No. _____

IN THE

Supreme Court of the United States

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Petitioner,

—v.—

GATEWAY HOSPITALITY GROUP INC., WESTERN HOSPITALITY GROUP, LP, d/b/a HILTON GARDEN INN MISSOULA; KALISPELL HOTEL, LLC, d/b/a HILTON GARDEN INN KALISPELL; BOZEMAN LODGING INVESTORS, LLC, d/b/a HILTON GARDEN INN BOZEMAN; JWT HOSPITALITY GROUP, LLC, d/b/a HILTON GARDEN INN BILLINGS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

PETITION FOR A WRIT OF CERTIORARI

THOMAS A. MARRA
MARRA, EVENSON & LEVINE P.C.
2 Railroad Square, Suite C
P.O. Box 1525
Great Falls, Montana 59403
(406) 268-1000
tmarra@marralawfirm.com

DAVID GRASSMICK
Counsel of Record
CARRIE E. COPE
DAVID CURKOVIC
COPE EHLERS, P.C.
120 West Madison Street,
Suite 1300
Chicago, Illinois 60602
(312) 549-9280
dgrassmick@copeehlers.com

Attorneys for Petitioner

QUESTION PRESENTED

Whether the nationwide territory of coverage clause in the insurance policy Philadelphia sold to Gateway in Ohio obligated Philadelphia to submit to personal jurisdiction in a Montana court when Gateway sued Philadelphia in Montana because, as the Montana Supreme Court found, "Philadelphia had the power to contractually exclude Montana from the Policy's coverage area …." should Philadelphia have sought to avoid litigating in Montana. *Gateway Hosp. Grp. Inc. v. Phila. Indem Ins. Co.*, 2020 MT 125 at *P33; *see also Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 914 (9th Cir. 1990). Or whether the due process requirements of the Fourteenth Amendment as expressed in this Court's personal jurisdiction jurisprudence coupled with concepts of "fair play and substantial justice" defeat personal jurisdiction in Montana because Gateway's Philadelphia Policy contained a forum selection /arbitration clause that required all disputes about coverage between Philadelphia and Gateway be arbitrated in Ohio, thus leading Philadelphia to expect at the time of contracting with Gateway in Ohio that, by the parties contractual agreement, any coverage dispute would be arbitrated in Ohio and that Philadelphia would not be subject to personal jurisdiction in a Montana court.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Philadelphia Indemnity Insurance Company was the Defendant-Appellant below.

Philadelphia Indemnity Insurance Company is a wholly-owned subsidiary of Philadelphia Consolidated Holding Corp., which itself is a privately-held and wholly-owned subsidiary of Tokio Marine North America, Inc. ("TMNA"), a privately-held Delaware corporation. TMNA is a subsidiary of Tokio Marine and Nichido Fire Insurance Company, Ltd. ("TNMF"), a privately-held insurance company organized under the Companies Act of Japan. TMNF is a subsidiary of Tokio Marine Holdings, Inc., an insurance holding company organized under the Companies Act of Japan.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Federal Cases

State Cases

Federal Statutes

State Statutes

PAGE(S)

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the Montana Supreme Court.

OPINIONS BELOW

The judgment of the Montana Supreme Court was entered on May 19, 2020. The opinion is reported at *Gateway Hosp. Grp. Inc. v. Phila. Indem. Ins. Co.*, 2020 MT 125, 400 Mont. 80, 464 P.3d 44. Pet. App. 1a. The Order of the Montana District Court for the Fourth Judicial District of Missoula County, Montana is unreported. Pet. App. 36a.

Pursuant to the Order of this Court extending deadlines because of the Covid virus pandemic, this Petition is due to the Court on October 16, 2020.

JURISDICTION

Petitioner Philadelphia Indemnity Insurance Company invokes this Court's jurisdiction under 28 U.S.C. § 1257.

FEDERAL STATUTES

No Federal Statutes were considered below.

Section III in this Petition discusses implications for the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. and the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq*. that are raised by this Petition and may merit consideration should this Court grant the Writ.

STATEMENT OF THE CASE

This case concerns litigation of a dispute about insurance coverage under a policy of insurance sold

by Philadelphia Indemnity Insurance Company to Gateway in Ohio.

Philadelphia is an insurance company with its principal place of business in Bala Cynwyd, Pennsylvania.

Gateway Hospitality Group, Inc. ("Gateway") is a corporation organized under the laws of Ohio with its principal place of business in Twinsburg, Ohio. Pet. App. 6a. Gateway is a nationwide seller of hotel and restaurant management services. Pet. App. 6a. The HGI Entities are private equity vehicle limited investment partnerships that own hotel franchises. Pet. App. 6a. The HGI Entities purchased hotel management services from Gateway in Ohio. Pet. App. 6a. Gateway has a limited number of employees, all of whom work in Ohio. Pet. App. 77a "Policy, Renewal Application."

Gateway purchased the hotel management insurance policy at issue in this litigation from Philadelphia in Ohio. Pet. App. 75a. That insurance policy contains an endorsement that requires all insurance coverage disputes be arbitrated in an Ohio forum and that Ohio law concerning procedure and evidence will be used in the arbitration. Pet. App. 73a-74a.

Gateway and the HGI Entities were sued by the HGI Entities' employees in Montana where those employees alleged that the HGI Entities intentionally withheld wages from some of their food service employees. Pet. App. 47a. Gateway and the HGI Entities sought insurance coverage to pay the unpaid wages from Philadelphia. Pet. App. 47a. Philadelphia denied coverage because the wage claims in dispute arising from Gateway's and the HGI Entities' intentional failure to pay their

employees' wages were not covered under Gateway's Ohio-issued Philadelphia hotel management insurance policy and were an uninsurable claim. Pet. App. 47a. Gateway and the HGI Entities settled the unpaid wage action on their own. Pet. App. 47a.

On July 21, 2018, Gateway and the HGI Entities filed this insurance coverage action in the United States District Court for the State of Montana under the Federal Court's diversity jurisdiction. Gateway and the HGI Entities subsequently informed Philadelphia that because one of the members or limited partners in one of the HGI Entities was a Pennsylvania resident, Gateway and the HGI Entities would voluntarily dismiss their Federal action because complete diversity was not present. Philadelphia did nothing to litigate the Federal action in Montana. Gateway and the HGI Entities refiled this insurance coverage action in the Montana Fourth Judicial District Court in Missoula County, Montana. On February 1, 2019, Gateway and the HGI Entities filed their First Amended Complaint which is the operative complaint below.

Philadelphia moved to dismiss Gateway's and the HGI Entities' insurance coverage action contending a Montana Court lacked personal jurisdiction over Philadelphia. Philadelphia did not move to compel arbitration in Montana pursuant to the arbitration provision in the insurance Policy because a Montana court will not enforce an arbitration clause in an insurance policy.

Young v. Security Union Title Insurance Company, 1998 MT 334, ¶33, 292 Mont. 310, 971 P.2d 1233 (1998). The Montana District Court denied Philadelphia's Motion to dismiss for lack of personal jurisdiction. Pet. App. 71a-72a. Philadelphia

appealed to the Montana Supreme Court. Without taking Oral Argument to fully consider the issue, the Montana Supreme Court denied the Appeal and held that a Montana court could exercise personal jurisdiction over Philadelphia because the insurance policy in dispute contained a nationwide territory of coverage clause. Pet. App. 25a-30a. Philadelphia now Petitions this Court for a Writ of Certiorari to review the Montana Supreme Court's decision.

REASONS FOR GRANTING THE WRIT

In the midst of the COVID virus the insurance industry faces massive litigation over various types of claims, and the industry is doing its best to honor its policies and to cope with disputed and controversial virus claims. *See*, *e.g.*, Akexua Ekehakde-Ruiz, "In a sweeping lawsuit, 42 Chicago businesses seek insurance coverage for COVID-related business losses," *Chicago Tribune*, August 3, 2020, https://www.chicagotribune.com/coronavirus/ct-coronavirus-chicago-lawsuit-business-interruption-insurance-gibsons-20200803-gu6anbsmqzfxxh6h6hgivwxbfq-story.html; Leslie Scism, "Companies Hit by Covid-19 Want Insurance Payouts. Insurers Say No.," *Wall Street Journal*, June 30, 2020, https://www.wsj.com/articles/companies-hit-by-covid-19-want-insurance-payouts-insurers-say-no-11593527047. It is crucial to the insurance industry that the industry know what insurance contracts actually mean in the current environment and how courts will construe them. Philadelphia recently received an adverse ruling from the Montana Supreme Court in which that court simply ignored the fact that the insurance contract at issue contained a forum selection clause requiring all disputes about insurance coverage be arbitrated in Ohio. Indeed, as mentioned below, the Montana court

simply ignored important opinions issued by this Court on this issue. The Montana Court said the dispute should be resolved in Montana. Insurance companies cannot write COVID coverage, or any other coverage, when they write an insurance policy with a forum selection clause and they nevertheless have no clue at the time of contracting in what state their insureds may seek to litigate coverage disputes and whether forum selection clauses in policies will be found unenforceable. Philadelphia respectfully petitions this court as follows:

I. There is a Split Among Circuits Reflected in the Montana Supreme Court Ruling Regarding Whether the Presence of a Nationwide Territory of Coverage Clause in an Insurance Policy Means the Insurer Has Agreed to Submit to the Personal Jurisdiction of Courts Wherever it Sells Insurance—and This Court Should Resolve the Split in Favor of Reading the Entire Insurance Contract to Find the Insurer's Expectations Concerning Where it (and the Insured) Expects to Litigate in the Four Corners of the Insurance Contract, Not in the Territory of Coverage Clause Only.

The narrow reason why this Court should grant "cert" is that there is a glaring circuit split on the question of whether a nationwide territory of coverage clause in an insurance company automatically subjects an insurance company to personal jurisdiction. The Court should grant certiorari to resolve the conflict between Fourth and Ninth Circuit decisions in *Rossman v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282 (4th Cir. 1987), *Farmers Ins. Exchange v. Portage La Prairie Mut.*

Ins., 907 F.2d 911 (9th Cir. 1990), and the Montana Supreme Court decision below holding that nationwide territory of coverage clauses constitute purposeful availment sufficient to subject an insurance company to personal jurisdiction and the conflicting decisions in the *Lexington Ins. Co. v. Hotai Ins. Co.* 938 F.3d 874 (7th Cir. 2019) ("*Hotai*") and *OMI Holdings v. Royal Ins. Co. of Can.*, 149 F. 3d 1086 (10th Cir. 1998) finding that due process requires a reading of the entire insurance contract, not merely the nationwide territory of coverage clause, to find whether the defendant insurance company is subject to personal jurisdiction in an unexpected jurisdiction.

The reasoning in the Fourth and Ninth Circuits, as well as in the Montana Supreme Court, is that an insurance company purposefully avails itself of the laws of a particular state by providing insurance coverage in that state through a nationwide territory of coverage clause. Those courts have held that the insurance company could avoid that problem of an unwanted forum—and personal jurisdiction—by writing a different contract that excluded coverage in unwelcome jurisdictions.

In *Rossman*, the Fourth Circuit stated: "In this case, there is no doubt that [the insurance company] could forsee being haled into court in Virginia …. As an automobile liability insurer, [the insurance company] could anticipate the risk that its clients would travel in their automobiles to different states and become involved in accidents and litigation there." 832 F. 2d at 286. *Rossman* continued that the insurance company could have avoided personal jurisdiction, and avoided suit in Virginia, because "it could have excluded that state from the 'policy territory' defined in the policy." *Id.* at 287.

In *Farmers*, the Ninth Circuit, citing *Rossman*, held: "The record establishes that [the insurance company] satisfied the purposeful availment requirement. Its policy coverage extends into Montana and an insured event resulted in litigation there." 907 F.2d at 913.

In the case below, the Montana Supreme Court followed the *Farmers'* reasoning exactly. The Montana Supreme Court found that Philadelphia, by insuring risks in Montana, knew it could face litigation about coverage with an insured in Montana, and the Montana Supreme Court held on that point: "Philadelphia had the power to contractually exclude Montana from the Policy's coverage area, but did not do so." *Gateway* at *P33.

What is significant about the Fourth and Ninth Circuits, and the Montana Supreme Court decision, is that those courts concede that what this Court has taught, that foreseeability is the crucial factor in personal jurisdiction analysis, but those courts all find that the only way for an insurance company to avoid personal jurisdiction in any given state is to write a policy that excludes the state from coverage. Absent a specific exclusion of coverage for the state which is the unwanted forum, litigation is *per se* foreseeable in an unwanted forum state if that state is part of the policy's territory of coverage.

Philadelphia disagrees and so do the Tenth and Seventh Circuits. In *OMI Holdings*, 149 F. 3d at 1095, the court found that the finding of minimum contacts based solely on an insurance policy's territory of coverage clause does not "implicate a strong connection between Defendants and the forum state. On the contrary, we believe that sole reliance on the territory of coverage clause creates contacts

which are qualitatively low on the due process scale." In *OMI*, the Tenth Circuit held that to show the existence of personal jurisdiction, one must show the defendant directed its activity at the forum state, and that a territory of coverage clause was insufficient to show such activity. *Id*.

The Seventh Circuit, in a well-reasoned opinion that reflects how insurance policies actually are written, found in *Hotai*, 938 F.3d at 880-82, that the nationwide territory of coverage clause was not dispositive on the question of personal jurisdiction because that clause alone did not signal purposeful availment of the laws in any particular jurisdiction. In *Hotai*, the Seventh Circuit held that a court should look to the entire insurance contract, not merely the territory of coverage clause, to determine an insurance company's reasonable expectations concerning where it could expect to be subject to personal jurisdiction under a policy. *Id*. Philadelphia notes that the Montana Supreme Court failed to address or in any way distinguish Hotai in its opinion in this case. Thus, the Montana Supreme Court simply refuses to engage the notion that an insurance company can contract around personal jurisdiction with a forum selection/dispute resolution clause.

Here, Philadelphia followed the guidance provided by the Circuit Courts of Appeal and drafted a policy that demonstrated Philadelphia never expected to litigate insurance coverage disputes in Montana under the Gateway Policy. The Policy Philadelphia sold to Gateway included a forum selection clause that required the insured, and any persons claiming benefits under the Policy, to arbitrate all disputes about coverage in Ohio. Thus, using the reasoning taught by the Seventh or Tenth Circuits, the Policy in dispute here, read in its entirety, would show

Philadelphia expected to resolve all coverage disputes with an insured in an arbitral forum in Ohio.

This Court should take this case to resolve the split in how the various Circuit Courts and Montana resolve disputes concerning personal jurisdiction in insurance coverage cases. Specifically, the question is that if an insurance company seeks to avoid personal jurisdiction in a state must the insurance company write its policy to exclude coverage for that state, or can an insurance company avoid personal jurisdiction in a state by writing a policy provision with a forum selection clause that requires insureds resolve coverage disputes with the insurance company in a single forum identified in the policy and known to the insured when the policy is written—as was the case of the Policy in dispute in this litigation—or as was the case here a policy that contained a forum selection clause requiring disputes be resolved in the place the policy was delivered. Crucially on that point, this Court has held that arbitration clause are specialized forum selection clauses, *see*, *e.g.*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 482-83 (1989) ("arbitration agreements … are 'in effect, a specialized kind of forum-selection clause.'"); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) ("An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute."). Thus this Circuit split also can be framed as thus: does a nationwide territory of coverage clause subject an insurance company to personal jurisdiction in any state in which there is insurance coverage under the policy, and as a matter of law, make a nullity an arbitration/forum selection clause in the insurance

policy which requires insurance coverage disputes be arbitrated in in a forum named on the face of the policy?

II. The Montana Supreme Court Ruling Conflicts With This Court's Rulings On A Defendant's Expectations Concerning Personal Jurisdiction.

This Court recently reversed a decision by the Montana Supreme Court on the question of general personal jurisdiction. *See BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549 (2017). In *BNSF*, this Court reversed a Montana Supreme Court decision where the Montana Supreme Court had found that Montana could exercise general personal jurisdiction over BNSF. *Tyrrell v. BNSF Ry. Co.*, 2016 MT 126, 383 Mont. 417, 373 P.3d 1 (2016). This Court explained that BNSF was not incorporated in Montana, did not maintain a principal place of business in Montana, and despite having thousands of employees engaged in work in Montana and running a huge railway business in Montana, BNSF was not so heavily engaged in activity in Montana as to render it "essentially at home" in Montana. *BNSF*, 137 S. Ct. at 1558. In the present case, the Montana Supreme Court made the same type of error that it made in *BNSF*. The Montana Supreme Court's opinion in the present *Gateway* case speaks of the fact that Philadelphia targets Montana because it is licensed to sell insurance in Montana even though the Policy at issue in this litigation was sold in Ohio. *See*, *e.g.*, *Gateway* at *P43. This Court has repeatedly taught that the fact that a party may do some business in a forum which is unrelated to the dispute in issue does not provide grounds for the exercise of specific personal jurisdiction but that specific personal jurisdiction must be rooted in the facts or transaction

giving rise to the litigation in which personal jurisdiction is sought.

This Court this term just heard argument in the case of *Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.*, No. 19-368. As framed by Ford's Petition for A Writ of Certiorari in that case, the question was "Whether the 'arise out of or relate to' requirement is met when none of the defendant's forum contacts caused the plaintiff's claims, such that the plaintiff's claims would be the same even if the defendant had no forum contacts." *Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.*, No. 19-368, Petition at (i). While this case presents a similar question to that presented in *Ford Motor* because Philadelphia contends it had no forum specific contacts that give rise to this dispute, this case also presents a very different question rooted in the intangible nature of Philadelphia's insurance product. Ford's product is a tangible material thing manufactured in a specific place at a specific time and sold to numerous individuals at a variety of locations. Philadelphia's insurance product is an intangible sold at a specific place and a specific time to a specific insured party. Philadelphia's insurance product is triggered by acts that are beyond Philadelphia's control done by the insured that may arise in some place different from where the insurance policy is sold. Philadelphia knows when it sells insurance that its insureds may commit wrongful acts anywhere in the world, but Philadelphia does not anticipate "litigation" in any specific place at the point in time it sells a policy. As discussed below, Philadelphia contracts around that problem. To compare, in *Ford Motor*, any alleged product defect is Ford's doing and under its control. Here, the bad act giving rise to an insurance claim is done by the insured and the bad act is beyond

Philadelphia's control. The only thing under Philadelphia's control is the language of the insurance contract. The reason this Court should take this case is because a ruling here will explain how to deal with questions of causation when the product that gives rise to a dispute is an intangible product. As Philadelphia explains below, the key "hook" for this analysis lies in the "choice of law" discussion in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 481-82 (1985). Philadelphia again notes that the Montana Supreme Court opinion below fails even to address *Burger King* in its analysis. Montana has not even considered the possibility that a party may reasonably contract around the risk of personal jurisdiction when selling an intangible by placing a choice-of-law/forum selection/arbitration clause in the contract. Indeed, Montana is playing "ostrich" and seeking to avoid *Burger King*, and this Court's teaching about party's expressed intentions.

Philadelphia seeks a ruling from this Court that when an insurance company sells a policy (which is subject to state regulation), the insurance company can limit where it is subject to personal jurisdiction by including choice-of-law, forum selection, and dispute resolution/arbitration language that expresses an intent (and agreement with the insured), concerning where disputes about coverage under the Policy must be resolved. And that expectation can be used to defeat efforts to subject the insurance company to personal jurisdiction in any jurisdiction not contemplated by the insurance contract.

The insurance Policy at issue was sold by Philadelphia to Gateway in Ohio. Pet. App. 73a -75a. The circumstance that initially gave rise to the insurance claim in dispute here was that the HGI

Entities, whose hotel business was managed by Gateway, allegedly withheld wages from employees in Montana. Philadelphia disputes whether the HGI Entities are even insureds under the policy—which is immaterial to the dispute as framed for this Petition because the law in Ohio, where the policy was delivered and where the Policy requires disputes be arbitrated—holds that a party seeking the benefit of a contract must take its burdens. *See*, *e.g.*, *Katz v. Katz*, 2018-Ohio-3210 *P36 (Ohio Ct. App. 2018) ("Ohio courts recognize a number of theories pursuant to which a non-signatory may be bound by an arbitration agreement. Under the theory of estoppel, for instance, 'a party who knowingly accepts the benefits of an agreement is estopped from denying a corresponding obligation to arbitrate.'"). That would mean that Philadelphia fully expected that any claimant under the Policy would arbitrate any dispute about the Policy in Ohio because the forum selection and arbitration clause represents an agreement to arbitrate in Ohio.

This Court has held that a defendant's own actions only, not the actions of another party, can give rise to personal jurisdiction and that in the case of a contract, the defendant must anticipate being haled into court at the time of contracting. *World-Wide Volkswagen Corp.*, 444 U.S. 286, 296-298 (1980) ("But the mere 'unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." And a defendant "should reasonably anticipate being haled into court."); *Walden v. Fiore*, 571 U.S. 277, 284 (2014) ("the relationship [giving rise to personal jurisdiction] must arise out of contacts that the 'defendant himself' creates with the forum State"). Here, Philadelphia sold an insurance

Policy in Ohio to Gateway that contained an Ohio forum selection and arbitration clause in which the language was quite explicit: "Unless both parties agree otherwise, arbitration will take place in the county in which the address shown in the Declarations is located. Local rules of law as to procedure and evidence will apply." (Pet. App. 73a-74a.) This Court has further held that the choice of law and forum selection clauses in a contract signal a party's intent concerning in what jurisdiction it reasonably anticipates litigating disputes. *Burger King*, 471 U.S. at 481-82 (holding that a choice-of-law clause providing that all disputes would be governed by the law of the forum state "reinforced [the defendant's] deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there."). It is undisputed that the insurance contracts at issue here requires anyone seeking benefits of the Policy to arbitrate disputes about coverage in Ohio. Thus, even if one was to contend that Philadelphia knew when it sold the insurance policy to Gateway in Ohio that the policy could implicate the HGI Entities in Montana, that would not be sufficient to give rise to personal jurisdiction in Montana because of the presence of the Ohio forum selection and arbitration clause. *See*, *e,g.*, *Burger King*, that "minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities." *Id.* (citing *World Wide-Volkswagen Corp.*, 444 U.S. at 292.).

The Montana Supreme Court simply ignored the impact of the forum selection clause on Philadelphia's expectations and erroneously found that Philadelphia subjected itself to jurisdiction in Montana, in part,

because in other cases involving parties other than Gateway, Philadelphia sold insurance in Montana and could expect to litigate disputes such as the Gateway dispute in Montana. *See*, *e.g.*, *Gateway* at *P43 ("As discussed above, Philadelphia sells insurance in Montana and, by extension, litigates insurance claims in Montana. Therefore, defending this action in this forum would likely cause little additional burden to Philadelphia, which it is well positioned to undertake.").

The Montana Supreme Court elides the personal jurisdiction issue. Perhaps more importantly, Philadelphia was not litigating arbitration in Montana, Philadelphia was litigating its expectations concerning personal jurisdiction as grounded in a Policy with an Ohio forum selection clause. This Court has held that the expectations that give rise to personal jurisdiction are rooted in the defendant's expectation not in the conduct of others. *World-Wide Volkswagen Corp.*, 444 U.S. at 296-298; *Walden*, 571 U.S. at 284. Thus, for example, the failure by Gateway to seek arbitration in Ohio (as required by the contract) cannot subject Philadelphia to personal jurisdiction in Montana and the HGI Entities' alleged failure to pay wages in Montana likewise cannot subject Philadelphia to personal jurisdiction in Montana. *Id.* This court should grant the writ and take the case to reverse the Montana Supreme Court and re-enforce the principle that personal jurisdiction is rooted in the expectations of the defendant not in the bad conduct of a plaintiff that gives rise to a dispute. Specifically, this court should find that an insured cannot drag an insurance coverage dispute into any jurisdiction where the insured did bad acts—when the insurance policy at issue has a forum selection clause that requires all disputes about

coverage be resolved in a forum agreed at the time of contracting. This issue is quite important when dealing with intangible products and e-commerce because insurance companies like Philadelphia need guidance as to how they may structure transactions so that they may anticipate where they will be forced to litigate disputes. The idea of "fair play and substantial justice" articulated by this Court in *Burger King* should allow insurance companies to draft contracts that both provide the scope of coverage sought by an insured, but also allow the insurance company to anticipate where it may have to litigate disputes. The insurance industry should not have to refuse coverage in one state (or limit the scope of a nationwide territory of coverage clause) in order anticipate where it will not be subject to personal jurisdiction.

III. This Case Points At A Conflict Among the Federal Arbitration Act, the McCarran-Ferguson Act, and United States Supreme Court Jurisprudence Concerning Personal Jurisdiction—And This Court Should Provide Guidance How the Insurance Industry Should Navigate Those Issues.

Philadelphia has not raised the Federal Arbitration Act in the proceedings below nor have the parties litigated the McCarran-Ferguson Act—though both acts certainly sit in the background and guided the parties' reasoning.

The insurance policy in dispute contains an Ohio forum selection and arbitration clause and application of the Federal Arbitration Act would require that this dispute be arbitrated in Ohio. 9 U.S.C. § 2 (an arbitration clause in a contract involved in interstate commerce is "valid, irrevocable,

and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract …"); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 341 (2011) (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp*., 460 U.S. 1, 24 (1983) (The language in the FAA reflects a "liberal federal policy favoring arbitration" and pre-empts state laws "prohibit[ing] outright the arbitration of a particular type of claim.")). The McCarran-Ferguson Act, however, exempts insurance from Federal regulation and permits states to bar arbitration of insurance disputes notwithstanding the requirements of the Federal Arbitration Act. *See*, *e.g.*, 15 U.S.C. §1012(b)(" [n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.") Ohio enforces arbitration clauses in insurance policies. Montana does not enforce arbitration clauses in insurance policies. *See*, *e.g.*, *Young v. Security Union Title Insurance Company,* 1998 MT 335, ¶33, 292 Mont. 310, 971 P.2d 1233 (1998) (holding "arbitration provision in … insurance policy was contrary to Montana's statutory law and, therefore, unenforceable …").

Montana and Gateway have made much of the fact that Philadelphia did not move to compel arbitration of this dispute in Montana—which of course Philadelphia would not have done in Montana because Montana would not enforce the arbitration clause. There is a gap between the Federal Arbitration Act and the McCarran-Ferguson Act that makes agreement to arbitrate insurance coverage disputes enforceable in only some jurisdictions. A prudent insurance company can contract around that

gap between the Federal Arbitration Act and the McCarran-Ferguson Act by placing a forum selection clause in its insurance contract—which Philadelphia did here—requiring coverage disputes be arbitrated in a forum that permits arbitration of insurance disputes. The issue thus raised, did Montana violate due process when it found the Philadelphia consented to personal jurisdiction in Montana by including a nationwide territory of coverage clause in its Policy—while Montana at the same time simply gave no weight to the intent of the parties concerning their agreed forum and personal jurisdiction as expressed in an forum selection/arbitration clause in the Policy. This Court's Federal Arbitration Act jurisprudence and its personal jurisdiction jurisprudence suggest that an arbitration clause which, by virtue of the McCarran-Ferguson Act, may not be enforceable in a state, may still signal that the insurance company had no intention of subjecting itself to the personal jurisdiction of the forum state because the arbitration clause, which this Court has found to be a forum selection clause, may still signal a defendant's expectations concerning personal jurisdiction. *See*, *e.g.*, *Burger King*, 471 U.S. at 481-82 (holding that a choice-of-law clause providing that all disputes would be governed by the law of the forum state "reinforced [the defendant's] deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there."); *see also, e.g.* ORC 3927.03(m)(" Any foreign insurance company transacting business in this state by an agent consents that suit may be brought against it in the county where the property insured was situated, or was insured, or the application for insurance taken."). Instead, the arbitration/forum selection clause signals the place where the Insurance company expected disputes

would be resolved and in fact may be the product of insurance regulation in the state in which the policy is delivered. *Id.* *See also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. at 482-83; *Scherk v. Alberto-Culver Co.*, 417 U.S. at 519.

Indeed, the state insurance regulations rooted in the McCarren-Ferguson Act, create for insurance companies an expectation the disputes with an insured about a policy will be resolved where the policy is sold. State insurance codes and regulations, presumably drafted in context with the McCarren-Ferguson Act, routinely reflect an expectation that all disputes arising under a policy will be litigated in the state in which the policy is delivered. PIIC cites abovie to the Ohio insurance code that requires PIIC to write an Ohio-delivered policy with an Ohio forum selection clause. Another example would be the Washington Insurance Code, in the Ninth Circuit, which requires all policies be drafted such that no policy delivered in Washington may "depriv[e] the courts of this state of the jurisdiction of action against the insurer." RCW 48.18.200. Because those states allow nationwide territory of coverage clauses in insurance policies, those regulations seem to reflect an understanding that, notwithstanding the territory of coverage language, an insurance company should not expect to be subject to personal jurisdiction in coverage disputes with insureds anywhere other than the forum in which the policy is delivered.

Philadelphia, moved to defeat personal jurisdiction in this case in Montana because Philadelphia argued that the presence of an Ohio forum selection/ arbitration clause, which would be enforceable and required in Ohio, signaled that Philadelphia wrote an insurance policy under which it fully expected all disputes would be arbitrated in Ohio. Philadelphia

also contended that the insured was aware of that arbitration clause at the time it purchased the Policy and the insured was also aware that the policy required an insured satisfy all of the Policy's requirements (which would include the dispute resolution clause) to obtain the Policy's benefits. It is important that this Court grant certiorari in this case so that the insurance industry may know that it can write insurance policies with arbitration clauses that require arbitration of coverage disputes in jurisdictions that will enforce such clauses and the industry can operate with the understanding that efforts by insureds to force litigation in states that will not enforce arbitration clauses can be defeated on personal jurisdiction grounds when the insurance policy contains an express forum selection clause. Insurance companies need the assurance that they can write insurance contracts that express a mutual understanding and agreement between insurance company and insured concerning in what forum insurance companies can expect to resolve coverage disputes with insureds.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

DAVID GRASSMICK
Counsel of Record
CARRIE E. COPE
DAVID CURKOVIC
COPE EHLERS, P.C.
120 West Madison Street
Suite 1300
Chicago, IL 60602
(312) 549-9280
dgrassmick@copeehlers.com

THOMAS A. MARRA
MARRA, EVENSON & LEVINE P.C.
2 Railroad Square, Suite C
P.O. Box 1525
Great Falls, Montana 59403-1525
(406) 268-1000
tmarra@marralawfirm.com

APPENDIX

Appendix A

SUPREME COURT OF MONTANA

DA 19-0502

Submitted on Briefs: March 4, 2020
Decided: May 19, 2020

GATEWAY HOSPITALITY GROUP INC., WESTERN HOSPITALITY GROUP, LP, d/b/a HILTON GARDEN INN MISSOULA; KALISPELL HOTEL, LLC, d/b/a HILTON GARDEN INN KALISPELL; BOZEMAN LODGING INVESTORS, LLC, d/b/a HILTON GARDEN INN BOZEMAN; JWT HOSPITALITY GROUP, LLC, d/b/a HILTON GARDEN INN BILLINGS, and JOHN DOES 1-5,

Plaintiffs and Appellees,

—v.—

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Defendant and Appellant.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula,
Cause No. DV 18-1357
Honorable Shane A. Vannatta,
Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Thomas A. Marra,
Marra, Evenson & Levine, P.C.,
Great Falls, Montana

For Appellees:

Dale R. Cockrell, Jay T. Johnson,
Moore, Cockrell, Goicoechea &
Johnson, P.C.,
Kalispell, Montana

Jory C. Ruggiero, Domenic Cossi,
Western Justice Associates, PLLC,
Bozeman, Montana

Justice Jim Rice delivered the Opinion and Order of the Court.

OPINION

Philadelphia Indemnity Insurance Company (Philadelphia) appeals from the denial of its motion to dismiss for lack of personal jurisdiction, pursuant to M. R. Civ. P. 12(b)(2), by the Fourth Judicial District Court, Missoula County.

As argued by Gateway Hospitality Group (Gateway), and the other named Plaintiffs (Entities) (collectively, Plaintiffs or Appellees), a district court's denial of a motion to dismiss for lack of personal jurisdiction is not an appealable order. *See*

M. R. App. P. 6(3)(a)-(k), 6(5)(b). Therefore, we must first determine whether this matter is presently reviewable by this Court. Although the parties contest the appealability of the ruling, both sides ultimately take the position that, alternatively, this Court could undertake consideration of the District Court's denial of Philadelphia's motion to dismiss by deeming this matter to be a request for a writ of supervisory control under M. R. App. P. 14, a procedural issue we initially take up.

This Court may exercise supervisory control over cases pursuant to the authority granted by Article VII, Section 2(2) of the Montana Constitution and Rule 14(3) of the Montana Rules of Appellate Procedure. *See Inter-Fluve v. Mont. Eighteenth Judicial Dist. Ct.*, 2005 MT 103, ¶ 17, 327 Mont. 14, 112 P.3d 258 (citing *Evans v. Mont. Eleventh Judicial Dist. Ct.*, 2000 MT 38, ¶ 16, 298 Mont. 279, 995 P. 2d 455); *Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct.*, 2019 MT 115, ¶ 5, 395 Mont. 478, 443 P.3d 407. The Rule provides:

> The supreme court has supervisory control over all other courts and may, on a case-by-case basis, supervise another court by way of a writ of supervisory control. Supervisory control is an extraordinary remedy and is sometimes justified when urgency or emergency factors exist making the normal appeal process inadequate, when the case involves purely legal questions, and when one or more of the following circumstances exist:
>
> (a) The other court is proceeding under a mistake of law and is causing a gross injustice;

> (b) Constitutional issues of state-wide importance are involved;
>
> (c) The other court has granted or denied a motion for substitution of a judge in a criminal case.

The Court may invoke its power of supervisory control over a matter brought before the Court by direct appeal. *See, e.g., State v. Spady*, 2015 MT 218, ¶ 11, 380 Mont. 179, 354 P.3d 590. "In determining the propriety of supervisory control for a particular case, we are mindful that it is an extraordinary remedy. Consequently, we have followed the practice of proceeding on a case-by-case basis[.]" *Inter-Fluve*, ¶ 17 (citing *Preston v. Mont. Eighteenth Judicial Dist. Ct.*, 282 Mont. 200, 204, 936 P.2d 814, 816 (1997)).

In *Ford Motor Co.*, ¶ 7, we reasoned that urgency can render the appeal process inadequate for some cases involving personal jurisdiction, "because the District Court must have power over the parties in a proceeding to afford adequate relief." Several entities operating hotels across the State are parties in this litigation with an out-of-state insurer. An error in the determination of personal jurisdiction could result in the later nullification of extensive litigation efforts affecting many individuals statewide. Our review concludes that the issues in this matter are purely legal. Further, as stated by the Rule, a constitutional issue is at the center of this dispute, that being Philadelphia's due process rights under the Fourteenth Amendment to the United States Constitution. Finally, resolution will serve to further clarify when Montana insureds "may

appropriately file suit in Montana courts" against their insurers. *Ford Motor Co.*, ¶ 7.

For reasons similar to those expressed in *Ford Motor Co.*, we conclude this case has distinctives involving a constitutional issue of state-wide importance and impact that qualifies and merits review pursuant to the Court's constitutional power of supervisory control. Therefore, we accept supervisory control over this matter, and affirm the District Court's ruling. We restate the issues as follows:

1. *Did the District Court deny due process to Philadelphia by failing to hold an evidentiary hearing?*
2. *Did the District Court err by holding Montana had specific personal jurisdiction over Philadelphia under Montana's long arm statute and the Due Process Clause of the Fourteenth Amendment to the United States Constitution?*[1]

---

[1] Appellees noted in their answer brief that Philadelphia did not brief the issue of subject matter jurisdiction in its opening brief, prompting Philadelphia to summarily discuss that issue in its reply brief. Appellees then sought leave to file a sur-reply brief, arguing that Philadelphia had submitted documents with its reply brief that were not included in the record. Appellees also filed a short brief with their motion. Philadelphia objected to Appellees' motion, and Appellees' filed an amended motion, to which Philadelphia also objected. This Court took the motion under advisement. *Order, issued February 11, 2020.* Even though subject matter jurisdiction generally may be raised at any time, we conclude we do not have properly developed briefing from the parties in this regard and thus decline to undertake review of that issue in this proceeding.

FACTUAL AND PROCEDURAL BACKGROUND

Gateway is an Ohio corporation, with its principal place of business in Twinsburg, Ohio. Gateway's business is managing hotels, and it provided hotel management services, including food and beverage management, for the hotel Entities named in this action at the time the subject policy was procured, including: Western Hospitality Group, LP d/b/a Hilton Garden Inn Missoula; Kalispell Hotel, LLC d/b/a/ Hilton Garden Inn Kalispell; Bozeman Lodging Investors, LLC d/b/a Hilton Garden Inn Bozeman; and JWT Hospitality Group, LLC d/b/a Hilton Garden Inn Billings. Each of the Entities is organized under the laws of the State of Montana, and their principal places of business are in Montana. Gateway had the exclusive authority and duty to direct, supervise, manage, and operate the Entities' hotels on a day-to-day basis. Gateway's responsibilities included hiring, paying, and supervising all personnel for the hotels, including food and beverage banquet server-employees. Philadelphia is a Pennsylvania corporation, with its principal place of business in Philadelphia, Pennsylvania.

Pursuant to its contractual obligation to manage the Entities, Gateway applied in June of 2014 for an insurance policy from Philadelphia (the Policy), to insure both itself and the Entities. On the application, Gateway named itself as the applicant with its principal location in Twinsburg, Ohio, and its nature of business as "hotel and restaurant management and development co." In response to

a question asking, "[i]s the Applicant Firm controlled, owned, affiliated or associated with any other firm, corporation or company[,]" Gateway checked the box next to "[y]es." The next question on the application asked Gateway to "list the address(es) of all branch offices and/or subsidiaries. Include a brief description of their operations and indicate if coverage is desired for these offices." In response, Gateway answered "see attached sheets" in all capital letters. On an attached sheet labeled "Equity in Companies," Gateway listed: Western Hospitality group, noting it operated the Hilton Garden Inn in Missoula, Montana; Kalispell Hotel, LLC, noting it operated the Hilton Garden Inn in Kalispell; and JWT Hospitality Group Billings, LLC, noting it operated the Hilton Garden Inn in Billings, Montana. Likewise, Gateway listed under "other entities with no equity:" Bozeman Lodging Investors, LLC, operating the Hilton Garden Inn in Bozeman; Oak Street Partnership, operating the Comfort Inn in Bozeman; and Catron Partners LLC, operating Comfort Suites in Bozeman. On the next attached sheet, Gateway listed its operating hotels and restaurants, and included: Hilton Garden Inn in Missoula, Montana; Hilton Garden Inn in Kalispell, Montana; and Hilton Garden Inn in Billings, Montana. It also listed JWT Hospitality Group Billings LLC, Kalispell Hotel LLC, and Western Hospitality Group LP in a column titled "subsidiaries." The Policy states:

> In consideration of the payment of the premium and in reliance upon all statements and information furnished to us *including all the statements made in*

> *the application form, its attachments and the material incorporated therein, which are incorporated herein and deemed to be part of this policy*, we agree as follows: . . . . [(Emphasis added.)]

The Policy territory extends "to any wrongful act committed anywhere in the world." Under the Policy's definitions, "named entity" means "the proprietor, firm, or organization specified in Item 1 of the Declarations." Gateway is the named entity on the Declarations page. Additionally, under the Policy, "insured" means "the named entity; any subsidiary; and any independent contractor acting on your behalf; any individual insured." Finally, "Subsidiary" is defined as:

> A corporation or other entity of which the named entity owns on or before the inception of the policy period more than 50% of the issued outstanding voting stock either directly, or indirectly through one or more of its subsidiaries or the right to elect, appoint or designate more than 50% of such entity's board of directors, trustees, or managers and which is set forth in the application or, if the entity is a limited partnership, the named entity or one of its subsidiaries must serve as the general partner[.]

The Policy contains an arbitration endorsement, which states, "[i]f we and the insured do not agree whether coverage is provided under this Coverage Part for a claim made against the insured, then either party may make a written demand for arbitration." It also provides, "[u]nless both parties

agree otherwise, arbitration will take place in the county in which the address shown in the Declarations is located. Local rules of law as to procedure and evidence will apply." Twinsburg, Ohio is the address shown in the Declarations.

In 2015, employees of the Entities sued the Appellees in Missoula County, Montana,[2] alleging Appellees failed to distribute to the employees 18-20% service charges paid by banquet customers (the Walter Class Action). Appellees submitted a claim to Philadelphia under the Policy, requesting defense and indemnity. Philadelphia denied the claim, asserting the action arose out of intentional employment practices, which were precluded from coverage, and, further, that Policy exclusions applied. In a denial letter, Sedgwick LLP, a law firm representing Philadelphia, identified the Entities as insureds under the Policy. The Appellees subsequently settled the Walter Class Action, and paid the judgment entered against them.

In October of 2018, Appellees as Plaintiffs brought this suit against Philadelphia, seeking declarations that: (1) they were insureds under the Philadelphia Policy; (2) Philadelphia had a duty to defend them in the Walter Class Action; (3) Philadelphia breached its duty to defend them in that action, and (4) Philadelphia had a consequential duty to pay all damages they suffered as a result of the Walter Class Action. Plaintiffs also claimed breach of contract.

---

[2] *Pam Walter, et al. v. Gateway Hospitality Group, Inc., et. al.*, Montana Fourth Judicial District Court, Missoula County, DV 15-196.

Philadelphia filed a motion to dismiss based on M. R. Civ. P. 12(b)(1), (2), (3), and (6), asserting lack of personal jurisdiction, lack of standing, lack of subject matter jurisdiction, forum non conveniens, and failure to state a claim upon which relief could be granted. In its brief in support of the motion, Philadelphia requested that Plaintiffs' complaint "be dismissed without an evidentiary hearing." The District Court did not hold an evidentiary hearing on the issues, and in August of 2019, denied Philadelphia's motion on all grounds. Philadelphia filed a notice of appeal stating it "hereby appeals to the Supreme Court of the State of Montana the final Order Denying Philadelphia's Motion to Dismiss for lack of the subject matter jurisdiction," but as noted above, briefed the issue of personal jurisdiction, to which Appellees responded. Upon consideration of the parties' briefing, we undertake supervisory review only of the District Court's denial of Philadelphia's motion to dismiss based on lack of personal jurisdiction under M. R. Civ. P. 12(b)(2).

STANDARD OF REVIEW

This Court reviews a district court's decision on a motion to dismiss for lack of personal jurisdiction de novo, construing the complaint "in the light most favorable to the plaintiff." *Milky Whey, Inc. v. Dairy Partners, LLC*, 2015 MT 18, ¶ 7, 378 Mont. 75, 342 P.3d 13 (quoting *Grizzly Sec. Armored Express, Inc. v. Armored Grp., LLC*, 2011 MT 128, ¶ 12, 360 Mont. 517, 255 P.3d 143) (internal quotations omitted). Additionally, motions to dismiss "should not be granted unless, taking

all well-pled allegations of fact as true, it appears beyond a doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief." *Buckles v. Cont'l Res., Inc. (Buckles I)*, 2017 MT 235, ¶ 9, 388 Mont. 517, 402 P.3d 1213 (citing *Threlkeld v. Colorado*, 2000 MT 369, ¶ 7, 303 Mont. 432, 16 P.3d 359). Finally, we review a district court's findings of facts regarding personal jurisdiction to determine whether the findings are clearly erroneous and the conclusions are correct. *Buckles I*, ¶ 9 (citations omitted).

DISCUSSION

1. Did the District Court deny due process to Philadelphia by failing to hold an evidentiary hearing?

Philadelphia argues the District Court erred by making factual findings on issues "at the core of the litigation's coverage dispute" without first conducting an evidentiary hearing on those matters. Philadelphia argues "[i]t was error not to hold an evidentiary hearing if the lower court intended to find facts that were disputed." Specifically, Philadelphia contends that, despite knowing when issuing the policy that Gateway could provide hotel management services anywhere in the world, it was not aware that Gateway intended the Entities to be insured, notwithstanding the District Court's determination that Gateway intended to purchase coverage for the Entities, and, therefore, the District Court should have conducted a hearing on the issue. Appellees respond that this issue was waived because Philadelphia did not ask for an evidentiary

hearing, and, in fact, requested the District Court to rule on the motion without holding an evidentiary hearing.

Generally, this Court will only consider issues that are properly preserved for review. *State v. Johns*, 2019 MT 292, ¶ 12, 398 Mont. 152, 454 P.3d 692 (quoting *State v. Akers*, 2017 MT 311, ¶ 12, 389 Mont. 531, 408 P.3d 142). "The basis for the general rule is that it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider." *Akers*, ¶ 12 (quoting *Unified Indus., Inc. v. Easley*, 1998 MT 145, ¶ 15, 289 Mont. 255, 961 P.2d 100) (internal quotations omitted). "In order to preserve a claim or objection for appeal, an appellant must first raise that specific claim or objection in the district court." *In re T.E.*, 2002 MT 195, ¶ 20, 311 Mont. 148, 54 P.3d 38. In accordance with this rule, in *Johns*, ¶ 20, we held the defendant "failed to preserve a due process challenge to the lack of an evidentiary hearing" when he did not request an evidentiary hearing on the motion at issue.

Philadelphia does not dispute that it did not request the District Court hold an evidentiary hearing, and indeed, further than the appellant in *Johns*, Philadelphia requested that the District Court rule on its motion without a hearing. Moreover, factual issues Philadelphia now seeks to resolve, such as whether the Entities were properly insured under the Policy, go to the merits of the controversy—coverage and the duty to defend—that need not be reached to resolve the jurisdictional question, as discussed below. While this case is not before us on appeal, we nonetheless

decline to undertake supervisory review of the issue in light of the position Philadelphia took before the District Court.

2. *Did the District Court err by holding Montana had specific personal jurisdiction over Philadelphia under Montana's long arm statute and the Due Process Clause of the Fourteenth Amendment to the United States Constitution?*

Philadelphia argues the District Court erred by "improperly evaluat[ing] Philadelphia's contacts with Montana" and thereby failed to hold that "Philadelphia does not have sufficient minimum contacts with Montana" to establish personal jurisdiction. Additionally, Philadelphia argues the District Court "failed to properly evaluate the due process, justice and fair play requirements" for exercise of personal jurisdiction over Philadelphia. Philadelphia also contends the District Court erred by ignoring the Policy's arbitration provision, which it argues, for purposes of our review here, should also be considered a forum selection clause requiring this matter to be resolved by arbitration in the State of Ohio. Appellees answer the District Court correctly determined that the exercise of personal jurisdiction over Philadelphia complies with both Montana's long arm statute and due process.

Neither party asserts, nor did the District Court conclude, that a Montana court could exercise general personal jurisdiction over Philadelphia, and thus, our analysis is confined to specific personal jurisdiction. *See Simmons Oil Corp. v. Holly Corp.*, 244 Mont. 75, 83-84, 796 P.2d 189,

194 (1990) (explaining that M. R. Civ. P. 4(b)(1) "incorporates the principles of both general and specific jurisdiction[,]" and that general jurisdiction contemplates "whether the party can be 'found within' the state" meaning that "he or she is physically present in the state or if his or her contacts with the state are so pervasive that he or she may be deemed to be physically present there[,]" whereas specific jurisdiction "may be established even though a defendant maintains minimum contacts with the forum as long as the plaintiff's cause of action arises from any of the activities enumerated in [Montana's long arm statute] and the exercise of jurisdiction does not offend due process."); s*ee also Buckles I*, ¶ 13 (citing *BNSF Ry. v. Tyrrell*, ___ U.S. ___, 137 S. Ct. 1549 (2017)).

To determine whether specific personal jurisdiction may be exercised over a nonresident defendant, this Court applies a two-part analysis: "[f]irst, we determine whether personal jurisdiction exists pursuant to M. R. Civ. P. 4(b)(1). Second, if personal jurisdiction exists pursuant to M. R. Civ. P. 4(b)(1), we then determine whether exercising personal jurisdiction comports with traditional notions of fair play and substantial justice embodied in the Due Process Clause of the Fourteenth Amendment." *Buckles I*, ¶ 11 (internal citation omitted); *Ford Motor Co., ¶ 10; Buckles v. Cont'l Res., Inc. (Buckles II)*, 2020 MT 107, ¶ 12, 400 Mont. 18, ___ P.3d ___. A finding of specific jurisdiction "focuses on the relationship among the defendant, the forum, and the litigation, and depends on whether the defendant's suit-related conduct created a substantial connection with the

forum state." *Tackett v. Duncan*, 2014 MT 253, ¶ 19, 376 Mont. 348, 334 P.3d 920 (internal quotations and citations omitted); *Ford Motor Co.*, ¶ 9; *Buckles II*, ¶ 14.

a. Montana's long-arm statute

Montana's long-arm statute, M. R. Civ. P. 4(b)(1), provides,

> any person is subject to the jurisdiction of Montana courts as to any claim for relief arising from the doing personally, or through an employee or agent, any one of the following acts:
>
> (A) the transaction of any business within Montana;
>
> (B) the commission of any act resulting in accrual within Montana of a tort action;
>
> (C) the ownership, use, or possession of any property, or of any interest therein, situated within Montana;
>
> (D) contracting to insure any person, property, or risk located within Montana at the time of contracting;
>
> (E) entering into a contract for services to be rendered or for materials to be furnished in Montana by such person;
>
> (F) acting as director, manager, trustee, or other officer of a corporation organized under the laws of, or having its principal place of business within, Montana; or
>
> (G) acting as personal representative of any estate within Montana.

The parties dispute the applicability of subparts (A) and (D). We address subpart (D).

In *Seal v. Hart*, 2002 MT 149, 310 Mont. 307, 50 P.3d 522, Seal contracted to sell saddles and tack to Hart for $53,315.86, and to deliver the goods to Hart in Billings, Montana. Hart paid $13,315.86 as a down payment and agreed to remit the remainder upon Hart's transport and sale of the goods in California. Hart was required to obtain insurance to protect against theft or casualty loss of the property before Seal would release the goods. *Seal*, ¶ 5. Hart, a North Dakota resident, contacted his North Dakota insurance agent, Stevens, who arranged for issuance of a policy from Canal Insurance Company (Canal). *Seal*, ¶ 6. At Hart's request, and after a conversation with Seal, Stevens faxed a certificate of insurance to Seals' Billings, Montana, office. *Seal*, ¶ 35. Hart took delivery of the goods in Billings. *Seal*, ¶ 5.

The goods were subsequently stolen from the transport truck, and a claim was submitted to Canal, which Canal denied because the policy covered only common carriers, which Hart was not. *Seal*, ¶ 9. Seal brought suit against Hart and Stevens in Montana court, alleging breach of contract and breach of a duty to procure insurance. Stevens moved to dismiss the suit for lack of personal jurisdiction, which the District Court denied. *Seal*, ¶ 11. Although on alternate grounds, this Court affirmed the District Court, noting that Stevens knew the cargo to be insured by the policy was located in Billings, Montana, when she arranged for issuance of the policy, and, thus, "Seal's claim for relief arose out of Stevens' contracting to insure property in Montana at the time

of contracting," satisfying M. R. Civ. P. 4(b)(1)(D). *Seal*, ¶ 24. Addressing the contention that Stevens had not contracted directly with Seal to insure the property, and thus, owed no duty of care to Seal, we explained that Rule 4(b)(1)(D) "does not require that a plaintiff establish the substantive elements of a contract or a duty of care before a court may exercise personal jurisdiction over a particular party." *Seal*, ¶ 23. Rather, the Rule "simply requires that the claim for relief arise out of the contracting to insure any person, property, or risk located within Montana at the time of contracting." *Seal*, ¶ 23. We explained that "arising from" in this context is "a direct affiliation, nexus, or substantial connection between the basis for the cause of action and the act which falls within the long-arm statute," which was satisfied. *Seal*, ¶ 23 (citations omitted).

As in *Seal*, the subject Policy and the process of procuring the Policy occurred in another state, requiring a "direct affiliation, nexus, or substantial connection between the basis for the cause of action and the act which falls within the long-arm statute" to establish specific personal jurisdiction in Montana over the insurer for litigation concerning the Policy. *Seal*, ¶ 23. Plaintiffs alleged in their complaint that Philadelphia contracted to insure a risk in Montana and breached its duty to defend them by failing to appear in the underlying suit, as required by the Policy. In support of their allegations, Plaintiffs have offered the policy application, including the attached disclosures with the individual Montana Entities for which Gateway sought coverage, which was made a part of the Policy.

Although the parties disagree about whether the Entities were subsidiaries and insureds under the Policy, that is a coverage dispute we need not reach to resolve the jurisdictional issue here. *See Carter v. Miss. Farm Bureau Cas. Ins. Co.*, 2005 MT 74, ¶ 20, 326 Mont. 350, 109 P.3d 735 ("[I]t is important to emphasize that this appeal is not about whether Carter and Schmidt are covered by Carter's MFBCIC policy; rather, the question is whether or not they can *litigate the coverage dispute in Montana*." (emphasis in original)). Further, under Montana law, the duty to defend under a policy is broader than the duty to indemnify, potentially obligating an insurer to appear in litigation before coverage issues are resolved. *See State Farm Mut. Auto. Ins. Co. v. Freyer*, 2013 MT 301, ¶ 37, 372 Mont. 191, 312 P.3d 403 ("The broader duty to defend requires an insurer to act immediately to defend the insured from a claim. The insurer must do so on the basis of mere allegations that could implicate coverage, if proven.") (citation omitted). And, under Montana law, ambiguities in a policy are construed in favor of the insured. *See Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2017 MT 246, ¶ 10, 389 Mont. 48, 403 P.3d 664 ("Any ambiguity in an insurance policy must be construed in favor of the insured and in favor of extending coverage.") (citation omitted).[3]

---

[3] As more fully explained in *Kilby Butte Colony*:

> We use the following approach to interpret insurance contracts:
>
> > General rules of contract law apply to insurance policies and we construe them strictly against the insurer and in favor of the insured. Courts

Philadelphia failed to appear and defend Plaintiffs in the Walter Class Action, an alleged breach of contract and of the common law, which occurred in Montana. Philadelphia acknowledges that, at the time of contracting, it was aware Gateway could provide hotel management services

---

> give the terms and words used in an insurance contract their usual meaning and construe them using common sense. Any ambiguity in an insurance policy must be construed in favor of the insured and in favor of extending coverage. An ambiguity exists where the contract, when taken as a whole, reasonably is subject to two different interpretations. Courts should not, however, seize upon certain and definite covenants expressed in plain English with violent hands, and distort them so as to include a risk clearly excluded by the insurance contract.
>
> *Mecca v. Farmers Ins., Exch.*, 2005 MT 260, ¶ 9, 329 Mont. 73, 122 P.3d 1190 (quoting *Travelers Cas. and Sur. Co. v. Ribi Immunochem Research, Inc.*, 2005 MT 50, ¶ 17, 326 Mont. 174, 108 P.3d 469). We read insurance policies as a whole and reconcile the policy's various parts to give each part meaning and effect. Section 33-15-316, MCA; *Newbury v. State Farm Fire & Cas. Co. of Bloomington, Ill.*, 2008 MT 156, ¶ 19, 343 Mont. 279, 184 P.3d 1021. We recognize the reasonable expectations doctrine and have consistently held that the objectively reasonable expectations of insurance purchasers regarding their policy terms should be honored, even if a painstaking study of the policy negates expectations. When applying the doctrine, an insurance contract is to be interpreted from the viewpoint of a consumer with average intelligence, with no training in the law or insurance. *Flathead Janitorial*, ¶ 22 (citing *Leibrand v. Nat'l Farmers Union Prop. & Cas. Co.*, 272 Mont. 1, 7, 898 P.2d 1220, 1224 (1995)).
>
> *Kilby Butte Colony*, ¶ 10.

"anywhere in the world," which it contracted to insure. And, more specifically, because the Montana Entities were disclosed and individually listed in the application expressly made part of the Policy, Philadelphia was clearly aware that Gateway's business included the active management of hotel entities in Montana at the time it issued the Policy. The denial letter sent by Philadelphia's counsel in response to the claim identified the Entities as insureds under the Policy.[4] The circumstances resemble those in *Seal*, where Defendant Stevens, a North Dakota resident, understood that the property she was contracting to insure was located in Montana at the time the policy was issued. *Seal*, ¶ 24. Philadelphia issued the Policy to Gateway upon its understanding that Gateway conducted business in Montana. As in *Seal*, we conclude there is a "direct affiliation, nexus, or substantial connection" between the basis for the cause of action—a breach of the duty to defend and indemnify Plaintiffs

---

[4] Philadelphia states that its counsel erred by identifying the Entities as insureds under the Policy. We recognize that counsel's action occurred after the time of contracting, and we take no position on the ultimate resolution of coverage issues. We merely cite the evidence in the record supporting the District Court's conclusion that, concerning issues of coverage, Plaintiffs made out a prima facie case that Philadelphia contracted to insure a risk in Montana, with which counsel's action was consistent. *See First Nat'l Bank v. Estate of Carlson*, 2020 U.S. Dist. LEXIS 51089, *3 (citing *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2003) (explaining that when the motion to dismiss for lack of personal jurisdiction "is based on written materials rather than an evidentiary hearing, the plaintiff need only make a prima facie showing of jurisdictional facts.").

against claims made in the Montana Walter Class Action—and the act falling under the long-arm statute—"contracting to insure any person, property, or risk located within Montana at the time of contracting" by issuance of this particular Policy. M. R. Civ. P. 4(b)(1)(D).

Philadelphia relies on the Policy's arbitration provision, which it posits is also a forum selection clause, to argue that it managed the risk of the Policy's broad geographic coverage by "requir[ing] any coverage dispute to be litigated in a Summit County, Ohio, arbitral forum, regardless of where events leading to Gateway's insurance claim arose." Thus, while acknowledging third-party claims against Gateway could arise anywhere in the world that would require it to defend locally, Philadelphia asserts that it contracted to resolve first-party coverage disputes with Gateway only in Ohio. However, the Policy's arbitration provision simply does not accomplish what Philadelphia contends. The provision states, "[i]f we and the insured do not agree whether coverage is provided under this Coverage Part for a claim made against the insured, then either party *may* make a written demand for arbitration" (emphasis added), and provides that any arbitration "will take place in the county in which the address shown in the Declarations is located." We note, first, that the provision is voluntary, requiring arbitration only if one of the parties requests it, and does not mandate that arbitration be undertaken in any case. Here, arbitration was never triggered at the time the "claim made against the insured" arose in 2015, because neither party requested it. Philadelphia bypassed it, unilaterally denying

Gateway's claim without seeking an arbitration determination of coverage; and Plaintiffs litigated the Walter Class Action on their own. Second, the provision's plain text designates only one particular issue for arbitration: when the parties "do not agree whether coverage is provided for a claim made against the insured." Not encompassed within this optional arbitration provision is other litigation about other issues, such as here: state court civil litigation regarding an insured's claim against the insurer for breach of the duty to defend. As noted above, the duty to defend is broader than the question of coverage. Lastly, the cases Philadelphia cites for its contention that arbitration clauses should be treated as forum selection clauses are distinguishable. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S. Ct. 2449 (1974) (dealing with a mandatory, rather than voluntary, arbitration provision in a securities dispute); *Rodriguez de Quijas v. Shearson/ American Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917 (1989) (also involving a mandatory arbitration provision and expressing the importance of treating such provisions as forum selection clauses in cases governed by the Securities Act). Consequently, the Policy neither mandated arbitration nor selected another forum for this dispute, and Philadelphia's reliance upon the arbitration provision does not undermine the "substantial connection" between the basis for the cause of action and the act encompassed in the long-arm statute, here, "contracting to insure" a risk located in Montana at the time of contracting. M. R. Civ. P. 4(b)(1)(D).

We conclude the District Court did not err in holding that Montana courts may exercise personal jurisdiction over Philadelphia under M. R. Civ. P. 4(b)(1)(D).[5]

b. Due process under the Fourteenth Amendment to the United States Constitution

Turning to the second inquiry in the analysis, we apply, when analyzing whether the exercise of personal jurisdiction comports with traditional notions of fair play and substantial justice, the three-part test we adopted from the Ninth Circuit Court of Appeals in *Simmons Oil Corp.*:

> (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privileges of conducting activities in the forum, thereby invoking the laws;

---

[5] Having so concluded, we need not reach the parties' arguments regarding the exercise of jurisdiction under Rule 4(b)(1)(A), requiring the claim for relief to arise from the transaction of business in Montana, which the District Court also held was applicable. The District Court noted Philadelphia's authorization from the Commissioner of Insurance to sell insurance products and to conduct related business transactions in Montana since 1992, its sale of policies of insurance for risks and persons within the State, its authorization of the Commissioner as its agent for service of legal process in Montana, and its issuance of the Policy here upon an application naming the Montana Entities, concluding that "Plaintiffs have made a prima facie showing of jurisdictional facts that, when construing the allegations in a light most favorable to them, the claim for relief arises from Philadelphia's transaction of business in Montana."

> (2) The claim must be one which arises out of or results from the defendant's forum-related activities; and
>
> (3) The exercise of jurisdiction must be reasonable.

Nasca v. Hull, 2004 MT 306, ¶ 26, 323 Mont. 484, 100 P.3d 997 (citing *Simmons Oil Corp.*, 244 Mont. at 83, 796 P.2d at 194); *Buckles I*, ¶ 16; *Ford Motor Co.*, ¶ 12. If a plaintiff establishes the first element of the test, a presumption of reasonableness arises, which a defendant can overcome only by presenting a compelling case that jurisdiction would be unreasonable. *B.T. Metal Works v. United Die & Mfg. Co.*, 2004 MT 286, ¶ 34, 323 Mont. 308, 100 P.3d 127 (citing *Simmons Oil Corp.*, 244 Mont. at 85, 796 P.2d at 195).

Purposeful Availment

"A nonresident defendant purposefully avails itself of the benefits and protections of the laws of the forum state when it takes voluntary action designed to have an effect in the forum. Conversely, a defendant does not purposefully avail itself of the forum's laws when its only contacts with the forum are random, fortuitous, attenuated, or due to the unilateral activity of a third party." *B.T. Metal Work*s, ¶ 35 (citing *Simmons Oil Corp.*, 244 Mont. at 86, 796 P.2d at 195). This is primarily because a defendant that invokes the forum state's laws by purposeful availment "should reasonably anticipate being haled into court in the forum state" and, therefore, exercising jurisdiction over that defendant is "fundamentally fair." *B.T. Metal Works*, ¶ 35

(citing *Simmons Oil Corp.*, 244 Mont. at 86, 796 P.2d at 195).

Philadelphia argues "[i]t does not matter to the jurisdictional analysis that Philadelphia knew that Gateway's business involved providing hotel management services to a few Montana entities. The fact that Philadelphia could foresee a potential claim arising from the sale of those services to Montana companies is not the standard for establishing specific personal jurisdiction," citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295, 100 S. Ct. 556, 566 (1980) ("'[f]oreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.").

In *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911 (9th Cir. 1990), Portage, a foreign insurer, insured a vehicle that was involved in an accident in Montana. *Farmers Ins. Exch.*, 907 F.2d at 912. Its policy provided that Portage would "defend in the name and on behalf of any person insured by the Policy and at the cost of the Insurer . . . ." *Farmers Ins. Exch.*, 907 F.2d at 914, n.3. The driver of the vehicle was separately insured by Farmers. When the driver was sued, demand was made upon Portage, as the insurer of the vehicle, to appear and defend the driver. Portage, a Canadian insurer that issued no policies and had no agents in Montana, refused to defend and, thus, Farmers defended and settled the case. Farmers then sued Portage, who in turn raised the absence of personal jurisdiction as a defense. *Farmers Ins. Exch.*, 907 F.2d at 912. The district court ruled in favor of Portage, but the Ninth Circuit reversed, concluding personal

jurisdiction could be exercised over Portage in Montana because Portage failed to rebut the prima facie showing that it had voluntarily injected itself into the Montana forum. *Farmers Ins. Exch.*, 907 F.2d at 915. Distinguishing the U.S. Supreme Court's determination that the New York automobile sellers in *World-Wide Volkswagen* had not purposely availed themselves to the jurisdiction of Oklahoma merely because legal action in all states was foreseeable, the Ninth Circuit reasoned regarding Portage's role as an insurer:

> [L]itigation requiring the presence of the insurer is not only foreseeable, but it was purposefully contracted for by the insurer. Moreover, unlike a product seller or distributor, an insurer has the contractual ability to control the territory into which its "product" – the indemnification and defense of claims – will travel.

Farmers Ins. Exch., 907 P.2d at 914. Regarding foreseeability, the U.S. Supreme Court had further explained in *World-Wide Volkswagen*, "[t]his is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297, 100 S. Ct. at 567; see also *Ford Motor Co.*, ¶ 14.

We conclude that Philadelphia purposely availed itself to the benefits and protections of the laws of Montana and established a connection such that it

reasonably should have anticipated "being haled into court" here. Even if *Farmers Ins. Exch.* were to be reevaluated under subsequent jurisprudence of the U.S. Supreme Court, there is a stronger basis in this case for the exercise of jurisdiction than the Ninth Circuit Court found to be sufficient in *Farmers Ins. Exch.* First, there was more than a mere foreseeability that a claim could arise here. Philadelphia had the power to contractually exclude Montana from the Policy's coverage area, but did not do so. Consistent therewith is Philadelphia's authorization by the Commissioner of Insurance to sell insurance products and to conduct related business transactions in Montana since 1992, its sale of policies of insurance for risks and persons within the State, and its authorization of the Commissioner as its agent for service of legal process in Montana. This is the mechanism for being haled into court in Montana. Then, as discussed above, Philadelphia processed an application from Gateway that listed, on several attachments, the company's active business locations in Montana. Upon that knowledge, Philadelphia issued the Policy that incorporated those materials and insured Gateway and, consistent therewith, Philadelphia's counsel later identified the Entities as insureds under the Policy when Gateway presented a claim. As also discussed above, nothing in the Policy, including the arbitration provision, prohibited Montana courts as serving as a forum for this particular dispute between the parties. These actions go further than those upon which the Ninth Circuit Court determined that Portage, a company that sold no policies in Montana, had "purposely

availed itself of the Montana forum" and "purposely contracted" for the risk of litigation in Montana. *Farmers Ins. Exch.*, 907 P.2d at 914-15. We consider here not merely the "unilateral acts" by Gateway, as Philadelphia contends, but the entirety of the actions taken by Philadelphia. Given the context of insurance practices, Philadelphia acted purposely, and its contacts with Montana were not merely "random, fortuitous, attenuated, or due to the unilateral activity of a third party." *B.T. Metal Works*, ¶ 35.

Illustratively, the circumstances here stand in contrast to those in *Carter v. Miss. Farm Bureau Cas. Ins. Co.*, where we held that Montana courts had no personal jurisdiction over the foreign insurer at issue. In *Carter*, Plaintiffs Carter and Schmidt were residents of Mississippi when they purchased automobile insurance from Mississippi Farm Bureau Casualty Insurance Company (MFBCIC), "a remote and strictly regional insurance carrier which does not do business in Montana." *Carter*, ¶ 16. The policy was purchased to insure the Plaintiffs' four vehicles garaged in Mississippi, and Plaintiffs did not advise the insurer that they were moving to Montana. *Carter*, ¶ 5. MFBCIC had no offices or agents, did not advertise, and was not authorized to conduct business in Montana as a foreign insurer. *Carter*, ¶ 11. Several weeks after Plaintiffs moved to Montana, to live here at least part-time, one of Plaintiffs' cars was involved in an accident in Montana, in which Plaintiffs were injured. Plaintiffs settled with the responsible party for payment of the party's liability policy limits, then

filed a Montana action against MFBCIC for payment under the underinsured motorist coverage of their MFBCIC policy. *Carter*, ¶ 3. Plaintiffs' MFBCIC policy renewal notices subsequent to the accident were mailed to a Mississippi address, which Plaintiffs were using while in Montana. *Carter*, ¶ 14.

We recognized that, "[w]hile a promise to provide coverage throughout the United States may establish that an insurer has agreed to submit to jurisdiction in any forum that has jurisdiction to adjudicate claims against its insured, this agreement to defend and indemnify its insured in any state does not imply an agreement to allow its insured to bring suit against it in any state." *Carter*, ¶ 23. Acknowledging that "it is the defendant's forum-related conduct that is at issue," we contrasted the "remote and strictly regional" nature of MFBCIC with "national carrier[s] doing business in Montana," noted the lack of notice to MFBCIC that Plaintiffs were moving to Montana, and the complete absence of any commercial business or any other contacts by the insurer with Montana: "there simply is none on the part of MFBCIC." *Carter*, ¶¶ 17-25. MFBCIC had taken no action to purposely avail itself to the benefits and protections of the law of Montana by establishing any connection such that it reasonably could have anticipated "being haled into court" here.[6] In contrast, Philadelphia has done so here.

---

[6] We further concluded that Plaintiffs had failed to carry their burden to establish a basis under M. R. Civ. P. 4(B)(1)(D), for conferring long-arm jurisdiction over MFBCIC. *Carter*, ¶ 29.

We conclude the District Court did not err in finding Philadelphia purposefully availed itself of the laws of Montana as required to confer specific personal jurisdiction under our three-part test. Additionally, because we reach this conclusion, a presumption of reasonableness arises, which Philadelphia can overcome only by presenting a compelling case that jurisdiction would be unreasonable. *B.T. Metal Works*, ¶ 34.

The claim arises out of or results from the defendant's forum-related activities

We have explained that "[t]he Supreme Court recently clarified the mandatory nature of this prong[,]" and that "[d]ue process requires a connection between the defendant's in-state actions and the plaintiff's claim: 'the suit must arise out of or relate to the defendant's contacts with the forum.'" *Ford Motor Co.*, ¶ 18 (citing *Bristol-Meyers Squibb Co. v. Superior Ct.*, ___ U.S. ___, 137 S. Ct. 1773, 1780 (2017)) (emphasis in original). As the Supreme Court further explained, and as we cited in *Buckles I*:

> In order for a state court to exercise specific jurisdiction, the *suit* must arise out of or relate to the defendant's contacts with the *forum*. In other words, there must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.

Buckles I, ¶ 17 (citing *Bristol-Myers Squibb Co.*, U.S. at ___, 137 S. Ct. at 1780.

The relevant portions of the Plaintiffs' complaint, which we have discussed above, allege as follows:

> 24. Philadelphia is in the business of providing insurance insuring risks, persons, and property located in Montana. When it issued the policy to the Gateway Group, Philadelphia expected to insure risks and persons located in Montana. When it issued the Policy to Gateway Group, Philadelphia did insure risks and persons located in Montana. As the Policy insured risks and persons located in Montana at the time the Policy was issued, the Policy contemplated disputes arising in Montana.
>
> 45. On or about March 3, 2015, Plaintiffs submitted a claim directly to Philadelphia under the Policy requesting defense and indemnity in the Walter Class Action.
>
> 46. On May 29, 2015, Philadelphia representative Sedgwick LLP wrote to Ron Hutcheson of Gateway. . . . In that letter, Philadelphia, through its authorized representative, denied Plaintiffs' request to Philadelphia, for defense and indemnity to plaintiffs for the Walter Class Action.
>
> 47. In that May 29, 2015 . . . letter, Philadelphia did not resolve any factual disputes in the Walter Class Action complaint in Plaintiffs' favor. Philadelphia could not make an unequivocal demonstration that the Walter Class Action did not fall within the Policy's coverage. As a

> result, Philadelphia had a duty to defend Plaintiffs for the Walter Class Action in Montana. Philadelphia breached that duty. Philadelphia did not defend Plaintiffs for the Walter Class Action and thus, Philadelphia failed to perform its obligations in Montana.

Established for purposes of this inquiry: Philadelphia issued an indemnity insurance policy to Gateway under which Philadelphia ostensibly provided coverage for Gateway's businesses operations, including those located in Montana; Gateway's businesses were sued in Montana; after Gateway submitted a claim, Philadelphia denied a defense to the Montana Entities in that Montana case; and those Montana businesses therefore sustained the loss of the policy's benefit and acted on their own behalf to defend themselves in the Montana case.

Considering these circumstances and the context of a liability insurer, this question is not a particularly difficult one. The suit here against Philadelphia arises out of or relates to its contacts with Montana, including its issuance of the Policy to Gateway pursuant to its authorization to do business here. All actions giving rise to Plaintiffs' claims occurred here: the initiation of the Walter Class Action against the Plaintiffs in Montana court, the denial of a defense to Plaintiffs in Montana court by Philadelphia under the Policy, and the Plaintiffs' action to defend themselves. We conclude the District Court did not err in finding Plaintiffs' claim "ar[ose] out of or result[ed] from the defendant's forum-related activities," as required to impose specific personal jurisdiction

over Philadelphia under the Fourteenth Amendment to the United States Constitution.

Reasonableness

This court considers seven factors when examining the reasonableness of jurisdiction:

> (1) The extent of the defendant's purposeful interjection into Montana;
> (2) The burden on the defendant of defending in Montana;
> (3) The extent of conflict with the sovereignty of the defendant's state;
> (4) Montana's interest in adjudicating the dispute;
> (5) The most efficient resolution of the controversy;
> (6) The importance of Montana to the plaintiff's interest in convenient and effective relief; and
> (7) The existence of an alternative forum.

Nasca, ¶ 32 (citing *Simmons Oil Corp.*, 244 Mont. at 87-88, 796 P.2d at 197). Each factor does not need to be proven for the court to assume jurisdiction, "[r]ather, the factors simply illustrate the concepts of fundamental fairness, which must be considered in each jurisdictional analysis." *Simmons Oil Corp.*, 244 Mont. at 88, 796 P.2d at 197.

As explained above, if a court concludes the defendant purposefully availed itself of the forum state's laws under the first part of the three-part test, reasonableness is presumed, and must be overcome by compelling case that jurisdiction would be unreasonable. *B.T. Metal Works*, ¶ 34. However, Philadelphia does not include in its

briefing a developed argument demonstrating why Montana's exercise of personal jurisdiction would be unreasonable. Indeed, Philadelphia essentially ignores this third part of the test altogether. Therefore, it clearly has not presented a "compelling case" to overcome the presumption of reasonableness.

Even so, there are several reasons why Montana's jurisdiction in this case would be reasonable under the factors. As discussed above, Philadelphia sells insurance in Montana and, by extension, litigates insurance claims in Montana. Therefore, defending this action in this forum would likely cause little additional burden to Philadelphia, which it is well positioned to undertake. Philadelphia, a Pennsylvania company, has presented no argument explaining why defending in Montana would impose any greater burden than defending in another foreign jurisdiction, the State of Ohio, where it has suggested the matter should be litigated. The case presents no conflict with the sovereignty with Philadelphia's home state of Pennsylvania. Montana courts provide a forum for the most efficient and convenient resolution of the controversy, as the Plaintiffs and their agents are sited here. Perhaps most importantly, Montana has a significant interest in adjudicating this dispute. As the District Court reasoned, "as a matter of public policy, Montana has an interest in adjudicating a complaint for declaratory judgment when the underlying suit is brought in Montana and an insurer concludes that coverage is not available and does not defend an insured in that Montana action."

Philadelphia has not presented a compelling case that jurisdiction would be unreasonable to overcome the presumption of reasonableness. Likewise, examining the factors relevant to our consideration of reasonableness, we conclude the District Court did not err in finding that it was reasonable for Montana to exercise personal jurisdiction over Philadelphia in this case.

CONCLUSION

We accept Philadelphia's deemed petition for supervisory control for the reasons stated herein. We agree with the District Court's determination that a Montana court may exercise specific personal jurisdiction over Philadelphia regarding Plaintiffs' claims herein.

IT IS THEREFORE ORDERED Philadelphia's deemed Petition for a Writ of Supervisory Control is GRANTED and the District Court's order denying Philadelphia's motion to dismiss for lack of personal jurisdiction is AFFIRMED.

The Clerk is directed to forward a copy of this Opinion and Order to all counsel of record in the Fourth Judicial District Court Cause No. DV-18-1357, and to the Honorable Shane A. Vannatta, presiding District Judge.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH

/S/ JAMES JEREMIAH SHEA

/S/ INGRID GUSTAFSON

/S/ DIRK M. SANDEFUR

Appendix B

Shane A. Vannatta
District Court Judge, Dept. 5
Missoula County Courthouse
200 W Broadway St
Missoula, MT 59802-4292
(406) 258-4765

[STAMP]

FILED
08/19/2019
Shirley Faust
CLERK
Missoula County District Court
STATE OF MONTANA
By: Susan Wall
DV-32-2018-0001357-DK
Vannatta, Shane
34.00

MONTANA FOURTH JUDICIAL
DISTRICT COURT, MISSOULA COUNTY

Dept. 5
Cause No.: DV-18-1357

GATEWAY HOSPITALITY GROUP INC.; WESTERN HOSPITALITY GROUP, LP d/b/a HILTON GARDEN INN MISSOULA; KALISPELL HOTEL, LLC d/b/a HILTON GARDEN INN KALISPELL; BOZEMAN LODGING INVESTORS, LLC d/b/a HILTON GARDEN INN BOZEMAN; JWT HOSPITALITY GROUP, LLC d/b/a HILTON GARDEN INN BILLINGS; and JOHN DOES 1-5,

Plaintiffs,

—v.—

PHILADELPHIA INDEMNITY INSURANCE COMPANY; and JOHN DOES I-X,

Defendants.

OPINION AND ORDER
(MOTION TO DISMISS)

This matter comes before the Court upon Defendant Philadelphia Indemnity Insurance Company's ("Philadelphia"), *Motion to Dismiss Plaintiff's First Amended Complaint or in the Alternative to Transfer Based Upon Forum Non Conveniens* ("Motion") (Doc. 19) filed February 20, 2019. Plaintiffs Gateway Hospitality Group Inc. ("Gateway") and the Montana Hilton Garden Inns identified individually above ("HGI Entities") filed an opposition brief on March 6, 2019. On March 27, 2019, Philadelphia filed a reply brief. On June 6, 2019, Plaintiffs filed a Notice of Supplemental Authority and on June 13, 2019 Philadelphia filed a response thereto. The above Motion has been fully-briefed. Gateway requested oral argument and the

Court heard oral argument on August 16, 2019. The Court has considered the record before it, the oral arguments, and deems the matter submitted for ruling.

ORDER

1. The Court DENIES Philadelphia's Motion (Doc. 19) under Rule 12(b)(1) for lack of subject matter jurisdiction.
2. The Court DENIES Philadelphia's Motion (Doc. 19) under Rule 12(b)(2) for lack of personal jurisdiction.
3. The Court DENIES Philadelphia's Motion (Doc. 19) as it relates to HGI Entities' lack of standing to bring the claims in the Amended Complaint.
4. The Court DENIES Philadelphia's Motion (Doc. 19) under Rule 12(b)(3) for improper venue and *forum non conveniens*.
5. The Court DENIES Philadelphia's Motion (Doc. 19) for failure to state a claim under Rule 12(b)(6).
6. Philadelphia shall file an answer to Plaintiffs' claims as required under Mont. R. Civ. P. Rule 8, within 21 days of this Opinion and Order (unless the parties otherwise stipulate or upon a showing of good cause).

OPINION

I. Procedural Background

On October 10, 2018, Plaintiffs filed their Complaint and Demand for Jury Trial ("Complaint"). On December 10, 2018, Philadelphia filed a motion to

dismiss and brief in support with exhibits. On January 15, 2019, Plaintiffs filed a response brief with exhibits to Philadelphia's motion to dismiss.

On January 15, 2019, Plaintiffs filed a motion for leave of court to file an amended complaint and brief in support with a draft amended complaint and insurance policy number PHSD965996 ("Policy") attached as exhibits to the brief (Doc. 13, amended complaint and Policy). On February 1, 2019, Plaintiffs filed a First Amended Complaint ("Amended Complaint") against Defendants. (Doc. 18). In Count I, Plaintiffs request declaratory relief from the Court that: Plaintiffs are insureds under the Policy issued by Philadelphia; Philadelphia had a duty to defend Plaintiffs against the *Pam Walter, et al. v. Gateway Hospitality Group, Inc., et. al.*, Fourth Judicial District Court, Missoula County, DV-15-196 matter ("Walter Class Action"); Philadelphia breached its duty to defend Plaintiffs against the Walter Class Action; and Philadelphia had a duty to pay all damages suffered by Plaintiffs as a result of the settlement in the Walter Class Action. In Count II, Plaintiffs request relief from Philadelphia's breach of contract. Plaintiffs reference the Policy as Exhibit 1 and the May 29, 2015 letter ("Denial Letter") (Doc. 8) from Philadelphia representative Sedgwick LLP ("Sedgwick") to Ron Hutcheson of Gateway as Exhibit 2 to the Amended Complaint. (Doc. 18).

On February 20, 2019, Philadelphia filed the Motion and brief in support with exhibit. Philadelphia seeks dismissal based on Rule 12(b)(1), (2), (3), (6), asserting: lack of personal jurisdiction; HGI Entities do not have standing to bring the claims asserted in the Amended Complaint; forum non conveniens; and failure to state a claim upon

which relief can be granted. On March 6, 209, Plaintiffs filed their response brief. On March 27, 2019, Philadelphia filed their reply brief.

On June 4, 2019, Plaintiffs filed a notice of supplemental authority with a May 21, 2019 Montana Supreme Court decision attached. On June 13, 2019, Philadelphia filed a response concerning the supplemental authority. Plaintiffs then file a notice of issue and request for oral argument.

This Opinion addresses Philadelphia's Motion under 12(b)(1), (2), (3), (6) and as asserted in the Motion and brief in support.

II. Legal Standard

"Generally, a court should determine jurisdiction only on the necessary jurisdictional facts and not on the merits of the case. *See* 21 C.J.S. *Courts* § 87 (1990)." *Seal v. Hart*, 2002 MT 149, ¶ 23, 310 Mont. 307, 314, 50 P.3d 522, 527. Where a district court decides the jurisdictional issue based on the record, "the plaintiff is only required to make a prima facie showing of jurisdictional facts in order to defeat a motion to dismiss." *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir. 1990). The motion is to be "construed in a light most favorable to the nonmoving party and should not be granted unless, taking all well-pled allegations of fact as true, it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief." *Threlkeld v. Colorado*, 2000 MT 369, 303 Mont. 432, 434, 16 P.3d 359, 361.

A motion to dismiss under Montana Rules of Civil Procedure 12(b)(6) is the appropriate method to

challenge the legal sufficiency of the allegations set forth in the Amended Complaint. "A claim is subject to dismissal only if it either fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under that claim." *Puryer v. HSBC Bank USA, Nat'l Ass'n*, 2018 MT 124, ¶ 12, 391 Mont. 361, 366, 419 P.3d 105, 109 (citation omitted).

Although all the factual allegations in the complaint which are well-pleaded must be taken as true, the court is under no obligation "to accept allegations of law and legal conclusions in a complaint as true." *Threlkeld*, ¶ 33 (citation omitted). The Court additionally is under no obligation to accept or consider allegations which lack factual basis. *Harris*, ¶ 14 (citations omitted). The "complaint must state something more than facts which, at most, would breed only a suspicion" that the claimant may be entitled to relief. *Anderson v. ReconTrust Co., N.A.*, 2017 MT 313, ¶ 8, 390 Mont. 12, 16, 407 P.3d 692, 696.

"A motion to dismiss under Rule 12(b)(6) allows the district court to examine only whether 'a claim has been adequately stated in the complaint.'" *Meagher v. Butte-Silver Bow City-County*, 2007 MT 129, ¶ 15, 337 Mont. 339, 343, 160 P.3d 552, 556. "As a result, the court is limited to an examination of the contents of the complaint in making its determination of adequacy." *Id.* However, a district court may properly review and consider

> the complaint and any documents it incorporates by reference without converting the motion to a summary judgment motion. The

> mere fact that documents are **attached to a complaint** does not automatically require that the motion to dismiss be converted into a Rule 56 motion for summary judgment. (*Citation omitted*.) [The Montana Supreme Court has] previously upheld a Rule 12(b)(6) motion to dismiss when the trial court based its decision upon a complaint and information **contained in attached documents**.

Cowan v. Cowan, 2004 MT 97, ¶ 11, 321 Mont. 13, 17, 89 P.3d 6, 8-9 (**emphasis** added).

III. Factual Background

For the purposes of Philadelphia's Motion (and only those alleged in the Amended Complaint for purposes of analyzing the merits of the Motion based on Rule 12(b)(6)), the following facts alleged by Plaintiffs are accepted as true:

Gateway is a corporation organized under the laws of Ohio, with its principal place of business located in Twinsburg, Ohio. Gateway is a hotel management company including "food and beverage management" which provided hotel management services for businesses including each of the HGI Entities at the time the Policy was issued.

Each HGI Entity is organized under the laws of the state of Montana with their principal place of business in Montana at the time the Policy was issued. On or about August 1, 2018 and August 14, 2018, each of the HGI Entities filed a Fed.R.Civ.P. 7.1 corporate disclosure in U.S. Dist. Ct. of Montana, Missoula Division CV-18-00136-DLC stating that it does not have a parent corporation and no publicly held corporation owns 10% or more of each HGI

Entity. (Doc. 21). Each of the HGI Entities hired Gateway to operate and manage their hotels.

Philadelphia is a foreign corporation organized under the laws of Pennsylvania with its principal place of business located in Philadelphia, Pennsylvania. At the time the Policy was issued, Philadelphia was authorized by the Montana Commissioner of Securities and Insurance ("Commissioner") to transact business in the State of Montana, including without limitation, advertising, offering and selling insurance in the State of Montana. Philadelphia authorized the Commissioner as its agent for service of legal process in Montana. At the time the Policy was issued Philadelphia did and currently does business in Montana by selling policies of insurance for risks and persons located in Montana.

Gateway procured the Policy on behalf of Gateway and each of the HGI Entities as a part of its responsibilities enumerated in its contract with the HGI Entities to manage their hotels. HGI Missoula, HGI Kalispell, and HGI Billings were listed in the insurance application as subsidiaries of Gateway. Gateway had the exclusive authority and duty to direct, supervise, manage, and operate the HGI Entities' hotels on a day-to-day basis. Gateway's responsibilities included hiring, paying and supervising all personnel for the hotels, including food and beverage banquet server-employees. Gateway was also responsible for generating banquet service agreements.

In the "Common Policy Declarations" of the Policy the named insured is Gateway and the business description is "hotel manager" showing a premium of

$22,424 was charged for "miscellaneous professional" coverage. (Doc.13, p.28). The forms and endorsements made a part of the policy for miscellaneous professional liability are listed on the "Forms Schedule." (Doc.13, p. 32). In the "Cover-Pro Declarations" Gateway is the named entity with their profession stated as hotel manager. (Doc.13, p. 30, 31).

The "Cover-Pro Professional Liability Insurance Policy" states,

> In consideration of the payment of the premium and in reliance upon all statements and information furnished to us including all statements made in the application form, its attachments and the material incorporated therein, which are incorporated herein and deemed to be a part of this policy, we agree as follows: . . .

(Doc.13, p. 44). The application is a part of the Policy.

The "Cover-Pro Professional Liability Insurance Policy" provides a definition section. Named entity means the proprietor, firm or organization specified in Item 1. of the Declarations. (Doc. 13, p. 46). Gateway is the named entity on the Declarations page. Insured means: the named entity; any subsidiary; any independent contractor while acting on your behalf; any individual insured. (Doc. 13, p. 47). Subsidiary means:

> 1. A corporation or other entity of which the named entity owns on or before the inception of the policy period more than 50% of the issued and outstanding voting stock either directly, or indirectly through one or more of

> its subsidiaries or the right to elect, appoint or designate more than 50% of such entity's board of directors, trustees, or managers and which is set forth in the application or, if the entity is a limited partnership, the named entity or one of its subsidiaries must serve as the general partner . . .

(Doc. 13, p. 46). The exclusion section states that,

> This policy does not apply to any claim or claim expenses: A. arising out of, resulting from, based upon or in consequence of, any dishonest, fraudulent, criminal or malicious act, error or omission, or any intentional or knowing violation of the law, or gaining of any profit or advantage wo which you are not legally entitled; however, we will defend suits alleging the foregoing until there is a judgment, final adjudication, adverse admission, plea *nolo contendere* or no contest or finding of fact against you as to such conduct.

(Doc. 13, p. 47). The Policy territory extends "to any wrongful act committed anywhere in the world." (Doc. 13, p. 49).

The Policy includes a Binding Arbitration endorsement which states, "This endorsement modifies coverage provided under the Coverage Part to which it is attached." (Doc 13, p.58). It is not clear to what "Coverage Part" this endorsement attaches. In the Binding Arbitration endorsement "other insured(s)" means all other persons or entities afforded coverage under this policy. Id. This endorsement also provides, "If we and the insured do not agree whether coverage is provided under this

Coverage Part for a claim made against the insured, then either party may make a written demand for arbitration." Neither Plaintiffs nor Philadelphia made a written demand for arbitration. "Unless both parties agree otherwise, arbitration will take place in the county in which the address shown in the Declarations is located. Local rules of law as to procedure and evidence will apply." Id. In the "Common Policy Declarations" and the "Cover-Pro Declarations" Twinsburg, Ohio is the address provided. (Doc. 13, p. 28, 30).

The "Hotel Manager Pro Pak Advantage" endorsement includes an additional definition ("hotel/motel manager") and additional exclusions with exceptions thereto. (Doc. 13, p. 59-61).

The Cover-Pro Renewal Application ("Application") was signed on June 18, 2014. (Doc. 13, p. 68). Therein, Gateway is the applicant firm with the principal location in Twinsburg, Ohio. The box is marked yes regarding whether the applicant firm is controlled, owned, affiliated or associated with any other firm, corporation, or company. (Doc. 13, p. 64). "See attached sheets" is written in response to list branch office and list subsidiaries. Id. In one attachment to their application, Gateway lists the Plaintiffs under "Operating Hotels & Restaurants" or under "Subsidiaries". (Doc. 13, p. 72).

The "Cover-Pro Application Hotel/Motel Manager Supplement" was also signed on June 18, 2014. (Doc. 13, p. 70). The Applicant (Gateway) manages 22 locations. Id. The box is marked yes regarding whether the Applicant has ownership interest in any of the locations managed with "See attached sheets" also written. Id. One attached sheet is "Equity in

Companies" where legal entities and ownership percentage are listed. (Doc. 13, p. 71).

In 2015, employees of the HGI Entities filed suit against Plaintiffs (the Walter Class Action) in Missoula County alleging that the banquet service agreements included an 18%-20% additional charge which was allegedly not distributed to the server-employees. On or about March 3, 2015, Plaintiffs submitted a claim directly to Philadelphia under the Policy requesting defense and indemnity in the Walter Class Action.

In the May 29, 2015 Denial Letter Philadelphia denied Plaintiffs' request. In the Denial Letter Sedgwick stated that Gateway and the HGI Entities were insureds under the Policy. Therein Philadelphia also denied defense and indemnity to Plaintiffs claiming the Walter Class Action arises out of the insureds' employment practices which are precluded from coverage under the Policy and that additional policy exclusions and conditions operate to limit or otherwise preclude coverage. (Doc. 8, p. 8, 9).

Philadelphia did not defend Plaintiffs for the Walter Class Action. On February 23, 2016, the Walter Class Action settled. On August 3, 2016, the settlement was approved and judgment entered against the Plaintiffs by the Montana Fourth Judicial District Court.

IV. Legal Analysis

A. Subject Matter Jurisdiction.

Subject-matter jurisdiction is the power of a court to hear and adjudicate a particular type of controversy. *Harrington*, ¶ 13. "The Montana Constitution provides that a Montana district court

has, without limitation, subject-matter jurisdiction in "all civil matters." *Id*.

Neither standing nor the application of Montana law is a prerequisite to subject matter jurisdiction. "That Montana law does not govern does not mean that a Montana district court lacks subject-matter jurisdiction over the claim." Harrington, ¶ 24. "If a plaintiff lacks standing, a court can grant no relief because a justiciable controversy does not exist. A party's lack of standing, however, does not deprive a district court of its subject matter jurisdiction." Ballas v. Missoula City Bd. of Adjustment, 2007 MT 299, ¶ 14, 340 Mont. 56, 59-60, 172 P.3d 1232, 1235 (internal citation omitted).

Plaintiffs seek a declaratory judgment from this Court to declare their rights under the Policy in relation to claims in the settled Walter Class Action. While Philadelphia states that the Amended Complaint should be dismissed based upon Rule 12(b)(1), Philadelphia has not specifically argued how this Court lacks subject matter jurisdiction. Philadelphia has asserted, in part, that HGI Entities do not have standing to bring a claim and has asserted that the Policy includes a choice of law provision applying Ohio law. Regardless of the Court's determination on each of these assertions, this Court has subject matter jurisdiction over this matter.

B. Personal Jurisdiction.

"A court's power over the parties in a proceeding—may be general (all-purpose) or specific (case-linked)." *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 2019 MT 115, ¶ 8, 395 Mont. 478, 484. Mont. R. Civ. P. Rule 4(b)(1), incorporates the

principles of both general and specific jurisdiction. *Simmons Oil Corp. v. Holly Corp.*, 244 Mont. 75, 83, 796 P.2d 189, 194 (1990).

1. General Jurisdiction.

"All persons found within the state of Montana are subject to the jurisdiction of Montana courts." M.R.Civ.P. 4(b)(1). It is [this] first sentence of Rule 4(b)(1), M.R.Civ.P. that deals with the question of general jurisdiction, that is, whether the party can be "found within" the state. *Simmons*, 244 Mont. at 83, 796 P.2d at 194. "A party is "found within" the state if he or she is physically present in the state *or* if his or her contacts with the state are so pervasive that he or she may be deemed to be physically present there." *Id*. (*emphasis* added).

In *Tyrrell* (a U. S. Supreme Court decision overturning the Montana Supreme Court's ruling on general jurisdiction), the court noted that "the 'paradigm' forums in which a corporate defendant is 'at home,' are the corporation's place of incorporation and its principal place of business." *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017) (internal citations omitted). Philadelphia is organized under the laws of Pennsylvania, with its principal place of business located in Philadelphia. Philadelphia is not alleged to have any offices in Montana. Philadelphia is not physically present in Montana. There is no general personal jurisdiction over Philadelphia pursuant to the physical presence consideration.

However, Philadelphia may be subject to the general jurisdiction of Montana if its contacts with Montana are so pervasive that it may be deemed to be physically present here. "The standard for general jurisdiction is high . . . . [A] defendant must not only

step through the door, it must also '[sit] down and [make] itself at home.'" *King v. Am. Family Mut. Ins. Co.*, 632 F.3d 570, 579 (9th Cir. 2011) (additional citations omitted). The standard is met only by "continuous corporate operations within a state [that are] thought so substantial and of such a nature as to justify suit against [the defendant] on causes of action arising from dealings entirely distinct from those activities." *Id* (additional citations omitted).

In *Ford*, the court held that "Ford is undisputedly not subject to general personal jurisdiction in Montana." *Ford*, ¶ 8 (citing the reasoning in *Tyrrell* that the in-state business conducted does not suffice to permit the assertion of general jurisdiction over claims that are unrelated to any activity occurring in Montana). The court in *Ford* provided no analysis with that holding but did describe Ford's connections with Montana in its discussion of specific personal jurisdiction as follows. The court noted that Ford advertised in Montana, was registered to do business in Montana, operated subsidiary companies in Montana, had thirty-six dealerships in Montana, had employees in Montana, sold automobiles and parts in Montana, and provided automotive services in Montana. With this list of Ford's connections with Montana, the Court found no general personal jurisdiction; Ford was not at home in Montana.

Philadelphia is authorized by the Commissioner to transact business in Montana including advertising, offering and selling insurance in Montana. Philadelphia sells policies of insurance for risks and persons located in the State of Montana. However, Philadelphia is not alleged to advertise in Montana (although it is authorized to do so), is not alleged to operate subsidiary companies in Montana, is not

alleged to have offices or employees in Montana. In short, the extent of the alleged connections that Philadelphia has with Montana does not equate to those identified above in *Ford* where the court declined to hold that Montana had general jurisdiction over Ford.

Philadelphia is not "found within" the state for the purposes of determining general personal jurisdiction. Philadelphia is not physically present in the state and Philadelphia's contacts with the state are not so pervasive that it may be deemed to be physically present here. Montana does not have general personal jurisdiction over Philadelphia.

2. Specific Jurisdiction.

The rest of Rule 4(b)(1) addresses the concept of specific jurisdiction.

> Under this theory, jurisdiction may be established even though a defendant maintains minimum contacts with the forum as long as the plaintiff's cause of action arises from any of the activities enumerated in Rule 4(b)(1), M.R.Civ.P. and the exercise of jurisdiction does not offend due process.

Simmons, 244 Mont. at 83-84, 796 P.2d at 194.

"Specific jurisdiction focuses on the 'relationship among the defendant, the forum, and the litigation,' and depends on whether the defendant's 'suit-related conduct' created a substantial connection with the forum state." *Tackett v. Duncan*, 2014 MT 253, ¶ 19, 376 Mont. 348, 353, 334 P.3d 920, 925 (internal citations omitted).

a. Specific jurisdiction pursuant to Rule 4(b)(1).

The first part of the test to determine specific jurisdiction is to apply Montana's long-arm statute.

> Any person is subject to the jurisdiction of Montana courts as to any claim for relief arising from the doing personally, or through an employee or agent, of any of the following acts:
>
> (A) the transaction of any business within Montana;
>
> . . .
>
> (D) contracting to insure any person, property, or risk located within Montana at the time of contracting;
>
> . . .

Mont. R. Civ. P. 4(b)(1).

In this case, Gateway has alleged specific jurisdiction exists over Philadelphia under subsection (A) and (D) of the rule.

i. Transaction of business within Montana.

"The 'transacting business' provision of the long-arm statute requires far fewer contacts with the forum state than are necessary to support general jurisdiction on the theory that the defendant is 'doing business' in the forum state." *Milky Whey, Inc. v. Dairy Partners, Ltd. Liab. Co.*, 2015 MT 18, ¶ 25, 378 Mont. 75, 83, 342 P.3d 13, 18.

The Commissioner has authorized Philadelphia to transact business in Montana, including without

limitation, advertising, offering and selling insurance in Montana. Philadelphia has been authorized in Montana to transact the business of surety, marine, property, casualty insurance since December 14, 1992 and is currently authorized to transact business in Montana. (Doc. 10, p. 6). Philadelphia sells policies of insurance for risks and persons located in the State of Montana. Philadelphia authorized the Commissioner as its agent for service of legal process in Montana.

While Philadelphia meets the minimum threshold of transacting business in Montana, application of Rule 4(b)(1)(A) requires that the claim for relief arise from the transaction of business in Montana. The transaction here is the procurement of the Policy. Plaintiffs' claim for relief is based upon the assertions that Gateway and HGI Entities are insureds under the Policy and that Philadelphia failed to defend and indemnify them in the Walter Class Action which was filed and settled in Missoula County. Philadelphia disputes that HGI Entities are insureds under the Policy. Gateway procured the Policy on behalf of Plaintiffs as a part of its responsibilities enumerated in its contract with Plaintiffs to manage Plaintiffs' hotels. The HGI Entities and their Montana locations were identified in the Application. Gateway applied for and Philadelphia issued the Policy.

Plaintiffs have made a prima facie showing of jurisdictional facts that, when construing the allegations in a light most favorable to them, the claim for relief arises from Philadelphia's transaction of business in Montana.

ii. Contracting to insure any person, property, or risk located within Montana at the time of contracting.

This sub-section of the long-arm statute does not require that the contract be entered into in Montana. Nor does the sub-section require that Philadelphia owed Plaintiffs a duty.

> Rule 4(b)(1)(D), M.R.Civ.P., does not require that a plaintiff establish the substantive elements of a contract or a duty of care before a court may exercise personal jurisdiction over a particular party. To assert personal jurisdiction over a prospective party, Rule 4(b)(1)(D), M.R.Civ.P., simply requires that the claim for relief arise out of the contracting to insure any person, property, or risk located within Montana at the time of contracting.

Seal, ¶ 23.

The court in *Seal* went on to define "arising from" in the context of sub- section (D) of the long-arm statute. "'Arising from' has been defined as a direct affiliation, nexus, or substantial connection between the basis for the cause of action and the act which falls within the long-arm statute." *Id*.

The act which falls within sub-section (D) of the long-arm statute, relevant to this case, is contracting to insure a risk located within Montana at the time the Policy was issued. **Gateway procured the Policy on behalf of Plaintiffs as a part of its responsibilities enumerated in its contract with Plaintiffs to manage Plaintiffs' hotels located in Montana**. At the time of contracting, on the Application, Gateway was identified as providing

hotel management services to businesses including and specifically identifying HGI Entities and their Montana locations. The Application is part of the Policy. The parties do not dispute that Gateway was an insured and Philadelphia the insurer under the Policy. While the parties dispute whether HGI Entities were Gateway's subsidiaries and whether HGI Entities were insureds, the Court need not determine those issues to determine if Philadelphia insured a risk in Montana. By insuring Gateway's hotel management services it provided to businesses (including those located in Montana), Philadelphia insured a risk in Montana.

Plaintiffs' claim for relief, the basis for the cause of action, is that Philadelphia failed to defend and indemnify them in the Walter Class Action in Missoula County, Montana brought by employees of HGI Entities. It is for that suit that Plaintiffs allege that Philadelphia failed to defend and indemnify them. Plaintiffs' claim for relief here arises from, it has a direct affiliation, nexus, or substantial connection to, Philadelphia insuring the risk located within Montana at the time the Policy was issued.

Plaintiffs have made a prima facie showing of jurisdictional facts that under the Policy Philadelphia is an insurer of risk associated with Gateway's hotel management services including those for HGI Entities located in Montana. At the time the Policy was issued Philadelphia contracted to insure risk located in Montana.

Under Montana's long-arm statute, Philadelphia is subject to specific jurisdiction in Montana for Plaintiffs' claim for relief that arises from (A) the transaction of any business within Montana; and (D)

contracting to insure risk located within Montana at the time of contracting. However, the Court must also determine whether specific jurisdiction over Philadelphia offends due process.

b. Specific jurisdiction pursuant to due process.

Because the Court has determined that Plaintiffs' cause of action arises from activities in Montana's long-arm statute, jurisdiction may be established even though Philadelphia may maintain minimum contacts with Montana as long as the exercise of jurisdiction does not offend due process. See *Simmons*, supra. "A defendant must have 'certain minimum contacts [with Montana] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Ford*, ¶ 12 (internal citations omitted).

The Montana Supreme Court has applied the Ninth Circuit Court of Appeal's three-part test for determining whether the exercise of jurisdiction comports with due process:

> (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privileges of conducting activities in the forum, thereby invoking the laws;
>
> (2) The claim must be one which arises out of or results from the defendant's forum-related activities; and
>
> (3) The exercise of jurisdiction must be reasonable.

Nasca v. Hull, 2004 MT 306, ¶ 26, 323 Mont. 484, 493, 100 P.3d 997, 1004

i. Purposefully avail.

"A nonresident defendant purposefully avails itself of the benefits and protections of the laws of the forum state when it takes voluntary action designed to have an effect in the forum." *Simmons*, 244 Mont. at 86, 796 P.2d at 195. The court in *Simmons* further held that,

> Conversely, a defendant does not purposefully avail itself of the forum's laws when its only contacts with the forum are random, fortuitous, or attenuated or due to the unilateral activity of a third party. The defendant that invokes the laws of the forum state by purposefully availing itself of the privilege of conducting activities within the forum should reasonably anticipate being haled into court in the forum state. Therefore, the exercise of jurisdiction over such a defendant is fundamentally fair.

Simmons Oil Corp. v. Holly Corp., 244 Mont. 75, 86, 796 P.2d 189, 195 (1990) (internal citation omitted).

It is under this first prong that product liability cases discuss the stream of commerce theory and foreseeability. The court in *Ford*, applied the more stringent "stream of commerce plus" theory in the case holding that "a defendant must do more than place a product into the stream of commerce in order to purposefully avail itself of the privilege of conducting activities in Montana." *Ford*, ¶ 16 (citing *Bunch v. Lancair Int'l, Inc.*, 2009 MT 29, ¶¶ 24, 28, 30, 55, 349 Mont. 144, 202 P.3d 784 (quoting) *Asahi Metal Indus. Co. v. Superior Court of Cal., Solano*

Cty., 480 U.S. 102, 112, 107 S. Ct. 1026, 1032 (1987)). "'Foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *Farmers*, 907 F.2d at 914 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980)).

The *Farmers* court addressed foreseeability in the context of a non-product liability case noting that,

> Unlike the automobile sellers in *World-Wide Volkswagen*, automobile liability insurers contract to indemnify and defend the insured for claims that will foreseeably result in litigation in foreign states. Thus litigation requiring the presence of the insurer is not only foreseeable, but it was purposefully contracted for by the insurer. Moreover, unlike a product seller or distributor, an insurer has the contractual ability to control the territory into which its "product" – the indemnification and defense of claims – will travel.

Id (internal citation omitted). In *Farmers*, the court held that Portage failed to rebut the prima facie showing that it had voluntarily injected itself into the Montana forum.

In *Carter v. Miss. Farm Bureau Cas. Ins. Co.*, 2005 MT 74, 326 Mont. 350, 109 P.3d 735, the court addressed the first prong analysis in a defense and indemnity case. In *Carter*, the driver/insured sought a declaratory judgment against the Mississippi insurer (MFBCIC) and sought interpretation of the insurance contract. The court held that,

> While MFBCIC could reasonably anticipate that its insured could suffer an injury within

> its fifty-state coverage area, thus triggering its duty to defend and indemnify, the foreseeability of that injury—without more—is not sufficient to subject the insurer, MFBCIC, to specific personal jurisdiction within Montana's courts.

Carter, ¶ 23. While the court in *Carter* declined to apply the *Farmers* holding, they declined to do so because,

> In [Farmers], Portage arguably had an obligation to appear and defend the driver who had been sued in Montana as a result of an accident, while here, MFBCIC had no similar obligation to appear and defend because neither its insured or an omnibus insured was sued in this state. It is the defendant's forum- related conduct that is at issue, and here, there simply is none on the part of MFBCIC.

Carter, ¶ 25. The court in *Carter* further distinguished *Farmers*, by noting that in *Farmers*,

> [t]he insurer is obligated by the terms of its policy to appear for and defend its insured, wherever an accident and resulting lawsuit occurs. *Farmers*, 907 F.2d at 913. Personal jurisdiction in such cases never becomes a question, as the insured's involvement in an accident in the foreign state is sufficient to confer jurisdiction upon him, and his contract of insurance follows him. *Farmers*, 907 F.2d at 914 (citing *Eli Lilly and Co. v. Home Ins. Co.* (D.C.Cir. 1986), 254 U.S. App. D.C. 1, 794 F.2d 710, 721, cert. denied, 479

> U.S. 1060, 107 S. Ct. 940, 93 L. Ed. 2d 991 (1987)).

Carter, ¶ 27.

Plaintiffs assert that Philadelphia purposefully availed itself of the laws of Montana by issuing the Policy which has a coverage territory that extends "to any wrongful act committed anywhere in the world," and therefore it was foreseeable that Philadelphia would be haled to Court Montana. Pursuant to the general rule set forth in *Ford*, *Asahi*, and *Carter*, this provision of the Policy in and of itself is not enough to establish that Philadelphia purposefully availed itself of the laws of Montana. However, the Policy includes more than a broad coverage territory. The parties do not dispute that the Policy insures Gateway's hotel management services. The businesses and their locations that Gateway provides services for are specifically identified in the Policy and include the HGI Entities in Montana. Philadelphia should reasonably anticipate being haled into court in Montana and in any of the states where Gateway provides services to businesses identified in the Policy.

Furthermore, Philadelphia's contacts with Montana are not the result of a unilateral act on the part of Gateway or HGI Entities. Philadelphia voluntarily entered into the Policy in which Gateway's hotel management services were identified and HGI Entities and their locations were identified as subsidiaries and/or where Gateway would conduct those services.

Construing Plaintiffs' allegations in a light most favorable to them, they have made a prima facie showing of jurisdictional facts to establish that

Philadelphia purposefully availed itself of the privileges of conducting activities in Montana, thereby invoking the laws of Montana.

ii. Arising from.

Due process requires a connection between a defendant's in-state actions and a plaintiff's claim: "the suit must arise out of or relate to the defendant's contacts with the forum." *Ford*, ¶ 18 (citing *Bristol-Myers*, 582 U.S. at ___, 137 S. Ct. at 1780 (internal quotations and alterations omitted)). "To ascertain whether a cause of action arises out of a defendant's forum-related activity, we … review the entire chain of events leading up to the final act resulting in the claim." *Nasca*, ¶ 31. The court in *Farmers* held that,

> An action arises out of contacts with the forum if, "but for" those contacts, the cause would not have arisen. *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990). But for Portage's alleged breach of promise to defend its insured for injuries caused in Montana, this suit would not have arisen. The second prong is satisfied.

Farmers, 907 F.2d at 914-15.

Like in *Farmers*, but for Philadelphia's alleged breach of promise to defend Plaintiffs in the Walter Class Action (brought in Montana, by Montana employees), this Amended Complaint would not have arisen. Construing the Plaintiffs' allegations in a light most favorable to them, Plaintiffs have pled sufficient facts to establish that the claim for relief arises out of or results from Philadelphia's contacts with Montana.

iii. Reasonable.

"Once the plaintiff shows that the defendant has purposefully availed itself of the privilege of conducting activities in the forum, a presumption of reasonableness arises, which the defendant can overcome only by 'presenting a compelling case that jurisdiction would be unreasonable.'" *Simmons*, 244 Mont. at 85, 796 P.2d at 195.

The factors to be considered when examining the reasonableness of jurisdiction are:

1. The extent of defendant's purposeful interjection into Montana;
2. The burden on defendant of defending in Montana;
3. The extent of the conflict with the sovereignty of defendant's state;
4. Montana's interest in adjudicating the dispute;
5. The most efficient resolution of the controversy;
5. The importance of Montana to plaintiff's interest in convenient and effective relief; and
7. The existence of an alternative forum.

Simmons, 244 Mont. at 87-88, 796 P.2d at 196-97.

"The above factors are not mandatory tests, each of which the plaintiff must pass in order for the court to assume jurisdiction. Rather, the factors simply illustrate the concept of fundamental fairness, which must be considered in each jurisdictional analysis." *Id*.

Philadelphia entered into a Policy where insuring risk in Montana was identified on the Application.

The defense and settlement of a claim in Montana was foreseeable. Philadelphia has not asserted a conflict with the sovereignty of the state of Pennsylvania. While there may be a burden on Philadelphia of defending in Montana, Philadelphia has not presented a compelling case that such burden would be greater than defending in Ohio. Philadelphia and Ohio present alternate forums, but HGI Entities would have to avail themselves of personal jurisdiction in either forum. The parties in this matter are comprised of: HGI Entities – 4 separate Montana businesses, Gateway an Ohio company and Philadelphia, a Pennsylvania company. Philadelphia has not presented a compelling case that Montana would be a less efficient forum.

In fact, given Philadelphia's particular reasons for denial of coverage set forth in the Denial Letter to Gateway (Doc. 14, p. 8-16), Montana may provide the most efficient forum for resolution of the Amended Complaint. The Denial Letter lists Gateway and the HGI Entities as insureds. (Doc. 14, p. 8). Whether or not the HGI Entities are ultimately determined to be insureds under the Policy, the Denial Letter and reasoning therein applies to Gateway and HGI Entities as the insureds. Philadelphia concludes that coverage is not available for the Walter Class Action under the Policy (Doc 14, p. 16) in part because of the actions of the Insureds. Therefore, many of the witnesses to refute/attest to the underlying reasons for the denial of coverage, as described in Denial Letter, are in Montana.

The matter was settled in Montana and the order granting final approval of the settlement agreement was entered in the Fourth Judicial District Court, Montana. Montana has an interest in adjudicating

the dispute because Plaintiffs HGI Entities are Montana companies. Furthermore, as a matter of public policy, Montana has an interest in adjudicating a complaint for declaratory judgment when the underlying suit is brought in Montana and an insurer concludes that coverage is not available and does not defend the insured in that underlying Montana action.

Philadelphia has not presented a compelling case that jurisdiction would be unreasonable. Philadelphia purposefully availed itself of the benefits and protections of Montana laws by transacting business in the state and therefore availed itself to Montana jurisdiction. Plaintiffs' claims arose from Philadelphia's forum-related activity, and the exercise of jurisdiction over Philadelphia is reasonable and comports with due process. Philadelphia's motion to dismiss for lack of personal jurisdiction is denied.

C. HGI Entities' Standing/Application of the Uniform Declaratory Judgement Act, Title 27, Chapter 8, et. seq.

"Standing refers to the threshold justiciability requirement that a plaintiff have a personal stake in a particular case. If a plaintiff lacks standing, a court can grant no relief because a justiciable controversy does not exist." *Ballas*, ¶ 14 (internal citations omitted). Philadelphia asserts that the HGI Entities do not have standing to seek relief under the Amended Complaint because they are not subsidiaries of Gateway and therefore are not insureds under the Policy.

Because Plaintiffs have filed an Amended Complaint seeking a declaratory judgment from the

Court pursuant to Title 27, Chapter 8, et. seq., seeking a declaration of their rights under the Policy, the Court must consider the requirements of the Uniform Declaratory Judgment Act in conjunction with Philadelphia's claims that HGI Entities lack standing. The statute regarding necessary parties for declaratory relief states in part that,

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

Mont. Code Ann. § 27-8-301.

The HGI Entities have an interest in the relief requested in the Amended Complaint. They were parties to the Walter Class Action, the settlement, and subsequent order adopting settlement. The Court declines to determine whether the HGI Entities are subsidiaries and/or insureds under the Policy in order to determine their standing as Plaintiffs to the Amended Complaint. The Court considers Mont. Code Ann. § 27-8-301 and concludes that the HGI Entities are necessary parties to the Amended Complaint for declaratory relief under the statute.

D. Change of Venue/Forum Non Conveniens.

Philadelphia has asserted that the language in the Binding Arbitration endorsement serves as the forum selection clause for the Policy, that Ohio is the proper forum. That endorsement states, "Unless both parties agree otherwise, arbitration will take place in the county in which the address shown in the Declarations is located. Local rules of law as to

procedure and evidence will apply." This language specifically references arbitration. Given that neither party made a demand for arbitration, this particular provision was not triggered. The Court does not find Philadelphia's assertion that this provision is the forum selection clause for the Policy persuasive.

Philadelphia has asserted that in the alternative, Plaintiffs' Amended Complaint should be dismissed based on forum non conveniens. Montana has a change of venue statute that addresses this theory. "Section 25-2-201(3), MCA, which governs motions to change venue within Montana on the ground of convenience of witnesses and the ends of justice, reflects the principles of forum non conveniens." *Harrington v. Energy W., Inc.*, 2017 MT 141, ¶ 11, 387 Mont. 497, 500-01, 396 P.3d 114, 117 (*Harrington II*). "The court or judge must, on motion, change the place of trial . . . when the convenience of witnesses and the ends of justice would be promoted by the change." Mont. Code Ann. § 25-2- 201(3). A district court is granted "wide discretion" in determining whether the convenience of witnesses and the ends of justice would be promoted by a change in venue. *Harrington II*, ¶ 27.

The Montana Supreme Court has interpreted the Montana Constitution "as expressing an 'open court policy' in its instruction that '[c]ourts of justice shall be open to every person, and speedy remedy afforded for every injury to person, property, or character.'" *Harrington*, ¶ 27. The court in *Harrington* further noted that,

> This policy comports with the Restatement (Second) Conflict of Laws instruction that the two most important factors in a forum

> non conveniens analysis are (1) that since it is for the plaintiff to choose the place of suit, his choice of a forum should not be disturbed except for weighty reasons, and (2) that the action will not be dismissed unless a suitable alternative forum is available to the plaintiff. Restatement (Second) Conflict of Laws § 84 cmt. c.

Id.

By filing the Amended Complaint, Plaintiffs have availed themselves of the Court and chosen the place of suit. Plaintiffs defended the underlying action, the Walter Class Action, in Missoula County. The alleged obligation for Philadelphia to defend Plaintiffs in the Walter Class Action would have taken place in Missoula County. The Walter Class Action settlement was approved and judgment entered against Plaintiffs in Missoula County. The HGI Entities Plaintiffs are Montana businesses and HGI Missoula is located in Missoula County. For the reasons set forth above in the discussion regarding the reasonableness factor of due process considerations for personal jurisdiction, a suitable alternative forum has not been shown to be available to the Plaintiffs. Plaintiffs have alleged sufficient jurisdictional facts, that if true, show that venue in Missoula County is proper.

E. Motion based on Rule 12(b)(6).

In the Amended Complaint, Plaintiffs seek a declaratory judgment that the Policy: is ambiguous, lacks notice of provisions potentially defeating coverage and violates the reasonable expectations of the Plaintiffs. Plaintiffs also assert breach of contract, that Philadelphia had a duty to defend and

indemnify Plaintiffs in the Walter Class Action and that they did not do so.

Most of Philadelphia's legal arguments in the Motion and reply brief present analysis of the Motion based on Mont. R. Civ. P. Rule 12(b)(1), (2), and (3). Philadelphia generally asserts that the Amended Complaint should be dismissed based on Rule 12(b)(6) in that Plaintiffs have failed to state a claim for which relief can be granted, but do not provide specific legal arguments in support. Philadelphia does specifically assert that HGI Entities are not insureds under the Policy and therefore the Amended Complaint should be dismissed as to the HGI Plaintiffs.

"Insurance agreements are contracts that are subject to the general rules of contract law." *State Farm Mut. Auto. Ins. Co. v. Freyer*, 2013 MT 301, ¶ 27, 372 Mont. 191, 199, 312 P.3d 403, 411.

> Under contract law, "a breach of contract is a failure, without legal excuse, to perform any promise that forms the whole or part of a contract." Richard A. Lord, *Williston on Contracts* vol. 23, § 63:1 at 434 (4th ed., West Group 2002). Hence, the contractual duty to indemnify is breached when an "insurer has wrongfully refused to provide coverage to an insured."

Id (additional citations omitted). "The narrower duty to indemnify typically involves complicated interpretational questions that often require legal opinions and separate declaratory actions to determine." *State Farm*, ¶ 37.

"The broader duty to defend requires an insurer to act immediately to defend the insured from a claim.

The insurer must do so on the basis of mere allegations that could implicate coverage, if proven." *Id*. "[A] duty to defend is triggered where one portion of the complaint alleges facts which, if proven, would result in coverage, even if the remaining counts of the complaint would not be covered." *Newman v. Scottsdale Ins. Co.*, 2013 MT 125, ¶ 40, 370 Mont. 133, 144- 45, 301 P.3d 348, 356

"Courts give the terms and words used in an insurance contract their usual meaning and construe them using common sense." *Travelers Cas. & Sur. Co. v. Ribi Immunochem Research*, 2005 MT 50, ¶ 17, 326 Mont. 174, 180, 108 P.3d 469, 474. "Any ambiguity in an insurance policy must be construed in favor of the insured and in favor of extending coverage." *Id*. "Exclusions must be narrowly and strictly construed because they 'are contrary to the fundamental protective purpose of an insurance policy.' Moreover, because exclusions are contrary to the fundamental purpose of the policy, such exclusions are frequently subject to challenge for ambiguity or inconsistency." *Newman*, ¶ 35 (internal citation omitted).

Whether or not HGI Entities were insureds under the Policy at the time of contracting is in dispute. Plaintiffs asserted that HGI Entities were insureds at the time of contracting. The businesses for which Gateway provided hotel management services are included on the Application as are the locations and percent ownership and the HGI Entities Plaintiffs were among those businesses. The Denial Letter states that Gateway and the HGI Entities were insureds under the Policy. Although Philadelphia argues that the declaration in the Denial Letter that the Plaintiffs are insureds conflicts with the

definition of "insured" and "subsidiary" in the Policy, that letter declaration is demonstrative of the parties' impressions of who the insureds were at the time of contracting and/or at the time Plaintiffs submitted the claim and further indicative of the factual dispute on this issue. Neither the Plaintiffs nor Philadelphia have provided information that the premiums paid were commensurate with coverage for each of the HGI Entities Plaintiffs as insureds.

The Denial Letter describes Philadelphia's reasons for denying coverage because, in part, the complaint in the Walter Class Action does not allege a wrongful act as defined in the Policy, does not arise out of the insureds' profession as defined in the Hotel Manager Pro Pak Advantage Endorsement, and/or falls under one of the exclusions of the Policy.

The Denial Letter states that the claim falls under the employment practices exclusion. The Denial Letter states that the Walter Class Action complaint alleges Gateway implemented a new policy in which the server employees were not compensated their rightful portion of the gratuity charge. Philadelphia concluded that,

> Because the Walter Class Action arises solely out of the insureds' employment policies and compensation of their employees, Philadelphia is constrained to conclude that the Walter Class Action arises out of the insured's employment practices such as to be precluded from coverage by operation of Exclusion K.

(Doc. 8, p.12). Employment policy and employment practice are not defined in the Policy.

Among the other potentially applicable limitations and exclusions explained in the Denial Letter was the fraud/unfair advantage exclusion.

> Section III.A. of the Policy provides that the Policy does not apply to any Claim or Claim Expenses: A. Arising out of . . . any dishonest, fraudulent, criminal or malicious act, error or omission . . . or gaining of any profit or advantage to which you are not legally entitled; however, we will defend suits alleging the foregoing until there is a judgment . . .

(Doc. 8, p. 13). This particular exclusion specifically states that Philadelphia will defend suits alleging those acts until there is a judgment.

Construing the Amended Complaint in a light most favorable to the Plaintiffs, the Plaintiffs have stated sufficient facts that, if true, would entitle them to relief under the claims therein. Philadelphia's Motion based on Rule 12(b)(6) is denied.

V. Conclusion.

In considering the jurisdictional facts presented in the record, Plaintiffs have made a prima facie showing of jurisdictional facts and for the reasons set forth in this opinion Philadelphia's motion to dismiss based on Mont. R. Civ. P. Rule 12(b)(1), (2), and (3) is denied. HGI Entities are necessary parties under Mont. Code Ann. § 27-8-301 to the Amended Complaint requesting declaratory relief and the Court therefore denies Philadelphia's motion to dismiss the HGI Entities Plaintiffs for lack of standing. In considering the Rule 12(b)(6) Motion in a light most favorable to the Plaintiffs, Plaintiffs'

claims have been adequately stated in the Amended Complaint and Philadelphia's Rule 12(b)(6) Motion is denied.

DATED: August 19, 2019.

ELECTRONICALLY SIGNED BELOW
Shane A. Vannatta, District Court Judge

cc: Dale R. Cockrell, Esq., Jay T. Johnson, Esq.
Jory C. Ruggiero, Esq., Domenic A. Cossi, Esq.
Thomas A. Marra, Esq.

Electronically Signed By:
Hon. Judge Shane A. Vannatta
Mon, Aug 19 2019 01:36:04 PM

Appendix C

MONTANA FOURTH JUDICIAL
DISTRICT COURT, MISSOULA COUNTY

Exhibit 6

Policy Arbitration Forum Selection Clause

PI-ARB-1 (4/03)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BINDING ARBITRATION

Wherever, used in this endorsement: 1) "we", "us", "our", and "insurer" mean the insurance company which issued this policy; and 2) "you", "your", "named insured", "first named insured", and "insured" mean lhe Named Corporation, the Named Organization, Named Sponsor, Named Insured, or Insured stated in lhe declarations page; and 3) "other insured(s)" means all other persons or entities afforded coverage under this policy.

This endorsement modifies coverage provided under the Coverage Part to which it is attached

If we and the insured do not agree whether coverage is provided under this Coverage Part for a claim made against the insured, then either party may make a written demand for arbitration.

When this demand is made, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction. Each party will:

1. Pay the expenses it incurs; and
2. Bear the expenses of the third arbitrator equally.

Unless both parties agree otherwise, arbitration will take place in the county in which the address shown in the Declarations is located. Local rules of law as to procedure and evidence will apply. A decision agreed to by two of the arbitrators will be binding.

All other terms of the policy remain unchanged.

[LOGO]

PHILADELPHIA INSURANCE COMPANIES
A Member of the Tokio Marine Group

One Bala Plaza, Suite 100
Bala Cynwyd, Pennsylvania 19004
610.617.7900 Fax 610.617.7940
PHLY.com

Philadelphia Indemnity Insurance Company

COMMON POLICY DECLARATIONS

Policy Number: PHSD965996

Named Insured and Mailing Address:
Gateway Hospitality Group, Inc.
8921 Canyon Falls Blvd Ste 140
Twinsburg, OH 44087-3900

Producer: 17833
United Agencies Inc.
1422 Euclid Avenue
Suite 900
Cleveland, OH 44115

Policy Period From: 08/16/2014 To: 08/16/2015 at 12.01 AM Standard Time to your mailing address shown above

Business Description: Hotel Manager

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 Property Coverage Part	
Commercial General Liability Coverage Part	
Commercial Crime Coverage Part	
Commercial Inland Marine Coverage Part	
Commercial Auto Coverage Part	
Businessowners	
Workers Compensation	
Miscellaneous Professional	22,424.00
Total	**$22,424.00**

FORM(S) AND ENDORSEMENT(S) MADE A PART OF THIS POLICY AT THE TIME OF ISSUE
Refer To Forms Schedule

*Omits applicable Forms and Endorsements if shown in specific Coverage Part/Coverage Form Declarations

CPD-PIIC (01/07) [Signature]

Countersignature Date Authorized Representative

Appendix D

MONTANA FOURTH JUDICIAL
DISTRICT COURT, MISSOULA COUNTY

Philadelphia Indemnity Insurance Company Policy

[LETTERHEAD LOGO]

Philadelphia Insurance Companies

A Member of the Tokio Marine Group

One Bala Plaza, Suite 100,
Bala Cynwyd, Pennsylvania 19004
610.617.7900 • Fax 610.617.7940 • PHLY.com

08/07/2014

Gateway Hospitality Group, Inc.
8921 Canyon Falls Blvd Ste 140
Twinsburg, OH 44087-3900

Re: PHSD965996

Dear Valued Customer:

Thank you very much for choosing Philadelphia Indemnity Insurance Company for your insurance

needs. Our first class customer service, national presence and A++ (Superior) A.M. Best financial strength rating have made us the selection by over 150,000 policyholders nationwide. I realize you have a choice in insurance companies and truly appreciate your business.

I wish you much success this year and look forward to building a mutually beneficial business partnership which will prosper for years to come. Welcome to PHLY and please visit PHLY.com to learn more about our Company!

Sincerely,

/s/ Robert D. O'Leary Jr.
Robert D. O'Leary Jr.
President & CEO
Philadelphia Insurance Companies

RDO/sm

Enroll Today!

- Receive Invoices Electronically
- Pay Your Bills Online
- Set Up Recurring Payments
- Available 24/7
- Safe and Secure
- NO FEE!
- Environmentally Friendly

Pay Your Bill Online
To pay your bills online you will need a User ID and Password to access our website. If you don't have a User ID please create one by visiting **https://www.PHLY.com/myphly/newuser.aspx.**

If you have a User ID, please login and click on "Online Bill Pay" and enter the necessary information to pay your bills.
Philadelphia Insurance Companies accepts electronic checks (a debit from your checking or savings account) as a method of payment. Please allow 2 to 3 business days for your payment to post to your account. This service is offered free of charge. Please note that credit card payments cannot be made online.

Recurring Payment
Customers that receive their bill directly (and not from their agent) can sign up for recurring payment via automatic withdrawals from a checking, savings, or money market account for direct bill policies.

If you do not already have an account on **PHLY.com** you will need to create one by visiting **https://www.PHLY.com/myphly/newuser.aspx**. Once logged in please refer to "*Links for You*" and

click the "*Recurring Payment Instructions*" to learn how to enroll. You can also click the "O*nline Bill Pay*" tab on the left hand side to enroll in Recurring Payment.

How to Create an Account on PHLY.com

1. Go to **https://www.PHLY.com/myphly/newuser.aspx**
2. Select the applicable BUTTON (insured or producer).
3. Complete the information on the page:
   - You will CREATE your own USER NAME and PASSWORD.
   - The password must be at least 7 characters and contain one number, one lower case letter, and one capital letter.
4. Click CONTINUE when done.
5. On the next page, complete the PASSWORD RESET QUESTION. If you ever forget your password, we will ask you this security question and you will enter the answer you have selected.
6. Once you have received the page that states: "CONTINUE TO MY PHLY," then you have successfully created the account.

[IMAGE]

[LOGO]

Focus on the Things that Matter, We'll Handle the Risk!©

[LOGO]

Making Things Easier for You!

PHLY CUSTOMER SERVICE

Did you know...

- PHLY has a dedicated National Processing Center to efficiently and effectively process endorsements
- The Loss Assistance Hotline provides **Management & Professional Liability** policyholders with 2 FREE HOURS of legal consultation with knowledgeable attorneys on ony matter that could potentially result in a claim under a PHLY policy
- You can review billing and payment history online
  For example: Payment verifications go to MyPHLY on PHLY.com
- You can pull up and print your invoices and policy documents online
- You can update your profile online
  For example: Billing address changes and contact information
- We offer live help within seconds: No complicated phone systems
- 97.3% of our policyholders would refer us to prospective customers*
- 48 hour turnaround time on small business quotes and policy issuance in less than 10 days

---

* All statistics contained herein were generated via an internal company survey of active policy holders

- We provide interest free installments for accounts that generate at least $2,000 in premium

Frequently Asked Questions

How can I get information about my insurance?

There are 5 different ways to contact Customer Service

- Customer Service 877.438.7459
- Customer Service Fax 866.847.4046
- Customer Service Email: custserv@phlyins.com
- Customer Service Online chat
- PHLY.com – "Contact Us"

When can I contact Customer Service?

Customer Service is available Monday – Friday from 8:30 a.m. – 8:00 p.m. EST

What forms of payment does PHLY accept?

PHLY accepts 3 forms of payment:

- Checks sent to the lock box
- Check by phone payments through our IVR (877.438.7459–Option 1), web site, or contact center representatives
- Credit card payments through our live contact center representatives (Visa, MasterCard and American Express)

Claims

- Average policyholder first party automobile losses settled in 10 days or less
- Same or next business day acknowledgements of newly reported and opened claims
- Claims representation nationally, with Commercial Liability Claims Examiner Niche expertise

- 24/7 Claims Service. Staff efficiencies with paperless and industry leading systems
- Staff of Subrogation and Recovery Examiners exclusively dedicated to recovery efforts for policyholder paid losses
- Experienced, consistent staff and department structure

Risk Management Services

- Product specific web-based Risk Management Services solutions through PHLY.com
- Free online interactive Defensive Driver Training course and examination
- Regular e-flyer communications on current Risk Management Services issues and Large Loss Lessons Learned
- Strategic partnership with best in class vendor for discounted background & motor vehicle record (MVR) checks

Automatically included on most accounts

PHLY Bell endorsement – Includes $50,000 limits each for Business Travel Accident Benefit, Donation Assurance, Emergency Real Estate Consulting Fee, Identity Theft Expense, Image Restoration and Counseling, Key Individual Replacement Expenses, Kidnap Expense, Terrorism Travel Reimbursement, Workplace Violence Counseling. $25,000 limits for each Conference Cancellation, Fundraising Event Blackout, Political Unrest ($5,000 per employee), Temporary Meeting Space Reimbursement and $1,500 Travel Delay Reimbursement.

Honors, Awards and Ratings

- Nationally recognized as a member of Ward's Top 50 Benchmark group of

Property/Casualty Insurance companies for outstanding achievement in the areas of financial strength, claims performance and consistently favorable underwriting results

- Forbes Magazine has recognized Philadelphia Insurance Companies as one of the 400 Best Big Companies in America
- A++ (Superior) rated by A.M. Best Company
- A+ rated by Standard & Poor's for counterparty credit and financial strength
- Business Insurance's Best Places to Work in Insurance program identifies and recognizes Philadelphia Insurance Companies as a high-quality workplaces in the commercial insurance industry

A Passion for Service!

[LOGOS]

[LOGO]

Bell Endorsement & Crisis Management

PHLY HAS INCREASED LIMITS...

PHLY has increased limits on Bell Endorsement and created a Crisis Management Endorsement that will be attached to our policies.

Bell Endorsement

$50,000 Identity Theft Expense – coverage which reimburses the expenses of any director or officer who becomes a victim of an incident of identity theft.

$50,000 Terrorism Travel Reimbursement – which covers any director or officer for emergency travel expenses that he or she incurs in the event of a "certified act of terrorism".

$50,000 Emergency Real Estate Consulting Fee – coverage for realtor's fee or real estate consultant's fee necessitated by the Insured's need to relocate due to the "Unforeseeable destruction" of the Insured's principal location.

$25,000 Temporary Meeting Space Reimbursement – coverage for rental of meeting space which is necessitated by the temporary unavailability of the Insured's primary office space due to the failure of a climate control system, or leakage of a hot water heater.

$50,000 Workplace Violence Counseling – in the event that a violent incident occurs on any of the Insured's premises.

$50,000 Kidnap Expense – coverage for reasonable fees incurred as a result of the kidnapping of a Director or Officer or their spouse, "domestic partner", parent or child.

$50,000 Key Individual Replacement Expenses – coverage for the Chief Executive Officer or Executive Director who suffers an "injury" which results in the loss of life. No deductible applies to this coverage.

$50,000 Image Restoration and Counseling – coverage for image restoration and counseling arising out of "Improper Acts."

$50,000 Donation Assurance – coverage for "Failed Donation Claim(s)."

$50,000 Business Travel – coverage for Business Travel Accidental Death Benefit to the Named Insured if a Director or Officer suffers an "injury" while traveling on a common carrier for business.

$25,000 Conference Cancellation – coverage for any business-related conference expenses, paid by the insured and not otherwise reimbursed, for a canceled conference that an employee was scheduled to attend. The cancellation must be due directly to a "natural catastrophe" or a "communicable disease" outbreak that forces the cancellation of the conference.

$25,000 Fundraising Event Blackout – coverage for expenses that are incurred due to the cancellation of a fundraising event caused by the lack of electric supply resulting in a power outage, provided the fundraising event is not re-scheduled. The fundraising event must have been planned at least thirty (30) days prior to the power outage.

$5,000 per employee: $25,000 policy limit Political Unrest – coverage to reimburse any present director, officer, employee or volunteer of the named insured while traveling outside the United States of America for "emergency evacuation expenses" that are incurred as a result of an incident of "political unrest."

$1,500 Travel Delay Reimbursement – coverage to reimburse any present director or officer of the named insured for any "non-reimbursable expenses" they incur as a result of the cancellation of any regularly scheduled business travel on a common carrier.

Crisis Management

$25,000 Crisis Management – coverage for "crisis management emergency response expenses" incurred because of an "incident" giving rise to a "crisis."

[LOGOS]

[LOGO]

Risk Management Services

PHLY RISK MANAGEMENT SERVICES

Welcome to PHLY Risk Management Services Services, PHLY is familiar with the unique Risk Management Services programming needs of you organization and has achieved superior results in this area. We are committed to delivering quality and timely loss prevention services and risk control products to your organization. Customer satisfaction through the delivery of these professional products to achieve measurable risk improvement results is our goal. We know the fulfillment of our Risk Management Services commitment is not complete until we deliver upon our promises.

OUR MISSION: We welcome the opportunity to demonstrate how we can tailor a risk management program suitable to our customer's needs. We are committed to providing our customers with improved communications, quicker implementation of loss control servicing initiatives, and specific benchmarking goals that help us quantify the true value of our services.

OUR MOTTO: "Innovative Services Producing Optimum Results:" This mantra reflects our commitment to utilize innovative products and solutions to help our customers achieve measurable results. Customer satisfaction through the delivery of these quality professional products is our goal. We know the fulfillment of our Risk Management Services commitment is not complete until we deliver upon our promises.

In order to gain full access to these resources and others, please take a moment to register on our website. If you already have an id to PHLY.com, please login to access Risk Management Services resources.

Risk Management Resources

- IntelliCorp Records, Inc.
- Accountants Resources
- WEMED Loss Assistance Hotline
- in2vate: Web-enabled EPLI (employment practices liability insurance) Risk Management Services

Proprietary Risk Management Services

- PHLY Risk Management Services E-flyers
- Responding to Risk Management Services Recommendations

Contact

- For more information please contact: Customer Service

800.873.4552

IMPORTANT NOTICE The information and suggestions presented by Philadelphia Indemnity Insurance Company in this e-brochure is for your consideration in your loss prevention efforts. They are not intended to be complete or definitive in identifying all hazards associated with your business, preventing workplace accidents, or complying with any safety related, or other, laws or regulations. You are encouraged to alter them to fit the specific hazards of your business and to have your legal counsel review all of your plans and company policies.

Philadelphia Insurance Companies is the marketing name for the insurance company subsidiaries of the Philadelphia Consolidated Holding Corp., a Member of the Tokio Marine Group. Your insurance policy, and not the information

contained in this document, forms the contract between you and your insurance company. If there is a discrepancy or conflict between the information contained herein and your policy, your policy takes precedence. All coverages are not available in all states due to state insurance regulations. Certain coverage(s) may be provided by a surplus lines insurer. Surplus lines insurers do not generally participate in state guaranty funds and insureds are therefore not protected by such funds. |

[LOGOS]

[LETTERHEAD LOGO]

Philadelphia Insurance Companies

A Member of the Tokio Marine Group

One Bala Plaza, Suite 100
Bala Cynwyd, Pennsylvania 19004
610.617.7900 Fax 610.617.7940
PHLY.com

Philadelphia Indemnity Insurance Company

Commercial Lines Policy

THIS POLICY CONSISTS OF:

– DECLARATIONS
– COMMON POLICY CONDITIONS
– ONE OR MORE COVERAGE PARTS.
A COVERAGE PART CONSISTS OF:
• ONE OR MORE COVERAGE FORMS
• APPLICABLE FORMS AND ENDORSEMENTS

IN WITNESS WHEREOF, we have caused this policy to be executed and attested, and, if required by state law, this policy shall not be valid unless signed by our authorized representative.

[Signature]	[Signature]
President & CEO	Secretary

[LOGO]

Risk Management Services

POLICYHOLDER NOTICE
(LOSS ASSISTANCE HOTLINE}

As a free service benefit to its policyholders, PHLY has partnered with nationally recognized law firm Wilson, Elser, Moskowitz, Edelman & Dicker LLP (WEMED), to offer a toll-free Loss Assistance Hotline. The telephone number is 877.742.2201 or you can contact a WEMED attorney online at: apps.wilsonelser.com/pic/. This hotline provides you with 2 free hours of legal consultation with a knowledgeable attorney on any matter that you feel could result in a Claim under your professional or management liability policy. The Loss Assistance Hotline is NOT a Claim reporting service. To report a Claim, follow the Claim reporting instructions in your policy and also notify your insurance agent. If you have any questions concerning the Loss Assistance Hotline, please contact us at 800.759.4961 x2967.

[WILSON ELSER LOGO]

800.873.4552

Philadelphia Insurance Companies is the marketing name for the insurance company subsidiaries of the Philadelphia Consolidated Holding Corp., a Member of the Tokio Marine Group. Your insurance policy, and not the information contained in this document, forms the contract between you and your insurance company. If there is a discrepancy or conflict between the information contained herein and your policy, your policy takes precedence. All coverages are not available in all states due to state insurance regulations. Certain coverage(s) may be provided by a surplus lines insurer. Surplus lines insurers do not generally participate

in state guaranty funds and insureds are therefore not protected by such funds. |

[LOGOS]

PP 07 13 (07/13)

PRIVACY POLICY NOTICE

Philadelphia Indemnity Insurance Company

The Philadelphia Indemnity Insurance Company (or "We") value(s) your privacy and we are committed to protecting personal information that we collect during the course of our business relationship with you.

The collection, use and disclosure of certain nonpublic personal Information are regulated by law.

This notice is for your information only and requires no action on your part. It will inform you about the types of information that we collect and how it may be disclosed. This does not reflect a change in the way we do business or handle your information.

Information We Collect:

We collect personal information about you from the following sources:

- Applications or other forms such as claims forms or underwriting questionnaires completed by you;
- Information about your transactions with us, our affiliates or others; and

- Depending on the type of transaction you are conducting with us, information may be collected from consumer reporting agencies, health care providers, employers and other third parties.

Information We Disclose:

We will only disclose the information described above to our affiliates and non-affiliated third parties, as permitted by law, and when necessary to conduct our normal business activities.

For example, we may make disclosures to the following types of third parties:

- Your agent or broker (producer);
- Parties who perform a business, professional or insurance functions for our company, including our reinsurance companies;
- Independent claims adjusters, investigators, attorneys, other insurers or medical care providers who need information to investigate, defend or settle a claim involving you;
- Regulatory agencies in connection with the regulation of our business; and
- Lienholders, mortgagees, lessors or other persons shown on our records as having a legal or beneficial interest in your policy.

We do not sell your information to others for marketing purposes. We do not disclose the personal information of persons who have ceased to be our customers.

Protection of Information:

Philadelphia Indemnity Insurance Company maintains physical, electronic and procedural safeguards that comply with state and federal

regulations to protect the confidentiality of your personal information. We also limit employee access to personally identifiable information to those with a business reason for knowing such information.

Use of Cookies:

We may place electronic "cookies" in the browser files of your computer when you access this website. Cookies are text files placed on your computer to enable our systems to recognize your browser and to tailor the information on our website to your interests. We or our third party service providers or business partners may place cookies on your computer's hard drive to enable us to match personal information that we maintain about you so that we are able to pre-populate on-line forms with your information. We also use cookies to help us analyze use of our website to understand which areas of our site are most useful to you. You may refuse the use of cookies by selecting the appropriate settings on your browser. Please note that if you do this, you may not be able to use the full functionality of the website.

How to Contact Us: Philadelphia Indemnity Insurance Company, One Bala Plaza, Suite 100, Bala Cynwyd, PA 19004 Attention: Chief Privacy Officer

07192013

[LOGO]

PHILADELPHIA INSURANCE COMPANIES
A Member of the Tokio Marine Group

One Bala Plaza, Suite 100
Bala Cynwyd, Pennsylvania 19004
610.617.7900 Fax 610.617.7940
PHLY.com

Philadelphia Indemnity Insurance Company

COMMON POLICY DECLARATIONS

Policy Number: PHSD965996

Named Insured and Mailing Address:
Gateway Hospitality Group, Inc.
8921 Canyon Falls Blvd Ste 140
Twinsburg, OH 44087-3900

Producer: 17833
United Agencies Inc.
1422 Euclid Avenue
Suite 900
Cleveland, OH 44115

Policy Period From: 08/16/2014 To: 08/16/2015 at 12.01 AM Standard Time to your mailing address shown above.

Business Description: Hotel Manager

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 Property Coverage Part	
Commercial General Liability Coverage Part	
Commercial Crime Coverage Part	
Commercial Inland Marine Coverage Part	
Commercial Auto Coverage Part	
Businessowners	
Workers Compensation	
Miscellaneous Professional	22,424.00
Total	**$22,424.00**

FORM(S) AND ENDORSEMENT(S) MADE A PART OF THIS POLICY AT THE TIME OF ISSUE
Refer To Forms Schedule

*Omits applicable Forms and Endorsements if shown in specific Coverage Part/Coverage Form Declarations

CPD-PIIC (01/07) [Signature]

Countersignature Date Authorized Representative

Philadelphia Indemnity Insurance Company

Form Schedule – Policy

Policy Number: PHSD965996

Forms and Endorsements applying to this Coverage Part and made a part of this policy at time of issue:

Form	Edition	Description
Recurring Payment Flyer	1212	Recurring Payment Flyer
CSNotice-1	0813	Making Things Easier
BJP-190-1	1298	Commercial Lines Policy Jacket
LAH-Notice	0813	Policyholder Notice (Loss Assistance Hotline)
PP0713	0713	Privacy Policy Notice
CPD-PIIC	0107	Common Policy Declarations
IL0985	0108	Disclosure Pursuant to Terrorism Risk Ins Act of 2002

PI-PLSP-001 (08/07)

[LOGO]

PHILADELPHIA INSURANCE COMPANIES
A Member of the Tokio Marine Group

One Bala Plaza, Suite 100
Bala Cynwyd, Pennsylvania 19004
610.617.7900 Fax 610.617.7940
PHLY.com

Cover-Pro^{sm}

Philadelphia Indemnity Insurance Company

DECLARATIONS

Policy Number: PHSD965996

NOTICE: THIS IS A CLAIMS MADE POLICY. PLEASE READ THIS POLICY CAREFULLY. THE LIMIT OF LIABILITY AVAILABLE TO PAY JUDGMENTS OR SETTLEMENTS SHALL BE REDUCED BY AMOUNTS INCURRED FOR INVESTIGATION AND LEGAL COSTS. FURTHER NOTE THAT AMOUNTS INCURRED FOR SUCH COST SHALL BE APPLIED AGAINST THE DEDUCTIBLE AMOUNT

Item 1.

Named Entity and Address:
Gateway Hospitality Group, Inc.
8921 Canyon Falls Blvd Ste 140
Twinsburg, OH 44087-3900

Item 2.

Policy Period: From: 08/16/2014 To: 08/16/2015
(12:01 A.M. Standard Time)

Item 3.

Premium: $ 22,424.00

Item 4.

Limits of Liability: (A) $ l,000,000 Each **Claim**, including **Claim Expense**

(B) $ l,000,000 Annual Aggregate, including **Claim Expense**

Item 5.

Deductible: $ 5,000 Deductible per **Claim**

Item 6.

Retroactive Date: 08/16/2001

Item 7.

Continuity Date: 08/16/2007

Item 8.

Additional Premium for Supplemental Extended Reporting Period: Refer to PI-PLSP-176

Item 9.

Named Entity's Profession: Hotel Manager

Endorsements: See Schedule

By accepting this Policy, the **Insured** agrees that the statements in the application are personal representations, that they shall be deemed material, and that this Policy is issued in reliance upon the truth of such representations.

_____ _____

Authorized Representative Countersignature

_____

Countersignature Date

Philadelphia Indemnity Insurance Company

Form Schedule – Miscellaneous Professional Liability

Policy Number: PHSD965996

Forms and Endorsements applying to this Coverage Part and made a part of this policy at time of issue:

Form	Edition	Description
PI-PLSP-001	0807	Cover Pro Policy Declarations Page
PI-BELL-1	1109	Bell Endorsement
PI-CME-1	1009	Crisis Management Enhancement Endorsement
PI-PLSP-002	0807	Cover Pro
PI-PLSP-010	0807	Nuclear Energy Liability Exclusion
PI-PLSP-102	0807	Bankruptcy/Insolvency Exclusion
PI-PLSP-117	0807	Mold Exclusion
PI-PLSP-176	0807	Additional Premium For Supplemental ERP
PI-ARB-1	0403	Binding Arbitration
PI-MANU-1	0100	HOTEL MANAGER PRO PAK ADVANTAGE
PI-PLSP-OH-1	1207	Ohio Amendatory Endorsement

POLICY NUMBER: PHSD965996

IL 09 86 01 08

THIS ENDORSEMENT IS ATTACHED TO AND MADE PART OF YOUR POLICY IN RESPONSE TO THE DISCLOSURE REQUIREMENTS OF THE TERRORISM RISK INSURANCE ACT. THIS ENDORSEMENT DOES NOT GRANT ANY COVERAGE OR CHANGE THE TERMS AND CONDITIONS OF ANY COVERAGE UNDER THE POLICY.

DISCLOSURE PURSUANT TO TERRORISM RISK INSURANCE ACT

SCHEDULE

Terrorism Premium (Certified Acts) $ 0 **This premium is the total Certified Acts premium attributable to the following Coverage Part(s), Coverage Form(s) and/or Policy(s):** **Additional information, If any, concerning the terrorism premium:**
Information required to complete this Schedule if not shown above, will be shown in the Declarations.

A. Disclosure Of Premium

In accordance with the federal Terrorism Risk Insurance Act, we are required to provide you

with a notice disclosing the portion of your premium, if any, attributable to coverage for terrorist acts certified under the Terrorism Risk Insurance Act. The portion of your premium attributable to such coverage is shown in the Schedule of this endorsement or in the policy Declarations.

B. Disclosure Of Federal Participation In Payment Of Terrorism Losses

The United States Government, Department of the Treasury, will pay a share of terrorism losses insured under the federal program. The federal share equals 85% of that portion of the amount of such insured losses that exceeds the applicable insurer retention. However, if aggregate insured losses attributable to terrorist acts certified under the Terrorism Risk Insurance Act exceed $100 billion in a Program Year (January 1 through December 31), the Treasury shall not make any payment for any portion of the amount of such losses that exceeds $100 billion.

C. Cap On Insurer Participation In Payment Of Terrorism Losses

If aggregate insured losses attributable to terrorist acts certified under the Terrorism Risk Insurance Act exceed $100 billion in a Program Year (January 1 through December 31) and we have met our insurer deductible under the Terrorism Risk Insurance Act, we shall not be liable for the payment of any portion of the amount of such losses that exceeds $100 billion, and in such case insured losses up to that amount are subject to pro rata allocation in accordance with procedures established by the Secretary of the Treasury.

PI-BELL-1 (11/09)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BELL ENDORSEMENT

[LOGO]

PHILADELPHIA INSURANCE COMPANIES
A Member of the Tokio Marine Group

One Bala Plaza, Suite 100
Bala Cynwyd, Pennsylvania 19004
610.617.7900 Fax 610.617.7940
PHLY.com

Unless otherwise stated herein, the terms, conditions, exclusions and other limitations set forth in this endorsement are solely applicable to coverage afforded by this endorsement, and the policy is amended as follows:

I. SCHEDULE OF ADDITIONAL COVERAGES AND LIMITS

The following is a summary of Limits of Liability or Limits of Insurance and/or additional coverages provided by this endorsement. This endorsement is subject to the provisions of the policy to which it is attached.

COVERAGE	LIMITS OF INSURANCE
Business Travel Accident Benefit	$50,000
Conference Cancellation	$25,000

Donation Assurance	$50,000
Emergency Real Estate Consulting Fee	$50,000
Fundraising Event Blackout	$25,000
Identity Theft Expense	$50,000
Image Restoration and Counseling	$50,000
Key Individual Replacement Expenses	$50,000
Kidnap Expense	$50,000
Political Unrest	$5,000 per employee: $25,000 policy limit
Temporary Meeting Space Reimbursement	$25,000
Terrorism Travel Reimbursement	$50,000
Travel Delay Reimbursement	$1,500
Workplace Violence Counseling	$50,000

II. CONDITIONS

A. Applicability of Coverage

Coverage provided by your policy and any endorsements attached thereto is amended by this endorsement where applicable.

B. Limits of Liability or Limits of Insurance

1. When coverage is provided by this endorsement and another coverage form

or endorsement attached to this policy, the greater limits of liability or limits of insurance will apply. In no instance will multiple limits apply to coverages which may be duplicated within this policy. Additionally, if this policy and any other coverage part or policy issued to you by us, or any company affiliated with us, apply to the same occurrence, offense, wrongful act, accident or loss, the maximum limits of liability or limits of insurance under all such coverage parts or policies combined shall not exceed the highest applicable limits of liability or limits of insurance under any one coverage part or policy.

2. Limits of liability or limits of insurance identified in Section **I. SCHEDULE OF ADDITIONAL COVERAGES AND LIMITS** above are not excess of, but are in addition to the applicable Limits of Liability or Limits of Insurance stated in the Declarations.

C. Claim Expenses

Coverages provided herein are not applicable to the generation of claim adjustment costs by you; such as fees you may incur by retaining a public adjuster or appraiser.

III. ADDITIONAL COVERAGES

A. Business Travel Accident Benefit

We will pay a Business Travel Accident Benefit to the insured if a director or officer

suffers injury or death while traveling on a common carrier for your business during the policy period.

For the purpose of Business Travel Accident Benefit coverage, Injury means:

1. Physical damage to the body caused by violence, fracture, or an accident that results in loss of life not later than one hundred eighty (180) days after the policy expiration, the date of cancellation or the date of non-renewal;

2. Accidental loss of limbs or multiple fingers;

3. Total loss of sight, speech or hearing.

The limit of insurance for this coverage is $50,000 per policy period for all insureds combined. No deductible applies to this coverage.

The Business Travel Accident Benefit shall not be payable if the cause of the injury was:

1. An intentional act by the insured;

2. An act of suicide or attempted suicide;

3. An act of war; or

4. A disease process.

B. Conference Cancellation

We will reimburse the insured for any business-related conference expenses, paid by the insured and not otherwise reimbursed, for a canceled conference that an employee was scheduled to attend. The cancellation must be due directly to a

"natural catastrophe" or a "communicable disease" outbreak that forces the cancellation of the conference.

With respect to a conference cancellation claim, it is further agreed as follows:

1. The insured employee must have registered for the conference at least thirty (30) days prior to the cancellation; and
2. The cancellation must be ordered by a local, state or federal Board of Health or other governmental authority having jurisdiction over the location of the conference.

The limit of insurance for this coverage is $25,000 per policy period for all insureds combined. No deductible applies to this coverage.

C. Donation Assurance

If the insured is a 501(c)(3) status non-profit organization as defined in the United States Internal Revenue Code, we will reimburse the Insured for "failed donation claim(s)."

With respect to any "failed donation claim," it is further agreed as follows:

1. The donor must not have been in bankruptcy, nor have filed for bankruptcy or reorganization in the past seven (7) years prior to the time said pledge was made to the insured;
2. For non-cash donations, our payment of a "failed donation claim" shall be based

on the fair market value of said non-cash donation at the time of the "failed donation claim";

3. In the case of unemployment or incapacitation of a natural person donor and as a condition of payment of the "failed donation claim":

a. Neither the natural person donor nor the insured shall have had reason to believe the donor would become unemployed or incapacitated subsequent to the donation date; and

b. The donor shall be unemployed for at least sixty (60) days prior to a claim being submitted by the insured;

4. No coverage shall be afforded for a written pledge of funds or other measurable, tangible property to the insured dated prior to the policy period; and

5. A donation amount which is to be collected by the insured over more than a twelve (12) month period shall be deemed a single donation.

The limit of insurance for this coverage is $50,000 per policy period for all insureds combined. No deductible applies to this coverage.

D. Emergency Real Estate Consulting Fee

We will reimburse the insured any realtor's fee or real estate consultant's fee necessitated by the insured's need to relocate due to the "unforeseeable destruction" of the insured's "principal location" listed in the

Declarations during the policy period. The limit of insurance for this coverage is $50,000 per policy period for all insureds combined. No deductible applies to this coverage.

E. Fundraising Event Blackout

We will reimburse the insured for "fund-raising expenses" that are incurred due to the cancellation of a fundraising event caused by the lack of electric supply resulting in a power outage, provided the fundraising event is not re-scheduled. The fundraising event must have been planned at least thirty (30) days prior to the power outage. The limit of insurance for this coverage is $25,000 per policy period for all insureds combined. No deductible applies to this coverage.

F. Identity Theft Expense

We will reimburse any present director or officer of the named insured for "identity theft expenses" incurred as the direct result of any "identity theft" first discovered and reported during the policy period; provided that it began to occur subsequent to the effective date of the insured's first policy with us. The limit of insurance for this coverage is $50,000 per policy period for all insureds combined. No deductible applies to this coverage.

G. Image Restoration and Counseling

We will reimburse the insured for expenses incurred for image restoration and counsel-

ing arising out of "improper acts" by any natural person.

Covered expenses are limited to:

1. The costs of rehabilitation and counseling for the accused natural person insured, provided the natural person insured is not ultimately found guilty of criminal conduct; this reimbursement to occur after acquittal of the natural person insured;
2. The costs charged by a recruiter or expended on advertising, for replacing an officer as a result of "improper acts"; and
3. The costs of restoring the named insured's reputation and consumer confidence through image consulting.

The limit of insurance for this coverage is $50,000 per policy period for all insureds combined. No deductible applies to this coverage.

H. Key Individual Replacement Expenses

We will pay "key individual replacement expenses" if the Chief Executive Officer or Executive Director suffers an "injury" during the policy period which results in the loss of life during the policy period. The limit of insurance for this coverage is the lesser of $50,000 or ten (10) times the annual premium paid for this policy. No deductible applies to this coverage.

I. Kidnap Expense

We will pay on behalf of any director or officer of the insured, reasonable fees incurred as a result of the kidnapping of them or their spouse, "domestic partner," parent or child during the policy period. Coverage will not apply to any kidnapping by or at the direction of any present or former family member of the victim.

Reasonable fees will include:

1. Fees and costs of independent negotiators;

2. Interest costs for any loan from a financial institution taken by you to pay a ransom demand or extortion threat;

3. Travel costs and accommodations incurred by the named insured;

4. Reward money paid to an informant which leads to the arrest and conviction of parties responsible for loss covered under this insurance; and

5. Salary, commissions and other financial benefits paid by you to a director or officer. Such compensation applies at the level in effect on the date of the kidnap and ends upon the earliest of:

a. Up to thirty (30) days after their release, if the director or officer has not yet returned to work;

b. Discovery of their death;

c. One hundred twenty (120) days after the last credible evidence following abduction that they are still alive; or

d. Twelve (12) months after the date of the kidnapping.

The limit of insurance for this coverage is $50,000 each policy period for all insureds combined. No deductible applies to this coverage.

J. Political Unrest Coverage

We will reimburse any present director, officer, employee or volunteer of the named insured while traveling outside the United States of America for "emergency evacuation expenses" that are incurred as a result of an incident of "political unrest." This "political unrest" must occur during the policy period. No coverage is granted for travel to countries in a state of "political unrest" at the time of departure of the travel. The limit of insurance for this coverage is $5,000 per covered person, subject to a maximum of $25,000 per policy period for all insureds combined. No deductible applies to this coverage.

K. Temporary Meeting Space Reimbursement

We will reimburse the insured for rental of meeting space which is necessitated by the temporary unavailability of the insured's primary office space due to the failure of a climate control system, or leakage of a hot water heater during the policy period. Coverage will exist only for the renting of temporary meeting space required for meeting with parties who are not insured under this policy. The limit of insurance for

this coverage is $25,000 per policy period for all insureds combined. No deductible applies to this coverage.

L. Terrorism Travel Reimbursement

We will reimburse any present director or officer of the named insured in the event of a "certified act of terrorism" during the policy period which necessitates that he/she incurs "emergency travel expenses." The limit of insurance for this coverage is $50,000 per policy period for all insureds combined. No deductible applies to this coverage.

M. Travel Delay Reimbursement

We will reimburse any present director or officer of the named insured for any "nonreimbursable expenses" they incur as a result of the cancellation of any regularly scheduled business travel on a common carrier. The limit of insurance for this coverage is $1,500 per policy period for all insureds combined. A seventy-two (72) hour waiting period deductible applies to this coverage.

N. Workplace Violence Counseling

We will reimburse the insured for emotional counseling expenses incurred directly as a result of a "workplace violence" incident at any of the insured's premises during the policy period. The emotional counseling expenses incurred must have been for:

1. Your employees who were victims of, or witnesses to the "workplace violence";
2. The spouse, "domestic partner," parents or children of your employees who were victims of, or witnesses to the "workplace violence"; and
3. Any other person or persons who directly witnessed the "workplace violence" incident.

The limit of Insurance for this coverage is $50,000 per policy period for all insureds combined. No deductible applies to this coverage.

IV. DEFINITIONS

For the purpose of this endorsement, the following definitions apply:

A. "Certified act of terrorism" means any act so defined under the Terrorism Risk Insurance Act, and its amendments or extensions.

B. "Communicable disease" means an illness, sickness, condition or an interruption or disorder of body functions, systems or organs that is transmissible by an infection or a contagion directly or indirectly through human contact, or contact with human fluids, waste, or similar agent, such as, but not limited to Meningitis, Measles or Legionnaire's Disease.

C. "Domestic partner" means any person who qualifies as a domestic partner under the provisions of any federal, state or local statute or regulation, or under the terms and

provisions of any employee benefit or other program established by the named insured.

D. "Emergency evacuation expenses" mean:

1. Additional lodging expenses;

2. Additional transportation costs;

3. The cost of obtaining replacements of lost or stolen travel documents necessary for evacuation from the area of "political unrest"; and

4. Translation services, message transmittals and other communication expenses,

provided that these expenses are not otherwise reimbursable.

E. "Emergency travel expenses" mean:

1. Hotel expenses incurred which directly result from the cancellation of a scheduled transport by a commercial transportation carrier, resulting directly from and within forty-eight (48) hours of a "certified act of terrorism"; and

2. The increased amount incurred which may result from re-scheduling comparable transport, to replace a similarly scheduled transport canceled by a commercial transportation carrier in direct response to a "certified act of terrorism";

provided that these expenses are not otherwise reimbursable.

F. "Failed donation claim" means written notice to the insured during the policy period of:

1. The bankruptcy or reorganization of any donor whereby such bankruptcy or reorganization prevents the donor from honoring a prior written pledge of funds or other measurable, tangible property to the insured; or

2. The unemployment or incapacitation of a natural person donor preventing him/her from honoring a prior written pledge of funds or other measurable, tangible property to the insured.

G. "Fundraising expenses" mean deposits forfeited and other charges paid by you for catering services, property and equipment rentals and related transport, venue rentals, accommodations (including travel), and entertainment expenses less any deposits or other fees refunded or refundable to you.

H. "Identity theft" means the act of knowingly transferring or using, without lawful authority, a means of identification of any director or officer (or spouse or "domestic partner" thereof) of the named insured with the intent to commit, or to aid or abet another to commit, any unlawful activity that constitutes a violation of federal law or a felony under any applicable state or local law.

I. "Identity theft expenses" mean:

1. Costs for notarizing affidavits or similar documents attesting to fraud required by financial institutions or similar credit granters or credit agencies;

2. Costs for certified mail to law enforcement agencies, credit agencies, financial institutions or similar credit granters; and

3. Loan application fees for re-applying for a loan or loans when the original application is rejected solely because the lender received incorrect credit information.

J. "Improper acts" means any actual or alleged act of:

1. Sexual abuse;

2. Sexual intimacy;

3. Sexual molestation; or

4. Sexual assault;

committed by an insured against any natural person who is not an insured. Such "improper acts" must have been committed by the insured while in his or her capacity as an insured.

K. "Injury" whenever used in this endorsement, other than in Section **III. A. Business Travel**, means any physical damage to the body caused by violence, fracture or an accident.

L. "Key individual replacement expenses" mean the following necessary expenses:

1. Costs of advertising the employment position opening;

2. Travel, lodging, meal and entertainment expenses incurred in interviewing job

applicants for the employment position opening; and

3. Miscellaneous extra expenses incurred in finding, interviewing and negotiating with the job applicants, including, but not limited to, overtime pay, costs to verify the background and references of the applicants and legal expenses incurred to draw up an employment contract.

M. "Natural catastrophe" means hurricane, tornado, earthquake or flood.

N. "Non-reimbursable expenses" means the following travel-related expenses incurred after a seventy-two (72) hour waiting period, beginning from the time documented on the proof of cancellation, and for which your director or officer produces a receipt:

1. Meals and lodging;

2. Alternative transportation;

3. Clothing and necessary toiletries; and

4. Emergency prescription and non-prescription drug expenses.

O. "Political unrest" means:

1. A short-term condition of disturbance, turmoil or agitation within a foreign country that poses imminent risks to the security of citizens of the United States;

2. A long-term condition of disturbance, turmoil or agitation that makes a

foreign country dangerous or unstable for citizens of the United States; or

3. A condition of disturbance, turmoil or agitation in a foreign country that constrains the United States Government's ability to assist citizens of the United States, due to the closure or inaccessibility of an embassy or consulate or because of a reduction of its staff for which either an alert or travel warning has been issued by the United States Department of State.

P. "Principal location" means the headquarters, home office or main location where most business is substantially conducted.

Q. "Unforeseeable destruction" means damage resulting from a "certified act of terrorism," fire, collision or collapse which renders all of the insured's "principal locations" completely unusable.

R. "Workplace violence" means any intentional use of or threat to use deadly force by any person with intent to cause harm and that results in bodily "injury" or death of any person while on the insured's premises.

PI-CME-1 (10/09)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CRISIS MANAGEMENT ENHANCEMENT ENDORSEMENT

Unless otherwise stated herein, the terms, conditions, exclusions and other limitations set forth in this endorsement are solely applicable to coverage afforded by this endorsement, and the policy is amended as follows:

Solely for the purpose of this endorsement: 1) 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. 2) The words "we," "us" and "our" refer to the company providing this insurance.

I. SCHEDULE OF ADDITIONAL COVERAGE AND LIMITS

The following is the Limit of Liability provided by this endorsement. This endorsement is subject to the provisions of the policy to which it is attached.

Crisis Management Expense	$25,000

II. CONDITIONS

A. Applicability of Coverage

Coverage provided by your policy and any endorsements attached thereto is amended by this endorsement where applicable. All other terms and conditions of the policy or

coverage part to which this endorsement is attached remain unchanged.

B. Limits of Liability or Limits of Insurance

When coverage is provided by this endorsement and any other coverage form or endorsement attached to this policy, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not. But we will not pay more than the applicable Limit of Liability or Limit of Insurance.

C. Claim Expenses

Coverages provided herein are not applicable to the generation of claim adjustment costs by you; such as fees you may incur by retaining a public adjuster or appraiser.

III. ADDITIONAL COVERAGES

A. We will reimburse you for "crisis management emergency response expenses" incurred because of an "incident" giving rise to a "crisis" to which this insurance applies. The amount of such reimbursement is limited as described in Section **II. CONDITIONS, B. Limits of Liability or Limits of Insurance**. No other obligation or liability to pay sums or perform acts or services is covered.

B. We will reimburse only those "crisis management emergency response expenses" which are incurred during the policy period as

shown in the Declarations of the policy to which this coverage is attached and reported to us within six (6) months of the date the "crisis" was initiated.

IV. DEFINITIONS

A. "Crisis" means the public announcement that an "incident" occurred on your premises or at an event sponsored by you.

B. "Crisis management emergency response expenses" mean those expenses incurred for services provided by a "crisis management firm." However, "crisis management emergency response expenses" shall not include compensation, fees, benefits, overhead, charges or expenses of any insured or any of your employees, nor shall "crisis management emergency response expenses" include any expenses that are payable on your behalf or reimbursable to you under any other valid and collectible insurance.

C. "Crisis management firm" means any service provider you hire that is acceptable to us. Our consent will not be unreasonably withheld.

D. "Incident" means an accident or other event, including the accidental discharge of pollutants, resulting in death or serious bodily injury to three or more persons.

E. "Serious bodily injury" means any injury to a person that creates a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

PI-PLSP-002 (08/07)

Cover-Pro[sm]

PROFESSIONAL LIABILITY
INSURANCE POLICY

THIS IS A CLAIMS MADE POLICY – PLEASE READ IT CAREFULLY

In consideration of the payment of the premium and in reliance upon all statements and information furnished to **us** including all statements made in the application form, its attachments and the material Incorporated therein, which are incorporated herein and deemed to be a part of this policy, **we** agree as follows:

I. INSURING AGREEMENTS

A. Professional Liability Coverage

We shall pay on **your** behalf all sums, not exceeding the Limits of Liability and in excess of the applicable Deductible set forth in the Declarations, for which **you** shall become legally obligated to pay **as damages** resulting from any **claim** first made against **you** during the **policy period** or any subsequent extended reporting period arising out of **a wrongful act** committed after the **retroactive date** stated in Item 6. of the Declarations and prior to the end of the **policy period.**

B. Defense And Settlement

We, in **your** name and on **your** behalf, shall have the right and duty to investigate, defend, and conduct settlement negotiations, including selection of defense counsel, in any **claim** or suit.

We shall not settle any **claim** without **your** consent, such consent not to be unreasonably withheld. Should **you** refuse to consent to any settlement recommended by **us**, and acceptable to the claimant, and elect to further contest the **claim, our** liability for such **claim** shall not exceed the amount for which the **claim** could have been settled, including **claim expenses** incurred, up to the date of such refusal, plus 50% of covered **damages** and **claim expenses** in excess of such settlement amount, it being a condition of this insurance that the remaining 50% of such **damages** and **claim expenses** excess of the first settlement amount shall be borne by **you** at **your** own risk and be uninsured. Notwithstanding the foregoing, this paragraph shall not apply until the settlement amount exceeds the Deductible amount stated in Item 5. of the Declarations.

You shall not admit liability for, or make any voluntary settlement, or incur any costs or expenses in connection with any **claim** except with our written consent.

We shall not be obligated to pay any **claim** or judgment or **claim expenses** or to defend any suit after the applicable Limits of Liability have been exhausted.

C. Supplemental Payments

We will pay up to two hundred and fifty dollars ($250) per **individual insured** per day for each day any such **individual insured** is required to appear at a trial, hearing or arbitration proceeding involving a **claim** against such **insured,** subject to a five thousand dollar ($5,000) sublimit of liability ("Trial Sublimit of Liability"). The

Trial Sublimit of Liability shall be in addition to the Limits of Liability as shown in Item 4. of the Declarations.

II. DEFINITIONS

THE FOLLOWING WORDS AND PHRASES APPEARING IN BOLD HAVE SPECIAL MEANING WHENEVER USED IN THIS POLICY:

A. Bodily injury means physical injury, sickness, disease, disability, mental anguish, mental injury or emotional distress sustained by a person, including death resulting therefrom at any time.

B. Claim means a demand received by **you** for money or services, including the service of suit or institution of arbitration proceedings involving **you** arising from any alleged **wrongful act**. **Claim** shall also include any request to toll the statute of limitations relating to a potential **claim** involving an alleged **wrongful act**.

C. Claim expenses means fees charged by any lawyer designated by **us** and all other fees, costs, and expenses resulting from the investigation, adjustment, defense, and appeal of a **claim**, if incurred by **us**. **Claim expenses** shall also include:

1. Premiums on bonds to release attachments and appeal bonds, limited to that portion of such bonds that does not exceed the Limits of Liability of this policy, but without any obligation by **us** to apply for or furnish such bonds;

2. Costs taxed against **you** in any suit except for any contempt citations;

3. Interest accruing after the entry of judgment, but only for that portion of the judgment which does not exceed the applicable Limits of Liability, and only until **we** have tendered to the court or paid to you our portion of such judgment as does not exceed our Limit of Liability thereon; and

4. Reasonable expenses incurred by **you** at **our** request in assisting in the investigation and defense of any **claim**, other than loss of earnings.

Claim expenses shall not include:

a. any amounts incurred in defense of any **claim** for which any other insurer has a duty to defend, regardless of whether or not such other insurer undertakes such duty; or

b. salaries, wages, overhead or benefit expenses associated with any insured except as specified in Section I. **INSURING AGREEMENTS,** Paragraph C. above; or

c. salaries, wages, overhead or benefit expenses associated with your employees.

D. Continuity Date means the date listed in Item 7. of the Declarations.

E. Damages means a monetary judgment, award or settlement, including punitive

damages or exemplary damages where insurable by law, but does not include the multiple part of multiplied damages, fines, taxes, sanctions or statutory penalties, including those based upon legal fees whether imposed by law, court or otherwise.

F. Domestic partner means any person who qualifies as a domestic partner under the provisions of any federal, state or local statute or regulation, or under the terms and provisions of any employee benefit or other program established by **you.**

G. Individual Insured means:

1. Any current partner, director, officer, member or employee of **yours** while acting within the scope of their duties as such.

2. Any former or retired partner, director, officer, member or employee of **yours,** but only for those **professional services** rendered on behalf of the **named entity** prior to the date of separation or retirement from such entity(ies).

3. The lawful spouse or **domestic partner** of an **individual insured,** but only for actual or alleged **wrongful acts** of such **individual insured** for which said spouse or **domestic partne**r may be liable as the spouse or domestic partner of such **individual insured**.

4. The heirs, executors, administrators, assignees, and legal representatives of each **insured** in the event of such **insured's**

death, incapacity or bankruptcy as respects the liability of each **insured** as is otherwise covered herein.

H. Named Entity means the proprietor, firm or organization specified in Item 1. of the Declarations.

I. Personal Injury means wrongful entry or eviction or other invasion of private occupancy, the publication or utterance of a libel or slander or other defamatory or disparaging material, or a publication or an utterance in violation of an individual's right of privacy.

J. Policy Period means the period from the inception date of this policy to the expiration date as set forth in Item 2. of the Declarations or such earlier termination date, if any.

K. Professional Services means services rendered to others for a fee solely in the conduct of **your** profession as stated in Item 9. of the Declarations.

L. Property Damage means physical injury to tangible property, including all resulting loss of use of such property or loss of use of tangible property that is not physically injured.

M. Retroactive Date means the date listed in Item 6. of the Declarations.

N. Subsidiary means:

1. A corporation or other entity of which the **named entity** owns on or before the

inception of the **policy period** more than 50% of the issued and outstanding voting stock either directly, or indirectly through one or more of its **subsidiaries** or the right to elect, appoint or designate more than 50% of such entity's board of directors, trustees, or managers and which is set forth in the application or, if the entity is a limited partnership, the **named entity** or one of its **subsidiaries** must serve as the general partner.

A corporation or other entity which becomes a **subsidiary** during the **policy period** and whose revenues total less than 15% of the total consolidated revenues of the **named entity** as disclosed by **you** on the most recently completed application as of the inception date of this **policy period**.

2. A corporation or other entity, which becomes a **subsidiary** during the **policy period** other than a corporation or other entity described in Paragraph 1. above, but only upon the condition that within 90 days of its becoming **a subsidiary,** the **named entity** shall have provided **us** with a completed application and all materials requested by **us** and agreed to any additional premium and/or amendment of the provisions of this policy required by **us** relating to the addition of such new **subsidiary.** Further, coverage as shall be afforded to the new **subsidiary is** conditioned upon the **named entity** paying when due any additional premium

required by **us** relating to such new **subsidiary.** Failure to provide the requested information within the 90 days or failure to pay the additional premium when requested will result in the denial of coverage to said **subsidiary** under this policy.

A corporation or other entity becomes **a subsidiary** when the **named entity** owns more than 50% of the issued and outstanding voting stock, either directly or indirectly through one or more of its **subsidiaries** or serves as a general partner for a limited partnership. A corporation ceases to be **a subsidiary** when the **named entity** ceases to own more than 50% of the issued and outstanding voting stock, either directly or indirectly through one or more of its **subsidiaries** or is removed or ceases to act as general partner of a limited partnership. Coverage for **claims** made against any **subsidiary** or the **insureds** of any **subsidiary** shall only apply to **wrongful acts** of such **subsidiary** or the **insureds** of such **subsidiary** occurring after the effective time that such **subsidiary** became a **subsidiary** and prior to the time that such **subsidiary** ceased to be a **subsidiary.**

O. We, us, our means the insurance company shown in the Declarations (a stock insurance company).

P. Wrongful Act means a negligent act, error, or omission committed or alleged to have been committed by **you** or any person for whom **you** are legally responsible in

the rendering of **professional services**. **Wrongful Act** shall include **personal injury** arising out of the rendering of **professional services**.

Q. You, your, insured means:

1. The **named entity.**

2. Any **subsidiary.**

3. Any independent contractor while acting on your behalf but solely as respects the provision of **professional services.**

4. Any **individual insured.**

III. EXCLUSIONS

THIS POLICY DOES NOT APPLY TO ANY CLAIM OR CLAIM EXPENSES:

A. arising out of, resulting from, based upon or in consequence of, any dishonest, fraudulent, criminal or malicious act, error or omission, or any intentional or knowing violation of the law, or gaining of any profit or advantage to which **you** are not legally entitled; however, **we** will defend suits alleging the foregoing until there is a judgment, final adjudication, adverse admission, plea *nolo contendere* or no contest or finding of fact against **you** as to such conduct.

B. for **bodily injury** or **property damage.**

C. arising out of any costs of corrections, costs of complying with non-pecuniary relief, fines or penalties imposed by law or other matters which may be deemed uninsurable under the

law pursuant to which this policy may be construed.

D. arising out of any Disciplinary Proceeding against any **insured,** however, **we** will defend **you** for said Disciplinary Proceeding up to a sublimit of liability ("Disciplinary Proceeding Sublimit") often thousand dollars ($10,000). The Disciplinary Proceeding Sublimit shall be part of, not in addition to, the Limits of Liability as shown in Item 4. of the Declarations and shall no way serve to increase the Limits of Liability. Defense for disciplinary proceedings will still be subject to all other terms and provisions in this policy.

E. arising out of, resulting from, based upon or in consequence of, directly or indirectly, any failure to effect or maintain any insurance or bond.

F. arising out of, resulting from, based upon or in consequence of, directly or indirectly, any infringement of copyright, patent, trademark service mark, trade name, or misappropriation of ideas or trade secrets.

G. arising out of, resulting from, based upon or in consequence of, directly or indirectly, any violation of the Securities Exchange Act of 1933 as amended, the Securities Exchange Act of 1934 as amended, any state Blue Sky or Securities Law or any rules, regulations or amendments issued in relation to such acts, or any similar state, federal or foreign statutes or regulations.

H. arising out of, resulting from, based upon or in consequence of, directly or indirectly, any express warranties or guarantees or any liability **you** assume under contract unless **you** would have been legally liable in the absence of such contract.

I. arising out of, resulting from, based upon or in consequence of, directly or indirectly, any **claim** brought by any **insured** against another **insured.**

J. arising out of, resulting from, based upon or in consequence of, directly or indirectly, any pending or prior litigation as of the **continuity date** of this policy, as well as all future **claims** or litigation based on the pending or prior litigation derived from the same or essentially the same facts (actual or alleged) that gave rise to the prior or pending litigation.

K. alleging, arising out of, resulting from, based upon or in consequence of, directly or indirectly, any employment practices or any discrimination against any person or entity on any basis, including but not limited to: race, creed, color, religion, ethnic background, national origin, age, handicap, disability, sex, sexual orientation or pregnancy.

L. arising out of, resulting from, based upon or in consequence of, directly or indirectly, any discharge, dispersal, release or escape of any solid, liquid, gaseous, biological, radiological or thermal irritant or contaminant, including smoke, vapor, dust, fibers, spores, fungi, germs, soot, fumes, asbestos, acids, alkalis, chemicals

and waste (including, but not limited to, materials to be recycled, reconditioned or reclaimed and nuclear materials) into or upon land, the atmosphere or any water-course or body of water or any cost or expense arising out of any direction, request or voluntary action to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize any pollutants.

M. arising out of, resulting from, based upon or in consequence of, directly or indirectly, any services as an attorney, accountant, actuary, tax preparer, tax consultant, real estate broker, securities broker, securities dealer, registered representative of a securities broker or dealer, financial planner, nurse, doctor of medicine, veterinary medicine or dentistry, architect or engineer.

N. arising out of, resulting from, based upon or in consequence of, directly or indirectly, any **professional services** performed for any entity in which any **insured** is a principal, partner, officer, director or owns or controls more than three percent (3%) of the issued and outstanding stock of such entity.

O. arising out of, resulting from, based upon or in consequence of, directly or indirectly, any disputes involving **your** fees or charges.

P. arising out of, resulting from, based upon or in consequence of, directly or indirectly, any **wrongful act** committed prior to the **policy period** and subsequent to the **retroactive date** for which you gave notice under any prior insurance policy or which you had any basis to

believe might reasonably be expected to give rise to a **claim** under this Policy

No wrongful act of any **individual insured** nor any fact pertaining to any **individual insured** shall be imputed to any other partner, director, officer or employee for the purposes of determining the applicability of Exclusion **A** above.

IV. LIMITS OF LIABILITY

Regardless of the number of (a) **insureds** under this policy, (b) persons or entities who allege **damages** or (c) **claims** made or suits brought, **our** liability is limited as follows:

A. **We** shall be liable to pay that portion of any **damages** and **claim expenses** in excess of the applicable Deductible as stated in the Declarations for any one **claim** up to the Limits of Liability as stated in Item 4. of the Declarations. A Deductible shall apply to each and every **claim**, including **claim expenses,** and such Deductible shall be borne by **you**. The Deductible shall be uninsured and be at **your** own risk.

B. Our maximum aggregate liability for all **damages** and **claim expenses** arising out of all **claims** made during the **policy period** shall be the Limit of Liability stated in the Declarations. The Limit of Liability during any Extended Reporting Period added to this policy shall be the remaining portion, if any, of the aggregate Limit of Liability provided by this policy as stated in Item 4. of the Declarations.

C. Claims based on or arising out of the same act or circumstance, or a series of similar or related acts or circumstances shall be considered a single **claim** and shall be considered first made during the **policy period** or the Extended Reporting Period (if applicable), of the policy In which the earliest **claim** arising out of such act(s) or circumstance(s(s) was first made and all **damages** and **claim expenses** shall be subject to the same Each **Claim** Limit of Liability.

V. GENERAL CONDITIONS

A. Policy Territory:

This policy shall extend to any **wrongful act** committed anywhere in the world.

All premiums, limits, retentions, **damages, claim expenses** and other amounts under this policy are expressed and payable in the currency of the United States of America. If judgment is rendered, settlement is denominated or another element of **damages** or **claims expenses** under this policy is stated in a currency other than United States dollars, payment under this policy shall be made in United States dollars at the rate of exchange published in *The Wall Street Journal* on the date the final judgment is reached, the amount of the settlement is agreed upon or the other element of **damages** or **claims expenses** is due, respectively.

B. Notice and Claim Reporting Provisions:

Notice hereunder shall be given by **you** or on **your** behalf in writing to **us** at One Bala Plaza, Suite 100, Bala Cynwyd, PA 19004 Attn: Claims Department.

1. **You** shall, as a condition precedent to **our** obligations under this policy, give written notice to us as soon as practicable during the **policy period**, or during the Extended Reporting Period (if any) of any **claim** made against **you**.

2. If during the **policy period,** or during the Extended Reporting Period (if any), but not during the Automatic Extension, you shall become aware of any circumstance which could reasonably be expected to give rise to a **claim**, **you** shall give written notice to **us** regarding all particulars of said incident as soon as practicable after **you** become aware of said circumstance. Such written notice of any circumstance must include:

   a. the specific **wrongful act**; and

   b. the **damages** which have or may result from such **wrongful act**; and

   c. the circumstances by which **you** first became aware of such **wrongful act**.

   Any **claim** then arising out of such **wrongful act** will be considered to have been first made at the time of the original notice.

C. Extended Reporting Period:

1. If **we** or **you** cancel or refuse to renew this policy for reasons other than non-payment of premium, **we** will provide to **you** a 60 day Automatic Extension of the coverage granted by this policy, at no additional charge, for any **claim** first made against **you** and reported to **us** during the 60 day extension period but only as respects **wrongful acts** committed after the **Retroactive Date** (if any) stated in the Declarations and prior to the date of cancellation or non-renewal. In the event you purchase replacement coverage for this policy or a Supplemental Extended Reporting Period under **2.** below, said 60 day Automatic Extension period will terminate upon the effective date of said replacement coverage or Extended Reporting Period.

2. If **we** or **you** cancel or refuse to renew this policy for reasons other than non-payment of premium, you shall have the right to purchase, for the appropriate additional payment as listed in Item 8. of the Declarations, a Supplemental Extended Reporting Period of a duration and for a premium as described on the Declarations. This extension will provide coverage granted by this policy for any claim first made against **you** and reported to **us** during the Supplemental Extended Reporting Period. This Supplemental Extended Reporting Period only applies to **wrongful acts** committed after the **Retroactive Date** (if any) stated in the

Declarations and prior to the date of cancellation or non-renewal. **You** must apply for this extension in writing accompanied by payment of the appropriate premium prior to the expiration of the 60 day Automatic Extension period under **1.** above.

3. All premium paid with respect to an extension period shall be deemed to be fully earned as of the first day of the extension period. For the purpose of this clause, any change in premium, retention, Limits of Liability or other terms on renewal shall not constitute a refusal to renew.

4. Limits of Liability available during any Extended Reporting Period shall not exceed the balance of the Limits of Liability in effect at the time the policy terminated.

5. In the event similar insurance is in force covering any **claims** first made during the 60 day extension period or during any Extended Reporting Period, coverage provided by this policy shall be excess over any such other insurance.

D. Deductible:

It is **your** responsibility to pay the Deductible amount as stated in Item 5. of the Declarations as the result of each **claim**. **We** may pay part of or all of the Deductible amount to effect a settlement of any claim, however, upon notification of any such action taken, **you** shall promptly reimburse **us** for all of the Deductible amount as has been paid by **us**.

E. Your Duties In the Event of a Claim:

1. Pursuant to **B. Notice and Claim Reporting Provisions**, Paragraph **1.** above, you shall give written notice containing particulars sufficient to identify the **insured**, time, place and underlying circumstances of the **claim** to **us**.

2. You shall admit no liability, make no payments, assume no obligation and incur no expense related to such **claim** without our written consent.

3. When a **claim** is made against **you**, **you** shall immediately forward to **us** every demand, notice, summons, or other process received by **you** or **your** representatives.

4. **You** shall cooperate with us and, upon **our** request, assist in making settlements and in the conduct of suits. You shall attend hearings, trials and depositions and shall assist in securing and giving evidence and in obtaining the attendance of witnesses.

5. **You** shall not demand or agree to arbitration of any **claim** without **our** written consent. Such consent shall not be unreasonably withheld.

F. Subrogation:

If **we** pay any amount hereunder as **damages, claim expenses** or any combination thereof, **we** shall be subrogated to **your** rights of recovery against any person,

firm or organization. **You** shall execute and deliver instruments and papers and do whatever is necessary to secure such rights. **You** shall not waive or prejudice such rights prior to or subsequent to any **claim**.

G. Changes:

Notwithstanding anything to the contrary, no provision of this policy may be amended, waived or otherwise changed except by endorsement issued by **us** to form part of this policy.

H. Action Against Us:

1. No action shall lie against **us** unless, as a condition precedent thereto, there shall have been compliance with all terms of this policy, and until the amount of **your** obligation to pay shall have been finally determined either by judgment entered in a court of law against **you** or by **your** written agreement with the claimant or claimant's legal representative and **us**.

2. Any person or the legal representatives thereof who has secured such a judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or entity shall have any right under this policy to join **us** as a party to any action against **you** to determine **your** liability, nor shall **we** be impeded by **you** or their legal representatives.

Your bankruptcy or insolvency or that of **your** successors in interest shall not relieve **us** of **our** obligations hereunder.

I. Change in Control:

If during the **policy period**:

1. the **named entity** merges into or consolidates with another entity such that the **named entity is** not the surviving entity; or

2. another entity, person, or group of entities and/or persons acting in concert acquires securities or voting rights which result in ownership or voting control by other entity(ies) or person(s) of more than fifty percent (50%) of the outstanding securities representing the rights to vote for the election of the **named entity's** directors:

(either of the above events hereinafter referred to as the "Transaction") then coverage shall continue until the later of the termination of the **policy period** or such other date to which **we** may agree, but only with respect to **wrongful acts** which occurred prior to the Transaction and are otherwise covered by this policy and premium shall be considered fully earned.

J. Cancellation or Non-Renewal:

1. This policy may be canceled by the **named entity** by surrender thereof and

selection of a future date to **us** at the address stated In the Declarations or by mailing to **us** written notice stating when thereafter such cancellation shall be effective. If this policy is canceled by **you**, **we** shall retain the customary short-rate portion of the premium.

2. The policy may be canceled by **us** by mailing to the **named entity** at the address stated in the Declarations written notice stating when, not less than forty-five (45) days thereafter or ten (10) days in the case of cancellation for non-payment of premium or Deductible, such cancellation shall become effective. If the policy is canceled by **us**, earned premium shall be computed pro-rata.

3. In the event **we** refuse to renew this policy, **we** shall mail to the **named entity,** at the address stated in the Declarations, not less than forty-five (45) days prior to the expiration of this policy, written notice of non-renewal. Such notice shall be conclusive on all **insureds**.

4. The mailing of Notice of Cancellation or Non-Renewal as aforementioned shall be sufficient notice of the intent to cancel or non-renew. The effective date of cancellation or non-renewal specified in the notice shall terminate this **policy period**.

K. Conformity to Statutes:

Terms of this policy which are in conflict with the statutes of the state wherein this policy is issued are hereby amended to conform to such statutes.

L. Assignment:

Assignment of interest under this policy shall not bind **us** unless **our** consent is endorsed hereon.

M. Authorization Clause:

By acceptance of this policy, **you** agree that the statements in the application are **your** agreements and representations and that this policy is issued in reliance upon the truth of such representations. This policy embodies all existing agreements between **you** and **us** relating to this insurance.

N. Other Insurance:

This insurance is excess over any other valid and collectable insurance available to **you** except as respects such insurance written to apply specifically in excess of this Insurance.

O. Liability Coverage Disputed and Reservation of Rights:

If a controversy or dispute arises with regard to whether coverage exists with respect to a **claim** submitted by **you** under the coverage sections of this policy, **we** may elect to provide a defense under a Reservation of Rights whereby **we** reserve our rights to deny and reject any **claim** for

damages. In the event it is finally established by judgment or agreement that **we** have no liability with respect to such a **claim, you** shall reimburse **us** upon demand all sums and monies paid by **us** to defend and/or settle such **claim.**

P. False or Fraudulent Claims:

If any **insured** shall commit fraud in presenting any **claim** as regards amounts or otherwise, this insurance shall become void as to such **insured** from the date such fraudulent **claim** is presented.

Q. Headings

The descriptions in the headings of this policy and any endorsements attached hereto are solely for convenience, and form no part of the terms and conditions of coverage.

IN WITNESS WHEREOF, WE HAVE CAUSED THIS POLICY TO BE SIGNED BY OUR PRESIDENT AND SECRETARY. THIS POLICY SHALL NOT BE VALID UNLESS COUNTER-SIGNED ON THE DECLARATIONS PAGE BY OUR DULY AUTHORIZED REPRESENTATIVE.

PI-PLSP-010 (08/07)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NUCLEAR ENERGY LIABILITY EXCLUSION

This endorsement modifies insurance provided under the following:

COVER-PRO℠

In consideration of the premium paid, it is agreed that this policy does not apply to any **claim** arising out of, resulting from, based upon or in consequence of, directly or indirectly, any **bodily injury** or **property damage** resulting from radioactive, toxic or explosive properties of nuclear material which includes, but is not limited to, "source material", "special nuclear material" and "by product material" as those terms are defined in the Atomic Energy Act of 1954 and any amendments thereto and any similar provisions of any federal, state or local statutory or common law.

All other terms and conditions of this policy remain unchanged.

PI-PLSP-102 (08/07)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BANKRUPTCY/INSOLVENCY EXCLUSION

This endorsement modifies insurance provided under the following:

COVER-PRO℠

In consideration of the premium paid, it is agreed that this policy does not apply to any **claim** arising out of, based upon, or attributable to:

1. the bankruptcy, insolvency or financial failure of the **insured**; or
2. the **insured's** seeking protection under federal bankruptcy laws (or any similar laws); or
3. the bankruptcy, insolvency or financial failure of any entity with whom the **Insured** transacts business.

All other terms and conditions of this policy remain unchanged.

PI-PLSP-117 (08/07)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

MOLD EXCLUSION

This endorsement modifies insurance provided under the following:

COVER-PRO℠

It is hereby agreed that **we** shall not be liable to make any payment for **damages** or **claim expenses** in connection with any **claim** that involves:

1. **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 mold, mildew, fungi or bacteria (or any materials containing any similar organic contaminant or pollutant) on or within a building or structure, including its contents, regardless of whether any other cause, event, material, rendering of **professional service** or product contributed concurrently or in any sequence to such injury or damage; or
2. any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, failure to detect, remediating or disposing of, or in any way responding to, or assessing the effects of mold, mildew, **fungi** or bacteria (or any

materials containing any similar organic contaminant or pollutant), by any **Insured** or by any other person or entity.

For the purposes of this exclusion, **fungi** means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or byproducts thereof.

All other terms and conditions of this policy remain unchanged.

PI-PLSP-176 (08/07)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL PREMIUM FOR SUPPLEMENTAL EXTENDED REPORTING PERIOD

This endorsement modifies and is subject to the insurance provided under the following:

COVER-PRO℠

The Declarations are amended as follows:

Item 8. is deleted in its entirety and replaced with the following:

> Item 8. The Additional Premium for Supplemental Extended Reporting Period shall be as follows:
>
> | | |
> |---|---|
> | 12 months: | 75% of Annual Premium |
> | 24 months: | 125% of Annual Premium |
> | 36 months: | 150% of Annual Premium |
> | 48 months: | 175% of Annual Premium |
> | 60 months: | 200% of Annual Premium |
> | Unlimited: | 285% of Annual Premium |

All other terms and conditions of this policy remain unchanged.

PI-ARB-1 (4/03)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BINDING ARBITRATION

Wherever, used in this endorsement: 1) "we", "us", "our", and "insurer" mean the insurance company which issued this policy; and 2) "you", "your", "named insured", "first named insured", and "insured" mean the Named Corporation, the Named Organization, Named Sponsor, Named Insured, or Insured stated in the declarations page; and 3) "other insured(s)" means all other persons or entities afforded coverage under this policy.

This endorsement modifies coverage provided under the Coverage Part to which it is attached.

If we and the insured do not agree whether coverage is provided under this Coverage Part for a claim made against the insured, then either party may make a written demand for arbitration.

When this demand is made, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction. Each party will:

1. Pay the expenses it incurs; and
2. Bear the expenses of the third arbitrator equally.

Unless both parties agree otherwise, arbitration will take place in the county in which the address

shown in the Declarations is located. Local rules of law as to procedure and evidence will apply. A decision agreed to by two of the arbitrators will be binding.

All other terms of the policy remain unchanged.

PI-MANU-1 (01/00)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

HOTEL MANAGER PRO PAK ADVANTAGE

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

HOTEL MANAGER PRO PAK ADVANTAGE

This endorsement modifies and is subject to the insurance provided under the following:

COVER-PRO[SM]

This policy is amended as follows:

A. The following is added to Section II, DEFINITIONS of the policy:

The term Hotel/Motel Manager as stated in Item 9. of the Declarations is defined as follows:

Hotel/Motel Manager means the provision of management services over hotel operations such as staffing, housekeeping, reservations, coordination of building maintenance, food services, and coordination of recreational activities for others, for a fee.

B. ADDITIONAL EXCLUSIONS

Section III. EXCLUSIONS, is amended to include the following:

THIS POLICY ALSO DOES NOT APPLY TO ANY CLAIM OR CLAIM EXPENSES ARISING OUT OF:

R. Any wrongful act committed with the knowledge that it was a wrongful act.

S. Any claim arising out of or connected with the performance or failure to perform services for any person or entity:

1. which is owned by or controlled by any insured; or

All other terms and conditions of this Policy remain unchanged.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

2. which owns or controls any insured; or

3. which is affiliated with any insured through any common ownership or control: or

4. in which any insured is a director, officer, partner or principal stockholder.

However, subparagraphs 1., 2. and 4. of this exclusion shall not apply to any claim arising out of your hotel/motel manager services which is brought or maintained by an entity:

a. in which any insured has an ownership interest of twenty-five percent (25%) or less: or

b. which is owned by an insured if such ownership interest is twenty-six percent (26%) or more but is equal to or less than ninety-nine percent (99%), provided that our liability for any damages and claim expenses for such

claim, in excess of the Deductible, shall not exceed a percentage equal in proportion to the amount of ownership interest in such entity not owned by an insured and you shall be responsible for the remaining percentage of such damages and claim expenses;

T. The operation of any data processing equipment on behalf of any client except for use of data processing equipment which is incidental to the performance of hotel/motel manager services.

U. Any claim arising out of any actual or alleged commingling of or inability or failure to pay, collect or safeguard funds;

V. Any claim alleging failure to provide maintenance or repairs;

W, Any claim arising out of the failure of any real, personal or intangible property to have at any point or points in time any guaranteed economic value.

X. Any claim arising out of the guaranteeing of the availability of funds.

Y. Any claim based upon or arising out of incorrect description of any

All other terms and conditions of this Policy remain unchanged.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

article or commodity or any mistake in advertised price or any false, misleading, deceptive or fraudulent advertising,

Z. Any claim arising out of the promoting of, syndication of, offering or selling of any interest in any limited partnership;

AA. Any claim arising out of activities as a Property Developer, Builder or Construction Manager, or

BB. Any claim arising either directly or indirectly out of any penalties initiated by the Internal Revenue Service.

All other terms and conditions of this Policy remain unchanged.

PI-PLSP-OH-1 (12/07)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

OHIO AMENDATORY ENDORSEMENT

This endorsement modifies insurance provided under the following:

COVER-PRO[sm]

1. It is hereby agreed and understood that Section **V. GENERAL CONDITIONS, J. Cancellation or NonRenewal** is deleted and replaced with the following:

J. Cancellation or Non-Renewal:

CANCELLATION:

1. The **Insurer** shown in the Declarations may cancel this policy by mailing or delivering to the **Named Insurer** advance written notice of cancellation.

2. If this policy has been in effect for:

a. Fewer than ninety (90) days and is not a renewal policy, the **Insurer** may cancel for any reason.

b. Ninety (90) days or more or is a renewal policy, the **Insurer** may cancel only for one or more of the following reasons:

(1) Nonpayment of premium;

(2) Discovery of fraud or material misrepresentation made by the **Insured** or with the **Insureds**

knowledge in obtaining the policy, continuing the policy or in presenting a **Claim** under the policy;

(3) Discovery of a moral hazard or willful or reckless acts or omissions on the **Insured's** part which increase any hazard insured against;

(4) Substantial increase in the risk of loss after insurance coverage has been issued or renewed, including but not limited to an increase in exposure due to rules, legislation or court decision;

(5) Loss of applicable reinsurance or a substantial decrease in applicable reinsurance, if the Superintendent has determined that reasonable efforts have been made to prevent the loss of, or substantial decrease in, the applicable reinsurance, or to obtain replacement coverage;

(6) Failure of an insured to correct material violations of safety codes or to comply with reasonable written loss control recommendations; or

(7) Determination by the Superintendent of insurance that the continuation of the policy would create a condition of that would be hazardous to the policyholders or the public.

3. The **Insurer** will mail or deliver to the **Named Insured** and agent, if any, written notice of cancellation . At the last mailing addresses known to the **Insurer**. Proof of mailing will be sufficient proof of notice.

4. Notice of cancellation will:

(1) State the effective date of cancellation. The **Policy Period** will end on that date.

(2) Contain the date of the notice and the policy number, and will state the reason for cancellation.

5. Policies written for a term of more than one year or on a continuous basis may be cancelled by the insurer for any reason at an anniversary date, upon 30 days' written notice of cancellation.

6. If this policy is cancelled, the **Insurer** will send the **Named Insured** any premium refund due. If the **Insurer** cancels, the refund will be pro rata. If the **Named Insured** cancels, the refund may be less than pro rata. The cancellation will be effective even if the **Insurer** have not made or offered a refund.

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

8. Number of Days Notice of Cancellation

a. With respect to insurance provided by this policy, cancellation will not be effective until at least:

(1) Ten (10) working days after the first **Named Insured** receives the notice, if the **Insurer** cancels for nonpayment of premium; or

(2) Thirty (30) days after the first **Named Insured** receives the notice, if the **Insurer** cancels for any other reason.

NON-RENEWAL:

1. The **Insurer** may elect not to renew this policy by mailing or delivering to the **Named Insured** and any agent, if any, at the last mailing address known to the **Insurer**, written notice of non-renewal.
2. We will mail the notice of nonrenewal at least 30 days before the expiration date of the policy.
3. Proof of malling will be sufficient proof of notice.

PROOF OF NOTICE OF CANCELLATION OR NON-RENEWAL:

If notice of cancellation or non-renewal is mailed, a post office certificate of mailing will be conclusive proof that the **Named Insured** received the notice on the third calendar day after the date of the certificate of mailing.

[LOGO]

Philadelphia Insurance Companies

A Member of the Tokio Marine Group

One Bala Plaza, Suite 100,
Bala Cynwyd, PA 19004

COVER-PRO[sm] RENEWAL APPLICATION

NOTICE: This professional liability coverage is provided on a claims-made basis; therefore, only claims which are first made against you, and reported to the Company, during the policy term, any subsequent renewal of this policy or any extended reporting period are covered, subject to policy provisions.

1. Name of the Applicant Firm:
   GATEWAY HOSPITALITY GROUP INC
2. Applicant principal location:

   Address: 8921 CANYON FALLS BLVD, STE 140

   City: TWINSBURG State: OH Zip: 44087

   Website: ghghotels.net

   E-mail address: RHUTCHESON@ghghotels.net
3. Date established: 12/23/2000

   Telephone: 330-405-9122
4. Describe the Applicant's nature of business:

   HOTEL & RESTAURANT MANAGEMENT + DEVELOPMENT CO.

5. Is the Applicant Firm controlled, owned, affiliated or associated with any other firm, corporation or company?
☒ Yes ☐ No **If yes, provide an explanation:**

_____

6. Please list the address(es) of all branch offices and / or subsidiaries. **Include a brief description of their operations and indicate if coverage is desired for these offices.**

Branch Office(s):

SEE ATTACHED SHEETS

Subsidiary(ies):

SEE ATTACHED SHEETS

7. During the past year has the Applicant Firm's name been changed or has any other business(es) been acquired, merged into *or* consolidated with the applicant firm? ☐ Yes ☐ No **If yes, provide a complete explanation detailing any liabilities assumed.**

_____

8. Staffing – Provide a breakdown of the Applicant's staff into the following categories:

A. Principals, Partners or Officers: 3

B. Professionals (not included in A): _____

C. Support staff (including part-time): 11

D. Part-time professionals (less than 20 hr/wk): _

TOTAL: 14

9. Dates of Applicant Firm's current fiscal period: From: 1/1/2014 To: 12/31/2014

PAST FISCAL YEAR	CURRENT FISCAL YEAR	ESTIMATE–NEXT YEAR
Total Gross Annual Revenue:		
$3,793,064	$4,346,457	$4,200,000

10. For the gross annual revenue listed in question 9, please give the approximate percentage derived from each service you provide.

Service: MANAGEMENT FEES
Percent of Revenue: 82%
Service: REVENUE MANAGEMENT
Percent of Revenue: 6%
Service: ACCOUNTING FEE/SERVICE FEE
Percent of Revenue: 6%
Service: DEVELOPMENT [ILLEGIBLE], TECHNICAL SERVICE FEE
Percent of Revenue: 6%
To enter more information, please use the separate page attached to the application

11. Were more than fifty (50)% of the Applicant's total gross annual revenue for any one year derived from a single client or contract?
☐ Yes ☒ No **If yes, provide the following:**

11a. Client name: _____

11b. Services rendered:

_____

11c. How long do you expect this relationship to continue?

_____

12. Describe the Applicant Firm's three (3) largest jobs or projects since your last renewal.

Client name: NONE Services rendered: _____ Total gross billings: $_____
Client name: _____ Services rendered: _____ Total gross billings: $_____
Client name: _____ Services rendered: _____ Total gross billings: $_____

13. Does the Applicant utilize the services of independent contractors or sub-consultants?
☐ Yes ☒ No

13a. Approximate percentage of gross annual revenue attributable to independent contractors or sub-consultants: 0 %

14. Does the Applicant ever enter into contracts where your fees for services provided are contingent upon the client achieving cost reductions or improved operating results?
☐ Yes ☒ No **If yes, provide a description of such arrangements.**

_____

15. Does the Applicant secure a written contract or agreement for every project? ☒ Yes ☐ No **(Please attach a sample copy)** If no, provide the percentage of your gross annual revenue where a written contract is secured _____%

16. Does the Applicant's contracts contain any of the following? **(check all that apply)**

    ☐ Hold harmless or indemnification clauses in the Applicant's favor
    ☐ Hold harmless or indemnification clauses in your Client's favor
    ☒ A specific description of the services the Applicant will provide
    ☐ Guarantees or warranties
    ☐ Payment terms

17. Are any staff members considered "Licensed Professionals" or do any staff members hold any professional designations or belong to any professional societies/associations?
    ☒ Yes ☐ No **If yes, provide the individual's name and designation/affiliation:**

    Ron Hutcheson, CPA

18. Do you currently carry commercial general liability insurance ☒ Yes ☐ No

Professional liability coverage requested:

LIMIT OF LIABILITY:

☐ $250,000 ☒ $2,000,000 ☐ $6,000,000
☐ $300,000 ☐ $3,000,000 ☐ $7,000,000
☐ $500,000 ☐ $4,000,000 ☐ $8,000,000
☐ $1,000,000 ☐ $5,000,000 ☐ $9,000,000
☐ $10,000,000

DEDUCTIBLE: $_____

FRAUD NOTICE STATEMENTS

NOTICE TO APPLICANTS: "ANY PERSON WHO KNOWINGLY AND WITH INTENT TO DEFRAUD ANY INSURANCE COMPANY OR OTHER PERSON FILES AN APPLICATION FOR INSURANCE OR STATEMENT OF CLAIM CONTAINING ANY MATERIALLY FALSE INFORMATION, OR CONCEALS FOR THE PURPOSE OF MISLEADING, INFORMATION CONCERNING ANY FACT MATERIAL THERETO, COMMITS A FRAUDULENT INSURANCE ACT WHICH IS A CRIME AND MAY SUBJECT SUCH PERSON TO CRIMINAL AND CIVIL PENALTIES."

NOTICE TO ALASKA RESIDENTS APPLICANTS: "A PERSON WHO KNOWINGLY AND WITH INTENT TO INJURE, DEFRAUD OR DECEIVE AN INSURANCE COMPANY FILES A CLAIM CONTAINING FALSE, INCOMPLETE OR MISLEADING INFORMATION MAY BE PROSECUTED UNDER STATE LAW."

NOTICE TO ARKANSAS RESIDENT APPLICANTS: "ANY PERSON WHO KNOWINGLY PRESENTS A FALSE OR FRAUDULENT CLAIM FOR PAYMENT OF A LOSS OR BENEFIT OR KNOWINGLY PRESENTS FALSE INFORMATION IN AN APPLICATION FOR INSURANCE IS GUILTY OF A CRIME AND MAY BE SUBJECT TO FINES AND CONFINEMENT IN PRISON."

NOTICE TO ARIZONA RESIDENTS APPLICANTS: "FOR YOUR PROTECTION ARIZONA LAW REQUIRES THE FOLLOWING STATEMENT TO APPEAR ON THIS FORM. ANY PERSON WHO KNOWINGLY PRESENTS A FALSE OR FRAUDULENT CLAIM FOR PAY-

MENT OF A LOSS IS SUBJECT TO CRIMINAL AND CIVIL PENALTIES."

NOTICE TO COLORADO RESIDENTS APPLICANTS: "IT IS UNLAWFUL TO KNOWINGLY PROVIDE FALSE, INCOMPLETE, OR MISLEADING FACTS OR INFORMATION TO AN INSURANCE COMPANY FOR THE PURPOSE OF DEFRAUDING OR ATTEMPTING TO DEFRAUD THE COMPANY. PENALTIES MAY INCLUDE IMPRISONMENT, FINES, DENIAL OF INSURANCE, AND CIVIL DAMAGES. ANY INSURANCE COMPANY OR AGENT OF AN INSURANCE COMPANY WHO KNOWINGLY PROVIDES FALSE, INCOMPLETE, OR MISLEADING FACTS OR INFORMATION TO A POLICYHOLDER OR CLAIMANT FOR THE PURPOSE OF DEFRAUDING OR ATTEMPTING TO DEFRAUD THE POLICYHOLDER OR CLAIMANT WITH REGARD TO A SETTLEMENT OR AWARD PAYABLE FROM INSURANCE PROCEEDS SHALL BE REPORTED TO THE COLORADO DIVISION OF INSURANCE WITHIN THE DEPARTMENT OF REGULATORY AGENCIES."

NOTICE TO DISTRICT OF COLUMBIA APPLICANTS: "WARNING: IT IS A CRIME TO PROVIDE FALSE OR MISLEADING INFORMATION TO AN INSURER FOR THE PURPOSE OF DEFRAUDING THE INSURER OR ANY OTHER PERSON, PENALTIES INCLUDE IMPRISONMENT AND/OR FINES, IN ADDITION, AN INSURER MAY DENY INSURANCE BENEFITS IF FALSE INFORMATION MATERIALLY RELATED TO A CLAIM WAS PROVIDED BY THE APPLICANT."

NOTICE TO FLORIDA RESIDENTS APPLICANTS: "ANY PERSON WHO, KNOWINGLY AND WITH INTENT TO INJURE, DEFRAUD, OR DECEIVE ANY INSURER FILES A STATEMENT OF CLAIM OR AN APPLICATION CONTAINING ANY FALSE, INCOMPLETE OR MISLEADING INFORMATION IS GUILTY OF A FELONY OF THE THIRD DEGREE."

NOTICE TO KENTUCKY APPLICANTS: "ANY PERSON WHO KNOWINGLY AND WITH INTENT TO DEFRAUD ANY INSURANCE COMPANY OR OTHER PERSON FILES AN APPLICATION FOR INSURANCE CONTAINING ANY "MATERIALLY" FALSE INFORMATION, OR CONCEALS FOR THE PURPOSE OF MISLEADING, INFORMATION CONCERNING ANY FACT MATERIAL THERETO, COMMITS A FRAUDULENT INSURANCE ACT WHICH IS A CRIME."

NOTICE TO LOUISIANA RESIDENTS APPLICANTS: "ANY PERSON WHO KNOWINGLY PRESENTS A FALSE OR FRAUDULENT CLAIM FOR PAYMENT OF A LOSS OR BENEFIT OR KNOWINGLY PRESENTS FALSE INFORMATION IN AN APPLICATION FOR INSURANCE IS GUILTY OF A CRIME AND MAY BE SUBJECT TO FINES AND CONFINEMENT IN PRISON."

NOTICE TO MAINE RESIDENTS APPLICANTS: "IT IS A CRIME TO KNOWINGLY PROVIDE FALSE, INCOMPLETE OR MISLEADING INFORMATION TO AN INSURANCE COMPANY FOR THE PURPOSE OF DEFRAUDING THE COMPANY, PENALTIES MAY INCLUDE IMPRISONMENT, FINES OR A DENIAL OF INSURANCE BENEFITS."

RESIDENTS OF MARYLAND APPLICANTS: "ANY PERSON WHO KNOWINGLY AND WILLFULLY PRESENTS A FALSE OR FRAUDULENT CLAIM FOR PAYMENT OF A LOSS OR BENEFIT OR WHO KNOWINGLY AND WILLFULLY PRESENTS FALSE INFORMATION IN AN APPLICATION FOR INSURANCE IS GUILTY OF A CRIME AND MAY BE SUBJECT TO FINES AND CONFINEMENT IN PRISON."

RESIDENTS OF MINNESOTA APPLICANTS: "ANY PERSON WHO, WITH INTENT TO DEFRAUD OR KNOWING THAT HE/SHE IS FACILITATING A FRAUD AGAINST ANY INSURER, SUBMITS AN APPLICATION OR FILES A CLAIM CONTAINING A FALSE OR DECEPTIVE STATEMENT IS GUILTY OF INSURANCE FRAUD."

RESIDENTS OF NEW JERSEY APPLICANTS: "ANY PERSON WHO INCLUDES ANY FALSE OR MISLEADING INFORMATION ON AN APPLICATION FOR AN INSURANCE POLICY IS SUBJECT TO CRIMINAL AND CIVIL PENALTIES."

RESIDENTS OF NEW MEXICO APPLICANTS: "ANY PERSON WHO KNOWINGLY PRESENTS A FALSE OR FRAUDULENT CLAIM FOR PAYMENT OF A LOSS OR BENEFIT OR KNOWINGLY PRESENTS FALSE INFORMATION IN AN APPLICATION FOR INSURANCE IS GUILTY OF A CRIME AND MAY BE SUBJECT TO CIVIL FINES AND CRIMINAL PENALTIES."

RESIDENTS OF NEW YORK APPLICANTS: "ANY PERSON WHO KNOWINGLY AND WITH INTENT TO DEFRAUD ANY INSURANCE COMPANY OR OTHER PERSON FILES AN APPLICA-

TION FOR INSURANCE OR STATEMENT OF CLAIM CONTAINING ANY MATERIALLY FALSE INFORMATION, OR CONCEALS FOR THE PURPOSE OF MISLEADING, INFORMATION CONCERNING ANY FACT MATERIAL THERETO, COMMITS A FRAUDULENT INSURANCE ACT, WHICH IS A CRIME AND SHALL ALSO BE SUBJECT TO A CIVIL PENALTY NOT TO EXCEED FIVE THOUSAND DOLLARS AND THE STATED VALUE OF THE CLAIM FOR EACH SUCH VIOLATION."

RESIDENTS OF OHIO APPLICANTS: "ANY PERSON WHO, WITH INTENT TO DEFRAUD OR KNOWING THAT HE/SHE IS FACILITATING A FRAUD AGAINST ANY INSURER, SUBMITS AN APPLICATION OR FILES A CLAIM CONTAINING A FALSE OR DECEPTIVE STATEMENT IS GUILTY OF INSURANCE FRAUD."

RESIDENTS OF OKLAHOMA APPLICANTS: "ANY PERSON WHO KNOWINGLY AND WITH INTENT TO INJURE, DEFRAUD OR DECEIVE ANY INSURER, MAKES ANY CLAIM FOR THE PROCEEDS OF AN INSURANCE POLICY CONTAINING ANY FALSE, INCOMPLETE OR MISLEADING INFORMATION IS GUILTY OF A FELONY."

RESIDENTS OF OREGON APPLICANTS: "ANY PERSON WHO KNOWINGLY AND WITH INTENT TO DEFRAUD OR SOLICIT ANOTHER TO DEFRAUD AN INSURER: (1) BY SUBMITTING AN APPLICATION, OR (2) BY FILING A CLAIM CONTAINING A FALSE STATEMENT AS TO ANY MATERIAL FACT, MAY BE VIOLATING STATE LAW."

RESIDENTS OF PENNSYLVANIA APPLICANTS: "ANY PERSON WHO KNOWINGLY AND WITH INTENT TO DEFRAUD ANY INSURANCE COMPANY OR OTHER PERSON FILES AN APPLICATION FOR INSURANCE OR STATEMENT OF CLAIM CONTAINING ANY MATERIALLY FALSE INFORMATION OR CONCEALS FOR THE PURPOSE OF MISLEADING INFORMATION CONCERNING ANY FACT MATERIAL THERETO COMMITS A FRAUDULENT INSURANCE ACT WHICH IS A CRIME AND SUBJECTS SUCH PERSON TO CRIMINAL AND CIVIL PENALTIES."

RESIDENTS OF TENNESSEE APPLICANTS: "IT IS A CRIME TO KNOWINGLY PROVIDE FALSE, INCOMPLETE OR MISLEADING INFORMATION TO AN INSURANCE COMPANY FOR THE PURPOSE OF DEFRAUDING THE COMPANY, PENALTIES INCLUDE IMPRISONMENT, FINES AND DENIAL OF INSURANCE BENEFITS."

RESIDENTS OF TEXAS APPLICANTS: IF A LIFE, HEALTH AND ACCIDENT INSURER PROVIDES A CLAIM FORM FOR A PERSON TO USE TO MAKE A CLAIM, THAT FORM MUST CONTAIN THE FOLLOWING STATEMENT OR A SUBSTANTIALLY SIMILAR STATEMENT: "ANY PERSON WHO KNOWINGLY PRESENTS A FALSE OR FRAUDULENT CLAIM FOR THE PAYMENT OF A LOSS IS GUILTY OF A CRIME AND MAY BE SUBJECT TO FINES AND CONFINEMENT IN STATE PRISON."

RESIDENTS OF VIRGINIA APPLICANTS: "IT IS A CRIME TO KNOWINGLY PROVIDE FALSE, INCOMPLETE OR MISLEADING INFORMA-

TION TO AN INSURANCE COMPANY FOR THE PURPOSE OF DEFRAUDING THE COMPANY. PENALTIES MAY INCLUDE IMPRISONMENT, FINES AND DENIAL OF INSURANCE BENEFITS."

RESIDENTS OF WASHINGTON APPLICANTS: "IT IS A CRIME TO KNOWINGLY PROVIDE FALSE, INCOMPLETE, OR MISLEADING INFORMATION TO AN INSURANCE COMPANY FOR THE PURPOSES OF DEFRAUDING THE COMPANY. PENALTIES INCLUDE IMPRISONMENT, FINES, AND DENIAL OF INSURANCE BENEFITS."

RESIDENTS OF WEST VIRGINIA APPLICANTS: "ANY PERSON WHO KNOWINGLY PRESENTS A FALSE OR FRAUDULENT CLAIM FOR PAYMENT OF A LOSS OR BENEFIT OR KNOWINGLY PRESENTS FALSE INFORMATION IN AN APPLICATION FOR INSURANCE IS GUILTY Of A CRIME AND MAY BE SUBJECT TO FINES AND CONFINEMENT IN PRISON."

RON HUTCHESON
Name (Please Print/Type)

CFO
Title (MUST BE SIGNED BY A PRINCIPAL, PARTNER OR OWNER)

/s/ Ron Hutcheson — June 18, 2014
Signature — Date

The above signed warrants that he/she is authorized and has the power to complete and execute this Application, including the Warranty Statement on behalf of the Applicant and their respective Directors, Officers or other insured persons.

Produced By: (Section to be completed by Producer/Broker)

_____
Producer

_____
Agency

_____
Producer License Number

_____
Agency Taxpayer ID or SS Number

_____
Address (Street, City, State, Zip)

ADDITIONAL INFORMATION

This page may be used to provide additional information to any question on this application. Please identify the question number to which you are referring.

NONE

/s/ Ron Hutcheson — June 18, 2014
Signature — Date

[LOGO]

Philadelphia Insurance Companies

A Member of the Tokio Marine Group

One Bala Plaza, Suite 100
Bala Cynwyd, PA 19004

COVER-PRO[sm] APPLICATION
HOTEL/ MOTEL MANAGER SUPPLEMENT

1. Full Name of the Applicant Firm:
   GATEWAY HOSPITALITY GROUP INC
2. Number of locations managed by the Applicant:
   22
3. Does the Applicant have ownership interest in any of the locations managed? ☒ Yes ☐ No
   If yes, what percentage of the total does the Applicant own? ___% – SEE ATTACHED SHEETS
4. Total years of experience of the Applicant involving direct management of hotels: 40+
5. Does the Applicant have written policies or procedures regarding:
   a. Internal accounting/bookkeeping: ☒ Yes ☐ No
   b. Customer complaints/ dissatisfaction: ☒ Yes ☐ No
   c. Emergency/Catastrophe procedures: ☒ Yes ☐ No
6. Does the owner of the hotels managed carry GL Insurance? ☒ Yes ☐ No
   a. If yes, provide details.
      i. Insurance company: _____
      ii. Policy number: _____

iii. Limits of liability: _____
iv. Policy expiration date: _____

7. Describe the backup system or procedures in place for your customer reservation system.

The Hotel Flag (Franchisor) uploads every night & Backups Data. Also the property Backups Tape Daily

---

ADDITIONAL INFORMATION

This section may be used to provide additional information to any question on this application. Please identify the question number to which you are referring.

I understand that the information submitted herein becomes a part of my Philadelphia Insurance Company Cover-Pro[sm] application and is subject to the same conditions as stated on the application.

RON HUTCHESON
Name (Please Print)

CFO
Title (Must be Principal, Partner or Officer)

/s/ Ron Hutcheson — June 18, 2014
Signature — Date

Gateway Hospitality Group
Equity in Companies

	Legal Entity	Type of Legal Entity	Type of Operations	Number of Employees	Ownership Percentage
	Gateway Hospitality Group Inc.	8 Corporation	Hotel Development & Management Company	14	
	Total Equity				100.00%
1	Western Hospitality Group LP	Limited Partnership	Hilton Garden Inn – Missoula, MT	128	
	Total Equity				36.13%
2	Applegate Hotel Operating Company LLC	Limited Liability Company	Entity holds the Employees for the 5 Apple Hotels (See Below)**		
	Total Equity				100.00%
3	Firewheel Hotel Ltd	Limited Partnership	Hyatt Place – Garland, TX	80	
	Total Equity				32.21%

(continued on next page)

4	Kallspell Hotel LLC	Limited Liability Company	Hilton Garden Inn – Kallspell	85	
	Total Equity				33.33%
5	Levt Commons Hotel LLC	Limited Liability Company	Hilton Garden Inn – Perrysburg	90	
	Total Equity				100.00%
6	JWT Hospitality Group Billings, LLC	Limited Liability Company	Hilton Garden Inn – Billings, MT	45	
	Total Equity				8.43%
7	RSV Wheeling LLC	Limited Liability Company	Hampton Inn & Suites– Wheeling	35	
	Total Equity				50.00%
8	Blue Canyon Ltd	Limited Partnership	Blue Canyon Restaurant– Twinsburg	125	
	Total Equity				88.00%

(continued on next page)

9	Heritage Square Hotel LLC	Limited Liability Company	Hampton Inn & Suites	35	
	Total Equity				15.00%
10	Duncanville Hospitality Ltd	Limited Partnership	Owns Land in Duncanville, TX	—	
	Total Equity				50.00%

List of Other Entities with No Equity – Third Party Management Contracts

9	Blue Kennwood LLC	Limited Liability Company	Hilton Garden Inn – Blue Ash	35
10	Bozeman Lodging Investors LLC	Limited Liability Company	Hilton Garden Inn – Bozeman	49
11	Oak Street Partnership	General Partnership – Montana	Comfort Inn – of Bozeman	30

(continued on next page)

12	Catron Partners LLC	Limited Liability Company	Comfort Suites – Bozeman	25
13	MFM 2000 Motel, Inc.	S Corporation	Hilton Garden Inn – Newburgh	60
14	Bella Harbor Hotel Adventure LLC	Limited Liability Company	Hilton Dallas/ Rockwall Lakefront	135
15	The Inn at St. Mary's Partners L.P.	Limited Partnership	Hilton Garden Inn – South Bend	108
16	Denson Walker Properties, LLC	Limited Liability Company	Hilton Garden Inn – Denison	90
17	Movie Lounge of Fort Smith	Limited Liability Company	The Movie Lounge of Fort Smith	36

(continued on next page)

17**	Apple Nine Hospitality Ownership Inc.	Corporation	Hampton Inn & Suites – Allen	22
18**	Apple Nine Hospitality Ownership Inc.	Corporation	Hilton Garden Inn – Allen	65
19**	Apple Nine Hospitality Ownership Inc.	Corporation	Hilton Garden Inn – Duncanville	71
20**	Apple Nine Hospitality Ownership Inc.	Corporation	Hilton Garden Inn – Lewisville	96
21**	Apple Nine Hospitality Ownership Inc.	Corporation	Hilton Garden Inn – Twinsburg	89
	Total Number of Employees			1,646

Gateway Hospitality Group Inc.
Hotels & Subsidiaries
6/18/2014

Operating Hotels & Restaurants

Hilton Garden Inn – Twinsburg, OH
Hilton Garden Inn – South Bend, IN
Hilton Hotel – Rockwall, TX
Hilton Garden Inn – Lewisville, TX
Hilton Garden Inn – Allen, TX
Hilton Garden Inn – Duncanville, TX
Hilton Garden Inn – Missoula, MT
Hilton Garden Inn – Kalispell, MT
Hilton Garden Inn – Billings, MT
Hampton Inn & Suites, Allen, TX
Hyatt Place – Garland, TX
Hilton Garden Inn – Perrysburg, OH
Hampton Inn & Suites – Wheeling, WV
Hilton Garden Inn – Blue Ash, OH
Hilton Garden Inn – Bozeman, MT
Hilton Garden Inn – Newburgh, NY
Comfort Inn – Bozeman, MT
Comfort Suites – Bozeman, MT
Hilton Garden Inn – Las Colinas, TX
Hilton Garden Inn – Denison, TX
Hampton Inn & Suites – Mishawka, IN
Blue Canyon Kitchen & Tavern – Twinsburg, OH
MovieLounge – Fort Smith, AR

Subsidiaries

Duncanville Hospitality Ltd.
Levis Commons Hotel LLC
JWT Hospitality Group Billings LLC
Firewheel Welcome LLC
Firewheel Hotel Ltd.

Kalispell-Hotel LLC
Glacier Hotel LLC
Western Hospitality Group LP
Missoula Hospitality LLC
WHGL LLC
North Texas Regional Hotel Ltd
SCI North Texas Regional Welcome LLC
GHG Pittsburgh LLC
GHG Duncanville LLC
GHG Billings LLC
GHG Garland LLC
GHG Kalispell LLC
GHG Liquor LLC
GHG Missoula LLC
GHG Perrysburg LLC
GHG Denison LLC
HGI Allen Private Club, Inc.
GHG Liquor LLC
Applegate Operating Company Inc.
Blue Canyon Ltd.
Blue Canyon Rockwall LLC
RSV Wheeling LLC
RSV Twinsburg Hotel Ltd
RSV Twinsburg LLC
RSV Hospitality Enterprises Inc.
Gateway Mishawaka LLC
Heritage Square Hotel LLC

Brenda L. McGee

From: "Carol Parsons" [cparsons@uainc.com]
Sent: Monday, June 23, 2014 10:19 AM
To: Shope, Michele
Subject: FW: GHG Errors & Omissions Renewal
Attachments: GHG Professional Liability application-6-2014.pdf

Policy# PHSD863530 August 16th expiration date.

Michele: Attached is the renewal application for the Gateway Hospitality Group's Professional Liability.

Please provide renewal quote at your earliest convenience. Thank you.

Carol Parsons
United Agencies, Inc.
1422 Euclid Ave., Suite 900
Cleveland, Ohio 44115
(216) 241-1199
(216) 241-1339 Fax
cparsons@uainc.com

From: Ron Hutcheson [mailto:rhutcheson@ghghotels.net]
Sent: Friday, June 20, 2014 3:29 PM
To: "Carol Parsons"
Subject: RE: GHG Errors & Omissions Renewal

Carol – attached is the application completed – enjoy – thanks

Ron Hutcheson
Gateway Hospitality Group
8921 Canyon Falls Blvd., Ste. 140
Twinsburg, OH 44087
(T) 330-405-9122
(F) 330-405-9898
(C) 440-336-3698

From: "Carol Parsons" [mailto:cparsons@uainc.com]
Sent: Tuesday, June 17, 2014 2:37 PM
To: Ron Hutcheson
Subject: GHG Errors & Omissions Renewal

Hi Ron: The E & O/Professional Liability for GHG is due to expire on August 16th. Attached is the application and supplement that need to be completed and returned in order for us to approach markets on your behalf and obtain quotes for your consideration. Please complete and return at your earliest convenience.

Also, by now you should have received your copy of the July 1st Office Package renewal from State Auto Insurance – Policy # BOP 2125758. This policy covers your actual office exposure in Twinsburg. The policy currently provides a limit of $341,129 for your building improvements and betterments, $43,181 for general office contents and $102,000 for electronic data processing equipment (phones, faxes, copiers, scanners, computers); as well as your premises General Liability coverage.

Please let me know if you wish to make any changes in these limits; or if you want me to come out and go over the coverages with you in greater detail.

Hope you are enjoying your summer so far. Don't hesitate to call if you have any questions. Thank you.

Carol Parsons
United Agencies, Inc.
1422 Euclid Ave., Suite 900
Cleveland, Ohio 44115
(216) 241-1199
(216) 241-1339 Fax
cparsons@uainc.com

[Cover-Pro[sm] Renewal Application and Cover-Pro[sm] Application Hotel/Motel Manager Supplement attached to this email are reproduced herein at pages 162 through 182]