21. "Your product":**

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

- (a) You;
- (b) Others trading under your name; or
- (c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and

(2) The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

**22. "Your work":**

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and

(2) The providing of or failure to provide warnings or instructions.

# COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V – Definitions.

## SECTION I – COVERAGES

### COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

#### 1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

- b. This insurance applies to "bodily injury" and "property damage" only if:

- (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

- (2) The "bodily injury" or "property damage" occurs during the policy period; and

- (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

- c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

- d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

- (1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;
- (2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or
- (3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

- e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

#### 2. Exclusions

This insurance does not apply to:

##### a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting

from the use of reasonable force to protect persons or property.

**b. Contractual Liability**

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
  - (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
    - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
- (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

**c. Liquor Liability**

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

**d. Workers' Compensation And Similar Laws**

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

**e. Employer's Liability**

"Bodily injury" to:

- (1) An "employee" of the insured arising out of and in the course of:
  - (a) Employment by the insured; or
  - (b) Performing duties related to the conduct of the insured's business; or
- (2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Para-

graph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

**f. Pollution**

- (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

- (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:

- (i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;

- (ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or

- (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";

- (b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

- (c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:

- (i) Any insured; or

- (ii) Any person or organization for whom you may be legally responsible; or

- (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to

the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:

- (i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;
  - (ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or
  - (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".
- (e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".
- (2) Any loss, cost or expense arising out of any:
- (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
  - (b) Claim or "suit" by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of

such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

#### **g. Aircraft, Auto Or Watercraft**

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

- (1) A watercraft while ashore on premises you own or rent;
- (2) A watercraft you do not own that is:
  - (a) Less than 26 feet long; and
  - (b) Not being used to carry persons or property for a charge;
- (3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;
- (4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or
- (5) "Bodily injury" or "property damage" arising out of:
  - (a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged; or
  - (b) the operation of any of the machinery or equipment listed in Paragraph **f.(2)** or **f.(3)** of the definition of "mobile equipment".

#### **h. Mobile Equipment**

"Bodily injury" or "property damage" arising out of:

- (1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or
- (2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.



**i. War**

"Bodily injury" or "property damage", however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

**j. Damage To Property**

"Property damage" to:

- (1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;
- (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody or control of the insured;
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III – Limits Of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

**k. Damage To Your Product**

"Property damage" to "your product" arising out of it or any part of it.

**l. Damage To Your Work**

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

**m. Damage To Impaired Property Or Property Not Physically Injured**

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

**n. Recall Of Products, Work Or Impaired Property**

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

**o. Personal And Advertising Injury**

"Bodily injury" arising out of "personal and advertising injury".

**p. Electronic Data**

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

**q. Distribution Of Material In Violation Of Statutes**

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act

(TCPA), including any amendment of or addition to such law; or

- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
- (3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

Exclusions c. through n. do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section III – Limits Of Insurance.

## **COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY**

### **1. Insuring Agreement**

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:
  - (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
  - (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

- b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

### **2. Exclusions**

This insurance does not apply to:

#### **a. Knowing Violation Of Rights Of Another**

"Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

#### **b. Material Published With Knowledge Of Falsity**

"Personal and advertising injury" arising out of oral or written publication of material, if done by or at

the direction of the insured with knowledge of its falsity.

#### **c. Material Published Prior To Policy Period**

"Personal and advertising injury" arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

#### **d. Criminal Acts**

"Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

#### **e. Contractual Liability**

"Personal and advertising injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

#### **f. Breach Of Contract**

"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement".

#### **g. Quality Or Performance Of Goods – Failure To Conform To Statements**

"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement".

#### **h. Wrong Description Of Prices**

"Personal and advertising injury" arising out of the wrong description of the price of goods, products or services stated in your "advertisement".

#### **i. Infringement Of Copyright, Patent, Trademark Or Trade Secret**

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your "advertisement".

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

#### **j. Insureds In Media And Internet Type Businesses**

"Personal and advertising injury" committed by an insured whose business is:

- (1) Advertising, broadcasting, publishing or telecasting;
- (2) Designing or determining content of web-sites for others; or
- (3) An Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs **14.a., b. and c.** of "personal and advertising injury" under the Definitions Section.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

**k. Electronic Chatrooms Or Bulletin Boards**

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

**l. Unauthorized Use Of Another's Name Or Product**

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

**m. Pollution**

"Personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

**n. Pollution-Related**

Any loss, cost or expense arising out of any:

- (1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
- (2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

**o. War**

"Personal and advertising injury", however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

**p. Distribution Of Material In Violation Of Statutes**

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or
- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
- (3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

**COVERAGE C MEDICAL PAYMENTS**

**1. Insuring Agreement**

a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

- (1) On premises you own or rent;
- (2) On ways next to premises you own or rent; or
- (3) Because of your operations;

provided that:

- (a) The accident takes place in the "coverage territory" and during the policy period;
- (b) The expenses are incurred and reported to us within one year of the date of the accident; and
- (c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

- (1) First aid administered at the time of an accident;
- (2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and
- (3) Necessary ambulance, hospital, professional nursing and funeral services.

**2. Exclusions**

We will not pay expenses for "bodily injury":

**a. Any Insured**

To any insured, except "volunteer workers".

**b. Hired Person**

To a person hired to do work for or on behalf of any insured or a tenant of any insured.

**c. Injury On Normally Occupied Premises**

To a person injured on that part of premises you own or rent that the person normally occupies.

**d. Workers Compensation And Similar Laws**

To a person, whether or not an "employee" of any insured, if benefits for the "bodily injury" are payable or must be provided under a workers' compensation or disability benefits law or a similar law.

**e. Athletics Activities**

To a person injured while practicing, instructing or participating in any physical exercises or games, sports, or athletic contests.

**f. Products-Completed Operations Hazard**

Included within the "products-completed operations hazard".

**g. Coverage A Exclusions**

Excluded under Coverage A.

**SUPPLEMENTARY PAYMENTS – COVERAGES A AND B**

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:
  - a. All expenses we incur.
  - b. Up to \$250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.
  - c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
  - d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to \$250 a day because of time off from work.
  - e. All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.
  - f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
  - g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:
  - a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";
  - b. This insurance applies to such liability assumed by the insured;
  - c. The obligation to defend, or the cost of the defense

of, that indemnitee, has also been assumed by the insured in the same "insured contract";

- d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;
- e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and
- f. The indemnitee:

**(1) Agrees in writing to:**

- (a)** Cooperate with us in the investigation, settlement or defense of the "suit";
- (b)** Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";
- (c)** Notify any other insurer whose coverage is available to the indemnitee; and
- (d)** Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and

**(2) Provides us with written authorization to:**

- (a)** Obtain records and other information related to the "suit"; and
- (b)** Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph 2.b.(2) of Section I – Coverage A – Bodily Injury And Property Damage Liability, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when we have used up the applicable limit of insurance in the payment of judgments or settlements or the conditions set forth above, or the terms of the agreement described in Paragraph f. above, are no longer met.

**SECTION II – WHO IS AN INSURED**

**1. If you are designated in the Declarations as:**

- a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
- b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the con-

duct of your business.

- c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
  - d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
  - e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.
2. Each of the following is also an insured:
- a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:
    - (1) "Bodily injury" or "personal and advertising injury":
      - (a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;
      - (b) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph (1)(a) above;
      - (c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs (1)(a) or (b) above; or
      - (d) Arising out of his or her providing or failing to provide professional health care services.
    - (2) "Property damage" to property:
      - (a) Owned, occupied or used by,
      - (b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose byyou, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you

are a limited liability company).

- b. Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.
  - c. Any person or organization having proper temporary custody of your property if you die, but only:
    - (1) With respect to liability arising out of the maintenance or use of that property; and
    - (2) Until your legal representative has been appointed.
  - d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.
3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:
- a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;
  - b. Coverage **A** does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and
  - c. Coverage **B** does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

### SECTION III – LIMITS OF INSURANCE

- 1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
  - a. Insureds;
  - b. Claims made or "suits" brought; or
  - c. Persons or organizations making claims or bringing "suits".
- 2. The General Aggregate Limit is the most we will pay for the sum of:
  - a. Medical expenses under Coverage **C**;
  - b. Damages under Coverage **A**, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard"; and
  - c. Damages under Coverage **B**.
- 3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage **A** for damages because of "bodily injury" and "property damage"

included in the "products-completed operations hazard".

4. Subject to Paragraph 2. above, the Personal and Advertising Injury Limit is the most we will pay under Coverage B for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.
5. Subject to Paragraph 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:
  - a. Damages under Coverage A; and
  - b. Medical expenses under Coverage Cbecause of all "bodily injury" and "property damage" arising out of any one "occurrence".
6. Subject to Paragraph 5. above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage A for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.
7. Subject to Paragraph 5. above, the Medical Expense Limit is the most we will pay under Coverage C for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

#### SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

##### 1. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

##### 2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

- a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
  - (1) How, when and where the "occurrence" or offense took place;
  - (2) The names and addresses of any injured persons and witnesses; and
  - (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
- b. If a claim is made or "suit" is brought against any insured, you must:

- (1) Immediately record the specifics of the claim or "suit" and the date received; and

- (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";

- (2) Authorize us to obtain records and other information;

- (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

- (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

##### 3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or

- b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

##### 4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

###### a. Primary Insurance

This insurance is primary except when Paragraph b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph c. below.

###### b. Excess Insurance

- (1) This insurance is excess over:

- (a) Any of the other insurance, whether primary, excess, contingent or on any other

basis:

- (i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
  - (ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;
  - (iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or
  - (iv) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I – Coverage A – Bodily Injury And Property Damage Liability.
- (b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.
- (2) When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.
- (3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:
- (a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
  - (b) The total of all deductible and self-insured amounts under all that other insurance.
- (4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

**c. Method Of Sharing**

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

**5. Premium Audit**

- a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.
- b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.
- c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

**6. Representations**

By accepting this policy, you agree:

- a. The statements in the Declarations are accurate and complete;
- b. Those statements are based upon representations you made to us; and
- c. We have issued this policy in reliance upon your representations.

**7. Separation Of Insureds**

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or "suit" is brought.

**8. Transfer Of Rights Of Recovery Against Others To Us**

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

**9. When We Do Not Renew**

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

**SECTION V – DEFINITIONS**

- 1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the

purposes of this definition:

- a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
- b. Regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

2. "Auto" means:

- a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or
- b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment".

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

4. "Coverage territory" means:

- a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
- b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph a. above; or
- c. All other parts of the world if the injury or damage arises out of:
  - (1) Goods or products made or sold by you in the territory described in Paragraph a. above;
  - (2) The activities of a person whose home is in the territory described in Paragraph a. above, but is away for a short time on your business; or
  - (3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication

provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in Paragraph a. above or in a settlement we agree to.

5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.
7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.
8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:
  - a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

- b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement.

9. "Insured contract" means:

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
- b. A sidetrack agreement;
- c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
  - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
  - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you



and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

**11. "Loading or unloading" means the handling of property:**

- a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";
- b. While it is in or on an aircraft, watercraft or "auto"; or
- c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

**12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:**

- a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
- b. Vehicles maintained for use solely on or next to premises you own or rent;
- c. Vehicles that travel on crawler treads;
- d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

- e. Vehicles not described in Paragraph a., b., c. or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in Paragraph a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

**(1) Equipment designed primarily for:**

- (a) Snow removal;
- (b) Road maintenance, but not construction or resurfacing; or
- (c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

- (3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

**13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.**

**14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:**

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
- f. The use of another's advertising idea in your "advertisement"; or
- g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

**15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.**

**16. "Products-completed operations hazard":**

- a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any per-

son or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

b. Does not include "bodily injury" or "property damage" arising out of:

- (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;
- (2) The existence of tools, uninstalled equipment or abandoned or unused materials; or
- (3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

17. "Property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

- a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
- b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which

the insured submits with our consent.

19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

20. "Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

21. "Your product":

a. Means:

- (1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
  - (a) You;
  - (b) Others trading under your name; or
  - (c) A person or organization whose business or assets you have acquired; and
- (2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and
- (2) The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

22. "Your work":

a. Means:

- (1) Work or operations performed by you or on your behalf; and
- (2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and
- (2) The providing of or failure to provide warnings or instructions.

## COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V – Definitions.

### SECTION I – COVERAGES

#### COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

##### 1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

- b. This insurance applies to "bodily injury" and "property damage" only if:
- (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

- (2) The "bodily injury" or "property damage" occurs during the policy period; and

- (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

- c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

- d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

- (1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;
- (2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or
- (3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

- e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

##### 2.Exclusions

This insurance does not apply to:

###### a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting

from the use of reasonable force to protect persons or property.

**b. Contractual Liability**

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
  - (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
    - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
- (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

**c. Liquor Liability**

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

**d. Workers' Compensation And Similar Laws**

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

**e. Employer's Liability**

"Bodily injury" to:

- (1) An "employee" of the insured arising out of and in the course of:
  - (a) Employment by the insured; or
  - (b) Performing duties related to the conduct of the insured's business; or
- (2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Para-

graph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

**f. Pollution**

- (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:

(i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;

(ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";

(b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:

(i) Any insured; or

(ii) Any person or organization for whom you may be legally responsible; or

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to

the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:

- (i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;
  - (ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or
  - (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".
- (e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".
- (2) Any loss, cost or expense arising out of any:
- (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
  - (b) Claim or "suit" by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of

such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

#### **g. Aircraft, Auto Or Watercraft**

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

- (1) A watercraft while ashore on premises you own or rent;
- (2) A watercraft you do not own that is:
  - (a) Less than 26 feet long; and
  - (b) Not being used to carry persons or property for a charge;
- (3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;
- (4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or
- (5) "Bodily injury" or "property damage" arising out of:
  - (a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged; or
  - (b) the operation of any of the machinery or equipment listed in Paragraph **f.(2)** or **f.(3)** of the definition of "mobile equipment".

#### **h. Mobile Equipment**

"Bodily injury" or "property damage" arising out of:

- (1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or
- (2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunt activity.

**i. War**

"Bodily injury" or "property damage", however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

**j. Damage To Property**

"Property damage" to:

- (1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;
- (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody or control of the insured;
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III – Limits Of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

**k. Damage To Your Product**

"Property damage" to "your product" arising out of it or any part of it.

**l. Damage To Your Work**

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

**m. Damage To Impaired Property Or Property Not Physically Injured**

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

**n. Recall Of Products, Work Or Impaired Property**

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

**o. Personal And Advertising Injury**

"Bodily injury" arising out of "personal and advertising injury".

**p. Electronic Data**

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

**q. Distribution Of Material In Violation Of Statutes**

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act

(TCPA), including any amendment of or addition to such law; or

- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
- (3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

Exclusions c. through n. do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section III – Limits Of Insurance.

## **COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY**

### **1. Insuring Agreement**

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:
  - (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
  - (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

- b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

### **2. Exclusions**

This insurance does not apply to:

#### **a. Knowing Violation Of Rights Of Another**

"Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

#### **b. Material Published With Knowledge Of Falsity**

"Personal and advertising injury" arising out of oral or written publication of material, if done by or at

the direction of the insured with knowledge of its falsity.

#### **c. Material Published Prior To Policy Period**

"Personal and advertising injury" arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

#### **d. Criminal Acts**

"Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

#### **e. Contractual Liability**

"Personal and advertising injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

#### **f. Breach Of Contract**

"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement".

#### **g. Quality Or Performance Of Goods – Failure To Conform To Statements**

"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement".

#### **h. Wrong Description Of Prices**

"Personal and advertising injury" arising out of the wrong description of the price of goods, products or services stated in your "advertisement".

#### **i. Infringement Of Copyright, Patent, Trademark Or Trade Secret**

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your "advertisement".

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

#### **j. Insureds In Media And Internet Type Businesses**

"Personal and advertising injury" committed by an insured whose business is:

- (1) Advertising, broadcasting, publishing or telecasting;
- (2) Designing or determining content of web-sites for others; or
- (3) An Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs **14.a., b. and c.** of "personal and advertising injury" under the Definitions Section.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

**k. Electronic Chatrooms Or Bulletin Boards**

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

**l. Unauthorized Use Of Another's Name Or Product**

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

**m. Pollution**

"Personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

**n. Pollution-Related**

Any loss, cost or expense arising out of any:

- (1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
- (2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

**o. War**

"Personal and advertising injury", however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

**p. Distribution Of Material In Violation Of Statutes**

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or
- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
- (3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

**COVERAGE C MEDICAL PAYMENTS**

**1. Insuring Agreement**

a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

- (1) On premises you own or rent;
- (2) On ways next to premises you own or rent; or
- (3) Because of your operations;

provided that:

- (a) The accident takes place in the "coverage territory" and during the policy period;
- (b) The expenses are incurred and reported to us within one year of the date of the accident; and
- (c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

- (1) First aid administered at the time of an accident;
- (2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and
- (3) Necessary ambulance, hospital, professional nursing and funeral services.

**2. Exclusions**

We will not pay expenses for "bodily injury":

**a. Any Insured**

To any insured, except "volunteer workers".

**b. Hired Person**

To a person hired to do work for or on behalf of any insured or a tenant of any insured.

**c. Injury On Normally Occupied Premises**

To a person injured on that part of premises you own or rent that the person normally occupies.

**d. Workers Compensation And Similar Laws**

To a person, whether or not an "employee" of any insured, if benefits for the "bodily injury" are payable or must be provided under a workers' compensation or disability benefits law or a similar law.



**e. Athletics Activities**

To a person injured while practicing, instructing or participating in any physical exercises or games, sports, or athletic contests.

**f. Products-Completed Operations Hazard**

Included within the "products-completed operations hazard".

**g. Coverage A Exclusions**

Excluded under Coverage A.

**SUPPLEMENTARY PAYMENTS – COVERAGES A AND B**

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:
  - a. All expenses we incur.
  - b. Up to \$250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.
  - c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
  - d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to \$250 a day because of time off from work.
  - e. All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.
  - f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
  - g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:
  - a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";
  - b. This insurance applies to such liability assumed by the insured;
  - c. The obligation to defend, or the cost of the defense

of, that indemnitee, has also been assumed by the insured in the same "insured contract";

- d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;
- e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and
- f. The indemnitee:

**(1) Agrees in writing to:**

- (a)** Cooperate with us in the investigation, settlement or defense of the "suit";
- (b)** Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";
- (c)** Notify any other insurer whose coverage is available to the indemnitee; and
- (d)** Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and

**(2) Provides us with written authorization to:**

- (a)** Obtain records and other information related to the "suit"; and
- (b)** Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph 2.b.(2) of Section I – Coverage A – Bodily Injury And Property Damage Liability, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when we have used up the applicable limit of insurance in the payment of judgments or settlements or the conditions set forth above, or the terms of the agreement described in Paragraph f. above, are no longer met.

**SECTION II – WHO IS AN INSURED**

**1. If you are designated in the Declarations as:**

- a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
- b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the con-

duct of your business.

- c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
  - d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
  - e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.
2. Each of the following is also an insured:
- a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:
    - (1) "Bodily injury" or "personal and advertising injury":
      - (a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;
      - (b) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph (1)(a) above;
      - (c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs (1)(a) or (b) above; or
      - (d) Arising out of his or her providing or failing to provide professional health care services.
    - (2) "Property damage" to property:
      - (a) Owned, occupied or used by,
      - (b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose byyou, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you

are a limited liability company).

- b. Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.
  - c. Any person or organization having proper temporary custody of your property if you die, but only:
    - (1) With respect to liability arising out of the maintenance or use of that property; and
    - (2) Until your legal representative has been appointed.
  - d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.
3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:
- a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;
  - b. Coverage **A** does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and
  - c. Coverage **B** does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

### SECTION III – LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
- a. Insureds;
  - b. Claims made or "suits" brought; or
  - c. Persons or organizations making claims or bringing "suits".
2. The General Aggregate Limit is the most we will pay for the sum of:
- a. Medical expenses under Coverage **C**;
  - b. Damages under Coverage **A**, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard"; and
  - c. Damages under Coverage **B**.
3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage **A** for damages because of "bodily injury" and "property damage"

included in the "products-completed operations hazard".

4. Subject to Paragraph 2. above, the Personal and Advertising Injury Limit is the most we will pay under Coverage B for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.
5. Subject to Paragraph 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:
  - a. Damages under Coverage A; and
  - b. Medical expenses under Coverage Cbecause of all "bodily injury" and "property damage" arising out of any one "occurrence".
6. Subject to Paragraph 5. above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage A for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.
7. Subject to Paragraph 5. above, the Medical Expense Limit is the most we will pay under Coverage C for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

#### SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

##### 1. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

##### 2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

- a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
  - (1) How, when and where the "occurrence" or offense took place;
  - (2) The names and addresses of any injured persons and witnesses; and
  - (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
- b. If a claim is made or "suit" is brought against any insured, you must:

- (1) Immediately record the specifics of the claim or "suit" and the date received; and

- (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";

- (2) Authorize us to obtain records and other information;

- (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

- (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

##### 3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or

- b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

##### 4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

###### a. Primary Insurance

This insurance is primary except when Paragraph b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph c. below.

###### b. Excess Insurance

- (1) This insurance is excess over:

- (a) Any of the other insurance, whether primary, excess, contingent or on any other

basis:

- (i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
  - (ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;
  - (iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or
  - (iv) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I – Coverage A – Bodily Injury And Property Damage Liability.
- (b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.
- (2) When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.
- (3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:
- (a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
  - (b) The total of all deductible and self-insured amounts under all that other insurance.
- (4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

#### c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

#### 5. Premium Audit

- a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.
- b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.
- c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

#### 6. Representations

By accepting this policy, you agree:

- a. The statements in the Declarations are accurate and complete;
- b. Those statements are based upon representations you made to us; and
- c. We have issued this policy in reliance upon your representations.

#### 7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or "suit" is brought.

#### 8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

#### 9. When We Do Not Renew

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

### SECTION V – DEFINITIONS

- 1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the

purposes of this definition:

- a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
- b. Regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

2. "Auto" means:

- a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or
- b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment".

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

4. "Coverage territory" means:

- a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
- b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph a. above; or
- c. All other parts of the world if the injury or damage arises out of:
  - (1) Goods or products made or sold by you in the territory described in Paragraph a. above;
  - (2) The activities of a person whose home is in the territory described in Paragraph a. above, but is away for a short time on your business; or
  - (3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication

provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in Paragraph a. above or in a settlement we agree to.

5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.
7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.
8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:
  - a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

- b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement.

9. "Insured contract" means:

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
- b. A sidetrack agreement;
- c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
  - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
  - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you

and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

**11. "Loading or unloading" means the handling of property:**

- a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";
- b. While it is in or on an aircraft, watercraft or "auto"; or
- c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

**12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:**

- a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
- b. Vehicles maintained for use solely on or next to premises you own or rent;
- c. Vehicles that travel on crawler treads;
- d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

- e. Vehicles not described in Paragraph a., b., c. or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in Paragraph a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

**(1) Equipment designed primarily for:**

- (a) Snow removal;
- (b) Road maintenance, but not construction or resurfacing; or
- (c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

- (3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

**13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.**

**14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:**

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
- f. The use of another's advertising idea in your "advertisement"; or
- g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

**15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.**

**16. "Products-completed operations hazard":**

- a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any per-

son or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

b. Does not include "bodily injury" or "property damage" arising out of:

- (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;
- (2) The existence of tools, uninstalled equipment or abandoned or unused materials; or
- (3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

17. "Property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

- a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
- b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which

the insured submits with our consent.

19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

20. "Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

21. "Your product":

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(a) You;

(b) Others trading under your name; or

(c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and

(2) The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

22. "Your work":

a. Means:

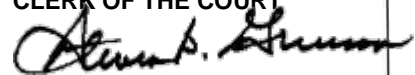
(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and

(2) The providing of or failure to provide warnings or instructions.



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13 **Attorneys for Defendants NATIONAL UNION FIRE**  
14 **INSURANCE COMPANY OF PITTSBURGH, PA and ROOF DECK**  
15 **ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB**

16 **DISTRICT COURT**  
17 **CLARK COUNTY, NEVADA**

18 **ST. PAUL FIRE & MARINE INSURANCE**  
19 **COMPANY,**

20 **Plaintiffs,**

21 **vs.**

22 **ASPEN SPECIALTY INSURANCE**  
23 **COMPANY; NATIONAL UNION FIRE**  
24 **INSURANCE COMPANY OF**  
25 **PITTSBURGH PA.; ROOF DECK**  
26 **ENTERTAINMENT, LLC d/b/a MARQUEE**  
27 **NIGHTCLUB; and DOES 1 through 25,**  
28 **inclusive,**

**Defendants.**

**CASE NO. A-17-758902-C**  
**DEPT. XXVI**

**DEFENDANT ROOF DECK**  
**ENTERTAINMENT, LLC d/b/a**  
**MARQUEE NIGHTCLUB'S**  
**RESPONSE TO PLAINTIFF ST.**  
**PAUL FIRE & MARINE**  
**INSURANCE COMPANY'S**  
**OBJECTIONS TO EVIDENCE**



1 Defendant Roof Deck Entertainment, LLC d/b/a Marquee Nightclub ("Marquee") hereby  
2 submits the following response to Plaintiff St. Paul Fire & Marine Insurance Company's ("St.  
3 Paul") objections to evidence.

4 Evidence: Night Club Management Agreement ("NMA"), Exhibit A to Marquee's  
5 Appendix of Exhibits.

6 St. Paul's Objection: The document is not properly authenticated.

7 Only someone with "personal" knowledge of the genuineness of a document may  
8 authenticate the document for evidentiary purposes. See NRS 52.025. It is not sufficient that the  
9 declaration states he has personal knowledge; he must specify the *source* of his knowledge. *See,*  
10 *e.g., Medina v. Multaler*, 547 F.Supp.2d 1099 (C.D. Cal. 2007); *Naveda v. Nalco Chemical, Inc.*,  
11 848 F.Supp.2d 1146 (D. Puerto Rico 2012).

12 Marquee purports to authenticate the Night Club Management Agreement by way of the  
13 Declaration of Bill Bonbrest. In his declaration, Bonbrest avers that he works for a "related entity"  
14 to Marquee. He does not indicate the nature of the relationship or that he has any involvement with  
15 Marquee whatsoever, much less any relationship to the Night Club Management Agreement. He  
16 further asserts that his declaration is based on "my personal knowledge of the facts and matters  
17 stated herein," but does not indicate how he acquired such knowledge. The nature and extent of his  
18 "personal knowledge" is not readily apparent from the face of the declaration. Although the Court  
19 is permitted to draw reasonable inferences, there is nothing in the Declaration from which to infer  
20 personal knowledge.

21 If all one needs to do to authenticate a document is to swear he has personal knowledge,  
22 then literally anyone could do it. But the law requires more. It requires some actual facts from  
23 which it could be concluded that the declaration actually has personal knowledge. The Bonbrest  
24 Declaration fails this test. The Management Agreement, therefore, has not been properly  
25 authenticated and is not evidence properly before the Court on Marquee's motion.

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1        National Union's Response:

2        Notably, St. Paul does not dispute that the NMA is a true and correct copy of the  
3 agreement. Instead, St. Paul asserts that Marquee must do more to authenticate the agreement.  
4 However, the cases cited by St. Paul are inapplicable as they involve federal courts in California  
5 and Puerto Rico applying federal statutes in the context of motions for summary judgment. *See,*  
6 *Medina v. Multaler*, 547 F.Supp.2d 1099 (C.D. Cal. 2007); *Navedo v. Nalco Chemical, Inc.*, 848  
7 F.Supp.2d 171 (D. Puerto Rico 2012). Whether the NMA is properly authenticated is a question  
8 that must be resolved under Nevada law. The applicable Nevada statute is NRS 52.025 which  
9 provides that "testimony of a witness is sufficient for authentication or identification if the witness  
10 has personal knowledge that a matter is what it claimed to be." St. Paul improperly attempts to  
11 increase obligations under the statute to include that a witness must also state and describe the  
12 "source" of his personal knowledge.

13        Bill Bonbrest, who authenticated the NMA, is the Chief Operating Officer of TAO Group,  
14 an entity related to Marquee. *Declaration of Bill Bonbrest*, ¶ 1. St. Paul complains that Mr.  
15 Bonbrest's declaration does not explain, to its satisfaction, the relationship between TAO Group  
16 and Marquee. However, Nevada law does not require such an explanation or description in order  
17 to authenticate a document. Instead, all that is necessary for a document to be properly  
18 authenticated under NRS 52.025 is the witness's testimony based on personal knowledge that the  
19 document is what it claims to be. In his declaration, Mr. Bonbrest states he has personal  
20 knowledge of the facts stated therein that Marquee entered into the NMA with Nevada Restaurant  
21 Venture 1, LLC with regard to the Marquee Nightclub located within the Cosmopolitan Hotel &  
22 Casino and that a true and correct copy of the agreement was filed under temporary seal as an  
23 exhibit to Marquee's motion. *Bonbrest Decl.*, ¶¶ 2-3. Accordingly, Mr. Bonbrest's declaration is  
24 more than sufficient to authenticate the Nightclub Management Agreement.

25        Additionally, in its opposition, St. Paul improperly asserts that Marquee's use of the NMA  
26 is beyond the scope of materials that may be considered by the Court as a part of a motion to  
27 dismiss. Contrary to St. Paul's assertion, the Court may properly consider the NMA in ruling on  
28 Marquee's Motion, given that St. Paul's complaint references provisions in the agreement and St.

1 Paul seeks to rely on the agreement in support of its claims. *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th  
2 Cir. 2003) (finding document that is not attached to the complaint may be incorporated by  
3 reference into the complaint if the plaintiff refers to the document or the document forms the basis  
4 of the plaintiff's claim.)

5 DATED: February 6, 2018

HEROLD & SAGER

6  
7 By: /s/ Nicholas B. Salerno

8 ANDREW D. HEROLD, ESQ.

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12 FIRE INSURANCE COMPANY OF

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13 ENTERTAINMENT, LLC d/b/a MARQUEE

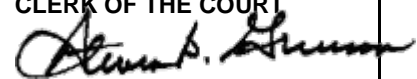
14 NIGHTCLUB  
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**CERTIFICATE OF SERVICE**

I certify that I am an employee of HEROLD & SAGER and that on **February 6, 2018**, I caused a true copy of the following document(s): **DEFENDANT ROOF DECK ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB'S RESPONSE TO ST. PAUL'S FIRE & MARINE INSURANCE COMPANY'S OBJECTIONS TO EVIDENCE**, pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR to be transmitted to the person(s) identified in the E-Service List for this captioned case in Odyssey E-File & Serve of the Eighth Judicial District Court, County of Clark, State of Nevada. A service transmission report reported service as complete and a copy of the service transmission report will be maintained with the document(s) in this office.

COUNSEL OF RECORD	TELEPHONE & FAX NOS.	PARTY
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Michael M. Edwards, Esq. Email: <a href="mailto:medwards@messner.com">medwards@messner.com</a> Nicholas L. Hamilton, Esq. <a href="mailto:nhamilton@messner.com">nhamilton@messner.com</a> MESSNER REEVES LLP 8945 W. Russell Road, Suite 300 Las Vegas, Nevada 89148	(702) 363-5100 (702) 363-5101 FAX	ASPEN SPECIALTY INSURANCE COMPANY

  
Eileen Monarez  
Employee of HEROLD & SAGER



**OBJ**

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Attorneys for Plaintiff ST. PAUL FIRE &  
MARINE INSURANCE COMPANY

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

ST. PAUL FIRE & MARINE INSURANCE )  
COMPANY, )

Plaintiff, )

vs. )

ASPEN SPECIALTY INSURANCE )  
COMPANY; NATIONAL UNION FIRE )  
INSURANCE COMPANY OF )  
PITTSBURGH, PA.; ROOF DECK )  
ENTERTAINMENT, LLC, d/b/a MARQUEE )  
NIGHTCLUB; and DOES 1 through 25, )  
inclusive, )

Defendants. )

CASE NO.: A-17-758902-C  
DEPT.: XXVI

ST. PAUL'S OBJECTIONS TO EVIDENCE  
OFFERED BY NATIONAL UNION IN  
SUPPORT OF MOTION TO DISMISS

Hearing Date: February 13, 2018  
Hearing Time: 9:30 AM

1 Plaintiff ST. PAUL FIRE & MARINE INSURANCE COMPANY (“St. Paul”) hereby  
2 objects to the following evidence proffered by defendant NATIONAL UNION FIRE  
3 INSURANCE COMPANY OF PITTSBURGH, PA (“National Union”) in support of National  
4 Union’s Motion to Dismiss St. Paul’s Complaint:

5 Evidence: National Union policy no. BE25414413, Exhibit A to Declaration of  
6 Declaration of Michael F. Muscarella in Support of National Union Fire Insurance Company of  
7 Pittsburgh, PA’s Motion to Dismiss.

8 Objection: The document is not properly authenticated.

9 Only someone with “personal” knowledge of the genuineness of a document may  
10 authenticate the document for evidentiary purposes. See NRS 52.025.

11 In support of its Motion to Dismiss, National Union relies on the Declaration of Michael F.  
12 Muscarella to authenticate the document attached thereto as a true and correct copy of the subject  
13 National Union policy. Mr. Muscarella declares that he is the Vice President of Excess Specialty  
14 Claims at AIG Property Casualty, a “related entity” to National Union. While Mr. Muscarella  
15 states that he is authorized to make the declaration on behalf of National Union, he does not state  
16 that he has personal knowledge of the matters to which he avers. He also provides no facts from  
17 which one can infer personal knowledge; he fails to explain how AIG Property Casualty is  
18 “related to” National Union. In fact, the document attached to Mr. Muscarella’s declaration  
19 includes a page titled “Policy Certification” where a manager of Risk Specialist Companies  
20 Insurance Agency, Inc., Richard C. Perkins, “certifies” that the policy is true and correct. The fact  
21 that the Declaration and the Policy Certification come from two different individuals, employed by  
22 two different entities, neither of which is National Union, highlights the declarant’s failure to  
23 provide the necessary facts supporting his personal knowledge that the document being averred to  
24 is a true and correct copy of what it purports to be, National Union’s subject policy.

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1 The National Union policy, therefore, has not been properly authenticated and is not  
2 evidence properly before the Court on National Union's Motion to Dismiss.

3 Dated: January 26, 2018

MORALES FIERRO & REEVES

4  
5 By: /s/ Ramiro Morales

6 Ramiro Morales [Bar No.: 007101]

7 William Reeves [Bar No.: 008235]

8 Marc Derewetzky [Bar No.: 006619]

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10 Las Vegas, NV 89106

11 Attorney for Plaintiff ST. PAUL FIRE

12 & MARINE INSURANCE COMPANY  
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On the date specified below, I served the following document:

**ST. PAUL’S OBJECTIONS TO EVIDENCE OFFERED BY MARQUEE IN SUPPORT OF  
MOTION TO DISMISS**

Service as effectuated in the following manner:

XXXX BY ODYSSEY: I caused such document(s) to be electronically served through Odyssey for the above-entitled case to the parties listed on the Service List maintained on the Odyssey website for this case on the date specified below.


XXXX BY U.S. MAIL: I am “readily familiar” with the firm’s practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on the same date with postage thereon fully prepaid in the ordinary course of business. The following parties were served by U.S. Mail.

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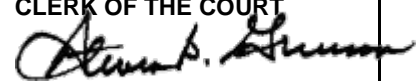
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*Attorney for*  
*National Union Fire Insurance Company*  
*Of Pittsburgh PA*

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 26, 2018

  
Matthew T. Matejcek





**OBJ**

RAMIRO MORALES [Bar No.: 007101]  
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WILLIAM C. REEVES [Bar No.: 008235]  
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Attorneys for Plaintiff ST. PAUL FIRE &  
MARINE INSURANCE COMPANY

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE	)	CASE NO.: A-17-758902-C
COMPANY,	)	DEPT.: XXVI
	)	
Plaintiff,	)	ST. PAUL'S OBJECTIONS TO EVIDENCE
	)	OFFERED BY MARQUEE IN SUPPORT
vs.	)	OF MOTION TO DISMISS
	)	
ASPEN SPECIALTY INSURANCE	)	Hearing Date: February 13, 2018
COMPANY; NATIONAL UNION FIRE	)	Hearing Time: 9:30 AM
INSURANCE COMPANY OF	)	
PITTSBURGH, PA.; ROOF DECK	)	
ENTERTAINMENT, LLC, d/b/a MARQUEE	)	
NIGHTCLUB; and DOES 1 through 25,	)	
inclusive,	)	
	)	
Defendants.	)	

Plaintiff ST. PAUL FIRE & MARINE INSURANCE COMPANY ("St. Paul") hereby  
objects to the following evidence proffered by defendant ROOF DECK ENTERTAINMENT,  
LLC, d/b/a MARQUEE NIGHTCLUB ("Marquee") in support of Marquee's Motion to Dismiss  
St. Paul's Complaint:

Evidence: Night Club Management Agreement, Exhibit A to Marquee's Appendix of  
Exhibits.

Objection: The document is not properly authenticated.

1 Only someone with “personal” knowledge of the genuineness of a document may  
2 authenticate the document for evidentiary purposes. See NRS 52.025. It is not sufficient that the  
3 declarant states he has personal knowledge; he must specify the *source* of his knowledge. See,  
4 e.g., *Medina v. Multaler*, 547 F.Supp.2d 1099 (C.D.Cal. 2007); *Navedo v. Nalco Chemical, Inc.*,  
5 848 F.Supp.2d 1146 (D.Puerto Rico 2012).

6 Marquee purports to authenticate the Night Club Management Agreement by way of the  
7 Declaration of Bill Bonbrest. In his declaration, Bonbrest avers that he works for a “related  
8 entity” to Marquee. He does not indicate the nature of the relationship or that he has any  
9 involvement with Marquee whatsoever, much less any relationship to the Night Club Management  
10 Agreement. He further asserts that his declaration is based on “my personal knowledge of the  
11 facts and matters stated herein,” but does not indicate how he acquired such knowledge. The  
12 nature and extent of his “personal knowledge” is not readily apparent from the face of the  
13 declaration. Although the Court is permitted to draw reasonable inferences, there is nothing in the  
14 Declaration from which to infer personal knowledge.

15 If all one needs to do to authenticate a document is to swear he has personal knowledge,  
16 then literally anyone could do it. But the law requires more. It requires some actual facts from  
17 which it could be concluded that the declarant actually has actual knowledge. The Bonbrest  
18 Declaration fails this test. The Management Agreement, therefore, has not been properly  
19 authenticated and is not evidence properly before the Court on Marquee’s motion.

20 Dated: January 26, 2018

MORALES FIERRO & REEVES

21  
22 By: /s/ Ramiro Morales  
23 Ramiro Morales [Bar No.: 007101]  
24 William Reeves [Bar No.: 008235]  
25 Marc Derewetzky [Bar No.: 006619]  
26 600 So. Tonopah Dr., Suite 300  
27 Las Vegas, NV 89106  
28 Attorney for Plaintiff ST. PAUL FIRE &  
MARINE INSURANCE COMPANY

1 PROOF OF SERVICE

2 I, Matthew T. Matejcek, declare that:

3 I am over the age of eighteen years and not a party to the within cause.

4 On the date specified below, I served the following document:

5 ST. PAUL'S OBJECTIONS TO EVIDENCE OFFERED BY MARQUEE IN SUPPORT OF  
6 MOTION TO DISMISS

7 Service as effectuated in the following manner:

8 XXXX BY ODYSSEY: I caused such document(s) to be electronically served through  
9 Odyssey for the above-entitled case to the parties listed on the Service List maintained on the  
10 Odyssey website for this case on the date specified below.

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12 processing correspondence for mailing. Under that practice it would be deposited with the U.S.  
13 Postal Service on the same date with postage thereon fully prepaid in the ordinary course of  
14 business. The following parties were served by U.S. Mail.  
15

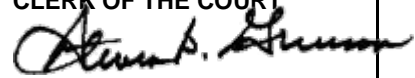
16 Michael M. Edwards, Esq.  
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23 **Attorney for**  
24 **Aspen Specialty Insurance Company**

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aherold@heroldsager.com  
**Attorney for**  
**National Union Fire Insurance Company**  
**Of Pittsburgh PA**

25 I declare under penalty of perjury that the foregoing is true and correct.

26 Dated: January 26, 2018

27   
28 Matthew T. Matejcek



**OPPS**

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Attorneys for Plaintiff ST. PAUL FIRE &  
MARINE INSURANCE COMPANY

DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE )  
COMPANY, )

Plaintiff, )

vs. )

ASPEN SPECIALTY INSURANCE )  
COMPANY; NATIONAL UNION FIRE )  
INSURANCE COMPANY OF )  
PITTSBURGH, PA.; ROOF DECK )  
ENTERTAINMENT, LLC, d/b/a MARQUEE )  
NIGHTCLUB; and DOES 1 through 25, )  
inclusive, )

Defendants. )

CASE NO.: A-17-758902-C  
DEPT.: XXVI

ST. PAUL'S OPPOSITION TO  
MARQUEE'S MOTION TO DISMISS  
COMPLAINT

Hearing Date: February 13, 2018  
Hearing Time: 9:30 AM

1 **I. INTRODUCTION**

2 Defendant Roof Deck Entertainment LLC dba Marquee Nightclub's ("Marquee") has  
3 express contractual obligations to indemnify, hold harmless and defend Nevada Property 1, LLC  
4 d/b/a "The Cosmopolitan of Las Vegas" ("Cosmopolitan"). St. Paul Fire & Marine Insurance  
5 Company ("St. Paul"), as subrogee of Cosmopolitan, is entitled to enforce those obligations. St.  
6 Paul is also entitled to statutory contribution from Marquee, pursuant to NRS §17.225. Try as it  
7 might to distract the Court from its obligations with unauthenticated agreements, documents that  
8 are not before the court, strained contract interpretation, and misreading and misapplication of  
9 statutes, Marquee's motion falls well short of the required standards and should be denied.

10 Marquee asserts, "on information and belief," that the St. Paul policy that contributed to  
11 the settlement to get Marquee out of harm's way contains a "waiver of subrogation" clause, but  
12 does not attach the policy or quote the provision. According to Marquee's motion, subrogation  
13 rights under the policy are waived only if "[Cosmopolitan] agreed in a written contract, to waive  
14 [its] rights to recovery [against Marquee] of payment of damages for Bodily Injury . . . ." But  
15 Marquee identifies no such written contract. To the extent Marquee's arguments are based on a  
16 "waiver of subrogation" clause in the St. Paul policy, Marquee has neither established the  
17 existence of such a clause nor proven it applies to this matter.

18 As to Marquee's contractual indemnity obligation, the motion erroneously focuses on the  
19 definition of "Loss." The indemnity provision states, however, that Marquee will indemnify  
20 Cosmopolitan for certain Losses "not otherwise covered by *the insurance required to be*  
21 *maintained hereunder.*" The Management Agreement requires Cosmopolitan to maintain  
22 commercial general liability insurance with combined single limits not less than \$2,000,000 for  
23 each occurrence and \$4,000,000 in the aggregate. The Management Agreement does not require  
24 limits of \$25,000,000, as provided by the St. Paul policy. So to the extent the St. Paul policy was  
25 compelled to pay a Loss in amounts greater than the \$2,000,000/\$4,000,000 limits required by the  
26 Management Agreement, it was not a Loss covered by insurance "required to be maintained"  
27 under the Management Agreement.

28 ///

1 As to St. Paul's NRS 17.225 contribution claim, Marquee misrepresents and misconstrues  
2 the terms of NRS 17.265, which provides that statutory contribution is not available to a party  
3 entitled to indemnity or who committed wrongful intentional acts. But elsewhere Marquee argues  
4 that St. Paul (as Cosmopolitan's subrogee) has no right of indemnity. As to intentional acts, the  
5 Complaint contains allegations (which must be presumed to be true on a motion to dismiss) that  
6 Cosmopolitan was *not* found liable for intentional misconduct. Neither this nor any of Marquee's  
7 arguments have merit. For all of these reasons, Marquee's motion to dismiss should be denied.

## 8 **II. STATEMENT OF FACTS**

9 To avoid confusion, St. Paul provides a brief recitation of the relevant facts as alleged in its  
10 Complaint.

11 This matter arises out of an incident in which David Moradi was severely beaten by  
12 employees of Marquee Nightclub, which is located inside the Cosmopolitan Hotel in Las Vegas.  
13 Moradi's injuries and damages were not caused by any affirmative acts or unreasonable conduct  
14 on the part of Cosmopolitan. Rather, per court order, Cosmopolitan was held merely vicariously  
15 liable for Marquee's actions and Moradi's resulting damages. Moradi sued Marquee and  
16 Cosmopolitan and obtained a judgment against them, jointly and severally, in the amount of  
17 \$160,500,000.

18 Following the verdict, St. Paul was forced to contribute confidential/redacted amounts to a  
19 post-verdict settlement in excess of the underlying National Union coverage and became  
20 subrogated to Cosmopolitan's rights of recovery against Marquee. St. Paul subsequently filed the  
21 instant complaint seeking statutory contribution (NRS 17.225) and express indemnity under the  
22 Management Agreement between Marquee and Cosmopolitan as Cosmopolitan's subrogee.  
23 Marquee then filed the instant motion to dismiss.

## 24 **III. LEGAL STANDARDS**

### 25 **A. Notice Pleading/Motion to Dismiss**

26 Nevada is a notice pleading jurisdiction; courts construe pleadings liberally to place into  
27 issue matters that are fairly noticed to an adverse party. *Nevada State Bank v. Jamison Family*  
28 *Partnership*, 106 Nev. 792, 801, 801 P.2d 1377, 1383 (1990). A motion to dismiss for failure to

1 state a claim should not be granted unless it appears beyond a doubt that plaintiff is entitled to no  
2 relief under any set of facts that could be proved to support the claim. *See Buzz Stew LLC v. City*  
3 *of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008). All facts alleged in the complaint are  
4 presumed true and all inferences are drawn in favor of the complainant. *Id.* Dismissal is not  
5 proper where the allegations of the complaint are sufficient to establish the elements of a claim for  
6 relief. *Stockmeir v. Nevada Dep’t of Corr.*, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008). A  
7 complaint need accomplish no more than to “set forth sufficient facts to demonstrate the necessary  
8 elements of a claim for relief so that the defending party has adequate notice of the nature of the  
9 claim and relief sought.” *W. States Constr., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220,  
10 1223 (1992); see also *Nevada Civil Practice Manual*, Matthew Bender & Company, Answers and  
11 Responsive Motions, section 9.08[6][a] (Sixth Edition, 2016).

12 In ruling on a motion to dismiss, the court is generally limited to considering the  
13 allegations of the complaint and the materials that are submitted with and attached to the  
14 complaint. In addition, a court may consider unattached evidence on which the complaint  
15 necessarily relies, but only if: (1) the complaint refers to the document; (2) the document is central  
16 to the plaintiff’s claim; and (3) no party questions the authenticity of the document. *Baxter v.*  
17 *Dignity Health*, 131 Nev. Adv. Op. 76, 357 P.3d 927 (2015). Moreover, where there is a dispute  
18 regarding the relevance of the document, and other documents are necessary to “fill in the gaps,” it  
19 is improper to consider the document for purposes of the pleading motion. *Faulkner v. Beer*, 463  
20 F.3d 130, 134 (2d Cir. 2006).

21 Marquee cites cases for the proposition that more is required at the initial pleading stage  
22 than labels, conclusions and a formulaic recitation of the elements of a cause of action. But  
23 Marquee’s opposition does not identify a single improper, conclusory allegation – because there  
24 are none. Instead, Marquee focuses on the fact that the 150-page Management Agreement was not  
25 attached as an exhibit or quoted verbatim. Marquee seeks to cure this supposed deficiency by  
26 attaching the Management Agreement to the motion, and quoting copious portions of it. Yet,  
27 remarkably, Marquee fails to address that the critical language it quotes either supports St. Paul’s  
28 position or is in direct conflict with other language that Marquee contends supports its position.

Marquee has not and cannot meet its burden on a motion to dismiss. The motion should be denied.

**B. Contract Interpretation**

The rules of contract interpretation that are essential to disposing of the arguments in this motion were recently summarized as follows in *Cleverley v. Ballantyne*, 2013 WL 1338205, \*11 (2013):

In Nevada, the general rules of contractual construction apply, where “[e]very word must be given effect if at all possible,” “[i]f clauses in a contract appear to be repugnant to each other, they must be given such an interpretation and construction as will reconcile them if possible,” and “[i]t is only where clauses are totally irreconcilable that a choice may be made between them.” *Royal Indem. Co. v. Special Supply Co.*, 82 Nev. 148, 413 P.2d 500, 502 (Nev.1966) (internal citations and quotation marks omitted); *see also Quirion v. Sherman*, 109 Nev. 62, 846 P.2d [1051] at 1053 [(Nev. 1993)]. (“Where two interpretations of a contract provision are possible, a court will prefer the interpretation which gives meaning to both provisions rather than an interpretation which renders one of the provisions meaningless.”)

“Every word [in a contract] must be given effect if at all possible.” *Royal Indem. Co. v. Special Serv.*, 82 Nev. 148, 150, 413 P.2d 500, 502 (1966); *Ellsion v. C.S.A.A.*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990) (“Absent some countervailing reason, contracts will be construed from the written language and enforced as written.”)

Marquee’s arguments fail to give effect to the full Management Agreement and, in fact, simply ignore language that supports St. Paul’s claims. The motion should be denied.

**IV. ARGUMENT**

**A. The Improperly Authenticated Management Agreement Should Be Disregarded**

Marquee spends considerable space criticizing St. Paul for not attaching the Marquee/Cosmopolitan Management Agreement to its Complaint. Ironically, the copy of the Management Agreement that accompanies Marquee’s motion is not properly authenticated and, therefore, is not evidence the Court should consider. See St. Paul’s Objections to Evidence, filed concurrently herewith.

Only someone with “personal” knowledge of the genuineness of a document may authenticate the document for evidentiary purposes. See NRS 52.025. It is not sufficient that the



1 declarant states he has personal knowledge; he must specify the *source* of his knowledge. See,  
2 e.g., *Medina v. Multaler*, 547 F.Supp.2d 1099 (C.D.Cal. 2007); *Navedo v. Nalco Chemical, Inc.*,  
3 848 F.Supp.2d 1146 (D.Puerto Rico 2012).

4 In his declaration, Bill Bonbrest avers that he works for a “related entity” to Marquee. He  
5 does not indicate the nature of the relationship or that he has any involvement with Marquee  
6 whatsoever, much less any relationship to the Management Agreement. He further asserts that his  
7 declaration is based on “my personal knowledge of the facts and matters stated herein,” but does  
8 not indicate how he acquired such knowledge. Certainly the nature and extent of his “personal  
9 knowledge” is not readily apparent from the face of the declaration. Although the Court is  
10 permitted to draw reasonable inferences, there is nothing in the Declaration from which to infer  
11 personal knowledge.

12 If all one needs to do to authenticate a document is to swear he has personal knowledge,  
13 then literally anyone could do it. But the law requires more. It requires some actual facts from  
14 which it could be concluded that the declarant has actual knowledge. The Bonbrest Declaration  
15 fails this test miserably. The Management Agreement, therefore, has not been properly  
16 authenticated and is not evidence before the Court on Marquee’s motion.

17 Marquee improperly attempts to use the Management Agreement not simply to attack St.  
18 Paul’s allegations but to set up defenses to claims that are only available through extrinsic  
19 evidence not before the Court. Specifically, the Complaint alleges with respect to the  
20 Management Agreement only that it contains: (1) an indemnity provision (Complaint, ¶ 86); and  
21 (2) a prevailing party attorneys’ fees provision (Complaint, ¶ 93). Yet, Marquee’s motion quotes,  
22 among other things, no fewer than 10 paragraphs of the Management Agreement dealing with  
23 insurance, including one that requires certain policies to contain a “waiver of subrogation”  
24 provision. Motion, 4:9-5:11. But in order to make its “waiver of subrogation” argument, Marquee  
25 must refer by reference, and *on information and belief*, to yet another document that is not part of  
26 the record – the St. Paul policy. Motion, 8:10-13. Marquee’s expansive use of a document -- the  
27 Management Agreement -- that is not attached to the Complaint, either to draw inferences or to  
28 take notice of facts that might be reasonably disputed, is plainly beyond the narrow scope of

1 materials that may be considered on a motion to dismiss.

2 Indeed, Marquee cites authority that supports St. Paul’s position on this issue. In that  
3 matter, the Court rejected the use of extrinsic evidence for a similar purpose:

4 Here, we can consider the *existence* of the reports identified by EY,  
5 since the Complaint expressly refers to and “necessarily relies on”  
6 them. Nonetheless, we may not, on the basis of these reports, draw  
7 inferences or take notice of facts that might reasonably be disputed.  
8 Whether EY is ultimately responsible for certifying Corinthian's  
9 compliance with HEA, and whether the Financial Reports they  
10 submitted failed accurately to reflect Corinthian's HEA-related  
11 liabilities, are open questions requiring further factual development. At  
12 the very least, they are certainly subject to “reasonable dispute.”  
13 Therefore, while EY's factual assertions with respect to the reports  
14 cited in Relators' Complaint may ultimately prove true, we will not  
15 decide these disputed factual matters at this stage. Instead, we focus  
16 only on the sufficiency of Relators' allegations.

17 *U.S. v. Ritchie*, 342 F.3d 903, 908 (9<sup>th</sup> Cir. 2003). So too here.

18 **B. Even Assuming The Management Agreement Is Authentic, St. Paul’s**  
19 **Claims Are Not Barred By A “Waiver Of Subrogation” Clause**

20 Marquee’s motion asserts, “upon information and belief,” that “the St. Paul policy contains  
21 a Waiver of Rights of Recovery Endorsement in which St. Paul agrees to waive its right to  
22 recovery for any payment it makes if Cosmopolitan agreed to waive its rights of recovery in a  
23 written contract.” Motion, 8:10-13. But Marquee, as a defendant, is not entitled to the same  
24 presumptions on a motion to dismiss as St. Paul. While St. Paul’s allegations are presumed true,  
25 Marquee’s are not. Its assertions on information and belief are a nullity.

26 Marquee later abandons any pretense of “information and belief” and simply assumes  
27 what it asserted without a shred of evidentiary support (“Given . . . the waiver of subrogation  
28 endorsement to the St. Paul policy . . .”) Motion, 9:4-6. Because Marquee’s argument is  
predicated on the existence of a Waiver of Rights of Recovery Endorsement in the St. Paul policy,  
and Marquee has not offered any competent evidence to prove the existence (or the actual terms)  
of such a provision, Marquee is not entitled to dismissal of St. Paul’s Fourth Cause of Action.

Even assuming that the St. Paul policy contains a Waiver of Rights of Recovery  
Endorsement with terms as set forth in the motion, neither this provision, nor anything allegedly  
contained in the Management Agreement would support Marquee’s argument. According to

1 Marquee, the St. Paul policy, which is not before the Court, waives St. Paul's rights to recover  
2 payments made on Cosmopolitan's behalf (by way of a subrogation claim) *only if* Cosmopolitan  
3 waived its rights to recovery against Marquee in a written contract. But the only written contract  
4 before the Court is the unauthenticated Management Agreement, and Marquee has not identified a  
5 provision of that agreement whereby Cosmopolitan waived its rights of recovery against Marquee.  
6 Marquee has not done so because it cannot do so: there is no such provision.

7 The only provision of the unauthenticated Management Agreement cited by Marquee for  
8 support is Section 12.2.6, which provides, in its entirety:

9 All Owner Policies and [Marquee] Policies shall contain a waiver  
10 of subrogation against the Owner Insured Parties and [Marquee]  
11 and its officers, directors, officials, managers, employees and  
12 agents and the [Marquee] Principals. The coverages provided by  
[Cosmopolitan] and [Marquee] shall not be limited to the liability  
assumed under the indemnification provisions of this agreement.

13 All this provision does is require that the St. Paul policy contain a Waiver of Rights of Recovery  
14 Endorsement. It does not on its face purport to be a waiver of Cosmopolitan's rights of recovery  
15 against Marquee. Absent the correct waiver in a written contract, the Waiver of Subrogation  
16 provision that may or may not exist in the St. Paul policy is not triggered, and Marquee's motion  
17 must be denied.

18 Cognizant of this shortcoming, Marquee resorts to a self-serving "interpretation" of the  
19 language of Section 12.2.6, to which it appends a conclusory allegation about the purpose of the  
20 waiver provision in the St. Paul policy for which there is no evidentiary support: "Given the  
21 waiver of subrogation provision in the Management Agreement and [on information and belief  
22 only] the subrogation endorsement in the St. Paul policy, any rights to subrogation against  
23 Marquee have been expressly waived. *To find otherwise would defeat the purpose of the waiver of*  
24 *subrogation provision and would be inconsistent with the terms of the St. Paul policy* [which is not  
25 before the Court]." Motion, 9:4-7 (emphasis supplied). What Marquee has done is to infer an  
26 intent that does not appear in the express language of the contract. But on this motion to dismiss,  
27 inferences are to be drawn in favor of St. Paul, not Marquee.

28 ///

1 Marquee's interpretation of the language is not reasonable, and it cannot overcome the  
2 absence of evidence of the St. Paul policy's Waiver of Rights of Recovery Endorsement, *and* the  
3 absence of a properly authenticated copy of the Management Agreement. It is based on inferences  
4 that improperly favor Marquee. The only truly reasonable interpretation is that Marquee simply  
5 failed to obtain Cosmopolitan's waiver of rights of recovery against Marquee. But even if there  
6 were two reasonable interpretations of Section 12.2.6, extrinsic evidence would be required to  
7 resolve the dispute, making its resolution improper on a motion to dismiss. *See Trans Western*  
8 *Leasing Corp. v. Corrao Constr. Co., Inc.*, 98 Nev. 445, 652 P.2d 1182 (1982) (Court may look to  
9 circumstances surrounding execution of contract and subsequent acts or declarations of parties to  
10 interpret unclear contract provisions).

11 Indeed, the Court cannot grant Marquee's motion without violating a basic principle of  
12 contract interpretation. "In interpreting an agreement a court may not modify or create a new or  
13 different one. A court is not at liberty to revise an agreement while professing to construe it."  
14 *Reno Club, Inc. v. Young Investment Co.*, 64 Nev. 312, 323-324, 182 P.2d 1011 (1947); see also  
15 *Traffic Control Serv., Inc. v. United Rental Nw., Inc.*, 120 Nev. 168, 87 P.3d 1054 (2004) ("We  
16 have previously stated that the court should not revise a contract under the guise of construing it.")  
17 Because the Management Agreement does not say what Marquee wants it to say, the Court would  
18 have to revise the contract in order to agree with Marquee. This it may not do. The motion should  
19 be denied.

20 **C. Marquee's Argument Based On The "Indemnity Obligation" Similarly Fails**

21 Marquee's argument that St. Paul's claims should be dismissed because Marquee's  
22 contractual indemnity obligation is covered by insurance required under the Management  
23 Agreement is cut from the same cloth as its waiver of subrogation argument. Here, there is even a  
24 more blatant problem that requires the motion to be denied.

25 According to Marquee, the unauthenticated Management Agreement contains an indemnity  
26 provision whereby Marquee agrees to defend and indemnify Cosmopolitan against certain "Losses  
27 ... not otherwise covered *by the insurance required to be maintained under the Management*  
28 *Agreement.*" Motion, 9:15-20 (emphasis supplied). This provision includes the term "Losses,"

1 which is expressly defined in part as: “liabilities, obligations, losses, damages, penalties, claims,  
2 actions, suits, costs, expenses and disbursements of a Person *not reimbursed by insurance.*”  
3 Motion, 9:21-24 (emphasis supplied). The ambiguity arises because one provision refers to  
4 “insurance required to be maintained under the Management Agreement” while the other operates  
5 where there is insurance of any kind, not limited to the insurance required under the Management  
6 Agreement. Marquee improperly focuses only on the latter.

7 The Court should resolve this discrepancy by applying the rule of contract interpretation  
8 that requires each word in the contract to be given meaning. Marquee’s interpretation plainly  
9 violates this rule because it gives no meaning to the phrase “required to be maintained under the  
10 Management Agreement.” And, of course, the difference in interpretation is dispositive.

11 As set forth in the motion, the unauthenticated Management Agreement requires  
12 Cosmopolitan to maintain insurance with limits of \$2,000,000 per occurrence, and \$4,000,000 in  
13 the aggregate. Motion, 4:13-15. Cosmopolitan obtained insurance from St. Paul with limits of  
14 \$25,000,000, and St. Paul paid more than the \$4,000,000 aggregate limit required by the  
15 Management Agreement to settle the case. Therefore, to the extent that Marquee has an indemnity  
16 obligation to Cosmopolitan, that obligation is not affected by amounts St. Paul paid in excess of  
17 the required \$2,000,000/\$4,000,000 limits, as those amounts do not represent insurance “required  
18 to be maintained under the Management Agreement.”

19 To the extent that the definition of “Loss,” if applied to these facts, would alter this result,  
20 the definition conflicts with other plain terms of the indemnity provision in the Management  
21 Agreement. Therefore, at the very least there is an ambiguity. Under the Nevada rules of contract  
22 interpretation, the Court should favor the interpretation which gives meaning to all provisions (St.  
23 Paul’s) rather than an interpretation that renders one of the provisions meaningless or mere  
24 surplusage (“Marquee’s). *See Quirrrion v. Sherman, supra.* The Court should reject Marquee’s  
25 argument because it requires to Court to ignore language in the indemnity provision quoted by  
26 Marquee, rendering that language meaningless or surplusage.

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1 Given that the Court is limited to the allegations of the Complaint, and for the reasons cited  
2 above, it would be inappropriate to resolve the “indemnity obligation” issue on a motion to  
3 dismiss, and Marquee’s motion should be denied on those grounds.

4 **D. St. Paul Is Entitled To Seek Contribution Under NRS 17.225**

5 St. Paul, in its third cause of action, seeks contribution under NRS 17.225. Marquee’s  
6 arguments as to why this claim should be dismissed have no merit. Indeed, the arguments are  
7 legally barren, and ignore the requirement on a motion to dismiss that factual allegations of the  
8 Complaint be deemed true.

9 Marquee’s first argument is based on waiver of subrogation. The waiver of subrogation  
10 issue, which completely lacks any merit, is addressed at length above.

11 The second argument is that contribution under NRS 17.225 is not available to a tortfeasor  
12 who has intentionally caused or contributed to the injury. Motion, 11:11-13. Marquee correctly  
13 notes that it was found jointly and severally liable with Cosmopolitan in the underlying action.  
14 From there, Marquee leaps to the erroneous conclusion, without citation to the Complaint or any  
15 case, statute or rule, that “Cosmopolitan was found to have intentionally caused or contributed to  
16 Moradi’s injury.” Motion, 11:16-18. This is not so.

17 Paragraph 82 of St. Paul’s Complaint states: “Moradi’s injuries and damages were not  
18 caused by any affirmative actions or unreasonable conduct on the part of Cosmopolitan. Rather,  
19 per court order, Cosmopolitan was held merely vicariously liable for Marquee’s actions and  
20 Moradi’s resulting damages.” St. Paul’s factual allegations, including these statements, are  
21 presumed true on a motion to dismiss, and all inferences are drawn in favor of St. Paul. *See Buzz*  
22 *Stew, supra*. Marquee’s “alternative facts” must be disregarded for the purposes of this motion,  
23 along with its argument.

24 Finally, Marquee asserts that the contribution claim is barred by NRS 17.265. Marquee  
25 misreads and misapplies the statute. According to Marquee, St. Paul’s statutory contribution  
26 claim fails because Cosmopolitan has a “right” to indemnity from Marquee. But what NRS  
27 17.265 actually says is: “Where one tortfeasor is *entitled* to indemnity from another the right of  
28 the indemnity obligee is for indemnity and not contribution . . .” Under the language of the

1 statute, it is the entitlement to indemnity, not the “right” which is dispositive.

2 Here, Marquee has already argued at length that the Court should dismiss St. Paul’s  
3 indemnity claim because the loss is covered by insurance and, therefore, Cosmopolitan (St. Paul’s  
4 subrogor) is not *entitled* to indemnity. Now it is arguing that St. Paul may not avail itself of NRS  
5 17.225 because Cosmopolitan has the “right” to indemnity. Marquee cannot have it both ways.  
6 Either St. Paul’s indemnity claim (through Cosmopolitan) survives (and along with it Marquee’s  
7 argument that NRS 17.265 bars St. Paul’s contribution claim) or it does not, and St. Paul may seek  
8 contribution from Marquee under NRS 17.225. However, for all the reasons discussed herein, that  
9 determination cannot and should not be made on a motion to dismiss. There is a set of facts under  
10 which St. Paul may prevail on each of its causes of action. Therefore, Marquee’s motion should  
11 be denied its entirety.

12 **E. Marquee Cannot Recover Attorneys’ Fees**

13 Marquee’s motion seeks attorneys’ fees under a prevailing party provision in the  
14 Management Agreement. St. Paul is not a party to the Management Agreement but seeks to  
15 enforce Cosmopolitan’s rights as a subrogee. Because St. Paul is standing in Cosmopolitan’s  
16 shoes, if it prevails, it is entitled to recover its attorneys’ fees.

17 For the reasons set forth above, St. Paul believes Marquee’s motion must be denied. If the  
18 Court agrees, Marquee’s request for fees would be rendered moot. Similarly, if Marquee’s motion  
19 is granted as to some, but not all of St. Paul’s claims, Marquee would not be the “prevailing party”  
20 and its fee request should be denied.

21 Even if the Court grants the motion to dismiss, the fee request should be denied. Granting  
22 the motion would have the effect of establishing that St. Paul may not pursue Cosmopolitan’s  
23 claims against Marquee. If St. Paul is not a party to the contract and not otherwise legally  
24 permitted to pursue contract remedies then the contractual prevailing party attorney’ fees provision  
25 has no application to the matter, and Marquee’s fee request should be denied.

26 **F. In The Alternative, St. Paul Requests Leave to Amend**

27 As asserted above, St. Paul asserts that it has properly pled its third and fourth causes of  
28 action for statutory contribution (NRS 17.225) and express indemnity. However, if this Court

1 disagrees as to one or both of those causes of action, St. Paul requests that this Court grant St. Paul  
2 leave to amend the Complaint in order to correct any perceived defects therein. Under NRC  
3 15(a), leave to amend a complaint shall be “freely given when justice so requires.” Here, Marquee  
4 moved to dismiss St. Paul’s original Complaint. To the extent that this Court concludes that  
5 Marquee has established that St. Paul failed to state facts sufficient to support its third and fourth  
6 causes of action, St. Paul requests that the Court grant leave to amend the same.

7 **V. CONCLUSION**

8 For all of the foregoing reasons, defendant Roof Deck Entertainment, LLC d/b/a Marquee  
9 Nightclub’s Motion to Dismiss St. Paul Fire & Marine Insurance Company’s Complaint should be  
10 denied. In the alternative, St. Paul respectfully requests that the Court grant leave to amend the  
11 Complaint.

12 Dated: January 26, 2018

MORALES FIERRO & REEVES

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14  
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22 & MARINE INSURANCE COMPANY  
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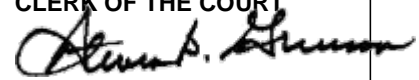
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For

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Matthew T. Matejcek



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DISTRICT COURT

CLARK COUNTY, NEVADA

ST. PAUL FIRE & MARINE INSURANCE )  
COMPANY, )

Plaintiff, )

vs. )

ASPEN SPECIALTY INSURANCE )  
COMPANY; NATIONAL UNION FIRE )  
INSURANCE COMPANY OF )  
PITTSBURGH, PA.; ROOF DECK )  
ENTERTAINMENT, LLC, d/b/a MARQUEE )  
NIGHTCLUB; and DOES 1 through 25, )  
inclusive, )

Defendants. )

CASE NO.: A-17-758902-C  
DEPT.: XXVI

ST. PAUL'S OPPOSITION TO NATIONAL  
UNION'S MOTION TO DISMISS  
COMPLAINT

Hearing Date: February 13, 2018  
Hearing Time: 9:30 AM

1 **I. INTRODUCTION**

2 National Union Fire Insurance Company of Pittsburgh PA moved to dismiss St. Paul Fire  
3 & Marine Insurance Company's first and second causes of action for equitable subrogation  
4 essentially claiming that the presence of other insurance provided it license to commit bad faith.  
5 National Union's motion is without merit and should be denied.

6 As St. Paul alleges in its complaint, St. Paul's equitable subrogation claims against  
7 National Union arise from National Union's unreasonable failure to settle an underlying personal  
8 injury suit, *Moradi v. Roof Deck Entertainment, LLC, d/b/a Marquee Nightclub, et al.*, District  
9 Court Clark County, Nevada, Case No. A-14-698824-C ("*Moradi* action"), which resulted in a  
10 \$160,500,000 compensatory damages jury verdict against Cosmopolitan, its insured. The *Moradi*  
11 action involved an altercation at the Marquee nightclub, which is located in the Cosmopolitan  
12 Hotel, between a nightclub patron, David Moradi, and Marquee employees. Mr. Moradi alleged  
13 that Marquee employees brutally attacked, beat him and falsely imprisoned him resulting in  
14 injuries, including permanent brain damage. Mr. Moradi also alleged a lost wage claim of  
15 approximately \$300,000,000.00. Although no Cosmopolitan employees were involved in the  
16 altercation, Mr. Moradi alleged that Cosmopolitan had a "non-delegable duty" to keep patrons safe  
17 and the court agreed, ruling that Cosmopolitan was vicariously liable for Marquee's actions, and  
18 joint and severally liable with Marquee for Mr. Moradi's damages. National Union ignored these  
19 facts and, during the pendency of the *Moradi* action, never offered a single dollar under its policy  
20 toward settlement despite several opportunities to settle the case.

21 St. Paul's first cause of action states an unreasonable failure to settle claim against  
22 National Union. In the face of a potential catastrophic judgment which included a nine-figure  
23 economic damage claim, allegations that key evidence went missing, and the fact that defense  
24 counsel warned National Union of the potential for a catastrophic judgment of \$3.5 billion to \$4  
25 billion, National Union refused to settle the action within its policy limit. National Union never  
26 committed any sums from its policy toward *settlement* even in the face of information highlighting  
27 the magnitude of the case. As a result of National Union's unreasonable handling of the  
28 underlying claim, a verdict was entered against Cosmopolitan (and Marquee) in excess of National

1 Union's stated \$25,000,000 limit, in the amount of \$160,500,000. National Union refused to settle  
2 or pay the judgment. Thus, St. Paul, Cosmopolitan's high-level excess carrier above the National  
3 Union coverage, was forced to contribute confidential/redacted amounts to a post-verdict  
4 settlement in excess of the underlying National Union coverage. St. Paul now seeks  
5 reimbursement from National Union.

6 Through its present motion to dismiss National Union seeks to disregard bedrock law and  
7 fast forward through trial regarding its bad faith. First, National Union contends, erroneously and  
8 without citation to any authority, that Nevada law does not recognize equitable subrogation  
9 between insurance carriers. In fact, the Nevada Supreme Court has stated numerous times that  
10 equitable subrogation is an established equitable doctrine created in common-law to accomplish  
11 what is just and fair as between the parties, insurance carriers or otherwise. Second, National  
12 Union erroneously insists that Nevada law does not allow for a claim between insurance carriers  
13 for bad faith failure to settle. Nevada recognizes that the duty of good faith and fair dealing owed  
14 by an insurance carrier to its insured includes a duty to settle, and under basic principles of  
15 equitable subrogation, a settling insurer may proceed on its insured's bad faith failure to settle  
16 claim against another insurer. National Union acknowledges that Nevada's federal district court  
17 and California courts, to which Nevada courts often look for guidance on issues of insurance, have  
18 expressly held that equitable subrogation permits a settling insurance carrier to pursue its insured's  
19 cause of action for bad faith failure to settle against another insurance carrier. This of course only  
20 makes sense as otherwise a bad acting insurer like National Union could proceed untethered  
21 whenever there is excess insurance above it. Third, while tacitly admitting the propriety of  
22 subrogation arising from its bad faith failure to settle, National Union attempts to adjudicate  
23 priority between insurers -- i.e. in what order the subject policies apply, which dictates if and when  
24 each respective carrier owes any obligation to the insured -- claiming that Cosmopolitan's  
25 coverage through National Union and St. Paul is "on the same level." Without all the policies or  
26 facts surrounding National Union's obligation to procure insurance for Cosmopolitan, National  
27 Union attempts to "prove" that National Union and St. Paul are "co-excess" carriers, and St. Paul  
28 therefore lacks the superior equities required to state a claim for equitable subrogation as a matter

1 of law. National Union's attempts to adjudicate the carriers' priority of coverage is misleading  
2 and premature. Moreover, the improperly authenticated document submitted by National Union  
3 "proves" nothing as the carriers' respective obligations to Cosmopolitan are not determined  
4 through National Union's policy alone. The evidence will show that St. Paul's coverage is excess  
5 to the coverage National Union issued to Cosmopolitan, but these evidentiary issues are not before  
6 the Court at this juncture. Rather, the issue is whether St. Paul has sufficiently pled, not proven,  
7 that fairness and equity require National Union to bear the cost of its bad faith failure to settle the  
8 *Moradi* action within National Union's stated limit. St. Paul has met its pleading burden.

9 St. Paul's second cause of action states a claim against National Union in equitable  
10 subrogation for National Union's violations of NRS § 686A.310. National Union recycles its  
11 position that it was free to commit bad faith because St. Paul was present to protect the mutual  
12 insured from National Union's bad behavior. Again, equitable subrogation originates in equity  
13 and arises by operation of law, not by statute. An insurer is entitled to pursue any claim or theory  
14 under equitable subrogation that the insured could pursue against a third party, including claims  
15 for violation of the Unfair Claims Practices Act. St. Paul's cause of action for violations of NRS  
16 686A.310 is correct.

17 St. Paul has sufficiently pled both its first cause of action for equitable subrogation for  
18 National Union's breach of the duty to settle and its second cause of action for equitable  
19 subrogation for National Union's violations of the Unfair Claims Practices Act. Accordingly,  
20 National Union's motion to dismiss should be denied in its entirety.

## 21 **II. LEGAL STANDARDS**

22 Nevada is a notice pleading jurisdiction; courts construe pleadings liberally to place into  
23 issue matters that are fairly noticed to an adverse party. *Nevada State Bank v. Jamison Family*  
24 *Partnership*, 106 Nev. 792, 801, 801 P.2d 1377, 1383 (1990). A motion to dismiss for failure to  
25 state a claim shall be denied unless it is established beyond a doubt that plaintiff is entitled to no  
26 relief under any set of facts that could be proved in support of the claim. *See Buzz Stew LLC v.*  
27 *City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008). All facts alleged in the complaint are  
28 presumed true and all inferences drawn in favor of the complaint. *Id.* Dismissal is not proper

1 where the allegations of the complaint are sufficient to establish the elements of a claim for relief.  
2 *Stockmeir v. Nevada Dep't of Corr.*, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008). National  
3 Union misstates Nevada's legal standard for a motion to dismiss. Contrary to National Union's  
4 assertions, Nevada has not adopted the "plausibility" standard articulated in *Bell Atlantic Corp. v.*  
5 *Twombly*, 550 U.S. 544, 570 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). Instead, in  
6 Nevada, a complaint need accomplish no more than to "set forth sufficient facts to demonstrate the  
7 necessary elements of a claim for relief so that the defending party has adequate notice of the  
8 nature of the claim and relief sought." *W. States Constr., Inc. v. Michoff*, 108 Nev. 931, 936, 840  
9 P.2d 1220, 1223 (1992); *see also Nevada Civil Practice Manual*, Matthew Bender & Company,  
10 Answers and Responsive Motions, section 9.08[6][a] (Sixth Edition, 2016). Further, where the  
11 action raises an issue of law that is one of first impression, as National Union suggests, motions to  
12 dismiss are disfavored. *Chestnut v. AVX Corp.*, 413 S.C. 224, 227, 776 S.E.2d 82, 84 (2015)  
13 (motions to dismiss disfavored where complaint sets forth novel legal theory that can best be  
14 assessed after factual development); *accord Tryon v. City of N. Platte*, 295 Neb. 706, 713–14, 890  
15 N.W.2d 784, 789–90 (2017); *Wright v. State of North Carolina*, 787 F.3d 256, 263 (4<sup>th</sup> Cir. 2015)  
16 ("to the extent plaintiffs' claims do not fall within "the four corners of our prior case law"  
17 dismissal not justified).

18 In ruling on a motion to dismiss, the court is generally limited to considering the  
19 allegations of the complaint and the materials that are submitted with and attached to the  
20 complaint. In addition, in appropriate circumstances not present here, a court may consider  
21 unattached evidence on which the complaint necessarily relies, but only if: (1) the complaint refers  
22 to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the  
23 authenticity of the document. *Baxter v. Dignity Health*, 131 Nev. Adv. Op. 76, 357 P.3d 927  
24 (2015). Moreover, where there is a dispute regarding the relevance of the document, and other  
25 documents are necessary to "fill in the gaps," then it is improper to consider the document for  
26 purposes of the pleading motion. *Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006).

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### III. ARGUMENT

A. **St. Paul Sufficiently Alleges A Cause of Action For Equitable Subrogation For National Union's Bad Faith Refusal To Settle The *Moradi* Action**

1. **St. Paul alleges National Union breached the duty to settle National Union owed to Cosmopolitan in connection with the *Moradi* action, resulting in a verdict in excess of National Union's stated \$25,000,000 limit, in the amount of \$160,500,000.**

Nevada imposes a duty of good faith and fair dealing as a matter of law on insurers in every insurance contract. *U. S. Fidelity & Guaranty Co. v. Peterson*, 91 Nev. 617, 619-20, 540 P.2d 1070, 1071 (1975). The Nevada Supreme Court has defined bad faith as an actual or implied awareness of the absence of a reasonable basis for denying benefits of the insurance policy. *American Excess Ins. Co. v. MGM*, 102 Nev. 601, 605, 729 P.2d 1352, 1354-5 (1983). Further, an insurer is in bad faith when it acts unreasonably and with knowledge that there is no reasonable basis for its conduct. *Guar. Nat'l Ins. Co. v. Potter*, 112 Nev. 199, 206, 912 P.2d 267, 272 (1996). An unreasonable failure to settle constitutes a violation of the covenant, giving rise to a bad-faith tort claim. Accordingly, in Nevada, an insurance carrier that unreasonably fails to accept a settlement demand within policy limits has exposure for excess liability to its insured. *See U. S. Fidelity & Guaranty Co. v. Peterson*, 91 Nev. at 620, 540 P.2d at 1071; *Allstate Insurance Company v. Miller*, 125 Nev. 300, 212 P.3d 318 (2009); *Kelly v. CSE Safeguard Ins., Co.*, 2:08-CV-0088-KJD-RJJ, 2011 WL 4526769, \*4 (D. Nev. Sept. 27, 2011); *Landow v. Medical Ins. Exch.*, 892 F.Supp. 239, 241 (D. Nev. 1995).

Here, St. Paul's complaint alleges in detail that National Union, along with the underlying primary carrier Aspen, breached its duty to settle by unreasonably failing to settle the *Moradi* action within its policy limits, despite having multiple opportunities to do so. Specifically, as alleged in the complaint, despite a nine-figure economic damage claim (Complaint, ¶12), allegations that key evidence went missing, and the fact that defense counsel warned National Union of the potential for a catastrophic judgment of \$3.5 billion to \$4 billion (Complaint, ¶¶ 11, 36, 37), National Union refused to settle the action within its policy limit. (Complaint, ¶¶ 38, 39, 40, 41.) During the pendency of the *Moradi* action, National Union never committed a single dollar from its policy toward settlement even in the face of information highlighting the magnitude

1 of the case. (Complaint, ¶ 43.)

2 As a result of National Union’s unreasonable handling of the underlying claim, a verdict  
3 was entered against Cosmopolitan (and Marquee) in excess of National Union’s stated  
4 \$25,000,000 limit, in the amount of \$160,500,000. (Complaint, ¶ 44.) Due to National Union’s  
5 conduct, St. Paul was forced to contribute confidential/redacted amounts to a post-verdict  
6 settlement. (Complaint, ¶¶ 50, 54.) Under theories of equitable subrogation, St. Paul’s complaint  
7 seeks reimbursement from National Union for the amounts St. Paul was forced to contribute to the  
8 settlement due to National Union’s bad faith failure to settle the matter within its limits.

9 **2. Under Nevada law, St. Paul is equitably subrogated to Cosmopolitan’s**  
10 **claim for bad faith failure to settle against National Union.**

11 Contrary to National Union’s claim, the Nevada Supreme Court recognizes equitable  
12 subrogation as an equitable doctrine created in common-law to accomplish what is just and fair as  
13 between the parties. It arises when one party, e.g. St. Paul, has been compelled to satisfy an  
14 obligation that is ultimately determined to be the obligation of another, e.g. National Union. *AT &*  
15 *T Technologies, Inc. v. Reid*, 109 Nev. 592, 595–96, 855 P.2d 533, 535 (1993); *see also Am.*  
16 *Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428, 245 P.3d 535, 538 (2010). The right  
17 of subrogation is “‘founded upon the facts and circumstances of the particular case, and upon  
18 principles of natural justice; and generally, where it is equitable that a person furnishing money to  
19 pay a debt should be substituted for the creditor, or in place of the creditor, such a person will be  
20 so substituted.’” *Colony Insurance Company v. Colorado Casualty Ins. Co.*, 2:12-CV-01727-  
21 RFB-NJK, 2016 WL 3360943, \*4 (D. Nev. June 9, 2016), *quoting Laffranchini v. Clark*, 39 Nev.  
22 48, 153 P. 250, 252-53 (1915).

23 The doctrine of equitable subrogation “‘is broad enough to include *every instance* in which  
24 one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily  
25 liable, and which in equity and good conscience should have been discharged by the latter.’  
26 [Citations omitted.]” *Caito v. United California Bank*, 20 Cal.3d 694, 704, 576 P.2d 466 (1978).  
27 Equitable subrogation allows an insurer that paid an insured’s loss to be placed in the insured's  
28 position to pursue a full recovery from another insurer who was primarily responsible for the loss.



1 *Firemen's Fund Ins., Co. v. Maryland Cas. Co.*, 65 Cal.App.4<sup>th</sup> 1279, 1291-92, 77 Cal.Rptr.2d 296  
2 (1998); *Gibbs v. Hawaiian Eugenia Corp.*, 966 F.2d 101, 106 (2<sup>nd</sup> Cir. 1992)(insurer's right to  
3 subrogation attaches on paying an insured's loss; at that time the insurer is subrogated "to the  
4 insured's right of action against any other person responsible for the loss, and the insurer succeeds  
5 to all the procedural rights and remedies possessed by the insured.")

6 Here, St. Paul has adequately alleged a claim for equitable subrogation against National  
7 Union. As set forth above, St. Paul alleges that National Union unreasonably failed to settle the  
8 *Moradi* action within limits multiple times, causing an excess verdict to be entered against  
9 Cosmopolitan (and Marquee). St. Paul, a high-level excess carrier whose policy for Cosmopolitan  
10 sits above the Aspen and National Union policies, was forced to contribute redacted amounts  
11 towards a post-verdict settlement because Aspen and National Union as the insurance carriers  
12 below St. Paul failed to settle the case within their policy limits in violation of Nevada law. St.  
13 Paul now stands in the shoes of Cosmopolitan to assert Cosmopolitan's bad faith failure to settle  
14 claim against National Union (and Aspen). St. Paul alleges that National Union is primarily liable  
15 for the excess verdict as its unreasonable failure to settle within the policy limit allowed the excess  
16 verdict to be entered against Cosmopolitan. Fairness and equity require that National Union be  
17 held accountable for its bad faith failure to settle: Equitable subrogation "insures that the "burden  
18 for a loss [is] on the party ultimately liable or responsible for it and by whom it should have been  
19 discharged." *Firemen's Fund*, 65 Cal.App.4<sup>th</sup> at 1296, 77 Cal.Rptr.2d 296.

20 **3. National Union's attempts to litigate the merits of St. Paul's**  
21 **subrogation claim for National Union's bad faith failure to settle is**  
22 **improper at this pleading stage.**

23 Nation Union requests the Court dismiss St. Paul's equitable subrogation claim for  
24 National Union's bad faith failure to settle for essentially two reasons: 1) Nevada does not  
25 recognize equitable subrogation between insurance carriers, and 2), even if it did, St. Paul does not  
26 possess superior equities entitling it to equitable subrogation. As to the first point, National Union  
27 offers no authority or argument, essentially conceding the meritlessness of its attack. As to the  
28 second point, National Union is not challenging the form of St. Paul's pleading, but instead  
attempting to litigate the ultimate merits of St. Paul's equitable claim. National Union's

1 substantive attack as to St. Paul's "superior equities" ignores St. Paul's allegations, which are  
2 presumed true for purposes of this motion, lacks merit and is entirely premature. Consequently,  
3 National Union's motion to dismiss should be denied.

4 First, as explained above, Nevada law plainly recognizes the right of equitable subrogation,  
5 which by its very nature encompasses claims between insurance carriers, including those for bad  
6 faith failure to settle. *See AT & T Technologies*, 109 Nev. at 595–96, 855 P.2d at 535; *see also*  
7 *Am. Sterling Bank*, 126 Nev. at 428, 245 P.3d at 538. Undeterred, but without legal authority,  
8 National Union baldly concludes that there has never been a Nevada state court decision applying  
9 equitable subrogation as between insurers (how it knows this is a mystery) and then accepts its  
10 own empty statement to conclude that Nevada does not permit equitable subrogation between  
11 insurers. Oddly, in the next breath, National Union concedes that there are legions of cases  
12 confirming the right of equitable subrogation between carriers. The United States District Court  
13 for the District of Nevada, sitting in diversity, considered the issue under Nevada law and in the  
14 very context at issue here, regarding a carrier's bad faith failure to settle. *See Colony Ins. Co. v.*  
15 *Colorado Cas. Ins. Co.*, 2016 WL 3360943, \*3-\*4. In *Colony* the district court held that Nevada  
16 law allows an insured's carrier to pursue another carrier for the insured through equitable  
17 subrogation for bad faith failure to settle, where the pursued carrier unreasonably failed to accept a  
18 prior policy limit demand. *Id.* In reaching its decision, the district court rejected the assertion that  
19 Nevada does not have a basis for equitable subrogation between carriers:

20 The Nevada Supreme Court has held that equitable subrogation is  
21 "an equitable remedy that requires the court to balance the equities  
22 based on the facts and circumstances of each particular case.  
23 Subrogation's purpose is to 'grant an equitable result between the  
24 parties.' This court has expressly stated that district courts have  
25 full discretion to fashion and grant equitable remedies." *Am.*  
26 *Sterling Bank v. Johnny Mgmt. LV, Inc.*, 245 P.3d 535, 538 (Nev.  
27 2010) (internal citation omitted). *See also AT & T Technologies,*  
28 *Inc. v. Reid*, 855 P.2d 533, 535 (Nev. 1993) ("Generally,  
subrogation is an equitable doctrine created to 'accomplish what is  
just and fair as between the parties.' It arises when one party has  
been compelled to satisfy an obligation that is ultimately  
determined to be the obligation of another. Equitable subrogation  
exists independently of any contractual relation between the  
parties." (internal citations omitted)).

\* \* \*

1 ...Among the oldest of the [equitable doctrines] is the rule of  
2 subrogation whereby ‘one who has been compelled to pay a debt  
3 which ought to have been paid by another is entitled to exercise all  
4 the remedies which the creditor possessed against the other.’. *Am.*  
5 *Sur. Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa.*,  
6 314 U.S. 314, 316-17 (1941) (internal citations omitted); *See*  
7 *also Laffranchini v. Clark*, 153 P. 250, 252-53 (Nev. 1915)  
8 (internal quotations and citations omitted) (“The right of  
subrogation, or of equitable assignment, is not founded upon  
contract alone, nor upon the absence of contract, but is founded  
upon the facts and circumstances of the particular case, and upon  
principles of natural justice; and generally, where it is equitable  
that a person furnishing money to pay a debt should be substituted  
for the creditor, or in place of the creditor, such person will be so  
substituted.”).

9 *Id.* In other words, Nevada law supports a claim for equitable subrogation by St. Paul against  
10 National Union, which as discussed above, St. Paul has adequately alleged.

11 Further, as National Union points out, many jurisdictions, including California,<sup>1</sup> confirm  
12 equitable subrogation claims between an insured’s carriers for bad faith failure to settle. In fact, it  
13 is the majority position. *See e.g., Commercial Union Assurance Companies v. Safeway Stores,*  
14 *Inc.*, 26 Cal. 3d 912, 918, 610 P.2d 1038 (1980); *Ace American Ins. Co. v. Fireman’s Fund Ins.*  
15 *Co.*, 2 Cal.App.5th 159, 174, 206 Cal.Rptr.3d 176, 187 (2016); *Hartford Accident & Indem. Co. v.*  
16 *Aetna Casualty & Sur. Co.*, 164 Ariz. 286, 289-291, 792 P.2d 749, 754 (1990); *National Sur.*  
17 *Corp. v. Hartford Cas. Ins. Co.*, 493 F.3d 752, 757 fn. 2 (6th Cir. 2007), *Central Illinois Public*  
18 *Service Co. v. Agricultural Ins. Co.*, 378 Ill.App.3d 728, 735–36, 880 N.E.2d 1172, 1179 (2008).

19 National Union attempts to distinguish *Colony*, and certain other California cases allowing  
20 for equitable subrogation between carriers, arguing that these cases are inapplicable because they  
21 involve claims between a primary carrier and an excess carrier in the “same tower of coverage  
22 involving the same mutual insured.” National Union’s use of jargon in effort to obfuscate the real  
23 facts, as alleged by St. Paul, is unavailing. St. Paul alleges that the Aspen policy provides  
24 primary coverage for Cosmopolitan (Complaint, ¶ 15), National Union’s umbrella policy provides

25 <sup>1</sup> Nevada courts often look to California law where Nevada law is silent, particularly on issues of  
26 insurance coverage and bad faith. *Hansen v. State Farm Mut. Auto. Ins. Co.*, No. 2:10-CV-01434-  
27 MMD, 2012 WL 6205722, at \*5 (D. Nev. Dec. 12, 2012), *citing Commercial Standard Ins. Co. v.*  
28 *Tab Constr., Inc.*, 94 Nev. 536, 539, 583 P.2d 449, 451 (1978); *Selfaison v. First Nat. Bank of*  
*Ariz.*, No. 09–CV–01918-KJD, 2011 WL 742212, at \*2 (D. Nev. Feb. 24, 2011); *Miller v. Skogg*,  
No. 2:10–CV–01121-KJD, 2011 WL 383948, at \*3 (D. Nev. Feb. 3, 2011).

1 *first level* excess coverage for Cosmopolitan over the Aspen policy (Complaint, ¶¶ 23, 28), and St.  
2 Paul’s umbrella policy provides Cosmopolitan coverage that is *excess to both the Aspen policy*  
3 *and the National Union policy* (Complaint, ¶ 33). As alleged and not disputed by National Union,  
4 all of the carriers insured Cosmopolitan, which necessarily puts them in the same “tower of  
5 coverage,” as the phrase “tower of coverage” refers to the priority of the insurance available to the  
6 insured, Cosmopolitan. Essentially, every carrier that insures Cosmopolitan owes some  
7 obligations to Cosmopolitan as their insured, whether the carrier is primary (Aspen), first-level  
8 excess (National Union), or high-level excess (St. Paul). The order of the carriers’ obligations to  
9 the insured, i.e. when the carriers owe a duty to Cosmopolitan, is determined by the order in  
10 which the available insurance applies, or the priority of coverage, e.g. primary, first-level excess,  
11 high-level excess, etc. Here, St. Paul alleges that it is excess to both Aspen (primary) and  
12 National Union (first-level excess). Moreover, equitable subrogation for bad faith failure to settle  
13 is not limited to claims between an insured’s primary carrier and its first level excess carrier as  
14 National Union suggests; the insured’s high-level excess carriers may also assert claims in  
15 equitable subrogation against the insured’s lower-tiered carriers. *See Central Illinois Public*  
16 *Service Co.*, 378 Ill.App.3d at 735-736, 880 N.E.2d at 1179 (lower tiered excess has exposure to  
17 higher tiered excess for failure to reasonably settle). This only makes logical sense as otherwise  
18 National Union could proceed untethered whenever there is excess insurance above it. *See Kelly*,  
19 2011 WL 4526769, \*4, citing *Murphy v. Allstate Ins. Co.*, 17 Cal. 3d 937, 941, 17 553 P.2d 584  
20 (1976) (duty to settle implied in law to protect the insured from exposure to liability in excess of  
21 coverage as a result of insurer’s gamble in face of policy limit demand).

22 National Union urges the Court to ignore the complaint’s factual allegations regarding St.  
23 Paul’s superior position, and simultaneously asks the Court to adjudicate the issue of priority here  
24 at the pleading stage to conclude that St. Paul does not have a superior position to National Union.  
25 It makes this argument only by proffering an improperly authenticated copy of National Union’s  
26 alleged policy to the Court. Essentially, National Union seeks an affirmative adjudication through  
27 its motion to dismiss that St. Paul is not excess to Aspen and National Union, contrary to the  
28 allegations of St. Paul’s complaint. Thus, says National Union, St. Paul had the same obligations

1 to Cosmopolitan as National Union in regards to the *Moradi* action, so St. Paul lacks the  
2 necessary “superior equities” to state a claim against National Union in equitable subrogation for  
3 National Union’s bad faith failure to settle. National Union’s argument goes too far and ignores  
4 the complaint that must frame the basis for the Court’s analysis.

5 As an initial matter, the Court should reject the evidence that National Union attaches to its  
6 motion to dismiss. As set forth in St. Paul’s separate Objection to Evidence, filed concurrently  
7 herewith, National Union fails to properly authenticate the proffered document. Only someone  
8 with “personal” knowledge of the genuineness of a document may authenticate the document for  
9 evidentiary purposes. See NRS 52.025. Here, National Union’s motion to dismiss relies on the  
10 Declaration of Michael F. Muscarella to authenticate the document attached thereto as a true and  
11 correct copy of the subject National Union policy. Mr. Muscarella declares that he is the Vice  
12 President of Excess Specialty Claims at AIG Property Casualty, a “related entity” to National  
13 Union. While Mr. Muscarella states that he is authorized to make the declaration on behalf of  
14 National Union, he does not state that he has personal knowledge of the matters to which he avers.  
15 He also provides no facts from which one can infer personal knowledge; he fails to explain how  
16 AIG Property Casualty is “related to” National Union. In fact, the document attached to Mr.  
17 Muscarella’s declaration includes a page titled “Policy Certification” where a manager of Risk  
18 Specialist Companies Insurance Agency, Inc., Richard C. Perkins, “certifies” that the policy is true  
19 and correct. The fact that the Declaration and the Policy Certification come from two different  
20 individuals, employed by two different entities, neither of which is National Union, highlights the  
21 declarant’s failure to provide the necessary facts supporting his personal knowledge that the  
22 document being averred to is a true and correct copy of what it purports to be, National Union’s  
23 subject policy. As the purported policy is not properly authenticated, the court must reject it for  
24 purposes of the motion to dismiss, *see Baxter v. Dignity Health*, 131 Nev. Adv. Op. 76, 357 P.3d  
25 927, this is particularly true given that National Union offers this single document to prove a  
26 disputed issue in the case – the priority of Cosmopolitan’s insurance coverage. *See Faulkner v.*  
27 *Beer*, 463 F.3d 130, 134 (2d Cir. 2006).

28 ///

1 Even if the policy was properly before the Court, it fails to “prove” National Union’s  
2 claimed defense, that St. Paul lacks superior equities as a matter of law, precluding St. Paul from  
3 stating a claim for equitable subrogation. National Union insists that it is “co-excess” with St.  
4 Paul and argues therefore that St. Paul owed the same obligations to Cosmopolitan as National  
5 Union. But nothing in the improperly authenticated National Union policy expressly states that  
6 the St Paul policy is “co-excess” to the National Union policy. Obviously, Aspen, National Union  
7 and St. Paul’s obligations to Cosmopolitan cannot be determined by the National Union policy  
8 alone. Here, consistent with the allegations of St. Paul’s complaint, the evidence will show that  
9 the parties agreed to the priority of their respective insurance coverages. More specifically, the  
10 policies issued to Marquee, to which Cosmopolitan is an additional insured, shall be primary to  
11 any insurance issued directly to Cosmopolitan, and other Cosmopolitan policies, including the St.  
12 Paul policy, shall be excess of, and not contribute towards the Marquee purchased policies, i.e. the  
13 Aspen and National Union policies. In other words, the parties contracted for Cosmopolitan’s  
14 additional insured coverage through Aspen and National Union to pay before Cosmopolitan’s  
15 other coverage through its upper layer excess carrier, St. Paul. Courts honor parties’ contractual  
16 agreements regarding the priority of their respective insurance coverages, see *Rossmoor*  
17 *Sanitation, Inc. v. Pylon, Inc.*, 13 Cal. 3d 622, 532 P.2d 97 (1975); *Hartford Cas. Ins. Co. v. Mt.*  
18 *Hawley Ins. Co.* 123 Cal.App.4th 278, 20 Cal.Rptr.3d 128 (2004), particularly in the context of  
19 additional insured coverage, because the very purpose of bargaining for additional insured  
20 coverage is to secure insurance that will pay first in priority. See *Hartford Cas. Ins. Co. v.*  
21 *Travelers Indemnity Company*, 110 Cal.App.4th 710, 724, 2 Cal.Rptr.3d 18, 28 (2003). Moreover,  
22 contrary to National Union’s assertion, the evidence will show that Cosmopolitan’s alleged  
23 independent negligence (if any) is squarely within the scope of additional insured coverage  
24 provided by National Union (and Aspen), as it indisputably “arise[s] out of the ownership,  
25 maintenance or use of premises leased to” Marquee. Neither of the exclusions contained in the  
26 “Additional Insured – Managers or Lessors of Premises” endorsement to the Aspen policy  
27 (incorporated by reference in the National Union policy) are applicable, and the courts of Nevada  
28 (and other jurisdictions) routinely enforce additional insured coverage grants as written. *Fed. Ins.*

1 *Co. v. Am. Hardware Mut. Ins. Co.*, 124 Nev. 319, 321, 184 P.3d 390, 391 (2008); *Hartford v.*  
2 *Travelers*, 110 Cal.App.4<sup>th</sup> at 716-720, 2 Cal.Rptr.3d at 22-25; *Vitton Const. Co. v. Pacific Ins.*  
3 *Co.*, 110 Cal.App.4<sup>th</sup> 762, 2 Cal.Rptr.3d 1 (2003); *Acceptance Ins. Co. v. Syufy Enterprises*, 69  
4 Cal.App.4<sup>th</sup> 321, 81 Cal.Rptr.2d 557 (1999).

5 In addition, as alleged by St. Paul, the facts of the *Moradi* litigation support the inference  
6 that during the course of the *Moradi* action, Aspen and National Union agreed that St. Paul's  
7 coverage for Cosmopolitan was excess/superior to both Aspen and National Union. Specifically,  
8 St Paul alleges that both Aspen and National Union "controlled the defense and all settlement  
9 negotiations on behalf of Marquee and Cosmopolitan." (Complaint, ¶ 35.) St. Paul alleges that it  
10 was not notified of the *Moradi* action until February 13, 2017, that trial began on March 20, 2017,  
11 but St. Paul was not advised of the trial date and did not learn of the trial until March 23, 2017.  
12 (Complaint, ¶ 34.) St. Paul alleges that Aspen and National Union failed to communicate with St.  
13 Paul regarding offers, settlement negotiations, and the facts pertaining to the *Moradi* action.  
14 (Complaint, ¶¶ 45, 46.) St. Paul alleges that Aspen and National Union ignored and/or delayed  
15 responding to St. Paul's repeated requests for information, and despite knowledge of St. Paul's  
16 requests for information, Aspen and National Union did not report to St. Paul that Mr. Moradi  
17 made a settlement demand on March 9, 2017 for the defending carriers' combined stated limited  
18 of \$26,000,000. (Complaint, ¶ 47.) St. Paul alleges that it did not first learn of the March 9, 2017  
19 settlement demand until after the demand had expired and trial had commenced, and that "[o]n or  
20 around March 29, 2017, St. Paul sent National Union (which at that point was the lead decision-  
21 maker among the Carrier Defendants regarding the settlement of the Underlying Action) a letter  
22 confirming that Carrier Defendants had previously rejected the pre-trial \$26,000,000 settlement  
23 demand" and demanding that National Union take all reasonable and necessary steps to settle the  
24 case on behalf of Cosmopolitan for Aspen and National Union's stated combined policy limit of  
25 \$26,000,000. (Complaint, ¶¶ 47, 48.)

26 Despite the fact that National Union's and Aspen's repeated refusals to settle within their  
27 stated \$26 million policy limits resulted in an excess verdict against Cosmopolitan in the amount  
28 of \$160,500,000, requiring St. Paul to contribute significant sums towards a post-verdict

1 settlement, National Union now argues that it did not cause Cosmopolitan's loss, and thus St.  
2 Paul's loss. Without any support whatsoever, National Union now argues, for the first time, that  
3 Cosmopolitan did not have coverage under the Aspen and National Union policies for its own  
4 independent negligence, making Cosmopolitan's direct coverage, including the St. Paul policy, the  
5 only insurance available to Cosmopolitan for such losses. This is patently false – nowhere in the  
6 policy National Union attached to its motion to dismiss is coverage to additional insureds limited  
7 as National Union suggests. Further, this new coverage theory compounds National Union's bad  
8 faith as it defended both of its insureds, who it now concedes were adverse, through one counsel  
9 and made no effort to inform or protect them. National Union's decision to act in such a manner,  
10 however, fits neatly within the way it has handled this entire affair. National Union acted entirely  
11 in its own interest when it ignored this conflict to the detriment of Cosmopolitan, just as  
12 National Union acted entirely in its own interest when it refused to settle the *Moradi* action within  
13 its policy limits when it had the opportunity to do so.

14 More importantly, National Union is repeatedly attempting to “prove” the ultimate issue of  
15 priority at the pleading stage, here without any actual proof or legal authority whatsoever.  
16 Contrary to National Union's position, St. Paul expressly alleges that its coverage to Cosmopolitan  
17 is excess to that of Aspen and National Union. St. Paul alleges facts sufficient to show that Aspen  
18 and National Union understood that St. Paul was excess to Aspen and National Union during the  
19 course of the *Moradi* litigation. St. Paul alleges that Aspen and National Union controlled the  
20 defense and settlement negotiations on behalf of Cosmopolitan in the *Moradi* action, that they  
21 refused to cooperate with St. Paul, that St. Paul was unaware of the plaintiff's March 9 settlement  
22 offer for the defending carriers' limits of \$26 million until after the offer expired, that despite  
23 repeated opportunities to settle the matter within their stated limits, Aspen and National Union  
24 refused to settle the matter, resulting in an excess verdict against Cosmopolitan in the amount of  
25 \$160,500,000, and a post-verdict settlement which St. Paul was forced to contribute to due to  
26 National Union's bad faith. St. Paul contends that fairness and equity require that Aspen and  
27 National Union bear the cost of their bad faith failure to settle, not the insured Cosmopolitan or  
28 Cosmopolitan's high-level excess carrier St. Paul. St. Paul has thus more than adequately alleged



1 a cause of action in equitable subrogation for National Union’s breach of the duty to settle, and  
2 St. Paul’s first cause of action should not be dismissed.

3 **B. St. Paul Has Sufficiently Pled Its Second Cause Of Action For Equitable**  
4 **Subrogation For Violations Of NRS § 686A.310**

5 **1. Because St. Paul is equitably subrogated to the rights of its insured, St.**  
6 **Paul has standing to sue National Union for Unfair Claims Practices.**

7 St. Paul brings a claim against National Union for its violations of NRS 686A.310 as the  
8 equitable subrogee of its insured, not as a third-party claimant. Accordingly, National Union’s  
9 invocation of the rule that a third-party claimant has no private cause of action under this statute  
10 is irrelevant. National Union further argues that, because NRS 686A.310 does not authorize an  
11 insurer to step into the shoes of its insured to assert a claim for unfair practices, St. Paul lacks  
12 standing. National Union cites no case law to support this argument. National Union fails to  
13 provide any authority because the argument that equitable subrogation must be predicated on the  
14 statute is groundless.

15 As explained above, equitable subrogation has its source in equity and arises by operation  
16 of law. *Sapiano v. Williamsburg Natl’ Ins. Co.*, 28 Cal.App.4<sup>th</sup> 533 fn.1, 33 Cal.Rptr.2d 659  
17 (1994). “As a creature of equity, the right of subrogation does not arise from, nor is it dependent  
18 upon, statute . . . .” *Gibbs*, 966 F.2d at 106. The right of subrogation is “founded upon the facts  
19 and circumstances of the particular case, and upon principles of natural justice; and generally,  
20 where it is equitable that a person furnishing money to pay a debt should be substituted for the  
21 creditor, or in place of the creditor, such a person will be so substituted.” *Colony*, 2016 WL  
22 3360943, \* 4, *quoting Laffranchini*, 153 P. at 252-53. Moreover, where an equitable subrogation  
23 claim is brought, “an insurer is entitled to pursue any claim or theory that the insured could  
24 pursue against a third party.” *Croskey et al.*, *Cal. Practice Guide: Insurance Litigation* (The  
25 Rutter Group 2017) § 9:59. An insurer’s right to subrogation attaches on paying an insured’s  
26 loss: at that time the insurer is subrogated “to the insured’s right of action against any other  
27 person responsible for the loss, and the insurer succeeds to all the procedural rights and remedies  
28 possessed by the insured.” *Gibbs*, 966 F.2d at 106.

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Accordingly, under the doctrine of equitable subrogation, St. Paul may bring a claim against National Union for its unfair claims practices based on equity. Contrary to National Union's assertion, there is no requirement that NRS 686A.310 must authorize such a claim. Instead, by way of equitable subrogation, St. Paul succeeds to *all* of its insured's rights, including the right to hold National Union responsible for its violations of the Unfair Claims Practices Act.

If National Union's contention were accepted, National Union's unfair claims practices obligations under NRS 686A.310 would vanish anytime another insurer stepped up to the plate and satisfied the insured's loss. Instead, the doctrine of equitable subrogation is "broad and expansive and has a very liberal application." *In re Kemmerrer*, 114 Cal.App.2d 810, 814, 251 P.2d 345 (1952); *De La Torre v. Icenhower*, No. 09CV1161 BTM (BLM), 2010 WL 11508658, \*3 (S.D. Cal. Feb. 2, 2010). It should be "liberally applied to promote justice." *Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan Assn.*, 22 Cal.App.3d 303, 99 Cal.Rptr. 417 (1971). Applied here, St. Paul is equitably subrogated to its insured's rights under NRS 686A.310 to hold National Union to account for its multiple violations of the statute.

**2. The facts amply support the Unfair Claims Practices cause of action.**

St. Paul pleads an extensive set of facts in support its claims for violations of NRS 686A.310(1). The cause of action for these violations incorporates by reference the factual allegations previously set forth in the complaint. Most importantly, the complaint's factual allegations are replete with averments supporting the fact that National Union failed "to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear," which is the unfair practice described in 686A.310(1)(e).

For example, St. Paul alleges that National Union was aware of facts and evidence supporting Mr. Moradi's claim that he sustained brain injury as a result of the beating and supporting his lost wage claim for hundreds of millions of dollars. (Complaint, ¶36.) St. Paul further alleges that in addition to National Union's knowledge of facts and evidence (and other bases) demonstrating a likelihood of an adverse verdict and an astronomical damages award against the insured, the defense attorneys provided legal opinions that the insured faced liability

1 exposure in the hundreds of millions of dollars if the underlying action was tried and not settled.  
2 (Complaint, ¶37.) St. Paul even goes so far as to allege exposure figures, alleging that defense  
3 attorneys reported to the carrier defendants that “the compensatory damage exposure in the case  
4 was over \$310,000,000, and including punitive damages, the exposure was as high as  
5 \$4,000,000,000.” (Complaint, ¶37.) St. Paul alleges that given the facts known by National  
6 Union and the liability and damage assessments provided, National Union unreasonably refused  
7 to settle the underlying action despite multiple reasonable pre-trial settlement demands made by  
8 the underlying plaintiff at or within the stated total available policy limits of \$26 million.  
9 (Complaint, ¶38.) The complaint goes on to describe those demands in detail.

10 There are further factual allegations in the complaint regarding National Union’s failure to  
11 effectuate equitable claim settlement, but the point is clear. National Union’s contention that the  
12 complaint simply recites the statutory language of 686A.310(1)(e), and then merely asserts that  
13 the statute was violated, is groundless.

14 Section 686A.310(1)(a) bars the unfair practice of “[m]isrepresenting to insureds or  
15 claimants pertinent facts or insurance policy provisions relating to any coverage at issue.” St.  
16 Paul alleges various misrepresentations. For example, National Union misrepresented its  
17 obligations to make policy limits available by denying that it had a duty to accept offers to settle  
18 within the National Union policy limit. Further, the complaint alleges that National Union  
19 “provided a joint defense to Cosmopolitan and Marquee in the Underlying Action through a  
20 single defense firm.” (Complaint, 4:21-22.) Despite this defense, National Union never  
21 disclosed that there was a potential conflict of interest between National Union, Cosmopolitan,  
22 and Marquee. As to Cosmopolitan and Marquee, there was a conflict of interest in that each  
23 could seek to impose responsibility for the underlying plaintiff’s injuries on the other. Further,  
24 the appointed law firm was also National Union’s coverage counsel. National Union’s omission  
25 of this fact was a misrepresentation as to the nature of the defense it was providing. Worse yet,  
26 the impropriety of National Union’s foregoing conduct in the course of its defense of  
27 Cosmopolitan is underscored by its new claim, presented for the first time in its motion to  
28 dismiss, that Cosmopolitan is not covered for its independent negligence under the National

1 Union policy. This alleged coverage limitation (not previously disclosed to Cosmopolitan)  
2 created an irreconcilable conflict for National Union's controlled counsel, entitling Cosmopolitan  
3 to independent counsel. *State Farm Mut. Auto Ins. Co. v. Hansen*, 357 P.3d 338, 341 (2015)  
4 (where a conflict of interest exists between an insurer and insured, insurers must "fulfill their  
5 duty to defend by allowing insureds to select their own counsel and paying the reasonable costs  
6 for the independent counsel's representation.") By failing to make appropriate disclosure,  
7 National Union intentionally withheld Cosmopolitan's right to independent counsel in violation  
8 of 686A.310(1)(a).

9 The complaint also refers to NRS 686A.310(1)(b) -- "failing to acknowledge and act  
10 reasonably promptly upon communications with respect to claims arising under insurance  
11 policies." St. Paul alleges that on December 10, 2015, plaintiff in the underlying action served an  
12 offer of judgment of \$1.5 million that the defendant carriers let lapse without any counter-offer or  
13 further discussions regarding potential settlement. (Complaint, ¶39.) St. Paul further alleges that  
14 the carrier defendants failed to communicate with St. Paul, as an excess carrier for Cosmopolitan,  
15 regarding offers, settlement negotiations and the facts pertaining to the underlying action.  
16 (Complaint, ¶39.) St. Paul alleges it sent correspondence on multiple occasions to National  
17 Union requesting information pertaining to the underlying action and settlement negotiations, and  
18 National Union ignored and/or delayed responding. (Complaint, ¶46). These and other facts  
19 plainly support that National Union failed to acknowledge and act reasonably promptly upon the  
20 communications with respect to the claim arising under the policies.

21 National Union cites case law under which claims were dismissed because the plaintiffs  
22 did nothing more than allege that the defendant violated the statute, without offering any  
23 supporting facts whatsoever. That case law has no application here. St. Paul's complaint sets  
24 forth detailed, factual allegations showing how National Union violated the statute.

25 National Union also argues that, because the complaint does not allege that Cosmopolitan  
26 suffered damages as a result of National Union's conduct, the complaint fails to state a cause of  
27 action under NRS 686A.310(2). As discussed, St. Paul brings this claim under the doctrine of  
28 equitable subrogation, according to which an insurer steps into the shoes of its insured when it

1 has paid a loss. Under National Union’s theory, subrogation would only be possible where a  
2 carrier required its insured to pay a loss out of its own pocket before the carrier satisfied the  
3 obligation to provide coverage. For obvious reasons, courts have rejected that position. In  
4 *Northwestern Mutual Insurance Company v. Farmers’ Ins. Group*, 76 Cal.App.3d 1031, 1044,  
5 143 Cal.Rptr. 415, 423 (1978), the court held: “It is not a prerequisite to equitable subrogation  
6 that the subrogor suffered actual loss; it is required only that he *would have* suffered loss had the  
7 subrogee not discharged the liability or paid the loss.” (Emphasis added). Similarly, in *Troost v.*  
8 *Estate of DeBoer*, 155 Cal.App.3d 289, 295, 202 Cal.Rptr. 47 (1984), the court concludes “that  
9 equitable subrogation is not precluded on the basis that Troost [the insured] suffered no loss.”

10 St. Paul’s cause of action for violations of the Unfair Claims Practices Act provides more  
11 than enough facts to support the claim that National Union engaged in activities prohibited by the  
12 statute. Further, National Union’s assertion that the cause of action fails to state a claim because  
13 it does not allege that the insured suffered damages is useless. Equitable subrogation does not  
14 require the carrier to compel the insured to incur actual monetary harm before it pays a loss. St.  
15 Paul’s cause of action for violations of NRS 686A.310 should not be dismissed.

16 **C. In The Alternative, St. Paul Requests Leave to Amend**

17 As asserted above, St. Paul asserts that it has properly pled its first and second causes of  
18 action. However, if this Court disagrees as to one or both of those causes of action, St. Paul  
19 requests that this Court grant St. Paul leave to amend the complaint in order to correct any  
20 perceived defects therein. Under NRCP 15(a), leave to amend a complaint shall be “freely given  
21 when justice so requires.” Here, National Union moved to dismiss St. Paul’s original complaint.  
22 To the extent that this Court concludes that National Union has established that St. Paul failed to  
23 state facts sufficient to support its first and second causes of action, St. Paul requests that the Court  
24 grant leave to amend the same.

25 ///

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28 ///

1 **IV. CONCLUSION**

2 For all the foregoing reasons, St. Paul respectfully requests the Court deny National  
3 Union's motion to dismiss in its entirety. In the alternative, St. Paul respectfully requests that the  
4 Court grant leave to amend the complaint.

5 Dated: January 26, 2018

MORALES FIERRO & REEVES

7 By: /s/ Ramiro Morales  
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I am over the age of eighteen years and not a party to the within cause.

## ST. PAUL'S OPPOSITION TO NATIONAL UNION'S MOTION TO DISMISS COMPLAINT

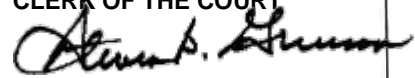
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15 ENTERTAINMENT, LLC d/b/a MARQUEE NIGHTCLUB

16 **DISTRICT COURT**

17 **CLARK COUNTY, NEVADA**

18 ST. PAUL FIRE & MARINE INSURANCE  
19 COMPANY,

20 Plaintiff,

21 vs.

22 ASPEN SPECIALTY INSURANCE  
23 COMPANY; NATIONAL UNION FIRE  
24 INSURANCE COMPANY OF  
25 PITTSBURGH PA; ROOF DECK  
26 ENTERTAINMENT, LLC d/b/a MARQUEE  
27 NIGHTCLUB; and DOES 1 through 25,  
28 inclusive,

Defendants.

CASE NO.: A-17-758902-C  
DEPT.: XXVI

**DEFENDANT NATIONAL  
UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH,  
PA'S REPLY IN SUPPORT OF  
MOTION TO DISMISS  
PLAINTIFF ST. PAUL FIRE &  
MARINE INSURANCE  
COMPANY'S COMPLAINT**



1 Defendant National Union Fire Insurance Company of Pittsburgh, PA (“National Union”)  
2 hereby submits the following reply brief in support of its Motion to Dismiss Plaintiff St. Paul Fire  
3 & Marine Insurance Company’s (“St. Paul”) Complaint (the “Motion”).

4 I.

5 INTRODUCTION

6 As with its opposition to the concurrently filed motion to dismiss by defendant Roof Deck  
7 Entertainment, LLC d/b/a Marquee Nightclub (“Marquis”), St. Paul’s opposition is full of  
8 purported factual matters not pled in its complaint, inaccurate statements and misplaced arguments  
9 that are insufficient to defeat National Union’s Motion. By raising additional matters in its  
10 opposition that were not pled in its complaint, St. Paul concedes that National Union’s motion has  
11 merit. Further, many of St. Paul’s arguments either lack supporting authority or provide authority  
12 that is clearly distinguishable or does not stand for the proposition claimed by St. Paul. St. Paul’s  
13 assertion that its policy is excess to National Union’s policy is nothing more than a legal  
14 conclusion, unsupported by any factual allegations. Additionally, it is contrary to the allegations in  
15 the complaint and the National Union policy which establish that St. Paul has no legal or equitable  
16 basis to pursue subrogation against National Union.

17 II.

18 ARGUMENT

19 A. St. Paul Is Not Entitled To Seek Equitable Subrogation Against A Co-Excess Carrier.

20 As set forth in National Union’s Motion, equitable subrogation between insurers is not an  
21 established right in Nevada. While St. Paul cites to *AT&T Technologies, Inc. v. Reid*, 109 Nev.  
22 592, 595-596 (1993) and *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428 (2010)  
23 in support of its contention that Nevada recognizes the right of equitable subrogation, neither of  
24 these cases involved an action for equitable subrogation between insurers and accordingly provide  
25 no support for St. Paul’s position. Specifically, *AT&T* involved a self-insured employer’s statutory  
26 subrogation claim against its employee injured by a third-party tortfeasor, while *American Sterling*  
27 *Bank* involved equitable subrogation in the context of mortgage lienholders. Even the federal  
28 district court in *Colony Ins. Co. v. Colorado Cas. Ins. Co.*, 2016 WL3360943 at \*4 (D. Nev. June

1 9, 2016), cited by St. Paul, notes that the Nevada Supreme Court had not yet addressed the  
2 question of whether equitable subrogation applied between insurers.

3 In addition, as predicted by National Union in its Motion, St. Paul attempts to rely on the  
4 *Colony* case as well as other out-of-state authorities in support of its contention that it has a valid  
5 equitable subrogation claim against National Union for breach of the duty to settle. However, as  
6 discussed in National Union's Motion, all of the cases cited by St. Paul are inapposite as they  
7 involved actions between primary and excess insurers in the same tower of insurance coverage.  
8 National Union is not a primary insurer. As St. Paul admits in its complaint and as the National  
9 Union policy attached to the motion to dismiss establishes, St. Paul and National Union both  
10 issued umbrella policies and, therefore, are co-excess insurers.

11 St. Paul asserts that National Union has not properly authenticated the National Union  
12 policy. However, St. Paul's challenge in this regard is disingenuous as NRS 52.015 provides that  
13 authentication of a document may be satisfied by evidence or other showing sufficient to support a  
14 finding that the matter in question is what its proponent claims. National Union has provided a  
15 declaration from Michael Muscarella, a Vice President of Excess Specialty Claims at AIG  
16 Property Casualty, an entity that is related to National Union. St. Paul complains that Mr.  
17 Muscarella's declaration does not explain the relationship between the two entities. However,  
18 Nevada law does not require an explanation of the relationship between the two entities in order to  
19 authenticate the document. St. Paul also complains that Mr. Muscarella did not state he has  
20 "personal knowledge" of the matters to which he averred. However, in his declaration, Mr.  
21 Muscarella states that he is authorized to make the declaration on behalf of National Union and  
22 that the policy attached to the motion is a true and correct copy of the National Union policy.  
23 (Muscarella Decl., ¶¶ 1-2.) Such declaration could not be made without personal knowledge. In  
24 addition, St. Paul takes issue with the fact that the certification page of the National Union policy  
25 was signed by a person other than Mr. Muscarella, contending that this creates a conflict of some  
26 kind. However, no such conflict exists. Both Mr. Muscarella and Mr. Perkins have the requisite  
27 personal knowledge necessary to authenticate the National Union policy and National Union's  
28 choice to provide a declaration from Mr. Muscarella instead of Mr. Perkins in no way renders the

1 authentication of the policy deficient.

2 Further, contrary to St. Paul's assertion, the National Union policy establishes that  
3 National Union is a co-excess insurer. Pursuant to its terms, National Union is excess over  
4 scheduled underlying primary insurance and other insurance providing coverage to the insured,  
5 which includes the St. Paul policy. In its opposition, St. Paul continues to assert, without any  
6 support, that its policy is excess to the National Union policy. However, such assertion is nothing  
7 more than a legal conclusion which the Court can and should disregard. *Bell Atlantic Corp. v.*  
8 *Twombly*, 550 U.S. 544, 547 (2007) citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986) ("on a  
9 motion to dismiss, courts are not bound to accept as true legal conclusions couched as factual  
10 allegations") (internal quotations omitted); *Jafbros, Inc. v. GEICO Indem. Co.*, 127 Nev. 1148  
11 (2011) (upholding dismissal of action where complaint relied upon conclusory allegations  
12 unsupported by factual allegations).

13 As admitted by St. Paul in its complaint, National Union issued an umbrella insurance  
14 policy to Marquee and St. Paul issued an umbrella insurance policy to Cosmopolitan. The mere  
15 fact that Cosmopolitan may have been an additional insured under the National Union policy does  
16 not transform the separate and distinct coverage towers for Marquee and Cosmopolitan into a  
17 single unified tower as St. Paul would have this Court believe. Nor does it transform an umbrella  
18 policy into a primary policy. Along those same lines, St. Paul provides no authority and no  
19 Nevada authority exists holding that an excess insurer in one tower of coverage owes any duty to  
20 an excess insurer in a different tower of coverage. Further, the only case cited by St. Paul  
21 involving an action between excess insurers for breach of a duty to settle, *Central Illinois Public*  
22 *Service Co. v. Agricultural Ins. Co.*, 378 Ill.App.3d 728, 735-36 (2008), also provides no support  
23 for St. Paul as it involved insurers in the same tower of coverage issuing policies to the same  
24 named insured.

25 St. Paul asserts that evidence will show that Cosmopolitan and Marquee contractually  
26 agreed that St. Paul's policy would be excess to the National Union policy and the Court must  
27 honor the parties' contractual agreements regarding the priority of their respective insurance  
28 coverage, citing to *Rossmoor Sanitation, Inc. v. Pylon, Inc.*, 13 Cal.3d 622 (1975) and *Hartford*

1 *Cas. Ins. Co. v. Mt. Hawley Ins. Co.*, 123 Cal.App.4th 278 (2004). Notably, St. Paul's complaint  
2 fails to contain any such allegation. Nonetheless, even if that were true, neither St. Paul nor  
3 National Union were a party to such agreement and therefore such agreement would not be  
4 binding on them.

5 In addition, St. Paul's reliance on *Rossmoor* and *Mt. Hawley* is misplaced as those  
6 decisions involved actions between primary insurers stepping into the shoes of their insureds to  
7 pursue their insureds' contractual rights for indemnity. Here, St. Paul's claims against National  
8 Union are based on an alleged breach of the duty to settle, not a contractual indemnity provision.  
9 Moreover, in actions between insurers regarding priority of coverage issues, such as the instant  
10 action, courts have held that the provisions of an insurance policy control over the terms in an  
11 insured's contract. *See, Travelers Cas. & Surety Co. v. American Equity Ins. Co.*, 93 Cal.App.4th  
12 1142, 1157-1158 (2001) (holding that dispute between two insurers should be governed by general  
13 principles governing the interpretation and enforcement of the policies, as opposed to contractual  
14 indemnification clauses); *Reliance National Indem. Co. v. General Star Indem. Co.*, 72  
15 Cal.App.4th 1063, 1081 (1999) ("*Rossmoor* did not purport to establish a general rule that a  
16 contractual indemnification agreement between an insured and a third party takes precedence over  
17 well-established general rules of primary and excess coverage in an action between insurers...");  
18 *JPI Westcoast Construction, L.P. v. RJS & Associates, Inc.*, 156 Cal.App.4th 1448, 1465-1466  
19 (2007) ("contractual terms of insurance coverage are enforced whenever possible.") Accordingly,  
20 in this dispute between two excess insurers regarding priority of coverage of their policies, the  
21 insurers' applicable insurance policy language will control the determination of the issue.

22 Similarly, St. Paul's assertions that the facts of the underlying action support an inference  
23 that National Union agreed St. Paul's coverage for Cosmopolitan was excess to National Union  
24 are baseless and unsupported by any authority. St. Paul's recitation of purported "facts" in its  
25 opposition with regard to the underlying action and National Union's alleged conduct are merely  
26 conclusory, self-serving statements designed to distract the Court from the fact that St. Paul owed  
27 an independent concurrent obligation to Cosmopolitan under its own policy, separate and apart  
28 from any obligation owed by National Union.

1 Finally, contrary to St. Paul's assertion, National Union is not attempting to "prove" the  
2 priority of coverage between National Union and St. Paul. Rather, National Union is calling  
3 attention to the fact that St. Paul has no priority, given St. Paul and National Union were co-excess  
4 insurers on the same level of coverage with separate obligations to Cosmopolitan. Accordingly, St.  
5 Paul cannot establish superior equity to National Union and its claim for equitable subrogation  
6 fails as a matter of law.

7 **C. St. Paul Has No Factual or Legal Basis to Assert A Claim Under NRS 686A.310.**

8 The purpose of Nevada's Unfair Claims Practices Act (the "Act"), NRS section 686A.310,  
9 is to regulate the insurance practice in Nevada and to protect insureds from unfair practices by its  
10 insurers. *See, Pioneer Chlor Alkali Co. v. Nat'l Union Fire Ins.*, 863 F.Supp. 1237, 1241 (D. Nev.  
11 1994); *Turk v. TIG Ins. Co.*, 616 F.Supp.2d 1044 (D. Nev. 2009); *Albert H. Wohlers & Co. v.*  
12 *Bartgis*, 969 P.2d 949, 959 (1998). It is not a sword to be used by insurers against other insurers.  
13 While St. Paul asserts, under the guise of equitable subrogation, that it has standing to assert a  
14 claim against National Union under the Act, it cites no authority in support of its assertion.  
15 Instead, St. Paul cites various California authorities discussing the doctrine of equitable  
16 subrogation in general. The cases cited by St. Paul have no relevance or applicability to whether  
17 St. Paul has standing to assert a claim under NRS 686A.310.

18 Pursuant to the terms of the statute, only the insurance commissioner and policyholders are  
19 entitled to pursue claims against insurers under the statute. Insurers have no right to pursue claims  
20 against other insurers under the statute. Further, the Legislature has not authorized insurers to step  
21 into the shoes of their insureds to pursue claims against other insurers. If the Legislature had  
22 wanted an insurer to be subrogated to its insured's rights to pursue another insurer, it could have  
23 authorized same but it did not. Accordingly, St. Paul has no standing to assert a claim against  
24 National Union under the statute.

25 Additionally, St. Paul does not seek damages for National Union's alleged statutory  
26 violations in the handling of the underlying claim. It seeks to recover monies it paid on behalf of  
27 Cosmopolitan in settlement of that claim. St. Paul's claim fails as Cosmopolitan did not suffer any  
28 damages as a result of any alleged enumerated unfair practice as required under NRS

1 686A.310(2). See also, *Kingham v. State Farm Mut. Auto Ins. Co.*, 2017 WL4350973 at \*4  
2 (dismissing Unfair Claims Practices Act claim based upon failure of insured to present any  
3 evidence of damages arising from alleged practices in violation of Act). Accordingly, St. Paul has  
4 no claim against National Union for violation of the Act, either on its own behalf or on behalf of  
5 Cosmopolitan.

6 **D. St. Paul's Complaint Should Be Dismissed Without Leave to Amend**

7 While complaining about National Union's use of extrinsic evidence in its Motion, St.  
8 Paul's opposition includes several purported factual matters that were not pled in St. Paul's  
9 complaint, an admission of the deficient nature of its complaint. Recognizing the insufficiency of  
10 its pleading, St. Paul, in the alternative, requests leave to amend its complaint to correct the  
11 deficiencies therein. However, as discussed in National Union's motion to dismiss and herein, St.  
12 Paul has no viable claims against National Union and no amendments to St. Paul's complaint will  
13 change that fact. There is nothing that St. Paul can plead that would alter the fact that National  
14 Union and St. Paul were co-excess insurers with separate obligations to the insured. Accordingly,  
15 St. Paul should not be granted leave to amend its complaint.

16 **III.**

17 **CONCLUSION**

18 For all of the foregoing reasons, National Union's Motion should be granted and St. Paul's  
19 complaint dismissed with prejudice.

20 DATED: February 6, 2018

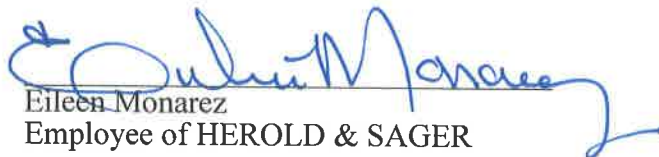
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**CERTIFICATE OF SERVICE**

I certify that I am an employee of HEROLD & SAGER and that on **February 6, 2018**, I caused a true copy of the following document(s): **DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY'S COMPLAINT**, pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR to be transmitted to the person(s) identified in the E-Service List for this captioned case in Odyssey E-File & Serve of the Eighth Judicial District Court, County of Clark, State of Nevada. A service transmission report reported service as complete and a copy of the service transmission report will be maintained with the document(s) in this office.

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