APPENDIX A

ATTORNEYS AT LAW

333 BUSH STREET, 30TH FLOOR SAN FRANCISCO, CALIFORNIA 94104-2834

www.sedgwicklaw.com 415.781.7900 *phone*
415.781.2635 *fax*

Sedgwick LLP

Marlin J. O'Leary,
martin.oleary@sedgwicklaw.com
direct (415) 627-1463

Kimberly K. Jackanich
kimberly.jackanich@sedgwicklaw.com
(415)627-3473

May 29, 2015

Via E-mail and Certified Mail/Return Receipt Requested

Ron Hutcheson
GATEWAY HOSPITALITY GROUP, INC.
8921 Canyon Falls Blvd. Ste. 140
Twinsburg, OH 44087-1976
(rhutcheson@ghghotels.net)

Re: ***Pam Walter, et al. v. Hilton Garden Inns Franchise, LLC, et al.***
Insured: GATEWAY HOSPITALITY GROUP, INC.
Policy No.: PHSD965996
Claim No.: 880619
Our File No.: 00875-012283

Dear Mr. Hutcheson:

We represent Philadelphia Indemnity Insurance Company ("Philadelphia"). This matter involves a class

action lawsuit filed in Montana State Court against Hilton Garden Inns Franchise, LLC; Gateway Hospitality Group, Inc.; Hilton Garden Inn Bozeman; Western Hospitality Group, LC [sic] dba Hilton Garden Inn of Missoula; JWT Hospitality Group Billings, LLC dba Hilton Garden Inn Billings; Kalispell Hotel LLC dba Hilton Garden Inn Kalispell; and all other Gateway Hospitality Group managed hotels in Montana (collectively "the Insureds"). The lawsuit is styled *Pam Walter, et al. v. Hilton Garden Inns Franchise, LLC, et al.*, Montana Fourth Judicial District Court, Missoula County Case No. DV-15-196 ("the *Walter* Class Action"). Claimants are past and present non-management server employees of the Hilton Garden Inns in Montana that claim they were wrongfully denied service charges for their services at banquets.

The purpose of this letter is to advise the Insureds of Philadelphia's conclusions regarding coverage under Cover-Pro Policy No. PHSD965996. Coverage under any other Philadelphia policy will be addressed under separate cover. Please ensure that all appropriate persons are notified of the contents of this letter.

After careful consideration, Philadelphia is constrained to conclude that coverage cannot be afforded for the *Walter* Class Action as the Claim arises out of the Insureds' Employment Practices, which are precluded from coverage under the Policy. Additional policy exclusions and conditions operate to limit or otherwise preclude coverage as outlined below.

After consideration of the issues and Policy provisions discussed herein, should you or any Insured believe that Philadelphia's conclusions are incorrect, we invite any additional information or documentation which you believe Philadelphia might not have considered and which might cause it to alter its analysis.

POLICY INFORMATION

Philadelphia issued Cover-Pro Policy No. PHSD965996 to Gateway Hospitality Group, Inc. for the Policy Period of August 16, 2014 to August 16, 2015. The Policy includes Professional Liability Insurance Coverage. The Policy has a Limit of Liability of $1,000,000, subject to a $5,000 Deductible for each Claim. The maximum aggregate liability for all Damages and Claim Expenses is the Limit of Liability in the Declarations. Philadelphia has the right and duty to defend Claims.

FACTUAL SUMMARY

The following factual summary is derived from Philadelphia's review of the complaint and information and documents received from the Insured. By referring to the allegations against the Insured in regards to coverage, Philadelphia does not intend to suggest or imply that the allegations are true.

On March 24, 2015, the Insureds were served with a class action complaint filed in Montana State Court by Claimants Pam Walter, Jimmy Smith, Lisa

Barnhill, Zach Winn, Windy Carlson, Denise Pyron, and Ashley-O'Connor (collectively "Claimants"). The lawsuit was filed against Hilton Garden Inns Franchise, LLC; Gateway Hospitality Group, Inc.; Hilton Garden Inn Bozeman; Western Hospitality Group, LC [sic] dba Hilton Garden Inn of Missoula; JWT Hospitality Group Billings, LLC dba Hilton Garden Inn Billings; Kalispell Hotel LLC dba Hilton Garden Inn Kalispell; and all other Gateway Hospitality Group managed hotels in Montana (collectively "the Insureds"). The lawsuit is styled *Pam Walter, et al. v. Hilton Garden Inns Franchise, LLC, et al.*, Montana Fourth Judicial District Court, Missoula County Case No. DV-15-196 ("the *Walter* Class Action"). Claimants are past and present non-management server employees of the Hilton Garden Inns in Montana that claim they were wrongfully denied service charges for their services at banquets.

The *Walter* Class Action is brought on behalf of the following proposed class:

> All past and present non-management server employees of the Hilton Garden Inn who provided services at any time within the applicable statute of limitations period prior to commencement of this action and did not receive a portion of the service charge as tip income in connection with banquet activities at the hotel for which a service charge or gratuity charge was imposed.

The Complaint "seeks to recover lost wages that Defendants wrongfully withheld from Plaintiffs and members of the Class in violation of Montana

statutory and common law, including Montana Code Annotated §§ 39-3-201, *et seq*. and §30-14-201, *et seq*." The Complaint alleges that for all events hosted by the Hilton Garden Inn hotels, a flat rate service charge of 15-18% was charged to the consumer for food and beverage. The Complaint alleges that when Gateway Hospitality Group assumed the management responsibilities for the Hilton Garden Inn Hotels, they implemented a new policy in which the server employees were not compensated their rightful portion of the gratuity charge, which was called a "service charge" or "set-up fee". Instead, the Complaint alleges that the Hilton Garden Inn hotels increased the rate to 18-20% and retained the money for its own benefit. The Complaint further alleges that the purchasers of banquet services at the Hilton Garden Inn hotels did not receive a clear disclosure that the service charge was not being used to pay the server employee tips and/or wages. Rather, the Complaint alleges that the Insureds routinely represented to customers that the gratuity would be fully distributed to the servers. As a result, the Complaint alleges that the Insureds "have repeatedly and willfully failed to pay non-management server employees' wages due."

The Complaint further alleges that the Insureds have been unjustly enriched by their conduct and that their policies constitute unfair methods of competition. The Complaint also alleges that the Insureds have conferred the benefit of non-management server employees without offering compensation due in circumstances where compensation is reasonably expected

and required, and that the Insureds have wrongfully converted Plaintiffs' earned wages. By lowering their overall costs and retaining tip income, the Complaint alleges that the Insureds have been able to offer lower prices than their competitors, giving them an unfair and illegal business advantage over legally compliant businesses. The Complaint alleges that the Insureds acted with "actual fraud or actual malice" and that they "deliberately proceeded to act with indifference to or with conscious disregard of the high probability of injury to the Plaintiffs by their violation of Montana law and the rights of Plaintiff employees."

The Complaint includes causes of action for (1) Violation of Montana Code Annotated Title 39, Chapter 3; (2) Unjust enrichment; (3) Conversion; (4) Unfair Trade Practices; and (5) Punitive Damages. The Complaint seeks recovery of (1) class certification; (2) declaratory and injunctive relief; (3) compensatory damages to Plaintiffs in an amount of 110% of the wages due and unpaid; (4) treble damages; (5) attorney fees and reasonable costs; (6) restitution; and (7) punitive damages.

The Insureds provided Philadelphia with notice of the possibility of the *Walter* Class Action on or about March 3, 2015.

COVERAGE ANALYSIS

1. Insuring Agreement / Definition of Claim

The Insuring Agreement for the Policy provides that:

> 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.

Section II.B. of the Policy provides that 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.

Section II.P. of the Policy provides that 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.

Section II.K. of the Policy provides that 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. Item 9. of the Declarations defines the Insured's profession as "Hotel/Motel Manager." Pursuant to the Hotel Manager Pro Pak Advantage Endorsement, 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 or recreational activities for others, for a fee.

The *Walter* Class Action includes allegations of deliberate, intentional conduct by the Insureds. Specifically, the Complaint in the *Walter* Class Action alleges that the Insureds deliberately retained the service charges for banquets and refused to provide these amounts as compensation to the non-management server employees. Philadelphia must respectfully reserve the right to disclaim coverage to the extent that the *Walter* Class Action does not allege a Wrongful Act as defined in the Policy or does not arise out of the Insureds' profession as defined in the Hotel Manager Pro Pak Advantage Endorsement.

For the reasons outlined below, Philadelphia has determined that coverage cannot be afforded for the *Walter* Class Action.

2. <u>Employment Practices Exclusion</u>

Section III.K. of the Policy provides that the Policy does not apply to any Claim or Claim Expenses:

> K. alleging, arising out of, resulting from, based upon or in consequence of, directly or indirectly, **any employment practices** or 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.

The *Walter* Class Action arises out of the Insureds' alleged failure to properly compensate its non-management server employees with service charges from banquets. The Complaint specifically alleges that the Insureds instituted an employment policy by which the Insureds retained the service charges received rather than distributing these amounts as compensation to their employees. 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 Insureds' employment practices such as to be precluded from coverage by operation of Exclusion K. Accordingly, Philadelphia must respectfully disclaim coverage and advise the Insureds that no policy benefits can be afforded.

3. Other Potentially Applicable Limitations and Exclusions

Although Philadelphia believes that the foregoing Policy provisions are dispositive of coverage for the *Walter* Class Action, Philadelphia notes that there are additional Policy provisions which would also exclude or limit coverage for this matter.

a. 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, 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.

The Complaint alleges that the Insureds wrongfully converted Claimants' Earned Wages and were unjustly enriched by their wrongful retention of service charges for banquets. The Complaint further alleges that the Insureds acted with actual fraud or malice in committing these actions. Based upon these allegations, Philadelphia must respectfully reserve all rights under Exclusion A. Additionally, Philadelphia must

respectfully reserve all rights with regard to the insurability of deliberate or malicious conduct by the Insureds.

b. The Non-Monetary Relief Exclusion

Section III.C. of the Policy provides that the Policy does not apply to any Claim or Claim Expenses:

> 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.

The *Walter* Class Action seeks recovery of various forms of non-pecuniary relief, including declaratory and injunctive relief. Further, the *Walter* Class Action seeks recovery of punitive damages, restitution, and treble damages, which may be uninsurable under applicable law. Philadelphia reserves all rights to disclaim coverage for any non-pecuniary relief, fines, penalties, or other recovery that is precluded from coverage under Exclusion C or is otherwise uninsurable under applicable law.

c. Other Insurance

Section V.N. of the Policy provides:

> 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.

Further, Section II.C. of the Policy provides that Claim Expenses shall not include, in pertinent part:

> 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

Philadelphia understands that the Insureds reported the *Walter* Class Action to its subsequent Employment Practices Carrier. Accordingly, Philadelphia must respectfully reserve all rights with respect to other insurance.

d. The Definition of Claim Expenses and Damages

Section II.2. of the Policy provides that 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 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.

Section II.E. of the Policy provides that 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.

The Complaint seeks recovery of treble damages, which are specifically excluded from the definition of Damages. Further, the Complaint seeks recovery of punitive damages and restitution, which may be uninsurable as a matter of law. Philadelphia reserves the right to disclaim coverage for any recovery sought in the *Walter* Class Action that does not constitute Damages as defined by the Policy or is otherwise uninsurable as a matter of law.

e. The Fee/Charges Dispute Exclusion

Section III.O. of the Policy provides that the Policy does not apply to any Claim or Claim Expenses:

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

Based on the allegations in the *Walter* Class Action, Philadelphia respectfully reserves all rights under Exclusion E.

f. The Knowledge of Wrongful Act Exclusion

The Policy includes the Hotel Manager Pro Pak Advantage Endorsement, which provides that the

Policy 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

Based on the allegations in the *Walter* Class Action, Philadelphia respectfully reserves all rights under Exclusion R.

RESERVATION OF RIGHTS

Due to the dispositive nature of the issues cited above, Philadelphia has not addressed all potentially applicable limitations to coverage under the Policy. The respective rights and obligations of Philadelphia and the Insureds should be considered fully reserved under the Policy and applicable law. Philadelphia's evaluation is based on presently known facts and circumstances; its investigation is ongoing and specification herein of certain coverage issues and reservations is not a waiver of other coverage rights or defenses which may exist in Philadelphia's favor or which may arise in the future. Philadelphia reserves the right to assert additional coverage or legal defenses as they may be ascertained.

CONCLUSION

For the reasons expressed herein, Philadelphia must respectfully conclude that coverage is not available for the *Walter* Class Action under the Policy.

After consideration of the issues and Policy provisions discussed herein, should you believe that Philadelphia's conclusions are incorrect, we invite any additional information or documentation which you believe Philadelphia might not have considered and which might cause it to alter its analysis. Philadelphia will promptly consider any additional information or documentation provided.

If you have any questions with regard to this matter, please contact us.

Very truly yours,

SEDGWICK LLP

By /s/ Kimberly K. Jackanich
Martin J. O'Leary
Kimberly K. Jackanich

MJO/KKJ

cc: June Zimmer, United Agencies, Inc.
(via e-mail only, (jzimmer@uainc.com)

APPENDIX B

Thomas A. Marra
MARRA, EVENSON & LEVINE, P.C.
2 Railroad Square, Suite C
P.O. Box 1525
Great Falls, Montana 59403-1525
Telephone: (406) 268-1000; Facsimile:(406) 761-2610
Direct e-mail: tmarra@marralawfirm.com
(Attorneys for Philadelphia Indemnity Insurance Company)

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

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.	Cause No. DV-18-1357 Dept. 2 **PHILADELPHIA INDEMNITY INSURANCE COMPANY'S BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT OR, IN THE ALTERNATIVE, TO TRANSFER BASED UPON FORUM NON CONVENIENS**

Pursuant to M.R. Civ. P. 12(b)(6), 12(b)(3), 12(b)(2), 12(b)(1), and M.C.A. § 25-2-201, Philadelphia Indemnity Insurance Company ("Philadelphia"), submits this brief in support of its *Motion to Dismiss Plaintiffs' First Amended Complaint or, in the Alternative to Transfer Based upon Forum Non Conveniens ("Complaint")*. The *Complaint*, as filed by Gateway Hospitality Group, Inc. ("Gateway"), Western Hospitality Group, LP d/b/a Hilton Garden Inn Missoula ("HGI Missoula"); Kalispell Hotel, LLC d/b/a Hilton Garden Inn Kalispell ("HGI Kalispell"); Bozeman Lodging Investors, LLC d/b/a Hilton Garden Inn Bozeman ("HGI Bozeman");and JWT Hospitality Group LLC d/b/a Hilton Garden Inn Billings ("HGI Billings") ("Plaintiffs"), should be dismissed on the following grounds:

I. INTRODUCTION

Plaintiffs' *Complaint* seeks a declaration that Philadelphia owed a defense and indemnity in connection with a matter captioned *Pam Walter, et al. v. Gateway Hospitality Group, Inc., et al.*, Fourth Judicial District Court, Missoula County, DV 15-196 (the "*Walter* class action") under an insurance policy ("Policy") issued by Philadelphia to Gateway, an Ohio corporation. (Compl. at ¶¶ 1-2.) The Complaint further alleges that Philadelphia breached its contract when it failed to defend and indemnify Plaintiffs. (Compl. at ¶ 63 *et*

seq.) The Complaint alleges that the "HGI Entities"[1] are insureds under the Policy. (Compl. at ¶¶20-22.)

The reasons for dismissing Plaintiffs' Complaint are: First, this Court lacks personal jurisdiction over Philadelphia, as set forth in the U.S. Supreme Court's 2017 decision of *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017), which overturned the Montana Supreme Court on this issue. The Complaint states that: (a) Gateway entered into an insurance policy with a Pennsylvania corporation, Philadelphia (Compl. ¶¶ 1, 9, 13); (b) Plaintiffs were sued by their employees in the *Walter* class action in Montana (Compl. ¶ 34); and (c) Plaintiffs were informed by Philadelphia the Policy provided no coverage for the class action lawsuit (Compl. ¶¶ 47-48). Plaintiffs do not and cannot allege their insurance Policy was formed in Montana or that Philadelphia performed under the policy in Montana. While Plaintiffs allege that Philadelphia expected (or should have expected) to insure a risk in Montana, this is contradicted by the actual Policy documents attached to the Complaint. Accordingly, Plaintiffs' claims must be dismissed due to this Court's lack of personal jurisdiction over Philadelphia.

Next, the HGI Entities do not have standing to bring the claims they assert in the Complaint because they are not insureds under the Policy. Accordingly, as a matter of law, there is no basis for their claims

[1] "HGI Entities" refers to HGI Missoula, HGI Kalispell, HGI Bozeman and HGI Billings.

against Philadelphia. Those claims should be dismissed with prejudice.

Finally, dismissal is appropriate based on the doctrine of *forum non conveniens*. *Forum non conveniens* permits a court to dismiss a case when the court believes the action may be more appropriately and justly tried elsewhere. M.C.A. § 25-2-201. There are alternative jurisdictions available to Gateway, an Ohio corporation, to address a dispute over an Ohio contract to which Ohio law applies.

II. ARGUMENT

A. The Complaint Fails to State a Claim Upon Which Relief May Be Granted when Subject to the Test of M.R.Civ.P. 12(b)(1)(2)(3)(6).

1. Plaintiffs Bear the Burden of Properly Stating a Claim.

A defendant may move to dismiss based upon a plaintiff's failure to state a claim upon which relief can be granted. M. R. Civ. P. 12(b)(1), 12(b)(2), 12(b)(3), and 12(b)(6). In order to survive a motion to dismiss M.R.Civ.P. 8 or Fed.R.Civ.P.8 require Plaintiffs to state "enough facts to state a claim to relief that is plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 124 S. Ct. 1955, 1959 (2007); M. R. Civ. P. 8(a)(2). A plaintiffs' factual allegations must be adequate to raise a right to relief above the speculative level and must provide more than labels, conclusions, and a formulaic recitation of the elements of a cause of action. *Id.* at

1965; *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1950 (2009).

Further, because mere legal conclusions are not entitled to the assumption of truth, a court may begin its analysis by disregarding them. *Iqbal* at 1940. A court is not bound to accept, as true, legal conclusions from plaintiffs that are couched as factual allegations. *Id.* at 1950 (citing *Twombly*, 124 S. Ct. at 1955). This pleading burden is crucial here, since Plaintiffs fail to allege facts sufficient to show personal jurisdiction, standing, or that this court is the proper venue to resolve this dispute. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) ("standing consists of three elements . . . at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element"); *Swartz v. KPMG LLP*, 476 F.3d 756, 766 (9th Cir. 2007) (Finding on Rule 12(b)(2) motion that "mere 'bare bones' assertions of minimum contacts with the forum or legal conclusions unsupported by specific factual allegations will not satisfy a plaintiff's pleading burden.").

2. Plaintiffs Failed To Allege Montana Has Personal Jurisdiction Over Philadelphia.

Montana applies a two-part analysis to determine whether a Montana court can exercise personal jurisdiction over a defendant. First, the court determines 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), [the court] then determine[s] 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 v. Cont'l Res., Inc.*, 2017 MT 235, ¶11, 388 Mont. 517, 402 P.3d 1213.

(a). It is Plaintiffs' Burden to Establish Personal Jurisdiction.

Where a defendant moves to dismiss a complaint for lack of personal jurisdiction, plaintiff bears the burden of demonstrating jurisdiction is appropriate. *Minuteman Aviation v. Swearingen*, 237 Mont. 207, 212 (1989); *Bunch v. Lancair Int'l.*, 2006 Mont. Dist. LEXIS 469 at *45.[2] Where there is no conflict of facts, such as competing affidavits, an evidentiary hearing on a motion contesting jurisdiction is not necessary. *Bunch* at *45-47 Here, Plaintiffs' *Complaint* fails to allege any factual basis for personal jurisdiction over Philadelphia. Therefore, Plaintiffs' *Complaint* should be dismissed without an evidentiary hearing.

[2] Moreover, because the burden of establishing jurisdiction rests with Plaintiffs, if Plaintiffs do not make a colorable showing of personal jurisdiction, the court may bar Plaintiffs from even taking discovery on disputed jurisdictional issues. *Bunch* at *45-47 (denying discovery and granting motion to dismiss for lack of personal jurisdiction); *Wenz v Nat'l Westminster Bank, PLC*, 91 P.3d 467, 469 (Colo. App. 2001) (holding jurisdictional discovery on personal jurisdiction is within the discretion of the trial court and affirming denial of discovery and granting motion to dismiss).

(b). There is No Personal Jurisdiction over Philadelphia.

The Supreme Court of the United States has repeatedly held that the 14th Amendment requirements for personal jurisdiction are paramount. *Bristol-Myers Squibb v. Superior Court* holds, "In determining whether personal jurisdiction is present, a court must consider a variety of interests . . . But the 'primary concern' is 'the burden on the defendant." 137 S. Ct. 1773, 1780 (2017). *Bristol-Myers* also holds: "The primary focus of our personal jurisdiction inquiry is the defendant's relationship to the forum State." *Id.* As explained below, Philadelphia does not have sufficient connection to Montana for a Montana court to exercise personal jurisdiction—either general or specific jurisdiction.

General jurisdiction will exist over a nonresident corporate defendant only where that corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011)). Courts may exercise general jurisdiction only when "the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit . . . on causes of action arising from dealings entirely distinct from those activities." *Id.* at 761. "The 'paradigm' forums in which a corporate defendant is 'at home,' we explained, are the corporation's place of incorporation and its principal place of business." *Tyrrell*, 137 S. Ct. at 1558.

In *Tyrrell*, the Supreme Court reversed the Montana Supreme Court's finding that a Montana court could exercise personal jurisdiction over BNSF based on general jurisdiction. 137 S. Ct. at 1558. *Tyrrell* held BNSF, like Philadelphia in this case, was not incorporated in Montana nor did it maintain its principal place of business in Montana. *Id. Tyrrell* held BNSF was not so heavily engaged in activity in Montana as to render it "essentially at home" in Montana. *Id.* This is significant given BNSF's substantial operations in Montana. BNSF operates over 2,000 miles of railroad track and had more than 2,000 railroad employees in Montana. *Id.*[3] *Tyrrell* holds that general jurisdiction does not focus solely on the magnitude of a defendant's in-state contacts, while observing a corporation that operates in many places can scarcely be deemed at home in all of them. *Id.* (citing *Daimler AG, 134* S. Ct. at 761).

Those principles described in *Tyrrell* foreclose general jurisdiction over Philadelphia. Philadelphia is not a Montana corporation and does not have its principal place of business in Montana. (Compl. ¶9.) Plaintiffs instead allege that Philadelphia was authorized by Montana to transact business in Montana – an argument specifically rejected by the *Tyrrell* court.

[3] Were this matter to proceed to an evidentiary hearing on the matter of general personal jurisdiction, Philadelphia would establish it has *no offices* and *no employees* in Montana. Plaintiffs' Complaint does not allege otherwise. Philadelphia sells insurance policies to Montana entities, but that too is not sufficient to establish general jurisdiction. Philadelphia is not "at home" in Montana. *Tyrrell*, 137 S. Ct. at 1558.

(Compl. ¶ 14.) The *Tyrrell* court rejected the Montana Supreme Court's determination that personal jurisdiction existed over a railroad company that was "doing business" and "found within" Montana. 137 S. Ct. at 1559. Rather than attempt to meet this inapplicable standard, Plaintiffs failed to allege facts in their Complaint that Philadelphia has contacts with Montana that are so "continuous and systematic" it would be fair to treat Philadelphia as though it was based or operated in Montana. Plaintiffs' failure to have done so is fatal to any claim of general personal jurisdiction.

(c). There Is No Jurisdiction Under Montana's Long Arm Statute.

M. R. Civ. P. 4(b)(1) provides:

(b) Jurisdiction of Persons.

(1) Subject to Jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of Montana courts. Additionally, 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;

(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.

Philadelphia has no contacts with Montana as described in M. R. Civ. P. 4(b)(1). While Plaintiffs allege that "the Policy insured risks and persons located in Montana at the time the Policy issued" (Compl. ¶ 25), the Policy attached to Plaintiffs' Complaint makes it clear that Philadelphia did not contract with "any person, property, or risk located within Montana at the time of contracting." Rather, none of the HGI Entities are insureds under the Policy. (Compl. at Ex. 1, p. 12.) There is no mention of Montana on the face of the Policy. *Id.* The Application for the Policy does not include the revenues of the HGI Entities or identify them where required on the first page. (*Id.*, pp. 46-47.) Thus, ***at the time of contracting***, Philadelphia did not

contemplate any connection with Montana through the Policy.

Moreover, even if personal jurisdiction exists pursuant to M. R. Civ. P. 4(b)(1) (which it does not), "[the court] then determine[s] 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*, 388 Mont. at 520. Again, there is no fair play or substantial justice in requiring Philadelphia to litigate this matter before a Montana court where Montana contacts do not exist.

Further, Gateway, by making itself subject to Montana's jurisdiction through its dealings with the HGI Entities, cannot drag its insurer along. It does not matter that Philadelphia knew that Gateway's business involved providing hotel management services to Montana entities. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296, 298 (1980) holds:

> If foreseeability were the criterion . . . Every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel. . . . It is foreseeable that the purchasers of automobiles sold by World-Wide and Seaway may take them to Oklahoma. 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***.' (emphasis added).

The fact Gateway does business in Montana does not satisfy the requirement for Montana to exercise personal jurisdiction over Philadelphia with regard to an Ohio insurance contract.

Likewise, *Bristol-Myers* holds: "What is needed . . . is a connection between the forum and the specific claims at issue." 137 S. Ct. at 1781. *Bristol-Myers* holds that non-residents of California could not sue a drug manufacturer in California as part of a nationwide class action because there was no connection between plaintiffs and the drug company in California. 137 S. Ct. at 1781-1784. Here, out-of-state Plaintiff Gateway, an Ohio corporation, seeks to drag Philadelphia to Montana to litigate an insurance coverage dispute that arose in Ohio. The 14th Amendment principles of due process do not contemplate that an insurance company avails itself of personal jurisdiction in every place where an insured may be sued. Indeed, this fact is evidenced by the Policy which contains a form requiring insurance coverage disputes between the parties be arbitrated in Ohio. (Compl. at Ex. 1, p. 40.)

(d). There Is No Specific Jurisdiction Based On Philadelphia's Contacts With Montana.

Goodyear Dunlop holds, "Specific jurisdiction . . . depends on 'affiliation between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State, and is therefore subject to the State's regulation." 131 S. Ct. at 2851. *Buckles*, 388 Mont. at 520, holds that a court

must consider the following factors before finding specific personal jurisdiction over a defendant:

> (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 privilege of conducting activities in the forum, thereby invoking its laws. (2) The claim must be one which arises out of or results from the defendant's forum-related activities. (3) Exercise of jurisdiction must be reasonable.
>
> The dispositive question, as it pertains to specific personal jurisdiction . . . is whether a relationship exists 'among the defendant . . . the forum, and the litigation . . . "
>
> Following the U.S. Supreme Court's direction, we have previously held: '[A] defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction . . . 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***.' *Id.* (emphasis added).

2017 MT 235 at ¶¶16, 20.

There is no connection between Plaintiffs' declaratory judgment action and Montana which would subject Philadelphia to this Court's jurisdiction. An Ohio corporation, Gateway, purchased insurance from a Pennsylvania corporation, Philadelphia. (Compl. ¶¶ 4, 9.) Plaintiffs' Complaint does not aver the Policy was negotiated or executed in Montana, as it was not. The

Policy contains no references to Montana.[4] To the contrary, the state-specific materials in the Policy contain an Ohio amendatory endorsement, written to ensure that the Policy conforms with Ohio insurance laws and an Ohio arbitration clause for insurance coverage disputes. (Compl. at Ex. 1, pp. 40, 44-45.) Thus, the Policy provides no connection between Philadelphia and Montana.

The only basis Plaintiffs use to connect Philadelphia to Montana are allegations that Gateway was sued in Montana in underlying wage and hour litigation. (Compl. ¶¶ 33*et seq.*) Philadelphia was not a party to that lawsuit and has denied coverage for that claim – including any duty to defend. (Compl. ¶¶ 46.) The underlying *Walter* case settled without Philadelphia's involvement. (Compl. ¶ 49.) Thus, Philadelphia had no contact with Montana with respect to that lawsuit.

Philadelphia is not subject to specific jurisdiction in Montana as to the claims asserted by Plaintiffs in this action because those claims do not arise out of any insurance coverage activities by Philadelphia in Montana. *Buckles, supra*, ¶23 ("defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction."); *Bristol-Myers*, 137

[4] As discussed below, while the Application for the Policy notes that certain related entities were Montana-based, those related entities (including the HGI Entities) are not Insureds under the Policy. By way of contrast, the Application also lists related entities which likely would qualify as subsidiaries under the Policy because Gateway owns 100% of the equity in the entity. None of those wholly owned entitles is in Montana.

S. Ct. at 1782 ("[A] defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction.").[5]

Thus, an insurance company does not subject itself to personal jurisdiction merely because its insured, in this case Gateway, may be subject to (or consent to) personal jurisdiction. Gateway operates across the country, which does not make Philadelphia subject to personal jurisdiction in every place Gateway may do business. No authority holds that a party may be subject to what would have to be called derivative specific personal jurisdiction simply by doing business with a third party outside of the jurisdiction. To the contrary, in *Bristol-Myers*, the Supreme Court found plaintiffs could not allege a theory of derivative liability to provide California personal jurisdiction over Bristol-Myers for third party transactions conducted in the putative forum state. 137 S. Ct. at 1783 ("Nor is it alleged that BMS is derivatively liable for McKesson's conduct in California."). The allegations giving rise to this dispute are that Philadelphia, a Pennsylvania company, breached an insurance contract, with Gateway, an Ohio company. Fundamental fairness under

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[5] Philadelphia notes that it has no connection at all with the HGI Entities other than the fact that as Plaintiffs they named Philadelphia as a defendant in this lawsuit. In *Buckles*, the Montana Supreme Court noted: "[A] court should determine jurisdiction only on the necessary jurisdictional facts and not on the merits of the case." 388 Mont. at 525. The HGI Entities can allege no relationship with Philadelphia, thus they cannot allege facts to support specific personal jurisdiction, except derivatively through Gateway.

14th Amendment due process requirements does not give Montana personal jurisdiction over Philadelphia to resolve that contract dispute.

B. The HGI Entities Are Not "Insureds" Under the Policy.

The Policy contains a clear definition of who constitutes an "Insured". Section II., DEFINITIONS, Item Q., provides:

> 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**.

(Compl. at Ex. 1, p. 29.) None of the HGI Entities are an "Insured".

1. None of the HGI Entities is the "Named Entity."

Under Item H., "Named Entity means the proprietor, firm or organization specified in Item 1. of the Declarations." (*Id.*, pp. 12, 28.) Under Item G. of the Policy, "Individual Insured" is defined in the Policy and it does not remotely include the HGI entities. (*Id.*, pp. 27-28.) Rather, the only Named Entity in Item 1. of the

Declarations is "Gateway Hospitality Group, Inc."*Id.*, p. 12.

2. None of the HGI Entities is a "Subsidiary."

Plaintiffs' *Complaint* alleges that three of the HGI Entities are an insured under the Policy "[a]s a Gateway subsidiary."[6] (Compl. ¶¶ 20-21.) This allegation is belied by the clear language of the Policy.[7] Item N., defines Subsidiary. (*Id.*, pp. 28-29.) None of the HGI Entities meet the definition of a Subsidiary under the Policy. The Application materials show that none of the HGI Entities could qualify as a Subsidiary through ownership. (*E.g.*, HGI Missoula – 36.13% owned by Gateway; HGI Kalispell – 33.33% owned by Gateway; HGI Bozeman – no ownership by Gateway; HGI Billings – 8.43% owned by Gateway) (*Id.*, p. 53.) Moreover, there are no allegations that Gateway has the right to elect, appoint or designate more than 50% of any of the HGI Entities' board of directors, trustees, or managers as is set forth in the Application or that Gateway serves as the general partner. As the HGI Entities cannot fall within the Policy's definition of

[6] Plaintiffs no longer assert that HGI Bozeman is a subsidiary of Gateway, despite having asserted so in its draft First Amended Complaint.

[7] This assertion is also in stark contradiction to the corporate disclosure statements filed by the HGI Entities in the now dismissed federal court litigation, of which Philadelphia requests that this Court take judicial notice. (Ex. A.) The disclosures admit the HGI Entities do not have a parent corporation. *Id.*

Subsidiary, they cannot now claim to be Insureds, as a Subsidiary, under the Policy.

Realizing that none of the HGI Entities qualifies as a Subsidiary under the clear terms of the Policy, Plaintiffs are reduced to making a series of arguments to the contrary, all of which fail. First, Plaintiffs state that "[t]he word subsidiary in the Policy is subject to two different interpretations." (Compl. at ¶39.) But Plaintiffs do not attempt to articulate either: (1) what those differing interpretations might be or (2) how the HGI Entities would qualify as a Subsidiary under any reasonable interpretation of that defined term. This is not a surprise, since there is no way a reasonable insurance consumer, let alone a sophisticated commercial entity like Gateway, would read the Policy's definition of Subsidiary and conclude that the HGI Entities qualify as Insureds. *See*, *e.g.*, *Westchester Surplus Lines Ins.* Co. v. *Keller Transportation, Inc.*, 2016 MT 6, ¶16, 382 Mont. 72, 365 P.3d 465 ("The terms in an insurance contract are to be interpreted according to their common sense meaning, viewed from the perspective of a reasonable insurance consumer"). As noted above, the only common sense interpretation of the definition of Subsidiary leads to a simple conclusion: the HGI Entities are not Insureds.

Plaintiffs also confuse matters by stating that "Gateway's subsidiaries are listed" in the Policy's Application. (Compl. at ¶ 38.) But this is not sufficient. The Policy specifically defines Subsidiary. Even though the HGI Entities were listed in the Policy's

Application, they still do not qualify as Subsidiaries under the Policy's definition of same.

Worth noting is that Gateway, when it completed the Policy's Application, chose not to include the revenue from the HGI Entities in the Policy's Application, which noted that 82% of revenue came from "management fees", with the remainder coming from "revenue management[,]" "accounting fee / service fee[,]" and "development fee / technical service fee[.]"(*Id.* at 47.) This is not a surprise – there is ample reason why Gateway would have wanted to secure coverage for itself under a hotel management professional liability policy as an entity that provides hotel management services, as opposed to the HGI Entities which were hotels themselves.

3. None of the HGI Entities is an "Individual Insured."

In the Policy, under Item G., "Individual Insured" is defined. (Ex. A, pp. 27-28) Even a cursory review of the definition of "Individual Insured" from the Policy establishes that none of the HGI Entities qualifies as such.

4. The HGI Entities are not Independent Contractors of Gateway.

The Complaint does not allege the HGI Entities are independent contractors of Gateway. The Complaint alleges Gateway provides hotel management

services to the HGI Entities. (Compl. ¶¶ 4, 17.) The HGI Entities are not independent contractors for Gateway. Since none of the HGI Entities is an Insured under the Policy they should be dismissed from the action under Rule 12(b)(6) for failing to state a claim against Philadelphia.

5. Plaintiffs Fail to Allege that HGI Bozeman is an Insured.

While Plaintiffs attempt to allege that the other HGI Entities are each a Subsidiary (though that attempt is contradicted by the Policy, as discussed above), there is no attempt to allege that HGI Bozeman is a Subsidiary or otherwise an Insured under the Policy. HGI Bozeman should be dismissed.

6. The Sedgwick Letter is Immaterial

The Complaint alleges that in a May 29, 2015 letter to Gateway a representative of Philadelphia "stated that Gateway, HGI Missoula, HGI Kalispell, HGI Bozeman and HGI Billings were insureds under the Policy." (Compl. ¶ 46.A.) While this statement was incorrect, it was a [sic] made without any analysis of the issue and was not part of the letter's main thrust: that there was no coverage for the *Walter* class action because of the various terms, conditions and exclusions contained in the Policy and discussed therein. Moreover, the statement did not and cannot amend the Policy, which clearly states that "[n]otwithstanding 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." (Compl. at Ex. 1, p. 33.)

Nor can Plaintiffs assert a theory of estoppel, as they do not (and cannot) claim that they were prejudiced by this statement. It is a long-settled proposition of Montana law that where an insurer "has denied coverage from the outset, there is no prejudice. Without prejudice, there is no ground for estoppel." *Haskins Constr., Inc. v. Mid-Continent Cas.* Co., 2013 WL 5325734, *5 (citing *Portal Pipeline Co. v. Stonewall Ins.* Co., 256 Mont. 211, 845 P.2d 746 (Mont. 1003 [sic])); *Parker v. Safeco Ins.* Co. *of America*, 2016 MT 173, ¶30, 384 Mont 125, 376 P.3d 114.

C. Pursuant to *Forum Non Conveniens*, Dismissal or, in the alternative, Transfer is required.

Missoula County is not the proper forum for this lawsuit. *Forum non conveniens* is codified at M.C.A. § 25-2-201(2) and (3). *San Diego Gas & Elec.* Co. *v Gilbert*, 2014 MT 191, ¶24, 375 Mont. 517, 329 P.3d 1264; *Harrington v Energy West, Inc.*, 2017 MT 141, ¶ 22, 387 Mont. 497, 396 P.3d 114. Montana's venue statute requires changing the place of venue when "the convenience of witnesses and the ends of justice could be promoted by the change." M.C.A. § 25-2-201(3). Either Ohio or Pennsylvania, not Montana, would be the appropriate forum for this lawsuit. This is because: (a) Gateway is an Ohio corporation; (b) Philadelphia is a

Pennsylvania corporation; (c) the Policy was negotiated and executed in both Ohio and Philadelphia; (d) the insured under the Policy is Gateway, an Ohio corporation; and (e) the four HGI Entities, are not "additional insureds" under the Policy.

Federal courts consider factors that are consistent with those set forth in M.C.A. § 25-2-201(3) when deciding whether dismissal of an action based on *forum non conveniens* is appropriate. Specifically, the Ninth Circuit Court of Appeals has identified four private and five public factors to be considered:

> Private factors include "(1) relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of hostile witnesses, and cost of obtaining attendance of willing witnesses; (3) possibility of viewing subject premises; (4) all other factors that render trial of the case expeditious and inexpensive." Public interest factors include "(1) administrative difficulties flowing from court congestion; (2) imposition of jury duty on the people of a community that has no relation to the litigation; (3) local interest in having localized controversies decided at home; (4) the interest in having a diversity case tried in a forum familiar with the law that governs the action; (5) the avoidance of unnecessary problems in conflicts of law."

Loya v. Stanwood Hotels & Resorts Worldwide, Inc., 583 F.3d 656, 664 (9th Cir. 2009) (internal citations omitted).

Analyzing the private factors, three favor this case being litigated in either Ohio or Pennsylvania and one is neutral. Those factors are: (1) the proofs relating to the Policy all exist in Ohio or Pennsylvania – where the parties are located and where the contract was negotiated – *not* Montana; (2) compulsory process will exist as to Ohio or Pennsylvania witnesses in those respective states – *not* in Montana; (3) no subject premises need to be viewed; and (4) all factors relevant to trying this case inexpensively, favor Ohio or Pennsylvania. Analyzing the public factors, two are neutral and three favor litigation in either Ohio or Pennsylvania. This is because: (1) there are no serious concerns regarding court congestion in Ohio, Pennsylvania, or Montana; (2) it would be an undue imposition on Montana courts and jurors to decide a case having no connection to Montana; (3) the local interest favors its being tried in Ohio or Pennsylvania; (4) the interest in having a case tried in a forum familiar with the law favors this dispute being tried in Ohio given Ohio courts' familiarity with Ohio law, and Ohio law specifically applies to the Policy; and (5) there are no concerns regarding conflicts of law.

While the underlying *Walter* class action was filed in Missoula it makes no material difference in this contract action, given: (a) the Policy applies only to Gateway, *not* the HGI Entities; and (b) Philadelphia never had a duty to defend (or indemnify) the *Walters* [sic] class action in Missoula County or anywhere else. Since the HGI Entities should be dismissed from this

case, the two remaining parties to the Policy have no connection to Montana.

The Policy was not negotiated or executed in Montana. As the only Insured is Gateway, an Ohio entity, Missoula County is not the appropriate forum. The evidence and witnesses are not located in Montana. Litigating here would place an inappropriate burden on the County's citizenry and judicial resources.

III. CONCLUSION AND RELIEF SOUGHT

For all of the foregoing reasons, Philadelphia respectfully requests that this Court enter an Order dismissing Plaintiffs' First Amended Complaint.

DATED this 20th day of February, 2019.

MARRA, EVENSON & LEVINE, P.C.
2 Railroad Square, Suite C
P.O. Box 1525
Great Falls, MT 59405

By /s/ Thomas A. Marra
Thomas A. Marra, Attorneys for
Philadelphia Indemnity
Insurance Company

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing *PHILADELPHIA INDEMNITY INSURANCE COMPANY'S BRIEF IN SUPPORT OF MOTION TO DISMISS*

PLAINTIFFS' FIRST AMENDED COMPLAINT OR, IN THE ALTERNATIVE, TO TRANSFER BASED UPON FORUM NON CONVENIENS was mailed on the 20th day of February, 2019, at Great Falls, Montana, postage prepaid, and directed to the following:

Dale R. Cockrell
Jay T. Johnson
P.O. Box 7370
Kalispell, MT 59904-0370
Telephone: (406) 751-6000
Facsimile: (406) 756-6522
Email: dcockrell@mcgalaw.com
jjohnson@mcgalaw.com
Attorneys for Plaintiffs Gateway Hospitality Grow, [sic] *Inc.; Western Hospitality Group, LP d/b/a Hilton Garden Inn Missoula; and Kalispell Hotel, LLC d/b/a Hilton Garden Inn Kalispell*

JORY C. RUGGIERO, ESQ.
DOMENIC A. COSSI, ESQ.
Mindenhall, Suite 1
Bozeman, Montana 59715
(406) 587-1900
Attorneys for the Plaintiffs Bozeman Lodging Investors, LLC d/b/a Hilton Garden Inn Bozeman and JWT Hospitality Group, LLC d/b/a Hilton Garden Inn Billings

/s/ Brenda L. McGee
Brenda L. McGee

CERTIFICATE OF SERVICE

I, Thomas Anthony Marra, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief – Brief In Support of Motion to the following on 02-20-2019:

Dale R. Cockrell (Attorney)
145 Commons Loop, Suite 200
P.O. Box 7370
Kalispell MT 59904
Representing: Gateway Hospitality Group Inc, Western Hospitality Group LP, Kalispell Hotel LLC
Service Method: eService

Jay Tyler Johnson (Attorney)
145 Commons Loop, Suite 200
Kalispell MT 59901
Representing: Gateway Hospitality Group Inc, Western Hospitality Group LP, Kalispell Hotel LLC
Service Method: eService

Jory C. Ruggiero (Attorney)
303 W. Mendenhall, Ste. 1
Bozeman MT 59715
Representing: Bozeman Lodging Investors LLC, JWT Hospitality Group Billings LLC
Service Method: eService

Domenic Cossi (Attorney)
303 W. Mendenhall, Ste. 1
Bozeman MT 59715
Representing: Bozeman Lodging Investors LLC, JWT Hospitality Group Billings LLC
Service Method: eService

Resp. 43a

Electronically signed by Brenda McGee on behalf of
Thomas Anthony Marra
Dated: 02-20-2019