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**OPINION OF THE UNITED STATES COURT OF  
APPEALS FOR THE ELEVENTH CIRCUIT  
(AUGUST 18, 2020)**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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MAMA JO'S INC., D/B/A BERRIES,

*Plaintiff-Appellant,*

v.

SPARTA INSURANCE COMPANY,

*Defendant-Appellee.*

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No. 18-12887

D.C. Docket No. 1:17-cv-23362-KMM

Appeal from the United States District Court  
for the Southern District of Florida

Before: NEWSOM, TJOFLAT, Circuit Judges,  
and PROCTOR,\* District Judge.

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PROCTOR, District Judge:

In this insurance coverage case, we are called upon to assess whether the district court properly excluded the opinions of Plaintiff's experts and granted Defendant's motion for summary judgment based

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\* Honorable R. David Proctor, United States District Judge for the Northern District of Alabama, sitting by designation.

upon the conclusion that Plaintiff failed to establish that it suffered a direct physical loss that would trigger coverage. We conclude the district court correctly ruled on both questions. Therefore, for the reasons more fully discussed below, we affirm.

## **I. Background**

Appellant Mama Jo's Inc. d/b/a Berries ("Berries") owns and operates a restaurant located at 2884 SW 27th Avenue, Miami, FL 33133. (Doc. 107-1 at 8-9). The restaurant is located less than one mile from the ocean (Doc. 111-5 at 4; Doc. 111-6 at 57-58, 104), and is partially enclosed by a retractable awning, wall, and roof system. (Doc. 109-4 at 4, 31; Doc. 109-5 at 66-68, 75-81; Doc. 110-8 at 104). When the system is opened, the restaurant's interior areas are exposed to the elements. (*Id.*). The restaurant's front entrance, bar, and seating areas are adjacent to SW 27th Avenue. (Doc. 107-1 at 95-97; Doc. 109-5 at 51-54, 66-71, 80; Doc. 116-8 at 4-5).

### **A. The Road Construction**

From December 2013 until June 2015, there was roadway construction at different locations along SW 27th Avenue in the general vicinity of the restaurant. (Doc. 102 at 2; Doc. 107-1 at 58-60; Doc. 116-5 at 11). During that time, dust and debris generated by the construction migrated into the restaurant. (Doc. 116 at 3-5; Doc. 110-3 at 51-55; Doc. 110-8 at 54; Doc. 116-8 at 3-7; Doc. 116-9 at 3-15, 19-29). Berries performed daily cleaning using its normal cleaning methods, employing dust pans, hoses, rags, towels, and blowers. (*Id.*).

Berries was open every day throughout the time period of the roadwork. (Doc. 116 at 3-5; Doc. 110-8 at 56-57, 95-97; Doc. 116-8 at 7-10; Doc. 116-9 at 25). Although the restaurant maintained the ability to serve the same number of customers as it had before the construction began, customer traffic decreased during the roadwork. (Doc. 116 at 3-5; Doc. 107-1 at 73-74; Doc. 110-8 at 56-57; Doc. 116-8 at 9-12; Doc. 116-9 at 24-27).

### **B. The Insurance Policy**

From September 19, 2013 to September 19, 2014, Berries was insured by Appellee, Sparta Insurance Company (“Sparta”). (Doc. 110-1 at 5, 31-54). Sparta issued an “all risk” commercial property insurance policy, which included, in relevant part, a Building and Personal Property Coverage Form and a Business Income (and Extra Expense) Coverage Form. (Doc. 110-1 at 31-54).

The Building and Personal Property Coverage Form contained in the policy covers “direct physical loss of or damage to Covered Property . . . caused by or resulting from any Covered Cause of Loss.” (*Id.* at 31). The policy defines “Covered Causes of Loss” as “Risks of Direct Physical Loss unless the loss is” excluded or limited. (*Id.* at 33, 63).

The policy’s Business Income (and Extra Expense) Coverage Form provides that Sparta will pay for “the actual loss of Business Income you sustain due to the necessary ‘suspension’ of your ‘operations’ during the ‘period of restoration.’” (*Id.* at 46). The policy provides that the “‘suspension’ must be caused by direct physical loss of or damage to” covered property. (*Id.*).

### C. The Initial Insurance Claim

On December 12, 2014, Berries submitted a claim to Sparta under the policy. (Doc. 143 at 4). Berries asserted that the claim was related to dust and debris generated by the roadway construction. (*Id.*). Sparta assigned Corey Buford, an insurance adjuster, to review the claim on behalf of Sparta. (Doc. 116-10 at 5). Berries hired a public adjuster, Robert Inguanzo of Epic Group Public Adjusters, to assist with its claim. (Doc. 110 at 3).

In December 2014 and January 2015, Buford requested information about the claim from Berries. (Doc. 116-10 at 6-8, 17-19). In January 2015, Inguanzo responded to these requests and informed Buford that the claimed loss “occurred as early as December of 2013 in the form of construction debris and dust from the [roadwork]” and that, “the construction related debris and dust . . . caused damage to the insured’s building. The scope of loss includes but is not limited to, cleaning of the floors, walls, tables, chairs and countertops.” (*Id.* at 17).

In March 2015, Inguanzo provided Berries with an estimate in the amount of \$16,275.58 to clean and paint the restaurant. (Doc. 110-10 at 1-10; Doc. 116-11 at 11-15, 23-25; Doc. 116-12 at 5-6). Inguanzo testified that, “based on our inspection back then” the estimate encompassed “the work that we felt was necessary to bring the property to its pre-loss condition includ[ing] the cleaning and painting,” and that, “[a]t that time, we didn’t have anything for removal or replacement. . . .” (Doc. 116-11 at 14-15).

In April 2015, Inguanzo sent Buford a “Sworn Statement in Proof of Loss” for the building claim,

including a preliminary damage estimate in the amount of \$13,775.58. (Doc. 116-10 at 21). This amount was calculated based on the amount of the estimate—\$16,235.58—minus a deductible. (*Id.*). Inguanzo also sent Buford a “Sworn Statement in Proof of Loss” and supporting documentation regarding a business income claim in the amount of \$292,550.84. (*Id.*). Berries contended that its 2014 sales were lower than expected when compared to its rate of sales growth in previous years. (Doc. 109-2).

On January 30, 2017, Sparta denied the claim because it was “not covered under the [] policy.” (Doc. 110-13). As Sparta explained: “[w]ith regard to Building coverage, . . . the Proof of Loss Form does not reflect the existence of any physical damage. It is also questionable whether a direct physical loss occurred.” (Doc. 110-13 at 5). Sparta also stated that:

Under the Business Income Coverage Form, coverage is provided for the actual loss of business income the insured sustains due to the necessary “suspension” of “operations” during the “period of restoration.” The “suspension” must be caused by direct physical loss of or damage to property at the premises. . . .

(Doc. 110-13 at 6) (emphasis in original).

## **D. The Litigation and Presentation of a New Claim for Damages**

Berries initiated this action in Florida state court in May 2017. (Doc. 1-2). Sparta removed the action to the United States District Court for the Southern District of Florida based on diversity jurisdiction. (Doc. 1). In its initial disclosures in the lawsuit, Berries claimed the same damages it had before the suit was filed: \$16,275.58 for cleaning and painting the restaurant, and \$292,550.84 for lower-than-expected sales in 2014. (Doc. 20 at 4).

On February 26, 2018, Berries also served amended answers to interrogatories. (Doc. 116-5 at 8). In those responses, it identified for the first time new categories of damages totaling \$319,688.57. (*Id.*). Berries contended that the newly claimed damages were due to replacement of the restaurant's awning and retractable roof systems, HVAC repairs, and replacement of the restaurant's audio and lighting systems. (*Id.* at 8-9).

### **1. Berries' Experts**

Berries relied on three experts to causally link its newly-claimed damages to the construction dust and debris generated more than two and a half years earlier, *i.e.*, during Sparta's policy period ending on September 19, 2014. First, Alex Posada offered opinion testimony about Berries' audio and lighting systems. Second, Christopher Thompson opined about the awning and retractable roof systems. Third, Alfredo Brizuela proffered his opinion about "engineering" and "the cause and origin of the loss." (Doc. 105-1 at 5-6; Doc. 113 at 2-4).



**a. Alex Posada**

Posada's firm, United Audio, had "been in the audio and special lighting industry for over 15 years providing integrated audio, video, lighting & control solutions. . . ." (Doc. 109-1 at 2). Posada's proposed methodology included performing a "QC diagnostic" which would have involved, among other things, "[d]ismantl[ing] all Audio & Lighting Equipment, . . . [t]est[ing] all existing wiring and terminations[, [d]isassembl[ing] each and every speaker and lighting fixture[], [t]est[ing] all audio devices[, and] [e]xamin[ing] all components in every lighting fixture." (*Id.* at 2-3; Doc. 108-1 at 51-53). However, Posada did not perform the QC diagnostic. (Doc. 108-1 at 53). Rather, in February 2018, he performed a two-hour site inspection and concluded that "it [wa]s more cost effective to replace the system." (*Id.* at 24-34).

At Posada's deposition, the following exchange occurred:

Q: So is it fair to say if you want to find out a specific reason why a speaker or light is not working, you have to run this diagnostic? [ ]

A: It's an option.

Q: What other options are there?

A: There are no other options . . . it[']s either this or replace it which, I mean—as of looking at it, I can already tell you it's not going to be worth doing this.

Q: If you want to find out the specific reason why a subwoofer or speaker or light is not working, do you need to perform the diagnostic?

A: It's an option. Yeah

Q: But are there any other options?

A: No, there is no other option.

Q: That's the only option?

A: That is correct.

(Doc. 108-1 at 55-56). Posada's inspection consisted of visually observing some of the system's audio and lighting components, and listening to some of its audio components. (Doc. 109 at 3; Doc. 108-1 at 51-53).

Posada did not inspect all of the restaurant's speakers and components because some were out of reach and, during his inspection, there were patrons in the restaurant whom he did not wish to disturb. (Doc. 108-1 at 24-25, 31-39). He only walked around the perimeter of the restaurant. (*Id.* at 34). Posada testified that the speakers outside the restaurant's entrance were "probably" damaged, and although he did not inspect the subwoofers, he assumed that they were not working. (*Id.* at 43, 68-69). Posada nevertheless testified that all of Berries' audio systems were damaged by construction dust and debris, to the exclusion of all other causes, because they produced sounds that were "tedious," "distorted," and "hard to explain in words." (*Id.* at 88, 93-94).

Posada's inspection of Berries' lighting system involved observing components from ground level, about 15 feet below the fixtures. (*Id.* at 45). Posada testified that the lights did not turn on at all and were "full of dust." (*Id.* at 33, 44-45). Although he opined that the light fixtures' motherboards were damaged, Posada conceded that he could not see those components, and did not inspect them. (*Id.* at

87-88, 97-98). He did not know the age of the lighting fixtures, or when they stopped working. (*Id.* at 76, 87).

**b. Christopher Thompson**

Thompson is employed by Awnings of Hollywood, the company that originally installed the awnings and retractable roof “several” (*i.e.*, “more than three [-] four”) years before his inspection. (Doc. 108-3 at 17-18, 32-33). Thompson’s inspection of the restaurant’s awnings and retractable roof consisted of a visual inspection from the ground floor, and lasted approximately one hour. (Doc. 108-3 at 29, 34, 83). His inspection took place more than two years after the road-work ended. (*Id.* at 26-29, 34-37). He did not take notes. (*Id.* at 34). Based on his one-hour inspection, Thompson concluded that the awnings and retractable roof systems were damaged beyond repair by sediment that he “assumed” was construction dust. (*Id.* at 46, 54; Doc. 109-3 at 1). Thompson took no samples of the sediment, and did no testing to determine its origin. (Doc. 108-3 at 45-46). Thompson had eaten at the restaurant during the road construction. (Doc. 108-3 at 46).

Thompson did not test the retractable roof system because he observed that the drive belt was broken. (Doc. 108-3 at 69). But, the belt was the only thing Thompson observed that was broken. (*Id.* at 69-70). In his report, Thompson noted that the system had to be replaced, rather than repaired, because the components were no longer available in the United States. (Doc. 109-3 at 1; Doc. 108-3 at 69). When asked why the drive belt snapped, Thompson testified: “I could not tell you. I have an opinion, but I couldn’t tell you seriously.” (Doc. 108-3 at 71).

**c. Alfredo Brizuela**

Brizuela has a degree in architecture and structural engineering, and is a Florida licensed civil and structural engineer. (Doc. 108-5 at 26-27). His inspection of the restaurant consisted of a one-hour visual inspection conducted in December 2017 and a review of photographs taken in 2014 and 2015. (Doc. 108-5 at 42, 76-77). He also ran his “fingers across” dust (which he believed was construction dust), although it had been over two years since the construction had been completed. (Doc. 108-5 at 45, 57-59, 115, 154). Based on this inspection, he offered the following opinion:

[I]t is evident that the source of the damage was from the nearby roadway construction on 27th [A]venue in front of the property. Simply stated, the migration of the dust and its resulting paste was a sudden and accidental occurrence that damaged the equipment, awning, windows, railings, and stucco.

(Doc. 109-5 at 7). Brizuela’s report explains how construction dust combined with water can be corrosive. (Doc. 108-5 at 117). But, on the question of the source of the corrosive material in this case, Brizuela acknowledged that his “testing was strictly [his] observation through [his] inspection and [his] review of the photographs.” (Doc. 108-5 at 116). That is, Brizuela did nothing other than touch the dust and look at pictures before opining as to its origin. (*Id.*). His opinion, like Thompson’s, was based on his assumption that the construction dust was the source of the corrosive material. (*Id.*).

## **2. The District Court's Decision Ruling on the Motions in Limine Regarding Berries' Experts**

In April 2018, Sparta filed a motion to preclude the testimony of Plaintiff's expert witnesses: Posada, Thompson, and Brizuela. (Doc. 105). That same day, the parties filed Cross Motions for Summary Judgment. (Docs. 106, 110). After briefing, the district court entered an omnibus order granting Sparta's *Daubert* and summary judgment motions. (Doc. 146). The district court found that, although Berries' causation experts were minimally qualified to render their opinions, their methodologies on the issue of causation were unreliable or nonexistent, and their testimony was speculative. (*Id.* at 5-15). The district court further concluded that, without expert testimony, Berries could not prove that construction dust and debris generated in 2014 caused the "new" damages (first claimed in 2018) to Berries' awnings, retractable roof, HVAC system, railings, and audio and lighting system. (*Id.* at 15-17).

The district court determined that Berries' initial claim for cleaning was not covered because property that must be cleaned, but is not damaged, has not sustained a "direct physical loss." (*Id.* at 17-19). The district court also concluded that direct physical loss refers to tangible damage to property, which causes it to become unsatisfactory for future use or requires repairs. (*Id.* at 17-19). Finally, the district court decided that Berries' claim for lower-than-expected sales in 2014 was not covered because Berries could not establish that it suffered a "necessary 'suspension'" of its "operations" as the result of a "direct physical loss." (*Id.* at 19-20). Because of its determinations,

the district court declined to address any of the parties' arguments related to the policy's exclusions or limitations. (*Id.* at 16, n. 14).

This appeal followed.

## II. Standard of Review

We review a district court's order granting summary judgment *de novo*, "considering all of the evidence in the light most favorable to the nonmoving party." *Nesbitt v. Candler County*, 945 F.3d 1355, 1357 (11th Cir. 2020). "Summary judgment is proper 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)).

"We review for abuse of discretion a district court's evidentiary ruling under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)." *Adams v. Lab. Corp. of Am.*, 760 F.3d 1322, 1327 (11th Cir. 2014) (parallel citations omitted). "A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous." *United States v. Alabama Power Co.*, 730 F.3d 1278, 1282 (11th Cir. 2013) (quoting *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1309 (11th Cir. 2001)). The deference we show on evidentiary rulings includes giving the court "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999). Even where a district court's ruling excluding expert testimony is "outcome determinative" and the basis for a grant of

summary judgment, our review is not more searching than it would otherwise be. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142-43 (1997).

### III. Analysis

Berries argues that the district court erred in three ways: first, by concluding that “direct physical loss” does not include cleaning, but rather requires a showing that the property be rendered uninhabitable or unusable; second, by requiring Berries to show that a suspension of operations was the result of physical damage in order to establish business income coverage; and third, in striking Berries’ causation experts. We begin by addressing the exclusion of Berries’ experts and then turn to the other two issues.

#### A. Exclusion of the Experts

In *Daubert*, the Supreme Court explained that trial courts must act as “gatekeepers” and are tasked with screening out “speculative, unreliable expert testimony.” *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1335 (11th Cir. 2010) (citing *Daubert*, 509 U.S. at 597). In that important role, trial courts may consider a non-exhaustive list of factors including: (1) whether the expert’s theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential error rate of the technique; and (4) whether the technique is generally accepted in the scientific community. *Kilpatrick*, 613 F.3d at 1335. Later, in *Kumho Tire*, the Court explained that the gatekeeping function governs all expert testimony, including “scientific, technical, or other specialized knowledge,” not just singularly scientific testimony. 526 U.S. at 147-49. The factors

identified in *Daubert* “do not constitute a definitive checklist or test.” *Kumho*, 526 U.S. at 150 (internal quotation marks omitted). Admittedly, they are designed to guide a district court’s assessment of the reliability of scientific or experience-based expert testimony. *Id.* But, the district court’s “gatekeeping inquiry must be tied to the facts of a particular case.” *Id.* (internal quotation marks omitted). The goal of gatekeeping is to ensure that an expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Id.* at 152.

Federal Rule of Evidence 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

F.R.E. 702. “We have distilled from *Daubert*, *Kumho*, and Rule 702 these three requirements: First, ‘the expert must be qualified to testify competently regarding the matter he or she intends to address’; second, the expert’s ‘methodology . . . must be reliable



as determined by a *Daubert* inquiry'; and third, the expert's 'testimony must assist the trier of fact through the application of expertise to understand the evidence or determine a fact in issue.'" *Kilpatrick*, 613 F.3d at 1335.

To be sure, experience, standing alone, is not a "sufficient foundation rendering reliable any conceivable opinion the expert may express." *U.S. v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004). Even experienced experts "must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." *Id.* at 1261 (quoting Fed. R. Evid. 702 advisory committee note (2000 amends.)). "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Joiner*, 522 U.S. at 146.

### 1. Alex Posada

The district court found that Posada, the audio and lighting expert, was qualified, but concluded that his methodology was unreliable. (Doc. 146 at 7, 10). We agree. Berries failed to establish that Posada's methodology was reliable.

Posada listened to the audio system and looked at the lighting system in 2018. From this brief inspection, he opined that any damage was caused by construction dust and debris from 2014. Posada identified what he thought to be the only diagnostic test to determine the reason why a speaker or light would not work, but he did not perform that test because "it [wa]s more cost effective to replace the system." (Doc.

108-1 at 24-34, 55-56). Posada performed no testing that would permit him to conclusively determine that the dust he observed in 2018 came from much earlier road construction. To the extent it can be said that Posada even identified a methodology for reaching his conclusions, he provided no testimony (or anything else) from which the district court could have concluded that his methodology was in any way reliable. *See Kilpatrick*, 613 F.3d at 1335 (the expert’s “methodology . . . must be reliable”). Nothing about Posada’s methodology is capable of being tested or being subjected to peer review, and Berries presented no evidence indicating that Posada’s technique is generally accepted in the scientific community. *Kilpatrick*, 613 F.3d at 1335.

Under *Daubert*, a “district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation.” *Chapman*, 766 F.3d at 1306. Here, the district court did not abuse its discretion in determining that Posada’s testimony provided nothing more than speculation about the cause of the damage to the audio and lighting systems.

## 2. Christopher Thompson

The district court found that Thompson was at least minimally qualified as an expert based on his years of experience, but concluded that “Thompson’s testimony is nothing more than unexplained assurances and unsupported speculation.” (Doc. 146 at 12). Again, we agree. Berries did not establish that Thompson’s opinions are reliable.

Like Posada, Thompson merely visually inspected the awnings and retractable roof, and did not do so

until more than two years after the road construction. (Doc. 108-3 at 26-29, 34-37). Thompson observed a broken drive belt on the retractable roof, but candidly admitted he could not say what caused it to break. (Doc. 108-3 at 71). Although Thompson did not test the retractable roof system, he determined that it had to be replaced. (Doc. 109-3 at 1). This conclusion was based on Thompson's knowledge that parts for this system could no longer be obtained in the United States. (*Id.*). And, although Thompson performed no testing on the sediment on the awnings and retractable roof two years after the construction ended, he nonetheless opined that it came from that construction. (*Id.*; 108-3 at 27, 44-45).

Again, to the extent that Thompson even employed a methodology, there was nothing against which that methodology could be compared to determine whether it was reliable or even scientific in nature. *See Chapman*, 766 F.3d at 1306 (recognizing the court must ensure the "evidence is genuinely scientific, as distinct from being unscientific speculation."). Therefore, the district court did not abuse its discretion in excluding Thompson's testimony as unreliable.

### 3. Alfredo Brizuela

Berries offered Brizuela as a cause and origin expert. He opined as to the source or origin of the damage to the restaurant. Brizuela opined that "[i]t is evident that the source of the damage was from the nearby roadway construction on 27th [A]venue in front of the property." (Doc. 109-5 at 7). In reaching this conclusion, he conducted a visual inspection of the restaurant, again over two years after the road construction ended. He conducted no sampling or

testing of the dust and sediment he found at that time. His “methodology” was simply observation and a review of photographs. (Doc. 108-5 at 116).

Brizuela gave a scientific explanation about the general issue of how dust and debris can damage property. But, even if one accepted the general proposition that construction dust and debris can damage or corrode property, Brizuela did not actually attribute any damage to the restaurant as a result of that circumstance. (Doc. 146 at 12-15). His “methodology” in this respect consisted of an assumption. Therefore, we conclude that the district court did not abuse its discretion in excluding Brizuela’s proposed testimony as unreliable under *Daubert*.

Here, given its considerable leeway in assessing expert testimony, the district court did not err in concluding that Berries failed to establish that its experts’ methodologies have been (or, for that matter, can be) tested. Berries also failed to show that its experts’ methodologies have been subjected to peer review and publication. Berries also failed to address the known or potential error rates of its experts’ techniques. And, Berries failed to establish that its experts’ techniques are generally accepted in the scientific community. Simply stated, Berries did not satisfy any of the factors which indicate a reliable and admissible expert opinion. Accordingly, the district court did not abuse its discretion in excluding the experts. *See Kilpatrick*, 613 F.3d at 1335.

The district court correctly excluded the expert opinions proffered by Berries and this inexorably led to the swing of the summary judgment axe. “[A]n insured claiming under an all-risks policy has the burden of proving that the insured property suffered a

loss while the policy was in effect.” *Jones v. Federated Nat’l Ins. Co.*, 235 So. 3d 936, 941 (Fla. 4th DCA 2018) (citation omitted). Berries relied on the expert reports of Brizuela, Thompson, and Posada to prove that the “new” damages to Berries’ awnings, retractable roof, and audio and lighting system, first claimed in 2018, were caused by construction dust and debris from 2014. That is, it was necessary for Berries to tie the damages it claimed in 2018 to construction occurring during the much earlier policy period, ending on September 19, 2014. Without the properly excluded experts’ testimony, the district court properly granted Sparta summary judgment on Berries’ newly claimed damages.

### **B. Berries Failed to Show Any “Direct Physical Loss or Damage”**

Under Florida law, the interpretation of an insurance contract, including resolution of any ambiguities contained therein, is a question of law to be decided by the court. *Dahl–Eimers v. Mutual of Omaha Life Ins. Co.*, 986 F.2d 1379, 1381 (11th Cir. 1993) (citing *Sproles v. Amer. States Ins. Co.*, 578 So. 2d 482, 484 (Fla. 5th DCA 1991)). In construing an insurance contract, a court must strive to give every provision meaning and effect. *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000); *Excelsior Ins. Com. v. Pomona Park Bar & Package Store*, 369 So. 2d 938, 941 (Fla. 1979). A party claiming coverage (here, Berries) generally bears the burden of proof to establish that coverage exists. *U.S. Liab. Ins. Co. v. Bove*, 347 So. 2d 678, 680 (Fla. 3rd DCA. 1977). The policy at issue is an “all risks” policy. However, as the Florida Supreme Court has noted, “an ‘all-risk’ policy is not an ‘all loss’ policy, and thus does not extend

coverage for every conceivable loss.” *Sebo v. Am. Home Assurance Co.*, 208 So. 3d 694, 696-97 (Fla. 2016) (citation omitted).

Berries’ initial claim had two components: one for cleaning the restaurant, and another for Business Income Loss. (Doc. 110-10). The insuring agreement in the policy’s Building and Personal Property Coverage Form states that Sparta “will pay for direct physical loss of or damage to Covered Property . . . caused by or resulting from any Covered Cause of Loss.” (Doc. 110-1 at 31). The policy’s Business Income Coverage Form provides that Sparta will pay for “the actual loss of Business Income you sustain due to the necessary ‘suspension’ of your ‘operations’ during the ‘period of restoration.’” (*Id.* at 46). The “‘suspension’ must be caused by direct physical loss of or damage to” covered property. (*Id.*).

Florida’s District Court of Appeals for the Third District has addressed the definition of “direct physical loss”: “A ‘loss’ is the diminution of value of something [ ]. Loss, *Black’s Law Dictionary* (10th ed. 2014). ‘Direct’ and ‘physical’ modify loss and impose the requirement that the damage be actual.” *Homeowners Choice Prop. & Cas. v. Maspons*, 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017); *see also Vazquez v. Citizens Prop. Ins. Corp.*, 2020 WL 1950831, at \*3 (Fla. 3d DCA 2020).

With regard to the cleaning claim, Berries’s public adjuster, Inguanzo, testified that “cleaning and painting” was all that was required. (Doc. 76-1 at 35-36). He also testified that there was no need for removal or replacement of items at that time. (*Id.* at 36). Based on this testimony, the district court held that Berries had failed to establish that it had suffered a

“direct physical loss” as that term is defined under Florida law. (Doc. 146 at 18-19). We conclude that the district court correctly granted summary judgment on Berries’ cleaning claim because, under Florida law, an item or structure that merely needs to be cleaned has not suffered a “loss” which is both “direct” and “physical.” *See Maspons*, 211 So. 3d at 1069 (recognizing that “damage [must] be actual”); *Vazquez*, 2020 WL 1950831, at \*3 (same). *See also Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App’x 569, 573 (6th Cir. 2012) (“[C]leaning . . . expenses . . . are not tangible, physical losses, but economic losses.”); *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779, 115 Cal. Rptr. 3d 27, 37 (2010) (“A direct physical loss ‘contemplates an actual change in insured property.’”); *AFLAC Inc. v. Chubb & Sons, Inc.* (2003) 260 Ga.App. 306, 581 S.E.2d 317, 319 (same).

As to the Business Income Loss claim, the Business Income Coverage Form requires that a “suspension” of operations “be caused by direct physical loss of or damage to property.” (Doc. 110-1 at 46). Again, as discussed above, even if Berries had shown a “suspension” of operations, Berries did not put forward any Rule 56 evidence that it suffered a direct physical loss of or damage to its property during the policy period. Therefore, the district court’s entry of summary judgment on Berries’ Business Income Loss claim was also proper. Berries failed to show it suffered a “direct physical loss.”

**C. Berries Did Not Establish That It Suffered a Covered Suspension of Operations**

The policy's Business Income Coverage Form provides that Sparta will pay for "the actual loss of Business Income you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration.'" (*Id.* at 46). Berries argues that the district court erred when it held that Berries did not suffer a "suspension" of its operations, and when it ignored evidence that Berries had been required to close sections of the restaurant for cleaning. Conceivably, a slowdown caused by closing parts of the restaurant for cleaning could be attributed to a "period of restoration." But, even if Berries is correct that the district court got this part of the analysis wrong, Sparta was still entitled to summary judgment on the Business Income Claim because any "'suspension' must be caused by direct physical loss of or damage to property." Berries failed to show it suffered a "direct physical loss." (*Id.*).

**IV. Conclusion**

For the foregoing reasons, the district court's grant of summary judgment in favor of Sparta is AFFIRMED.



OMNIBUS ORDER OF THE UNITED STATES  
DISTRICT COURT FOR THE SOUTHERN  
DISTRICT OF FLORIDA  
(JUNE 11, 2018)

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IN THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF FLORIDA

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MAMA JO'S, INC. D/B/A BERRIES,

*Plaintiff,*

v.

SPARTA INSURANCE COMPANY,

*Defendant.*

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Case No. 17-cv-23362-KMM

Before: K. Michael MOORE,  
Chief United States District Judge.

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This cause came before the Court upon cross-motions for summary judgment. Defendant Sparta Insurance Company (“Defendant” or “Sparta”) filed a Motion for Summary Judgment (“Def.’s Mot.”) (ECF No. 106) and Plaintiff Mama Jo’s, Inc., d/b/a Berries (“Plaintiff”) filed a Motion for Partial Summary Judgment (“Pl.’s Mot.”) (ECF No. 110).<sup>1</sup> Also before

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<sup>1</sup> The Parties filed their respective responses and replies. *See* (“Pl.’s Resp.”) (ECF No. 119); (“Def.’s Reply”) (ECF No. 125); (“Def.’s Resp.”) (ECF No. 117); (Pl.’s Reply”) (ECF No. 124).

the Court are two *Daubert* Motions.<sup>2</sup> The motions are now ripe for review.

## I. Background<sup>3</sup>

### A. Factual Background

This case arises from a dispute regarding insurance coverage of Plaintiff's property located at 2884 SW 27th Avenue, Miami, FL, 33133 (the "Restaurant") under a commercial insurance policy issued by Defendant. The Policy (ECF No. 110-1)

#### i. The Policy

The Policy was in effect from September 19, 2013 to September 19, 2014. Pl.'s 56.1, ¶¶ 1, 4; Def.'s Resp. 56.1, ¶ 21. Only certain provisions of the Policy at are issue. The Policy covers "direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." The Policy at 31. "Covered Causes of Loss" means "direct physical loss unless

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<sup>2</sup> Defendant moved to exclude Plaintiff's expert witnesses ("Def.'s *Daubert* Mot.") (ECF No. 105) and Plaintiff moves to exclude Defendant's expert witnesses. ("Pl.'s *Daubert* Mot.") (ECF No. 111). The Parties filed their respective responses and replies. *See* ("Pl.'s *Daubert* Resp.") (ECF No. 118); ("Def.'s *Daubert* Reply") (ECF No. 122); ("Def.'s *Daubert* Resp.") (ECF No. 115); ("Pl.'s *Daubert* Reply") (ECF No. 120).

<sup>3</sup> The undisputed facts are taken from the Amended Complaint ("Am. Compl.") (ECF No. 102); Plaintiff's Statement of Facts ("Pl.'s 56.1") (ECF No. 110); Defendant's Resp. 56.1 ("Def.'s Resp. 56.1") (ECF No. 116); Plaintiff's Reply 56.1 ("Pl.'s Reply 56.1") (ECF No. 123); Defendant's Statement of Facts ("Def.'s 56.1") (ECF No. 106); Plaintiff's Resp. 56.1 ("Pl.'s Resp. 56.1") (ECF No. 119), and a review of the corresponding record citations and exhibits.

the loss is” excluded or limited. *Id.* at 68. There is additional coverage “to remove debris of Covered Property caused by or resulting from a Covered Cause of Loss that occurs during the policy period.” *Id.* at 33.

Under the Business Income Loss (and Extra Expense) Coverage Form, Defendant “will pay for the actual loss of Business Income you sustain due to the necessary ‘suspension’ of your ‘operations’ during the ‘period or restoration’. The ‘suspension’ must be caused by direct physical loss of or damage to property.” *Id.* at 46.

## ii. The Claim and Sparta’s Response

From December 2013 through June 2015, construction roadwork was performed at SW 27th Avenue, the street adjacent to the restaurant. Pl.’s 56.1, ¶ 5; Def.’s Resp. 56.1, ¶ 22; Def.’s 56.1, ¶ 9. During this time, Plaintiff continually cleaned the restaurant. Pl.’s 56.1, ¶ 7. In December 2014, Plaintiff notified Sparta of its claims. Joint Pretrial Stipulation (“Stipulation”) (ECF No. 143) at 4. Corey Buford, an insurance adjuster, was assigned to adjust the claim on Sparta’s behalf and made requests for additional information during December 2014 and January 2015. Def.’s Resp. 56.1, ¶¶ 33, 35. Plaintiff hired Epic Group Public Adjusters (“Epic”) to assist it with its adjustment claim for cleaning. Pl.’s 56.1, ¶ 8.4 In January 2015, Robert Inguanzo, Epic’s representative public adjuster,

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<sup>4</sup> Robert Inguanzo of Epic assisted Plaintiff with its initial claim submitted to Defendant. Frank Inguanzo also works for Epic and provided a Rule 26 Report regarding damages alleged by Plaintiff. Frank Inguanzo Report (ECF No. 105-6).

responded to Buford’s request for additional information, stating that the loss “occurred as early as December of 2013 in the form of construction debris and dust from the road work” and that in terms of damages, “the construction related debris and dust . . . caused damage to the insured’s building. The scope of loss including but is not limited to, cleaning of the floors, walls, tables, chairs and countertops.” *Id.* at ¶¶ 25, 34, 36.

In March 2015, Epic provided Plaintiff with an estimate of \$16,275.58 for cleaning, painting and striping the parking lot. Pl.’s 56.1, ¶ 9; Def.’s Resp. 56.1, ¶ 9.<sup>5</sup> In April 2015, Robert Inganzo sent a letter to Buford with a “preliminary damage estimate” for \$16,275.58 and a corresponding “Sworn Statement in Proof of Loss” for \$13,775.58 (*i.e.*, the amount of the estimate minus a \$2500 deductible) and a loss of business income claim for \$292,550.84. Pl.’s 56.1, ¶ 9; Def.’s Resp. 56.1, ¶¶ 9, 37. In January 2017, Sparta sent Plaintiff a letter stating that the claims presented “are not covered under the subject SPARTA policy . . .” Pl.’s 56.1, ¶16, Ex. M. at 5.

## **B. Procedural Background**

After Plaintiff was denied coverage, Plaintiff filed its claim in Florida State court on May 19, 2017 against Defendants Sparta, Prohost USA, Inc. (“Prohost”) and Buford, which Sparta removed to federal court in the Southern District of Florida on

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<sup>5</sup> This estimate for cleaning was the result of a March 2015 inspection of the property by LCD Estimators. Def.’s Resp. 56.1, ¶ 38.

September 6, 2017 based on diversity jurisdiction.<sup>6</sup> Notice of Removal (ECF No. 1). Plaintiff voluntarily dismissed Defendants Buford and Prohost. *See* (ECF Nos. 63, 64). On October 11, 2017, Plaintiff claimed \$16,275.58 of damages for cleaning in its initial disclosures. (ECF No. 20). On February 26, 2018, Plaintiff amended its disclosures to identify new categories of damages and a new damage total of \$319,668.57. (ECF No. 101-5).<sup>7</sup> In the Amended Complaint, Plaintiff alleges one count of breach of contract against Sparta, the only remaining Defendant, for denial of coverage.

## II. Legal Standard

Summary judgment is appropriate where there is “no genuine issue as to any material fact [such] that the moving party is entitled to judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed R. Civ. P. 56. A genuine issue of material fact exists when “a reasonable jury could return a verdict for the non-moving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). “For factual issues to be considered genuine, they must have a real basis in the record.” *Mann v. Taser Int’l, Inc.*, 588 F.3d 1291, 1303 (11th Cir. 2009) (citation omitted). Speculation or conjecture cannot create a genuine issue of material fact. *Cordoba v. Dillard’s*,

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<sup>6</sup> “In a contract action, a federal court sitting in diversity jurisdiction applies the substantive law of the forum state.” *Tech. Coating Applicators, Inc. v. U.S. Fid. & Guar. Co.*, 157 F.3d 843, 844 (11th Cir. 1998).

<sup>7</sup> The new damages included Cleaning, Concrete & Asphalt, Electrical, HVAC, Roofing (awning, roll-up curtains, retractable roof, and related motors, electronics, hardware, etc.), audio and lighting systems, and replacement of the lighting system.

*Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005). The moving party has the initial burden of showing the absence of a genuine issue as to any material fact. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). In assessing whether the moving party has met this burden, the court must view the movant's evidence and all factual inferences arising from it in the light most favorable to the non-moving party. *Denney v. City of Albany*, 247 F.3d 1172, 1181 (11th Cir. 2001). Once the moving party satisfies its initial burden, the burden shifts to the non-moving party to come forward with evidence showing a genuine issue of material fact that precludes summary judgment. *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1243 (11th Cir. 2002); Fed. R. Civ. P. 56(e). "If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment." *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992).

### III. Discussion

Defendant moves for summary judgment arguing that Plaintiff's alleged damages and business income loss are not covered under the Policy. As a threshold matter, the Court must determine whether Plaintiff can prove "direct physical loss or damage" and thus whether coverage exists under the Policy. Because Plaintiff's theory of liability hinges upon expert testimony and because the Court may consider only admissible evidence on summary judgment, the Court first addresses Defendant's objections to the admissibility of Plaintiff's causation experts.<sup>8</sup>

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<sup>8</sup> Expert testimony is required regarding proof of causation "where a jury is asked to assess complex . . . scientific issues

### A. *Daubert* Standard

Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure provides that expert disclosures be accompanied by a written report, signed by the witness, containing a complete statement of all opinions the witness will express and the bases for those opinions. Fed. R. Civ. P. 26(a)(2)(A), (B). Rule 702 of the Federal Rules of Evidence provides that expert testimony is admissible if

scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

*STMicroelectronics, Inc. v. SanDisk Corp.*, No. 05cv-45, 2007 WL 4386234 (E.D. Tex. Mar. 15, 2007). “Rule 702 compels the district courts to perform the critical

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outside the scope of a layperson’s knowledge.” *Small v. Amgen, Inc.*, No. 17-cv-11440, 2018 WL 501354, at \*3 (11th Cir. Jan. 22, 2018); *see also Chapman v. Procter & Gamble Distrib., LLC*, 766 F.3d 1296, 1316 (11th Cir. 2014) (applying Florida law and affirming the district court’s decision on summary judgment where plaintiff’s expert failed to meet the *Daubert* standard and the plaintiff had no other expert to testify as to causation). Plaintiff acknowledges that “causation is a central issue in this case,” which “raises scientific and technical issues beyond a juror’s ordinary knowledge.” Pl.’s *Daubert* Resp. at 15.

‘gatekeeping’ function concerning the admissibility of expert *scientific* evidence.” *U.S. v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (emphasis in original) (citing *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579, 589, n.7, 597 (2006)). The court must also act as gatekeeper with respect to the admissibility of technical expert evidence. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). In determining the admissibility of expert testimony, the Court considers whether:

- (1) The expert is qualified to testify competently regarding the matters he intends to address;
- (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and
- (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

*Finestone v. Florida Power & Light Co.*, No. 03-cv-14040, 2006 WL 267330, \*8 (S.D. Fla. Jan. 6, 2006) (internal citations omitted). “The burden of laying the proper foundation for the admission of the expert testimony is on the party offering the expert.” *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999).

#### i. Defendant’s *Daubert* Motion

Defendant moves to exclude the opinions of all Plaintiff’s experts. For purposes of summary judgment, the Court considers Defendant’s *Daubert* Motion as to the following experts: (1) Alex Posada—damage to audio and lighting systems; (2) Christopher Thompson—damage to the awnings, roll-up curtains, retractable



roof, and related motors, hardware and electronics; and (3) Alfred Brizuela—causation and origin of property damage. Plaintiff designated the testimony of Posada, Thompson, and Brizuela to prove that the construction dust caused the alleged damage to the restaurant.<sup>9</sup>

### **1. Plaintiff's Expert Alex Posada**

Alex Posada is Plaintiff's audio and lighting expert. Defendant argues that Posada is not qualified and his testimony on causation and damages is not reliable.

First, Defendant challenges Posada's qualifications, arguing that Posada's Rule 26 Report did not include a resume or curriculum vitae and that Plaintiff failed to show education, training, or experience that would provide him with scientific, technical, or other specialized knowledge to opine that roadway construction can and did cause damage to Plaintiff's audio and lighting systems in 2014. ("Posada Report") (ECF No. 105-3). Plaintiff contends that Posada has extensive experience in the audio and lighting industry and has assessed lighting and audio systems damaged by construction dust and debris around twenty to thirty times in the past. Posada Dep. (ECF No. 108-1) at 98:21-99:8. An expert "may be qualified 'by knowledge, skill, experience, training, or education.'"

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<sup>9</sup> The Court will consider the *Daubert* motions only to the extent necessary to resolve the pending Motions for Summary Judgment. *Johnson v. State Farm Fire & Cas. Co.*, No. 12-cv-00534, 2013 WL 4607548, at \*2 (S.D. Ala. Aug. 29, 2013). Here, the Court need not consider Frank Inguanzo's opinions to determine causation because at his deposition, Plaintiff's counsel stipulated that he will not offer any opinions on causation. Inguanzo Dep. at 53:12-17.

*Bouton v. Ocean Props., Ltd.*, No. 16-cv-80502, 2017 WL 4792488, at \*7 (S.D. Fla. Oct. 23, 2017). The Court finds that Posada is qualified because of his experience in the field.

Second, Defendant argues Posada’s testimony is not reliable. Even a “supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based on some recognized scientific method.” *Beltran v. NCL Corp., Ltd.*, No. 13-cv-24566, 2017 WL 4270618, at \*4 (S.D. Fla. Sept. 26, 2017). Thus, a court must focus on the “‘reliability’ of a proffered expert’s ‘sources and methods.’” *Chapman*, 766 F.3d at 1306.

Posada identified a reliable methodology, the “QC diagnostic” test, to determine which components of the audio system were damaged and which needed to be repaired or replaced. *See* Posada Report at 3 (“The testing provides valuable diagnostic information for detecting the root cause of the problem and allows to determine if the system is repairable.”). Posada testified that the QC Diagnostic test was the only option to determine a specific reason why a speaker or light was not working. Posada Dep. at 55:12–56:7.<sup>10</sup> However, Posada did not perform the

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<sup>10</sup> Question (“Q”): “So is it fair to say if you want to find out a specific reason why a speaker or light is not working, you have to run this diagnostic?” Answer (“A”): “It’s an option” Q: “What other options are there?” A: “There are no other options . . . its either this or replace it which, I mean—as of looking at it, I can already tell you it’s not going to be worth doing this.” Q: “If you want to find out the specific reason why a subwoofer or speaker or light is not working, do you need to perform the diagnostic?” A: “It’s an option. Yeah” Q: “But are there any other options?” A: “No, there is no other option.” Q: “That’s the only option?” A: “That is correct.”

QC diagnostic test. *Id.* at 53:21-24; 55:5-16, 55:19-22; 57:10-23.

Instead, Posada did a two hour walk-through at the restaurant and conducted a visual and auditory test in February 2018, over two years after the roadway construction ended. Posada Dep. at 30:16. Plaintiff argues Posada's walk-through was sufficient due to his years of experience and ability to determine whether a speaker has been damaged by dust or debris based on the unique sound the speaker makes. Posada testified that he could tell it was construction dust damage from listening to the speakers because the sound was "tedious." *Id.* at 88:12-89:6; 94:1-9. Posada did not inspect the entire audio system because some were out of reach and he did not want to disturb the patrons who were having lunch. *Id.* at 24:18-24; 32:5-16.<sup>11</sup> He inspected the back of some subwoofers, which were located on the floor, and stated that he "had a hard time taking the connector out, and that is due to the corrosion and due to the dust." *Id.* at 40:11-13. Posada stated that speakers can remain in good condition for about ten years but admitted that he did not know the age of the speakers. In fact, Posada did not know when the speakers were installed or when they stopped working. *Id.* at 77:3-10; 76:4-20; 87:1-9.

Posada also testified that the lights at the restaurant were not working and that the only things that can cause damage to LED lighting are construction dust

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<sup>11</sup> Posada testified that he did not "walk in between the tables . . . [s]o it was basically a walk-through around the perimeters where [he] was able to walk and not disturb any guests." Posada Dep. at 34:7-11.

and water. *Id.* at 44:1-2; 81:6-15. He observed the ceiling lights from the ground level, about 15 feet below the fixtures. *Id.* at 45:8-9. (“all the light fixtures are all [15 feet or higher].”). Posada could not see the motherboard from the floor and did not inspect the motherboard of the light fixtures at the restaurant. *Id.* at 97:19-98:11. He further testified that “there was no way for [him] to grab a ladder to take a look at these lights in close proximity to see if it’s really the LED screen that’s not working or the lamp.” *Id.* at 33:11-17.

Under *Daubert*, the “district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation.” *Chapman*, 766 F.3d at 1306. Posada concluded that the audio and lighting systems were damaged by exposure to construction dust and debris. Posada Dep. at 75:4-18. He did not review any documents or photographs of the property before or during his inspection. *Id.* at 31:1-12. In February 2018, Posada merely listened to the audio system—while patrons were in the restaurant—and looked at the lighting system from 15-feet below to conclude that any alleged damage was caused by construction dust and debris from the roadway construction in 2014. Defendant argues that this unverified causation opinion amounts to nothing more than inadmissible *ipse dixit* that regurgitates Plaintiff’s theory of the case. Def.’s Daubert Motion at 5. This “Court does not denigrate the use of visual inspections,” *Banta Properties, Inc. v. Arch Specialty Ins. Co.*, No. 10-cv-61485, 2011 WL 7118542, at \*4 (S.D. Fla. Dec. 23, 2011). But here, Posada’s methodology was unreliable, providing nothing more than speculation about the

cause of the damage to audio and lighting equipment. Posada's testimony is therefore excluded.

## **2. Plaintiff's Expert Christopher Thompson**

Defendant moves to exclude the testimony of Thompson on the issue of damages to the awnings, roll-up curtains, retractable roof, and related motors, hardware and electronics arguing that he is not qualified and the methodology used was unreliable.

First, Defendant challenges Thompson's qualifications arguing that Thompson's Rule 26 Report ("Thompson Report") (ECF No. 105-4) did not suggest that Thompson has any specialized knowledge to opine on whether construction dust can and did, in fact, cause any property damage. Thompson has worked in his family awning business for the past 30 years. Thompson Report at 10. The "qualification standard for expert testimony is 'not stringent,' and 'so long as the expert is minimally qualified, objections to the level of the expert's expertise [go] to credibility and weight, not admissibility.'" *Banta*, 2011 WL 7118542, at \*2. Furthermore, an expert may be qualified by "experience." *Bouton*, 2017 WL 4792488, at \*7. Thompson is at least minimally qualified to render an expert opinion from his years of experience.

Second, Defendant argues that Thompson's opinions are unreliable "leaps of faith" unsupported by evidence. Plaintiff argues that Thompson's methodology was reliable because he conducted "visual testing" and that the testimony would be helpful because the damages involved "technical issues outside a juror's ordinary knowledge." Pl.'s *Daubert* Resp. at 11.

Thompson inspected the property for approximately one hour in February 2018. Thompson Dep. (ECF No. 108-3) at 29:23-24. He concluded that all the awnings, gear drives, and motors were damaged from construction dust and debris and must be replaced. Thompson Report at 1. The following deposition testimony is particularly relevant to the Court's determination that Thompson failed to use a reliable methodology to support his conclusions:

Q: "The black sediment that you observed, do you know what it was?" A: "In my opinion it was debris from the road construction, dirt." Q: "What are you basing that on? A: *"I'm basing my opinions on awnings that I did for many years and, you know, that awning is filthy. I know what it was when we put it up. I know what it looks like now, so . . ."* Id. at 43:20-22; 44:14-20 (emphasis added)

Q: "Other than the fact that you have eaten at [the restaurant] and have seen roadwork going on, do you have any other basis for that opinion that that black sediment was from the roadwork?" A: *"Well, I've seen several other awnings I did over the years and, you know, it didn't come with the awning on, you know, when it was new. So I'm just making that assumption that I'm seeing the road. And I've been there several times and the roof is closed and when you open it up, there is dirt and particles flying through the air when I have been there for lunch. So to me, if you have a road and you have –when I've been there and eaten lunch*

over the years and you have road debris going on and your curtains are down, and the dirt is flying, it leads me to believe that that would be from there.” *Id.* at 45:19-46:17 (emphasis added).

Thompson also testified that he observed discoloration in the awnings but did not know whether that discoloration was caused by the sediment. *Id.* at 62:20-25. When asked about alternative causes for the discoloration, Thompson did not know if it could have been caused by salt or sap but testified that although he did not know what the sediment was, he knew the sediment could deteriorate the fabric. *Id.* at 117:6-16. When asked if he knew when the sediment got on the awning, Thompson responded “I sure don’t.” Thompson Dep. at 54:11-13.

Thompson also inspected the retractable roof and drive belt. The only component of the retractable system that Thompson could confirm was broken was the drive belt that opens and closes the roof but he was unsure when the drive belt “snapped.” *Id.* at 47:1-12; 69:24-70:1; 71:12-13 (“Q: “Do you know why it snapped in half?” A: “I could not tell you. I have an opinion, but I couldn’t tell you seriously.”).

A district court enjoys flexibility in conducting the reliability analysis and application of *Daubert* factors in any “given case will depend . . . on the nature of the issue, the expert’s particular expertise, and the subject of his testimony.” *United States v. Brown*, 415 F.3d 1257, 1268 (11th Cir. 2005) (internal quotations omitted). Where “the proposed expert’s opinion relies principally upon his experience and knowledge,” the Court must be satisfied “that the witness has appropriately explained how his experience leads to the

conclusion he reached, why that experience provides a sufficient basis for the opinion, and how that experience is reliably applied to the facts.” *Clena Invs., Inc. v. XL Specialty Ins. Co.*, 280 F.R.D. 653, 663 (S.D. Fla. 2012). While “absolute certainty is not required from an expert,” *Banta*, 2011 WL 7118542, at \*3, “‘knowledge’ connotes more than subjective belief or unsupported speculation.” *Daubert*, 509 U.S. at 590. The Court finds that Thompson’s testimony is nothing more than unexplained assurances and unsupported speculation.

### **3. Plaintiff’s Expert Alfred Brizuela**

Defendant challenges the qualification and reliability of Brizuela, Plaintiff’s causation expert who opined that the roadway construction dust caused damage to metal structures at Plaintiff’s restaurant.

First, Defendant challenges Brizuela’s qualifications arguing that Plaintiff has not provided any credible evidence to show that Brizuela has the education, training, or experience on this discrete subject matter to assess whether roadway construction dust can cause damage to the metal structures and whether the roadway construction did, in fact, cause damage to the metal structures. Brizuela has a degree in architecture and structural engineering, is a Florida licensed civil and structural engineer with over thirty-three years of experience in assessing commercial and residential properties for structural and architectural damage, and has had experience with dust “affecting cars at [his] construction sites, affecting the finish and the metals on the cars.” Brizuela Dep. (ECF No. 108-5) at 22:12-23:25; Brizuela Qualifications (ECF No. 113-10). Because of Brizuela’s



education and background, the Court finds that Brizuela is qualified.

Second, Defendant argues Brizuela failed to use reliable methodology to support his testimony regarding causation. Brizuela stated that construction dust “in its simplest form, is a mixture of a [sic] small particles from concrete (Portland cement and water) and aggregate and limestone which is primarily calcium carbonate.” Brizuela Report (ECF No. 105-5). at 6. He stated that Portland cement “has distinctive characteristics of its own as it is the basic ingredient of concrete.” *Id.* at 6. Though Brizuela opined on what concrete is generally made of and damage that it can cause, he did not conduct any chemical testing of the construction dust allegedly adhered to the metal at the restaurant. Instead, he conducted a one hour visual inspection of the restaurant in December 2017; over two years after the construction had ended. Brizeula Report at 1; Brizeula Dep. at 57:5-58:6; 59:19-21; 115:24-115-4; 154:4-7 (“testing was strictly the observation through . . . inspection and review of [] photographs.”) His efforts to remove the alleged “adhered paste during [his] inspection” involved running his “fingers across it.” Brizeula Dep. At 116:5-10. Based on his inspection, Brizuela concluded that “it is evident that the source of [any] damage was from the nearby roadway construction.” Brizuela Report.

Brizuela stated in his report that the “migration of the [construction] dust and its resulting paste was a sudden and accidental occurrence that damaged” the “windows, railings, paint and stucco” and the

“awning structure.” Brizuela Report at 6-7.<sup>12</sup> The Court finds that Brizuela’s testimony is not based on any methodology and further, any testimony regarding the alleged damage would not be helpful to a jury because Brizuela testified that: (1) he did not observe any dust on the window frames during his inspection, (Brizuela Dep. at 86:17-19); (2) he did not see any damage to the stucco, (*id.* at 90:6-13); (3) he “observed dust on the metal framing of the awning” during his inspection in December of 2017—two years after the construction ended—but found that the “awning had yet to experience high levels of moisture which would cake on [ . . . ] that dust and make it stick” and testified that he has not seen any evidence of that on the frame, (*id.* at 67:10-24); (4) he did not know whether dust was caked on the awning structure because he “didn’t get up that high to see if it was caked,” (*id.* at 93:2-8); (5) he observed some corrosion on the metal railings but noted that “the finish is still in place. I mean, there is some corrosion on the railings or in — but that would—I would attribute that to natural oxidation. If you look [at] . . . the area where there is corrosion, it’s just, I would say, natural to that railing,”

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<sup>12</sup> Brizuela also testified that “the HVAC system, [ . . . ] And then the fabric [on the awnings]” could also be damaged. Brizuela Dep. at 73:1-6. This testimony is not helpful because Brizeula testified that he had no opinions regarding the damage to the HVAC system or audio and lighting and would not be giving his opinion on other allegedly damaged property. Brizuela Dep. at 71:9 19 (he could not speak to the awning fabric because of “his lack of experience with that fabric”); 69:20-70:14 (he did not inspect the HVAC system and had no experience with audio and lighting equipment); 92:4-14 (he was informed that the retractable roof was not functioning but that he did not know why); and 85: 19-22 (he was not rendering an opinion that dust damaged the exterior walls).

(*id.* at 94:2-7); and (6) the corrosion damage in his Report “will” occur, but that “[c]orrosion damage relating to the dust has . . . not occurred yet.” *Id.* at 94:16-24.

Relevant testimony from a qualified expert is only admissible if the expert knows of facts which enable him to express reasonably accurate conclusion as opposed to conjecture or speculation. *Vision I Homeowners Ass’n, Inc. v. Aspen Specialty Ins. Co.*, 674 F. Supp. 2d 1321, 1325 (S.D. Fla. 2009). Absolute certainty is not required and expert testimony is admissible when it connects conditions existing later to those existing earlier provided the connection is concluded logically. *Id.* Even if the Court accepts, as Brizuela testified, that construction dust and debris can generally cause damage to metal, his conclusions are unreliable for the following reasons: (1) he did not inspect some allegedly damaged items, (2) he did not observe damage to some of the items claimed, and (3) testified that that some damage had yet to occur. Brizeula is unable to attribute damage to the construction dust with any degree of certainty and his testimony is therefore excluded.

## **B. Defendant’s Motion for Summary Judgment**

Defendant moves for summary judgment arguing that Plaintiff’s alleged “direct physical loss of or damage” and business income loss are not covered under the Policy. Defendant argues it is entitled to summary judgment for several reasons including but not limited to the following (1) Plaintiff’s expenses associated with cleaning dust from building surfaces and personal property do not constitute direct physical loss or damage because the dust did not tangibly

injure covered property; (2) Plaintiff cannot meet its burden of showing that the alleged damage occurred during the policy period; and (3) Plaintiff's business interruption claim fails because Plaintiff has not sustained a suspension of operations for a period of restoration caused by direct physical loss or damage.

Under Florida law, the interpretation of an insurance contract is a matter of law to be decided by the court. *Adelberg v. Berkshire Life Ins. Co.*, 97 F.3d 470, 472 (11th Cir. 1996). Florida courts look at the insurance policy as a whole and give every provision its full meaning. *State Farm Fire & Cas. Co. v. Steinberg*, 393 F.3d 1226, 1230 (11th Cir. 2004).

#### **i. Direct Physical Loss or Damage**

Plaintiff argues that the migration of dust and construction debris from the roadwork adjacent to the restaurant caused damage to the restaurant and contends that this dust and debris constitutes “direct physical loss” to the Property under the Policy. Under the all-risk insurance Policy between Plaintiff and Defendant, the insured must initially show (1) that there was a relevant loss—here a “direct physical loss or damage”—which (2) occurred within the policy period. *Sporting Prod., LLC v. Pac. Ins. Co., Ltd.*, No. 10-cv-80656, 2012 WL 13018367, at \*10 (S.D. Fla. Jan. 6, 2012).<sup>13</sup>

First, with regards to Plaintiff's new damages alleged in the February 2018 disclosures for replacement of the restaurant's awning and retractable roof, audio systems, lighting systems, asphalt parking lot,

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<sup>13</sup> The Parties agree that the Policy is an “all-risk” insurance policy. *See* Pl.'s Mot. at 8-9; Def.'s Resp. at 3.

and HVAC systems, Plaintiff relies on the expert reports of the excluded experts—Brizuela, Thompson, and Posada,—in order to prove causation and damage.

While an expert is not necessary in all breach of contract cases, here the crucial question whether construction dust and debris caused damage to Plaintiff's property is not one a lay witness can answer. *Johnson*, 2013 WL 4607548, at \*11 (“While it may be true that an expert is not required in all breach of contract cases, here the crucial question—whether the water damage came from ground water accumulation or a roof defect—is not one a lay witness can answer.”). “A person seeking to recover on an insurance policy has the burden of proving a loss from causes within the terms of the policy[,] and if such proof of loss is made within the contract of insurance, the burden is on the insurer to establish that the loss arose from a cause that is excepted from the policy.” *Evanston Ins. Co. v. Haven S. Beach, LLC*, 152 F. Supp. 3d 1370, 1374 (S.D. Fla. 2015).<sup>14</sup>

Plaintiff carries the burden of proving causation to show that there was a direct physical loss and thus coverage under the Policy. *Companhia Energetica Potiguar v. Caterpillar Inc.*, No. 14-cv-24277, 2016

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<sup>14</sup> Defendant also argues that several exclusions and limitations apply that would bar coverage if the Court were to attribute the “loss or damage” to the construction dust and debris. These include but are not limited to the following: “failure of power, communication, water or other utility service supplied to premises,” “wear and tear,” “marring or scratching,” “rust or other corrosion, decay deterioration,” “mechanical breakdown,” that the dust was a “pollutant,” and “failure to mitigate damages.” Because the Court has determined that there is no coverage, the Court need not address whether these exclusions apply.

WL 7507848, at \*13 (S.D. Fla. Aug. 1, 2016). Plaintiff acknowledges that “causation is a central issue in this case,” which “raises scientific and technical issues beyond a juror’s ordinary knowledge.” Pl.’s *Daubert* Resp. at 15.

The Eleventh Circuit affirmed a district court’s grant of summary judgment on the basis of its exclusion of the expert’s testimony, where that testimony was the only evidence on the issue of causation. *Guinn v. AstraZeneca Pharm. LP*, 602 F.3d 1245, 1251 (11th Cir. 2010) Where a plaintiff cannot show evidence that their loss is covered, a plaintiff “cannot show [Defendant] breached the terms of the Policy by refusing to pay their claim.” *Johnson*, 2013 WL 4607548, at \*11. Here, without its experts, Plaintiff cannot show that the construction dust and debris from 2014 caused the alleged “direct physical loss” to their awnings, retractable roof, HVAC system, railings, and audio and lighting system. Thus, summary judgment is appropriate.

Second, with regards to Plaintiff’s initial claim for cleaning,<sup>15</sup> cleaning is not considered direct physical loss. *See e.g., Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App’x 569, 573 (6th Cir. 2012) (“[Plaintiff]

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<sup>15</sup> Robert Inguanzo, Plaintiff’s public adjuster, who assisted Plaintiff in filing its original claim for coverage against Defendants, testified that based on his initial inspection, at the time of the request “the work that we felt was necessary to bring the property to its pre-loss condition included the cleaning and painting. Robert Inguanzo Dep. (ECF No. 76-1) at 35:22-36:1. There was no need for removal or replacement of items at that time. Robert Inguanzo Dep. at 36:4-7. The entire initial estimate was for cleaning the restaurant. LCD Estimators (ECF No. 110-10)

seeks coverage for cleaning and moving expenses . . . as well as lost business income. These are not tangible, physical losses, but economic losses.”). A direct physical loss “contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so.” *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010); *see also AFLAC Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306, 308, (2003).

Even if this Court were to adopt a more expansive definition of “direct physical loss or damage,” Plaintiff would not be entitled to coverage. Several courts have held that “physical loss” occurs when property becomes “uninhabitable” or substantially “unusable.” *See e.g. Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (“When the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner.”). Indeed, where “[t]he structure continues to function—it has not lost its utility . . . routine maintenance does not bring the expense within first-party coverage.” *Id.*

Here, the restaurant was not “uninhabitable” or “unusable.” In fact, the restaurant remained open every day, customers were always able to access the restaurant, and there is no evidence that dust had an impact on the operation other than requiring daily cleaning. *See* Def.’s Resp. 56.1, ¶ 26; Edmonson Dep. (ECF No. 116-8), 39:12-19, 46:3-6, 63:17-22; Snider Dep. (ECF No. 107-1) at 66:10-67:6. “The requirement

that the loss be ‘physical,’ given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.” *See* 10A Couch on Ins. § 148:46 (3d. Ed. West 1998). The fact that the restaurant needed to be cleaned more frequently does not mean Plaintiff suffered a direct physical loss or damage and thus, summary judgment is appropriate.<sup>16</sup>

## ii. Business Income Loss (and Extra Expense) Coverage

Sparta’s Business Income (And Extra Expense) Coverage form covers “the actual loss of Business Income you sustain due to the necessary ‘suspension’ of your ‘operations’ during the ‘period or restoration’.” The ‘suspension’ must be caused by direct physical loss of or damage to property.” The Policy at 46.

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<sup>16</sup> Plaintiff also argues that the cleaning constituted “debris removal.” Debris removal is not defined in the Policy. However, the Policy covers expenses “to remove debris of Covered Property caused by or resulting from a Covered Cause of Loss that occurs during the policy period.” *Id.* at 33 (emphasis added). Removal of debris from the collapse of a building is covered when the debris was ‘Covered Property.’” *Harbor Cmty., LLC v. Landmark Am. Ins. Co.*, No. 07-cv-14336, 2008 WL 2986424, at \*5 (S.D. Fla. Aug. 4, 2008) (“[R]emoval of debris from the collapse of Building # 9 is covered because the collapse was a ‘Covered Cause of Loss’ and the debris was ‘Covered Property.’”). Here, the alleged debris removal was from dust and debris migrating from the roadway construction—not from any “Covered Property.” Plaintiff is not entitled to coverage for cleaning under this portion of the Policy.



Defendant argues that Plaintiff cannot prove any element of the Business Loss Income claim. Plaintiff argues that its loss of income is intertwined with the damage to the property and the allocation of its recourses.

It is plaintiff's burden to prove "entitlement to business interruption insurance proceeds under the insurance policy." *Dictiomatic, Inc. v. U.S. Fid. & Guar. Co.*, 958 F. Supp. 594, 603 (S.D. Fla. 1997). Plaintiff must prove (1) there was direct physical loss or damage to covered property, (2) the damage was caused by a covered cause of loss, (3) there was a necessary "suspension" of the insured's "operations," (4) the "suspension" was caused by the covered damage, (5) there was an "actual loss of business income" during a "period of restoration," and (6) the "actual loss of income" was caused by the "suspension" of "operations." *Id.* at 62.

As addressed above, Plaintiff has not established a direct physical loss or damage. Plaintiff cannot recover under the Business Income (And Extra Expense) Coverage because Plaintiff cannot show that there was any suspension of operations caused by "physical damage." *See e.g. Ramada Inn Ramogreen, Inc. v. Travelers Indem. Co. of Am.*, 835 F.2d 812, 814 (11th Cir. 1988) ("recovery is intended when the loss is due to inability to use the premises where the damage occurs."). The restaurant remained open every day, customers were always able to access the restaurant, and suppliers were always able to access the restaurant. *See* Def.'s Resp. 56.1, ¶ 26; Edmonson Dep. (ECF No. 116-8), 39:12-19, 46:3-6, 53:1-9, 63:5-11. Thus, summary judgment is appropriate.

#### IV. Conclusion

For the foregoing reasons, is hereby ORDERED AND ADJUDGED that Defendant's *Daubert* Motion to Exclude Plaintiff's Expert (ECF No 105) is GRANTED as set forth above, Defendant's Motion for Summary Judgment (ECF No.106) is GRANTED as set forth above. All other pending motions are denied as MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 11th day of June, 2018.

/s/ K. Michael Moore

Chief United States District Judge

cc: All counsel of record

**SPARTA INSURANCE POLICY—  
RELEVANT EXCERPTS**

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SPARTA INSURANCE COMPANY, a Stock Insurance Company

Home Office:  
CityPlace II  
185 Asylum Street  
Hartford, CT 06103  
1-860-275-6500

Our President and Secretary have signed this policy. The Declaration page has also been countersigned by our duly authorized agent.

  
\_\_\_\_\_  
Michael A. Visintainer, Secretary

  
\_\_\_\_\_  
Brian D. First, President

## COMMON POLICY DECLARATIONS

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SPARTA INSURANCE COMPANY  
Cityplace II, 185 Asylum Street, Hartford, CT 05103

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### Item 1.

#### Named Insured and Mailing Address

Mama Jo's Inc. DBA: Berries  
2884 SW 27 Ave  
Miami FL 33133

#### Agent Name and Address

PROHOST USA, INC.  
4500 Park Glen Road  
Suite 410  
Minneapolis MN 55416

Agent No.                00029

### Item 2.

#### Policy Period

From: 09-19-2013 To: 09-19-2014

at 12:01 A.M., Standard time at your mailing  
address shown above.

### Item 3.

Business Description: RESTAURANT

Form of Business: CORPORATION

**Item 4.**

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. Where no premium is shown, there is no coverage. This premium may be subject to adjustment.

<b>Coverage Part(s)</b>	<b>Premium</b>
Commercial Property Coverage Part	\$ 6,195.00
Commercial General Liability Coverage Part	\$ 12,878.00
Commercial Crime Coverage Part	Not Covered
Commercial Inland Marine Coverage Part	Not Covered
Commercial Auto (Business or Truckers) Coverage Part	Not Covered
Commercial Garage Coverage Part	Not Covered
<b>TAX OR SURCHARGE</b>	<b>\$ 448.87</b>
<b>Total Policy Premium</b>	<b>\$ 19,521.87</b>

**Item 5.**

Forms and Endorsements

See Schedule of Forms and Endorsements

## **SCHEDULE OF FORMS AND ENDORSEMENTS**

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SPARTA INSURANCE COMPANY

[Policy Number 053CP00228]

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Named Insured: Mama Jo's Inc. DBA: Berries

Effective Date: 09-19-13

12:01 A.M, Standard Time

Agent Name: PROHOST USA, INC.

Agent No.: 00029

<b>Common Policy Forms and Endorsements</b>		
SPPJ 03	03-13	Policy Jacket
CO-DEC	01-97	Common Policy Declarations
FORM-SCHED	01-97	Schedule Of Forms And Endorsements
LOC-SCHED	01-97	Schedule Of Locations
IL 00 17	11-98	Common Policy Conditions
IL 00 21	09-08	Nuclear Energy Liability Exclusion Endt
IL 04 15	04-98	Protective Safeguards
IL 09 35	07-02	Excl of Certain Computer-Related Losses
IL 09 53	01-08	Excl/Cert Acts-Terror; Cov/Fire Losses
TAX-FORM	01-97	Schedule Of Taxes,

# App.53a

		Surcharges Or Fees
IL 01 12	06-10	Fl Chgs-Mediation/Apprl (Cmml Res Prop)
IL 01 75	09-07	Florida Changes Legal Action Against Us
IL 02 55	02-12	Florida Changes-Canc & Nonrenewal
IL 04 01	02-12	Florida-Sinkhole Loss Coverage
<b>Property Forms and Endorsements</b>		
PF-DEC	10-00	Comm Property Cov Part Supp Dec
PF-SCHED	10-00	Comm Property Cov Part Ext Of Supp Dec
CP 00 10	06-07	Building & Personal Pro- perty Coverage
CP 00 30	06-07	Business Income Coverage (&/Ex Exp)
CP 00 90	07-88	Commercial Property Condi- tions
CP 01 40	07-06	Excl of loss due to virus or bacteria
CP 04 17	06-07	Utility Services-Direct Damage
CP 04 40	06-07	Spoilage Coverage
CP 10 30	06-07	Causes Of Loss-Special Form
CP 10 32	08-08	Water Exclusion Endorse- ment

App.54a

CP 10 54	06-07	Windstorm Or Hail Exclusion
CP 12 18	06-07	Loss Payable Provisions
CP 15 45	06-07	Utility Services-Time Element
CP 55 04	12-08	Sparta Property Enhance- ment Endorsement
CP 55 21	03-11	Business Income Changes- Time Period
CP 75 00	06-08	Equipment Breakdown Coverage
CP 75 DS	05-08	Equipment Breakdown Coverage Schedule
MAN-PF	01-02	Sewer Or Drain Backup
MAN-PF	01-02	Windstorm Exclusion For Spoilage
CP 01 25	02-12	Florida Changes
<b>General Liability Forms And Endorsements</b>		
GL-DEC	12-01	Comm General Liability Coverage Supp Dec
GL- SCHED	01-97	Comm General Liability Coverage Schedule
LIQ-DEC	08-01	Liquor Liability Coverage Part Dec
CG 00 01	04-13	Commercial General Liabi- lity Cov Form
CG 00 33	04-13	Liquor Liability Cov Form (Occurrence)
CG 21 35	10-01	Excl-Cov C-Medical Payments



App.55a

CG 21 46	07-98	Abuse Or Molestation Exclusion
CG 21 47	12-07	Employment-Related Practices Exclusion
CG 21 49	09-99	Total Pollution Excl Endt
CG 21 67	12-04	Fungi Or Bacteria Exclusion
CG 21 75	06-08	Excl Certif Acts Of Terr & Othr Act O/S
CG 21 96	03-05	Silica Or Silica- Related Dust Exclusion
CG 02 20	03 - 12	Fl Changes - Cancellation & Nonrenewal
CG L4 07	01-96	Prod/ Completed Operations Hazard Redefin
GL 45 01	02-08	Asbestos Exclusion
GL 45 02	02-08	Lead Exclusion
GL 45 05	02-08	Prior And/Or Pending Litigation Excl.
GL 55 01	02-08	Amended Additional Insured

## SCHEDULE OF LOCATIONS

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SPARTA INSURANCE COMPANY

[Policy Number 053CP00228]

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Named Insured: Mama Jo's Inc. DBA: Berries

Effective Date: 09-19-13

12:01 A.M, Standard Time

Agent Name: PROHOST USA, INC.

Agent No.: 00029

<b>Loc No.</b>	001
<b>Bldg No.</b>	001
<b>Designated Locations (Address, City, State, Zip Code)</b>	2884 SW 27th Ave, Berries, Miami, FL 33133
<b>Occupancy</b>	Restaurant

<b>Loc No.</b>	001
<b>Bldg No.</b>	002
<b>Designated Locations (Address, City, State, Zip Code)</b>	2721 Coconut Ave, Berries, Miami, FL 33133
<b>Occupancy</b>	Storage

## COMMON POLICY CONDITIONS

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

### **A. Cancellation**

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

2. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:

- a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium;  
or
- b. 30 days before the effective date of cancellation if we cancel for any other reason.

3. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.

4. Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.

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

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

## **B. Changes**

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

## **C. Examination of Your Books and Records**

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

## **D. Inspections and Surveys**

1. We have the right to:

- a. Make inspections and surveys at any time;
- b. Give you reports on the conditions we find;  
and
- c. Recommend changes.

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

- a. Are safe or healthful; or
- b. Comply with laws, regulations, codes or standards.

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

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

#### **E. Premiums**

The first Named Insured shown in the Declarations:

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

#### **F. Transfer of Your Rights and Duties Under This Policy**

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

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

**NOTICE TO POLICYHOLDERS  
RISK MANAGEMENT PLAN FLORIDA**

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In accordance with Florida statute, section 627.0625(3), for insurance carriers who offer commercial casualty or commercial property insurance, we are advising you of your right under this section to obtain guidelines for risk management plans. Per Florida statute, this request must be made in writing to SPARTA Insurance Company.

These guidelines cover safety measures in a number of areas including:

- Pollution and environmental hazards
- Disease hazards
- Accidental occurrences
- Fire hazards
- Fire prevention and detection
- Liability for acts from the course of business
- Slip and fall hazards
- Product injury
- Hazards unique to a particular class or category of policyholders

Requests in writing can be mailed to:

Loss Control Department  
SPARTA Insurance Company  
CityPlace II  
185 Asylum Street  
Hartford, CT 06103

**COMMERCIAL PROPERTY COVERAGE PART  
SUPPLEMENTAL DECLARATIONS**

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SPARTA INSURANCE COMPANY

[Policy Number 053CP00228]

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Named Insured: Mama Jo's Inc. DBA: Berries

Effective Date: 09-19-13

12:01 A.M, Standard Time

Agent Name: PROHOST USA, INC.

Agent No.: 00029

**Item 1.** Business Description: Restaurant

**Item 2.** Premises Described:

See Schedule of Locations

**Item 3.** \$500 Deductible unless otherwise indicated.

**Item 4.** Coverage Provided

Loc No.	001	
Bldg No.	001	
Coverage	Building Joisted Masonry	
Limit of Insurance	\$500,000	
Covered Causes of Loss	Special	
Coins.	80	

**Other Provision**

☒ Replacement Cost

Deductible: 2,500

Exceptions: Wind

App.62a

Loc No.	001	
Bldg No.	001	
Coverage	Business Pers Pro Joisted Masonry	
Limit of Insurance	\$300,000	
Covered Causes of Loss	Special	
Coins.	80	

**Other Provision**

☒ Replacement Cost

Deductible: 2,500

Exceptions: Wind

Loc No.	001	
Bldg No.	001	
Coverage	Business Income Joisted Masonry	
Limit of Insurance	\$500,000	
Covered Causes of Loss	Special	

**Other Provision**

☒ Business Income Indemnity: Monthly Limit:  
1/6

Extended 60 Days

Exceptions: Wind

**Item 5. Forms and Endorsements**

Form(s) and Endorsement(s) made a part of this policy at time of issue:

See Schedule of Forms and Endorsements



**COMMERCIAL PROPERTY COVERAGE PART  
EXTENSION OF SUPPLEMENTAL  
DECLARATIONS**

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SPARTA INSURANCE COMPANY

[Policy Number 053CP00228]

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Named Insured: Mama Jo's Inc. DBA: Berries

Effective Date: 09-19-13

12:01 A.M, Standard Time

Agent Name: PROHOST USA, INC.

Agent No.: 00029

**Item 4. Coverage Provided**

Loc No.	001	
Bldg No.	001	
Coverage	Spoilage	
Limit of Insurance	\$25,000	
Covered Causes of Loss		
Coins.		

**Other Provision**

☒ Replacement Cost

Deductible: \$500

Type: Brkdwn Cont/Pwr Outage

App.64a

Loc No.	001	
Bldg No.	002	
Coverage	Business Pers Pro Joisted Masonry	
Limit of Insurance		\$50,000
Covered Causes of Loss		Special
Coins.		80

**Other Provision**

☒ Replacement Cost

Deductible: 2,500

Exceptions: Wind

## **BUILDING AND PERSONAL PROPERTY COVERAGE FORM**

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### **COMMERCIAL PROPERTY**

CP 00 10 06 07

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

Throughout this policy the words ‘you’ and ‘your’ refer to the Named Insured shown in the Declarations. The words “we”, “us” and “our” refer to the Company providing this insurance.

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

### **A. Coverage**

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

#### **1. Covered Property**

Covered Property, as used in this Coverage Part, means the type of property described in this section, A.1., and limited in A.2., Property Not Covered, if a Limit of Insurance is shown in the Declarations for that type of property.

- a. Building, meaning the building or structure described in the Declarations, including:
  - (1) Completed additions;
  - (2) Fixtures, including outdoor fixtures;

- (3) Permanently installed:
    - (a) Machinery and
    - (b) Equipment;
  - (4) Personal property owned by you that is used to maintain or service the building or structure or its premises, including:
    - (a) Fire-extinguishing equipment;
    - (b) Outdoor furniture;
    - (c) Floor coverings; and
    - (d) Appliances used for refrigerating, ventilating, cooking, dishwashing or laundering;
  - (5) If not covered by other insurance:
    - (a) Additions under construction, alterations and repairs to the building or structure;
    - (b) Materials, equipment, supplies and temporary structures, on or within 100 feet of the described premises, used for making additions, alterations or repairs to the building or structure.
- b. Your Business Personal Property located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises, consisting of the following unless otherwise specified in the Declarations or on the Your

Business Personal Property—Separation Of Coverage form:

- (1) Furniture and fixtures;
- (2) Machinery and equipment;
- (3) “Stock”;
- (4) All other personal property owned by you and used in your business;
- (5) Labor, materials or services furnished or arranged by you on personal property of others;
- (6) Your use interest as tenant in improvements and betterments. Improvements and betterments are fixtures, alterations, installations or additions:
  - (a) Made a part of the building or structure you occupy but do not own; and
  - (b) You acquired or made at your expense but cannot legally remove;
- (7) Leased personal property for which you have a contractual responsibility to insure, unless otherwise provided for under Personal Property of Others.

c. Personal Property of Others that is:

- (1) In your care, custody or control; and
- (2) Located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises,

However, our payment for loss of or damage to personal property of others will only be for the account of the owner of the property.

## **2. Property Not Covered**

Covered Property does not include:

- a. Accounts, bills, currency, food stamps or other evidences of debt, money, notes or securities. Lottery tickets held for sale are not securities;
- b. Animals, unless owned by others and boarded by you, or if owned by you, only as “stock” while inside of buildings;
- c. Automobiles held for sale;
- d. Bridges, roadways, walks, patios or other paved surfaces;
- e. Contraband, or property in the course of illegal transportation or trade;
- f. The cost of excavations, grading, backfilling or filling;
- g. Foundations of buildings, structures, machinery or boilers if their foundations are below:
  - (1) lowest basement floor; or
  - (2) The surface of the ground, if there is no basement;
- h. Land (including land on which the property is located), water, growing crops or lawns;
- i. Personal property while airborne or water-borne;

- j. Bulkheads, pilings, piers, wharves or docks;
- k. Property that is covered under another coverage form of this or any other policy in which it is more specifically described, except for the excess of the amount due (whether you can collect on it or not) from that other insurance;
- l. Retaining walls that are not part of a building;
- m. Underground pipes, flues or drains;
- n. Electronic data, except as provided under the Additional Coverage, Electronic Data. Electronic data means information, facts or computer programs stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), on hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other repositories of computer software which are used with electronically controlled equipment. The term computer programs, referred to in the foregoing description of electronic data, means a set of related electronic instructions which direct the operations and functions of a computer or device connected to it, which enable the computer or device to receive, process, store, retrieve or send data. This paragraph, n., does not apply to your "stock" of prepackaged software;
- o. The cost to replace or restore the information on valuable papers and records, including those which exist as electronic data. Valuable

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papers and records include but are not limited to proprietary information, books of account, deeds, manuscripts, abstracts, drawings and card index systems. Refer to the Coverage Extension for Valuable Papers And Records (Other Than Electronic Data) for limited coverage for valuable papers and records other than those which exist as electronic data;

- p. Vehicles or self-propelled machines (including aircraft or watercraft) that:
  - (1) Are licensed for use on public roads; or
  - (2) Are operated principally away from the described premises.

This paragraph does not apply to:

- (a) Vehicles or self-propelled machines or autos you manufacture, process or warehouse;
  - (b) Vehicles or self-propelled machines, other than autos, you hold for sale;
  - (c) Rowboats or canoes out of water at the described premises; or
  - (d) Trailers, but only to the extent provided for in the Coverage Extension for Non-owned Detached Trailers;
- q. The following property while outside of buildings:
  - (1) Grain, hay, straw or other crops;
  - (2) Fences, radio or television antennas (including satellite dishes) and their



lead-in wiring, masts or towers, trees, shrubs or plants (other than 'stock" of trees, shrubs or plants), all except as provided in the Coverage Extensions.

### **3. Covered Causes of Loss**

See applicable Causes of Loss Form as shown in the Declarations.

### **4. Additional Coverages**

#### **a. Debris Removal**

- (1) Subject to Paragraphs (3) and (4), we will pay your expense to remove debris of Covered Property caused by or resulting from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date of direct physical loss or damage.
- (2) Debris Removal does not apply to costs to:
  - (a) Extract 'pollutants" from land or water; or
  - (b) Remove, restore or replace polluted land or water.
- (3) Subject to the exceptions in Paragraph (4), the following provisions apply:
  - (a) The most we will pay for the total of direct physical loss or damage plus debris removal expense is the Limit of Insurance applicable to the Covered Property that has sustained loss or damage.

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- (b) Subject to (a) above, the amount we will pay for debris removal expense is limited to 25% of the sum of the deductible plus the amount that we pay for direct physical loss or damage to the Covered Property that has sustained loss or damage.
- (4) We will pay up to an additional \$10,000 for debris removal expense, for each location, in any one occurrence of physical loss or damage to Covered Property, if one or both of the following circumstances apply:
  - (a) The total of the actual debris removal expense plus the amount we pay for direct physical loss or damage exceeds the Limit of Insurance on the Covered Property that has sustained loss or damage.
  - (b) The actual debris removal expense exceeds 25% of the sum of the deductible plus the amount that we pay for direct physical loss or damage to the Covered Property that has sustained loss or damage.

Therefore, if (4)(a) and/or (4)(b) apply, our total payment for direct physical loss or damage and debris removal expense may reach but will never exceed the Limit of Insurance on the Covered Property that has sustained loss or damage, plus \$10,000.

**(5) Examples**

The following examples assume that there is no Coinsurance penalty.

Limit of Insurance:	\$90,000
Amount of Deductible:	\$500
Amount of Loss:	\$50,000
Amount of Loss Payable:	\$49,500
(\$50,000 -\$500)	
Debris Removal Expense:	\$ 10,000
Debris Removal Expense Payable:	\$ 10,000
(\$10,000 is 20% of \$50,000.)	

The debris removal expense is less than 25% of the sum of the loss payable plus the deductible. The sum of the loss payable and the debris removal expense (\$49,500 + \$10,000 = \$59,500) is less than the Limit of Insurance. Therefore the full amount of debris removal expense is payable in accordance with the terms of Paragraph (3).

**Example #2**

Limit of Insurance:	\$90,000
Amount of Deductible:	\$500
Amount of Loss:	\$80,000
Amount of Loss Payable:	\$79,500
(\$80,000-\$500)	
Debris Removal Expense:	\$30,000

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Debris Removal Expense Payable	
Basic Amount:	\$10,500
Additional Amount:	\$10,000

The basic amount payable for debris removal expense under the terms of Paragraph (3) is calculated as follows:  $\$80,000 (\$79,500 + \$500) \times .25 = \$20,000$ ; capped at \$10,500. The cap applies because the sum of the loss payable (\$79,500) and the basic amount payable for debris removal expense (\$10,500) cannot exceed the Limit of Insurance (\$90,000).

The additional amount payable for debris removal expense is provided in accordance with the terms of Paragraph (4), because the debris removal expense (\$30,000) exceeds 25% of the loss payable plus the deductible (\$30,000 is 37.5% of \$80,000), and because the sum of the loss payable and debris removal expense ( $\$79,500 + \$30,000 = \$109,500$ ) would exceed the Limit of Insurance (\$90,000). The additional amount of covered debris removal expense is \$10,000, the maximum payable under Paragraph (4). Thus the total payable for debris removal expense in this example is \$20,500; \$9,500 of the debris removal expense is not covered.

### **b. Preservation of Property**

If it is necessary to move Covered Property from the described premises to preserve it from loss or damage by a Covered Cause of Loss, we will pay for any direct physical loss or damage to that property:

- (1) While it is being moved or while temporarily stored at another location; and

- (2) Only if the loss or damage occurs within 30 days after the property is first moved.

**c. Fire Department Service Charge**

When the fire department is called to save or protect Covered Property from a Covered Cause of Loss, we will pay up to \$1,000, unless a higher limit is shown in the Declarations, for your liability for fire department service charges:

- (1) Assumed by contract or agreement prior to loss; or
- (2) Required by local ordinance.

No Deductible applies to this Additional Coverage.

**d. Pollutant Clean-up and Removal**

We will pay your expense to extract “pollutants” from land or water at the described premises if the discharge, dispersal, seepage, migration, release or escape of the “pollutants” is caused by or results from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date on which the Covered Cause of Loss occurs.

This Additional Coverage does not apply to costs to test for, monitor or assess the existence, concentration or effects of “pollutants”. But we will pay for testing which is performed in the course of extracting the “pollutants” from the land or water.

The most we will pay under this Additional Coverage for each described premises is \$10,000 for the sum of all covered expenses arising out of

Covered Causes of Loss occurring during each separate 12-month period of this policy.

**e. Increased Cost of Construction**

(1) This Additional Coverage applies only to buildings to which the Replacement Cost Optional Coverage applies.

(2) In the event of damage by a Covered Cause of Loss to a building that is Covered Property, we will pay the increased costs incurred to comply with enforcement of an ordinance or law in the course of repair, rebuilding or replacement of damaged parts of that property, subject to the limitations stated in e.(3) through e.(9) of this Additional Coverage.

(3) The ordinance or law referred to in e.(2) of this Additional Coverage is an ordinance or law that regulates the construction or repair of buildings or establishes zoning or land use requirements at the described premises, and is in force at the time of loss.

(4) Under this Additional Coverage, we will not pay any costs due to an ordinance or law that:

- (a) You were required to comply with before the loss, even when the building was undamaged; and
- (b) You failed to comply with.

(5) Under this Additional Coverage, we will not pay for:

- (a) The enforcement of any ordinance or law which requires demolition, repair, replacement, reconstruction, remodeling or remediation of property due to contamination by “pollutants” or due to the presence, growth,

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proliferation, spread or any activity of “fungus”, wet or dry rot or bacteria; or

- (b) Any costs associated with the enforcement of an ordinance or law which requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of “pollutants”, “fungus”, wet or dry rot or bacteria.

(6) The most we will pay under this Additional Coverage, for each described building insured under this Coverage Form, is \$10,000 or 5% of the Limit of Insurance applicable to that building, whichever is less. If a damaged building is covered under a blanket Limit of Insurance which applies to more than one building or item of property, then the most we will pay under this Additional Coverage, for that damaged building, is the lesser of: \$10,000 or 5% times the value of the damaged building as of the time of loss times the applicable Coinsurance percentage.

The amount payable under this Additional Coverage is additional insurance.

- (7) With respect to this Additional Coverage:

- (a) We will not pay for the Increased Cost of Construction:
  - (i) Until the property is actually repaired or replaced, at the same or another premises; and
  - (ii) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage, not to exceed

two years. We may extend this period in writing during the two years.

- (b) If the building is repaired or replaced at the same premises, or if you elect to rebuild at another premises, the most we will pay for the Increased Cost of Construction, subject to the provisions of e.(6) of this Additional Coverage, is the increased cost of construction at the same premises.
- (c) If the ordinance or law requires relocation to another premises, the most we will pay for the Increased Cost of Construction, subject to the provisions of e.(6) of this Additional Coverage, is the increased cost of construction at the new premises.

(8) This Additional Coverage is not subject to the terms of the Ordinance Or Law Exclusion, to the extent that such Exclusion would conflict with the provisions of this Additional Coverage.

(9) The costs addressed in the Loss Payment and Valuation Conditions, and the Replacement Cost Optional Coverage, in this Coverage Form, do not include the increased cost attributable to enforcement of an ordinance or law. The amount payable under this Additional Coverage, as stated in e.(6) of this Additional Coverage, is not subject to such limitation.

**f. Electronic Data**

(1) Under this Additional Coverage, electronic data has the meaning described under Property Not Covered, Electronic Data.



(2) Subject to the provisions of this Additional Coverage, we will pay for the cost to replace or restore electronic data which has been destroyed or corrupted by a Covered Cause of Loss. To the extent that electronic data is not replaced or restored, the loss will be valued at the cost of replacement of the media on which the electronic data was stored, with blank media of substantially identical type.

(3) The Covered Causes of Loss applicable to Your Business Personal Property apply to this Additional Coverage, Electronic Data, subject to the following:

- (a) If the Causes of Loss—Special Form applies, coverage under this Additional Coverage, Electronic Data, is limited to the “specified causes of loss” as defined in that form, and Collapse as set forth in that form.
- (b) If the Causes of Loss—Broad Form applies, coverage under this Additional Coverage, Electronic Data, includes Collapse as set forth in that form.
- (c) If the Causes of Loss Form is endorsed to add a Covered Cause of Loss, the additional Covered Cause of Loss does not apply to the coverage provided under this Additional Coverage, Electronic Data.
- (d) The Covered Causes of Loss include a virus, harmful code or similar instruction introduced into or enacted on a computer system (including electronic data) or a network to which it is connected, designed to damage or destroy any part of the system or disrupt its normal operation. But there is

no coverage for loss or damage caused by or resulting from manipulation of a computer system (including electronic data) by any employee, including a temporary or leased employee, or by an entity retained by you or for you to inspect, design, install, modify, maintain, repair or replace that system.

(4) The most we will pay under this Additional Coverage, Electronic Data, is \$2,500 for all loss or damage sustained in any one policy year, regardless of the number of occurrences of loss or damage or the number of premises, locations or computer systems involved. If loss payment on the first occurrence does not exhaust this amount, then the balance is available for subsequent loss or damage sustained in but not after that policy year. With respect to an occurrence which begins in one policy year and continues or results in additional loss or damage in a subsequent policy year(s), all loss or damage is deemed to be sustained in the policy year in which the occurrence began.

## 5. Coverage Extensions

Except as otherwise provided, the following Extensions apply to property located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises.

If a Coinsurance percentage of 80% or more, or a Value Reporting period symbol, is shown in the Declarations, you may extend the insurance provided by this Coverage Part as follows:

**a. Newly Acquired or Constructed Property**

**(1) Buildings**

If this policy covers Building, you may extend that insurance to apply to:

- (a) Your new buildings while being built on the described premises; and
- (b) Buildings you acquire at locations, other than the described premises, intended for:
  - (i) Similar use as the building described in the Declarations; or
  - (ii) Use as a warehouse.

The most we will pay for loss or damage under this Extension is \$250,000 at each building.

**(2) Your Business Personal Property**

- (a) If this policy covers Your Business Personal Property, you may extend that insurance to apply to:
  - (i) Business personal property, including such property that you newly acquire, at any location you acquire other than at fairs, trade shows or exhibitions;
  - (ii) Business personal property, including such property that you newly acquire, located at your newly constructed or acquired buildings at the location described in the Declarations; or
  - (iii) Business personal property that you newly acquire, located at the described premises.

The most we will pay for loss or damage under this Extension is \$100,000 at each building

- (b) This Extension does not apply to:
  - (i) Personal property of others that is temporarily in your possession in the course of installing or performing work on such property; or
  - (ii) Personal property of others that is temporarily in your possession in the course of your manufacturing or wholesaling activities.

### (3)Period Of Coverage

With respect to insurance on or at each newly acquired or constructed property, coverage will end when any of the following first occurs:

- (a) This policy expires;
- (b) 30 days expire after you acquire the property or begin construction of that part of the building that would qualify as covered property; or
- (c) You report values to us.

We will charge you additional premium for values reported from the date you acquire the property or begin construction of that part of the building that would qualify as covered property.

### **b. Personal Effects and Property of Others**

You may extend the insurance that applies to Your Business Personal Property to apply to:

- (1) Personal effects owned by you, your officers, your partners or members, your managers or your employees. This Extension does not apply to loss or damage by theft.
- (2) Personal property of others in your care, custody or control.

The most we will pay for loss or damage under this Extension is \$2,500 at each described premises. Our payment for loss of or damage to personal property of others will only be for the account of the owner of the property.

**c. Valuable Papers and Records (Other Than Electronic Data)**

(1) You may extend the insurance that applies to Your Business Personal Property to apply to the cost to replace or restore the lost information on valuable papers and records for which duplicates do not exist. But this Extension does not apply to valuable papers and records which exist as electronic data. Electronic data has the meaning described under Property Not Covered, Electronic Data.

(2) If the Causes Of Loss—Special Form applies, coverage under this Extension is limited to the “specified causes of loss” as defined in that form, and Collapse as set forth in that form.

(3) If the Causes Of Loss—Broad Form applies, coverage under this Extension includes Collapse as set forth in that form.

(4) Under this Extension, the most we will pay to replace or restore the lost information is \$2,500 at each described premises, unless a higher limit is

shown in the Declarations. Such amount is additional insurance. We will also pay for the cost of blank material for reproducing the records (whether or not duplicates exist), and (when there is a duplicate) for the cost of labor to transcribe or copy the records. The costs of blank material and labor are subject to the applicable Limit of Insurance on Your Business Personal Property and therefore coverage of such costs is not additional insurance.

**d. Property Off-premises**

(1) You may extend the insurance provided by this Coverage Form to apply to your Covered Property while it is away from the described premises, if it is:

- (a) Temporarily at a location you do not own, lease or operate;
- (b) In storage at a location you lease, provided the lease was executed after the beginning of the current policy term; or
- (c) At any fair, trade show or exhibition.

(2) This Extension does not apply to property:

- (a) In or on a vehicle; or
- (b) In the care, custody or control of your salespersons, unless the property is in such care, custody or control at a fair, trade show or exhibition.

(3) The most we will pay for loss or damage under this Extension is \$10,000.

**e. Outdoor Property**

You may extend the insurance provided by this Coverage Form to apply to your outdoor fences, radio and television antennas (including satellite dishes), trees, shrubs and plants (other than “stock” of trees, shrubs or plants), including debris removal expense, caused by or resulting from any of the following causes of loss if they are Covered Causes of Loss:

- (1) Fire;
- (2) Lightning;
- (3) Explosion;
- (4) Riot or Civil Commotion; or
- (5) Aircraft.

The most we will pay for loss or damage under this Extension is \$1,000, but not more than \$250 for any one tree, shrub or plant. These limits apply to any one occurrence, regardless of the types or number of items lost or damaged in that occurrence.

**f. Non-owned Detached Trailers**

(1) You may extend the insurance that applies to Your Business Personal Property to apply to loss or damage to trailers that you do not own, provided that:

- (a) The trailer is used in your business;
- (b) The trailer is in your care, custody or control at the premises described in the Declarations; and
- (c) You have a contractual responsibility to pay for loss or damage to the trailer.

(2) We will not pay for any loss or damage that occurs:

- (a) While the trailer is attached to any motor vehicle or motorized conveyance, whether or not the motor vehicle or motorized conveyance is in motion;
- (b) During hitching or unhitching operations, or when a trailer becomes accidentally unhitched from a motor vehicle or motorized conveyance.

(3) The most we will pay for loss or damage under this Extension is \$5,000, unless a higher limit is shown in the Declarations.

(4) This insurance is excess over the amount due (whether you can collect on it or not) from any other insurance covering such property.

Each of these Extensions is additional insurance unless otherwise indicated. The Additional Condition, Coinsurance, does not apply to these Extensions.

## **B. Exclusions and Limitations**

See applicable Causes Of Loss Form as shown in the Declarations.

## **C. Units of Insurance**

The most we will pay for loss or damage in any one occurrence is the applicable Unit of Insurance shown in the Declarations.

The most we will pay for loss or damage to outdoor signs, whether or not the sign is attached to a building, is \$2,500 per sign in any one occurrence.



The amounts of insurance stated in the following Additional Coverages apply in accordance with the terms of such coverages and are separate from the Limit(s) of Insurance shown in the Declarations for any other coverage:

1. Fire Department Service Charge;
2. Pollutant Clean-up And Removal;
3. Increased Cost Of Construction; and
4. Electronic Data.

Payments under the Preservation Of Property Additional Coverage will not increase the applicable Limit of Insurance.

#### **D. Deductible**

In any one occurrence of loss or damage (hereinafter referred to as loss), we will first reduce the amount of loss if required by the Coinsurance Condition or the Agreed Value Optional Coverage. If the adjusted amount of loss is less than or equal to the Deductible, we will not pay for that loss. If the adjusted amount of loss exceeds the Deductible, we will then subtract the Deductible from the adjusted amount of loss, and will pay the resulting amount or the Limit of Insurance, whichever is less.

When the occurrence involves loss to more than one item of Covered Property and separate Limits of Insurance apply, the losses will not be combined in determining application of the Deductible. But the Deductible will be applied only once per occurrence.

### Example #1

(This example assumes there is no Coinsurance penalty.)

Deductible:	\$250
Limit of Insurance—Building #1:	\$60,000
Limit of Insurance—Building #2:	\$80,000
Loss to Building #1:	\$60,100
Loss to Building #2:	\$90,000

The amount of loss to Building #1 (\$60,100) is less than the sum (\$60,250) of the Limit of Insurance applicable to Building #1 plus the Deductible.

The Deductible will be subtracted from the amount of loss in calculating the loss payable for Building #1:

$$\begin{array}{r} \$60,100 \\ - 250 \\ \hline \end{array}$$

\$ 59,850 Loss Payable -Building #1

The Deductible applies once per occurrence and therefore is not subtracted in determining the amount of loss payable for Building #2. Loss payable for Building #2 is the Limit of Insurance of \$80,000.

Total amount of loss payable:

$$\$59,850 + \$80,000 = \$139,850$$

### Example #2

(This example, too, assumes there is no Coinsurance penalty.)

The Deductible and Limits of Insurance are the same as those in Example #1.

Loss to Building #1: \$70,000  
(Exceeds Limit of Insurance plus Deductible)

Loss to Building #2: \$90,00  
(Exceeds Limit of Insurance plus Deductible)

Loss Payable—Building #1: \$ 60,000  
(Limit of Insurance)

Loss Payable—Building #2: \$80,000  
(Limit of Insurance)

Total amount of loss payable: \$ 140,000

## **E. Loss Donations**

The following conditions apply in addition to the Common Policy Conditions and the Commercial Property Conditions.

### **1. Abandonment**

There can be no abandonment of any property to us.

### **2. Appraisal**

If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the

umpire. A decision agreed to by any two will be binding. Each party will:

- a. Pay its chosen appraiser; and
- b. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we will still retain our right to deny the claim.

### **3. Duties In The Event Of Loss Or Damage**

- a. You must see that the following are done in the event of loss or damage to Covered Property:
  - (1) Notify the police if a law may have been broken.
  - (2) Give us prompt notice of the loss or damage. Include a description of the property involved.
  - (3) As soon as possible, give us a description of how, when and where the loss or damage occurred.
  - (4) Take all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim. This will not increase the Limit of Insurance. However, we will not pay for any subsequent loss or damage resulting from a cause of loss that is not a Covered Cause of Loss. Also, if feasible, set the damaged

property aside and in the best possible order for examination.

- (5) At our request, give us complete inventories of the damaged and undamaged property. Include quantities, costs, values and amount of loss claimed.
- (6) As often as may be reasonably required, permit us to inspect the property proving the loss or damage and examine your books and records.

Also permit us to take samples of damaged and undamaged property for inspection, testing and analysis, and permit us to make copies from your books and records.

- (7) Send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.
- (8) Cooperate with us in the investigation or settlement of the claim.

- b. We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed.

#### **4. Loss Payment**

a. In the event of loss or damage covered by this Coverage Form, at our option, we will either:

- (1) Pay the value of lost or damaged property;
- (2) Pay the cost of repairing or replacing the lost or damaged property, subject to b. below;
- (3) Take all or any part of the property at an agreed or appraised value; or
- (4) Repair, rebuild or replace the property with other property of like kind and quality, subject to b. below.

We will determine the value of lost or damaged property, or the cost of its repair or replacement, in accordance with the applicable terms of the Valuation Condition in this Coverage Form or any applicable provision which amends or supersedes the Valuation Condition.

b. The cost to repair, rebuild or replace does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property.

c. We will give notice of our intentions within 30 days after we receive the sworn proof of loss.

d. We will not pay you more than your financial interest in the Covered Property.

e. We may adjust losses with the owners of lost or damaged property if other than you. If we pay the owners, such payments will satisfy your claims against us for the owners' property. We will not pay

the owners more than their financial interest in the Covered Property.

f. We may elect to defend you against suits arising from claims of owners of property. We will do this at our expense.

g. We will pay for covered loss or damage within 30 days after we receive the sworn proof of loss, if you have complied with all of the terms of this Coverage Part and:

- (1) We have reached agreement with you on the amount of loss; or
- (2) An appraisal award has been made.

h. A party wall is a wall that separates and is common to adjoining buildings that are owned by different parties. In settling covered losses involving a party wall, we will pay a proportion of the loss to the party wall based on your interest in the wall in proportion to the interest of the owner of the adjoining building. However, if you elect to repair or replace your building and the owner of the adjoining building elects not to repair or replace that building, we will pay you the full value of the loss to the party wall, subject to all applicable policy provisions including Limits of Insurance, the Valuation and Coinsurance Conditions and all other provisions of this Loss Payment Condition. Our payment under the provisions of this paragraph does not alter any right of subrogation we may have against any entity, including the owner or insurer of the adjoining building, and does not alter the terms of the Transfer Of Rights Of Recovery Against Others To Us Condition in this policy.

## **5. Recovered Property**

If either you or we recover any property after loss settlement, that party must give the other prompt notice. At your option, the property will be returned to you. You must then return to us the amount we paid to you for the property. We will pay recovery expenses and the expenses to repair the recovered property, subject to the Limit of Insurance.

## **6. Vacancy**

### **a. Description of Terms**

- (1) As used in this Vacancy Condition, the term building and the term vacant have the meanings set forth in (1)(a) and (1)(b) below:
  - (a) When this policy is issued to a tenant, and with respect to that tenant's interest in Covered Property, building means the unit or suite rented or leased to the tenant. Such building is vacant when it does not contain enough business personal property to conduct customary operations.
  - (b) When this policy is issued to the owner or general lessee of a building, building means the entire building. Such building is vacant unless at least 31% of its total square footage is
    - (i) Rented to a lessee or sub-lessee and used by the lessee or sublessee to conduct its customary operations; and/or



- (ii) Used by the building owner to conduct customary operations.

(2) Buildings under construction or renovation are not considered vacant.

### **b. Vacancy Provisions**

If the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs:

- (1) We will not pay for any loss or damage caused by any of the following even if they are Covered Causes of Loss:
  - (a) Vandalism;
  - (b) Sprinkler leakage, unless you have protected the system against freezing;
  - (c) Building glass breakage;
  - (d) Water damage;
  - (e) Theft; or
  - (f) Attempted theft.
- (2) With respect to Covered Causes of Loss other than those listed in b.(1)(a) through b.(1)(f) above, we will reduce the amount we would otherwise pay for the loss or damage by 15%.

## **7. Valuation**

We will determine the value of Covered Property in the event of loss or damage as follows:

- a. At actual cash value as of the time of loss or damage, except as provided in b., c., d. and e. below.
- b. If the Limit of Insurance for Building satisfies the Additional Condition, Coinsurance, and the cost to repair or replace the damaged building property is \$2,500 or less, we will pay the cost of building repairs or replacement.

The cost of building repairs or replacement does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property.

However, the following property will be valued at the actual cash value even when attached to the building:

- (1) Awnings or floor coverings;
  - (2) Appliances for refrigerating, ventilating, cooking, dishwashing or laundering; or
  - (3) Outdoor equipment or furniture.
- c. "Stock" you have sold but not delivered at the selling price less discounts and expenses you otherwise would have had.
- d. Glass at the cost of replacement with safety-glazing material if required by law.
- e. Tenants' Improvements and Betterments at:
  - (1) Actual cash value of the lost or damaged property if you make repairs promptly.

- (2) A proportion of your original cost if you do not make repairs promptly. We will determine the proportionate value as follows:
  - (a) Multiply the original cost by the number of days from the loss or damage to the expiration of the lease; and
  - (b) Divide the amount determined in (a) above by the number of days from the installation of improvements to the expiration of the lease.

If your lease contains a renewal option, the expiration of the renewal option period will replace the expiration of the lease in this procedure.

- (3) Nothing if others pay for repairs or replacement.

## **F. Additional Conditions**

The following conditions apply in addition to the Common Policy Conditions and the Commercial Property Conditions.

### **1. Coinsurance**

If a Coinsurance percentage is shown in the Declarations, the following condition applies.

- a. We will not pay the full amount of any loss if the value of Covered Property at the time of loss times the Coinsurance percentage shown for it in the Declarations is greater

than the Limit of Insurance for the property.

Instead, we will determine the most we will pay using the following steps:

- (1) Multiply the value of Covered Property at the time of loss by the Coinsurance percentage;
- (2) Divide the Limit of Insurance of the property by the figure determined in Step (1);
- (3) Multiply the total amount of loss, before the application of any deductible, by the figure determined in Step (2); and
- (4) Subtract the deductible from the figure determined in Step (3).

We will pay the amount determined in Step (4) or the limit of insurance, whichever is less. For the remainder, you will either have to rely on other insurance or absorb the loss yourself.

### **Example #1 (Underinsurance)**

When:

The value of the property is:                      \$ 250,000

The Coinsurance percentage for it is: 80%

The Limit of Insurance for it is:                      \$ 100,000

The Deductible is:    \$ 250

Step (1):  $\$250,000 \times 80\% = \$200,000$

(the minimum amount of insurance to meet your  
Coinsurance requirements)

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Step (2):  $\$100,000 + \$200,000 = .50$

Step (3):  $\$40,000 \times .50 = \$20,000$

Step (4):  $\$20,000 - \$250 = \$19,750$

We will pay no more than \$19,750. The remaining \$20,250 is not covered.

### **Example #2 (Adequate Insurance)**

When:

The value of the property is:                      \$ 250,000

The Coinsurance percentage for it is: 80%

The Limit of Insurance for it is:                      \$ 200,000

The Deductible is:    \$250

The amount of loss is:    \$40,000

The minimum amount of insurance to meet your Coinsurance requirement is \$200,000 ( $\$250,000 \times 80\%$ ). Therefore, the Limit of Insurance in this example is adequate and no penalty applies. We will pay no more than \$39,750 (\$40,000 amount of loss minus the deductible of \$250).

- b. If one Limit of Insurance applies to two or more separate items, this condition will apply to the total of all property to which the limit applies.

### **Example #3**

When:

The value of the property is:

Building at Location #1:                      \$75,000

Building at Location #2:                      \$100,000

## App.100a

Personal Property at Location #2: \$75,000

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\$250,000

The Coinsurance percentage for it is: 90%

The Limit of Insurance for

Buildings and Personal Property

at Locations #1 and #2 is:

\$180,000

The Deductible is:

\$1,000

The amount of loss is:

Building at Location #2:

\$30,000

Personal Property at Location #2:

\$20,000

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\$ 50,000

Step (1):  $\$250,000 \times 90\% = \$225,000$

(the minimum amount of insurance to meet  
your Coinsurance requirements and to avoid  
the penalty shown below)

Step (2):  $\$180,000 = \$225,000 = .80$

Step (3):  $\$50,000 \times .80 = \$40,000$

Step (4):  $\$40,000 - \$1,000 = \$39,000$

We will pay no more than \$39,000. The  
remaining \$11,000 is not covered.

## 2. Mortgageholders

- a. The term mortgageholder includes trustee.
- b. We will pay for covered loss of or damage to  
buildings or structures to each  
mortgageholder shown in the Declarations

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in their order of precedence, as interests may appear.

- c. The mortgageholder has the right to receive loss payment even if the mortgageholder has started foreclosure or similar action on the building or structure.
- d. If we deny your claim because of your acts or because you have failed to comply with the terms of this Coverage Part, the mortgageholder will still have the right to receive loss payment if the mortgageholder:
  - (1) Pays any premium due under this Coverage Part at our request if you have failed to do so;
  - (2) Submits a signed, sworn proof of loss within 60 days after receiving notice from us of your failure to do so; and
  - (3) Has notified us of any change in ownership, occupancy or substantial change in risk known to the mortgageholder.

All of the terms of this Coverage Part will then apply directly to the mortgageholder.

- e. If we pay the mortgageholder for any loss or damage and deny payment to you because of your acts or because you have failed to comply with the terms of this Coverage Part:
  - (1) The mortgageholder's rights under the mortgage will be transferred to us to the extent of the amount we pay; and

- (2) The mortgageholder's right to recover the full amount of the mortgageholder's claim will not be impaired.

At our option, we may pay to the mortgageholder the whole principal on the mortgage plus any accrued interest. In this event, your mortgage and note will be transferred to us and you will pay your remaining mortgage debt to us.

- f. If we cancel this policy, we will give written notice to the mortgageholder at least:
  - (1) 10 days before the effective date of cancellation if we cancel for your nonpayment of premium; or
  - (2) 30 days before the effective date of cancellation if we cancel for any other reason.
- g. If we elect not to renew this policy, we will give written notice to the mortgageholder at least 10 days before the expiration date of this policy.

## **G. Optional Coverages**

If shown as applicable in the Declarations, the following Optional Coverages apply separately to each item.

### **1. Agreed Value**

- (a) The Additional Condition, Coinsurance, does not apply to Covered Property to which this Optional Coverage applies. We will pay no more for loss of or damage to that



property than the proportion that the Unit of Insurance under this Coverage Part for the property bears to the Agreed Value shown for it in the Declarations.

- (b) If the expiration date for this Optional Coverage shown in the Declarations is not extended, the Additional Condition, Coinsurance, is reinstated and this Optional Coverage expires.
- (c) The terms of this Optional Coverage apply only to loss or damage that occurs:
  - (1) On or after the effective date of this Optional Coverage; and
  - (2) Before the Agreed Value expiration date shown in the Declarations or the policy expiration date, whichever occurs first.

## **2. Inflation Guard**

- a. The Limit of Insurance for property to which this Optional Coverage applied will automatically increase by the annual percentage shown in the Declarations.
- b. The amount of increase will be:
  - (1) The Limit of Insurance that applied on the most recent of the policy inception date, the policy anniversary date, or any other policy change amending the Limit of Insurance, times
  - (2) The percentage of annual increase shown in the Declarations, expressed as a decimal (example: 8% is .08), times

- (3) The number of days since the beginning of the current policy year or the effective date of the most recent policy change amending the Limit of Insurance, divided by 365.

**Example**

If:

The applicable Unit of Insurance is: \$100,000

The annual percentage increase is: 8%

The number of days since the beginning of the policy year (or last policy change) is: 146

The amount of increase is:  
 $\$100,000 \times .08 \times 146 \div 365 = \$ 3,200$

**3. Replacement Cost**

- a. Replacement Cost (without deduction for depreciation) replaces Actual Cash Value in the Valuation Loss Condition of this Coverage Form.
- b. This Optional Coverage does not apply to:
  - (1) Personal property of others;
  - (2) Contents of a residence;
  - (3) Works of art, antiques or rare articles, including etchings, pictures, statuary, marbles, bronzes, porcelains and bric-a-brac; or
  - (4) "Stock", unless the Including "Stock" option is shown in the Declarations.

Under the terms of this Replacement Cost Optional Coverage, tenants' improvements and betterments are not considered to be the personal property of others.

- c. You may make a claim for loss or damage covered by this insurance on an actual cash value basis instead of on a replacement cost basis. In the event you elect to have loss or damage settled on an actual cash value basis, you may still make a claim for the additional coverage this Optional Coverage provides if you notify us of your intent to do so within 180 days after the loss or damage.
- d. We will not pay on a replacement cost basis for any loss or damage:
  - (1) Until the lost or damaged property is actually repaired or replaced; and
  - (2) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.

With respect to tenants' improvements and betterments, the following also apply:

- (3) If the conditions in d.(1) and d.(2) above are not met, the value of tenants' improvements and betterments will be determined as a proportion of your original cost, as set forth in the Valuation Loss Condition of this Coverage Form; and
- (4) We will not pay for loss or damage to tenants' improvements and better-

ments if others pay for repairs or replacement.

- e. We will not pay more for loss or damage on a replacement cost basis than the least of (1), (2) or (3), subject to f. below:
  - (1) The Limit of Insurance applicable to the lost or damaged property;
  - (2) The cost to replace the lost or damaged property with other property:
    - (a) Of comparable material and quality; and
    - (b) Used for the same purpose; or
  - (3) The amount actually spent that is necessary to repair or replace the lost or damaged property.

If a building is rebuilt at a new premises, the cost described in e.(2) above is limited to the cost which would have been incurred if the building had been rebuilt at the original premises.

- f. The cost of repair or replacement does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or

#### **4. Extension of Replacement Cost to Personal Property of Others**

- a. If the Replacement Cost Optional Coverage is shown as applicable in the Declarations, then this Extension may also be shown as applicable, If the Declarations show this

Extension as applicable, then Paragraph 3.b.(1) of the Replacement Cost Optional Coverage is deleted and all other provisions of the Replacement Cost Optional Coverage apply to replacement cost on personal property of others.

- b. With respect to replacement cost on the personal property of others, the following limitation applies:

If an item(s) of personal property of others is subject to a written contract which governs your liability for loss or damage to that item(s), then valuation of that item(s) will be based on the amount for which you are liable under such contract, but not to exceed the lesser of the replacement cost of the property or the applicable Limit of Insurance.

## **H. Definitions**

1. "Fungus" means any type or form of fungus, including mold or mildew, and any mycotoxins, spores, scents or by-products produced or released by fungi.

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

3. "Stock" means merchandise held in storage or for sale, raw materials and in-process or finished goods, including supplies used in their packing or shipping.

**BUSINESS INCOME (AND EXTRA EXPENSE)  
COVERAGE FORM**

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Commercial Property  
CP 00 30 06 07

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

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

Throughout this policy the words ‘you’ and ‘your’ refer to the Named Insured shown in the Declarations. The words ‘We’, ‘us’ and ‘our’ refer to the Company providing this insurance.

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

**A. Coverage**

**1. Business Income**

Business Income means the:

- a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and
- b. Continuing normal operating expenses incurred, including payroll.

For manufacturing risks, Net Income includes the net sales value of production.

Coverage is provided as described and limited below for one or more of the following options for which a Limit of Insurance is shown in the Declarations:

- (1) Business Income Including "Rental Value".
- (2) Business Income Other Than "Rental Value".
- (3) "Rental Value".

If option (1) above is selected, the term Business Income will include 'Rental Value'. If option (3) above is selected, the term Business Income will mean 'Rental Value' only.

If Limits of Insurance are shown under more than one of the above options, the provisions of this Coverage Part apply separately to each.

We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of the site at which the described premises are located.

With respect to the requirements set forth in the preceding paragraph, if you occupy only part of

the site at which the described premises are located, your premises means:

- (a) The portion of the building which you rent, lease or occupy; and
- (b) Any area within the building or on the site at which the described premises are located, if that area services, or is used to gain access to, the described premises.

## **2. Extra Expense**

a. Extra Expense Coverage is provided at the premises described in the Declarations only if the Declarations show that Business Income Coverage applies at that premises.

b. Extra Expense means necessary expenses you incur during the “period of restoration” that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss.

We will pay Extra Expense (other than the expense to repair or replace property) to:

- (1) Avoid or minimize the “suspension” of business and to continue operations at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location.
- (2) Minimize the “suspension” of business if you cannot continue “operations”.

We will also pay Extra Expense to repair or replace property, but only to the extent it reduces the



amount of loss that otherwise would have been payable under this Coverage Form.

### **3. Covered Causes of Loss, Exclusions and Limitations**

See applicable Causes of Loss Form as shown in the Declarations.

### **4. Additional Limitation—Interruption of Computer Operations**

a. Coverage for Business Income does not apply when a “Suspension” of “operations” is caused by destruction or corruption of electronic data, or any loss or damage to electronic data, except as provided under the Additional Coverage—Interruption of Computer Operations.

b. Coverage for Extra Expense does not apply when action is taken to avoid or minimize a “Suspension” of “operations” caused by destruction or corruption of electronic data, or any loss or damage to electronic data, except as provided under the Additional Coverage—Interruption of Computer Operations.

c. Electronic data means information, facts or computer programs stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), on hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other repositories of computer software which are used with electronically controlled equipment. The term computer programs, referred to in the foregoing description of electronic data, means a set of related electronic instructions

which direct the operations and functions of a computer or device connected to it, which enable the computer or device to receive, process, store, retrieve or send data.

## **5. Additional Coverages**

### **a. Civil Authority**

In this Additional Coverage—Civil Authority, the described premises are premises to which this Coverage Form applies, as shown in the Declarations.

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
- (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began.

Civil Authority Coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the described premises and will end:

- (1) Four consecutive weeks after the date of that action; or
- (2) When your Civil Authority Coverage for Business Income ends; whichever is later.

**b. Alterations and New Buildings**

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense you incur due to direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss to:

- (1) New buildings or structures, whether complete or under construction;
- (2) Alterations or additions to existing buildings or structures; and
- (3) Machinery, equipment, supplies or building materials located on or within 100 feet of the described premises and:
  - (a) Used in the construction, alterations or additions; or

- (b) Incidental to the occupancy of new buildings.

If such direct physical loss or damage delays the start of “operations”, the “period of restoration” for Business Income Coverage will begin on the date “operations” would have begun if the direct physical loss or damage had not occurred.

**c. Extended Business Income**

**(1) Business Income Other Than  
“Rental Value”**

If the necessary “suspension” of your “operations” produces a Business Income loss payable under this policy, we will pay for the actual loss of Business Income you incur during the period that:

- (a) Begins on the date property (except “finished stock”) is actually repaired, rebuilt or replaced and “operations” are resumed; and
- (b) Ends on the earlier of:
  - (i) The date you could restore your “operations”, with reasonable speed, to the level which would generate the business income amount that would have existed if no direct physical loss or damage had occurred; or
  - (ii) 30 consecutive days after the date determined in (1)(a) above.

However, Extended Business Income does not apply to loss of Business Income incurred as a result

of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the described premises are located.

Loss of Business Income must be caused by direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss.

## **(2) “Rental Value”**

If the necessary “suspension” of your “operations” produces a “Rental Value” loss payable under this policy, we will pay for the actual loss of “Rental Value” you incur during the period that:

- (a) Begins on the date property is actually repaired, rebuilt or replaced and tenant-ability is restored; and
- (b) Ends on the earlier of:
  - (i) The date you could restore tenant occupancy, with reasonable speed, to the level which would generate the “Rental Value” that would have existed if no direct physical loss or damage had occurred; or
  - (ii) 30 consecutive days after the date determined in (2)(a) above.

However, Extended Business Income does not apply to loss of “Rental Value” incurred as a result of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the described premises are located.

Loss of “Rental Value” must be caused by direct physical loss or damage at the described premises

caused by or resulting from any Covered Cause of Loss.

**d. Interruption of Computer Operations**

(1) Under this Additional Coverage, electronic data has the meaning described under Additional Limitation—Interruption of Computer Operations.

(2) Subject to all provisions of this Additional Coverage, you may extend the insurance that applies to Business Income and Extra Expense to apply to a “suspension” of “operations” caused by an interruption in computer operations due to destruction or corruption of electronic data due to a Covered Cause of Loss.

(3) With respect to the coverage provided under this Additional Coverage, the Covered Causes of Loss are subject to the following:

- (a) If the Causes of Loss—Special Form applies, coverage under this Additional Coverage—Interruption of Computer Operations is limited to the "specified causes of loss" as defined in that form, and Collapse as set forth in that form.
- (b) If the Causes of Loss—Broad Form applies, coverage under this Additional Coverage—Interruption of Computer Operations includes Collapse as set forth in that form.
- (c) If the Causes of Loss Form is endorsed to add a Covered Cause of Loss, the additional Covered Cause of Loss does not apply to the coverage provided under this Additional

Coverage—Interruption of Computer Operations.

- (d) The Covered Causes of Loss include a virus, harmful code or similar instruction introduced into or enacted on a computer system (including electronic data) or a network to which it is connected, designed to damage or destroy any part of the system or disrupt its normal operation. But there is no coverage for an interruption related to manipulation of a computer system (including electronic data) by any employee, including a temporary or leased employee, or by an entity retained by you or for you to inspect, design, install, maintain, repair or replace that system.
- (e) The most we will pay under this Additional Coverage—Interruption of Computer Operations is \$2,500 for all loss sustained and expense incurred in any one policy year, regardless of the number of interruptions or the number of premises, locations or computer systems involved. If loss payment relating to the first interruption does not exhaust this amount, then the balance is available for loss or expense sustained or incurred as a result of subsequent interruptions in that policy year. A balance remaining at the end of a policy year does not increase the amount of insurance in the next policy year. With respect to any interruption which begins in one policy year and continues or results in additional loss or expense in a subsequent policy year(s), all loss and expense is deemed to be sustained or

incurred in the policy year in which the interruption began.

(5) This Additional Coverage—Interruption in Computer Operations does not apply to loss sustained or expense incurred after the end of the “period of restoration”, even if the amount of insurance stated in (4) above has not been exhausted.

## **6. Coverage Extension**

If a Coinsurance percentage of 50% or more is shown in the Declarations, you may extend the insurance provided by this Coverage Part as follows:

### **NEWLY ACQUIRED LOCATIONS**

a. You may extend your Business Income and Extra Expense Coverages to apply to property at any location you acquire other than fairs or exhibitions.

b. The most we will pay under this Extension, for the sum of Business Income loss and Extra Expense incurred, is \$100,000 at each location.

c. Insurance under this Extension for each newly acquired location will end when any of the following first occurs:

- (1) This policy expires;
- (2) 30 days expire after you acquire or begin to construct the property; or
- (3) You report values to us.

We will charge you additional premium for values reported from the date you acquire the property.



The Additional Condition, Coinsurance, does not apply to this Extension.

## **B. Units of Insurance**

The most we will pay for loss in any one occurrence is the applicable Limit of Insurance shown in the Declarations.

Payments under the following coverages will not increase the applicable Limit of Insurance:

1. Alterations and New Buildings;
2. Civil Authority;
3. Extra Expense; or
4. Extended Business Income.

The amounts of insurance stated in the Interruption of Computer Operations Additional Coverage and the Newly Acquired Locations Coverage Extension apply in accordance with the terms of those coverages and are separate from the Limit(s) of Insurance shown in the Declarations for any other coverage.

## **C. Loss Conditions**

The following conditions apply in addition to the Common Policy Conditions and the Commercial Property Conditions.

### **1. Appraisal**

If we and you disagree on the amount of Net Income and operating expense or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser.

The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the amount of Net Income and operating expense or amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

- a. Pay its chosen appraiser; and
- b. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we will still retain our right to deny the claim.

## **2. Duties in The Event Of Loss**

- a. You must see that the following are done in the event of loss:
  - (1) Notify the police if a law may have been broken.
  - (2) Give us prompt notice of the direct physical loss or damage. Include a description of the property involved.
  - (3) As soon as possible, give us a description of how, when, and where the direct physical loss or damage occurred.
  - (4) Take all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim. This will not increase the

Limit of Insurance. However, we will not pay for any subsequent loss or damage resulting from a cause of loss that is not a Covered Cause of Loss. Also, if feasible, set the damaged property aside and in the best possible order for examination.

- (5) As often as may be reasonably required, permit us to inspect the property proving the loss or damage and examine your books and records.

Also permit us to take samples of damaged and undamaged property for inspection, testing and analysis, and permit us to make copies from your books and records.

- (6) Send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.
  - (7) Cooperate with us in the investigation or settlement of the claim.
  - (8) If you intend to continue your business, you must resume all or part of your "operations" as quickly as possible.
- b. We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim,

including an insured's books and records. In the event of an examination, an insured's answers must be signed.

### **3. Loss Determination**

a. The amount of Business Income loss will be determined based on:

- (1) The Net Income of the business before the direct physical loss or damage occurred;
- (2) The likely Net Income of the business if no physical loss or damage had occurred, but not including any Net Income that would likely have been earned as a result of an increase in the volume of business due to favorable business conditions caused by the impact of the Covered Cause of Loss on customers or on other businesses;
- (3) The operating expenses, including payroll expenses, necessary to resume "operations" with the same quality of service that existed just before the direct physical loss or damage; and
- (4) Other relevant sources of information, including:
  - (a) Your financial records and accounting procedures;
  - (b) Bills, invoices and other vouchers; and
  - (c) Deeds, liens or contracts.

b. The amount of Extra Expense will be determined based on:

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- (1) All expenses that exceed the normal operating expenses that would have been incurred by “operations” during the “period of restoration” if no direct physical loss or damage had occurred. We will deduct from the total of such expenses:
  - (a) The salvage value that remains of any property bought for temporary use during the “period of restoration”, once “operations” are resumed; and
  - (b) Any Extra Expense that is paid for by other insurance, except for insurance that is written subject to the same plan, terms, conditions and provisions as this insurance; and
- (2) Necessary expenses that reduce the Business Income loss that otherwise would have been incurred.

### c. Resumption Of Operations

We will reduce the amount of your:

- (1) Business Income loss, other than Extra Expense, to the extent you can resume your “operations”, in whole or in part, by using damaged or undamaged property (including merchandise or stock) at the described premises or elsewhere.
- (2) Extra Expense loss to the extent you can return “operations” to normal and discontinue such Extra Expense.

d. If you do not resume “operations”, or do not resume “operations” as quickly as possible, we will

pay based on the length of time it would have taken to resume “operations” as quickly as possible.

#### **4. Loss Payment**

We will pay for covered loss within 30 days after we receive the sworn proof of loss, if you have complied with all of the terms of this Coverage Part and:

- a. We have reached agreement with you on the amount of loss; or
- b. An appraisal award has been made.

#### **D. Additional Condition**

##### **COINSURANCE**

If a Coinsurance percentage is shown in the Declarations, the following condition applies in addition to the Common Policy Conditions and the Commercial Property Conditions.

We will not pay the full amount of any Business Income loss if the Limit of Insurance for Business Income is less than:

1. The Coinsurance percentage shown for Business Income in the Declarations; times
2. The sum of:
  - (a) The Net Income (Net Profit or Loss before income taxes), and
  - b. Operating expenses, including payroll expenses, that would have been earned or incurred (had no loss occurred) by your “operations” at the described premises for the 12 months following

the inception, or last previous anniversary date, of this policy (whichever is later).

Instead, we will determine the most we will pay using the following steps:

Step (1):

Multiply the Net Income and operating expense for the 12 months following the inception, or last previous anniversary date, of this policy by the Coinsurance percentage;

Step (2):

Divide the Limit of Insurance for the described premises by the figure determined in Step (1); and

Step (3):

Multiply the total amount of loss by the figure determined in Step (2).

We will pay the amount determined in Step (3) or the limit of insurance, whichever is less. For the remainder, you will either have to rely on other insurance or absorb the loss yourself.

In determining operating expenses for the purpose of applying the Coinsurance condition, the following expenses, if applicable, shall be deducted from the total of all operating expenses:

- (1) Prepaid freight—outgoing;
- (2) Returns and allowances;
- (3) Discounts;

- (4) Bad debts;
- (5) Collection expenses;
- (6) Cost of raw stock and factory supplies consumed (including transportation charges);
- (7) Cost of merchandise sold (including transportation charges);
- (8) Cost of other supplies consumed (including transportation charges);
- (9) Cost of services purchased from outsiders (not employees) to resell, that do not continue under contract;
- (10) Power, heat and refrigeration expenses that do not continue under contract (if Form CP 15 11 is attached);
- (11) All ordinary payroll expenses or the amount of payroll expense excluded (if Form CP 15 10 is attached); and
- (12) Special deductions for mining properties (royalties unless specifically included in coverage; actual depletion commonly known as unit or cost depletion—not percentage depletion; welfare and retirement fund charges based on tonnage; hired trucks).

**Example #1 (Underinsurance)**

When:

The Net Income and operating expenses for the 12 months following the inception, or last previous anniversary date, of this policy at the described premises would have been:

\$ 400,000



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The Coinsurance percentage is: 50%

The Limit of Insurance is: \$150,000

The amount of loss is: \$80,000

Step (1):  $\$400,000 \times 50\% = \$200,000$   
(the minimum amount of insurance to meet your  
Coinsurance requirements)

Step (2):  $\$150,000 + \$200,000 = .75$

Step (3):  $\$80,000 \times .75 = \$60,000$

We will pay no more than \$60,000. The remaining \$20,000 is not covered.

### **Example #2 (Adequate Insurance)**

When: The Net Income and operating expenses for the 12 months following the inception, or last previous anniversary date, of this policy at the described premises would have been: \$400,000

The Coinsurance percentage is: 50%

The Limit of Insurance is: \$200,000

The amount of loss is: \$80,000

The minimum amount of insurance to meet your Coinsurance requirement is \$200,000 ( $\$400,000 \times 50\%$ ). Therefore, the Limit of Insurance in this example is adequate and no penalty applies. We will pay no more than \$80,000 (amount of loss).

This condition does not apply to Extra Expense Coverage.

## **E. Optional Coverages**

If shown as applicable in the Declarations, the following Optional Coverages apply separately to each item.

### **1. Maximum Period of Indemnity**

- a. The Additional Condition, Coinsurance, does not apply to this Coverage Form at the described premises to which this Optional Coverage applies.
- b. The most we will pay for the total of Business Income loss and Extra Expense is the lesser of:
  - (1) The amount of loss sustained and expenses incurred during the 120 days immediately following the beginning of the “period of restoration”; or
  - (2) The Limit of Insurance shown in the Declarations.

### **2. Monthly Unit of Indemnity**

- a. The Additional Condition, Coinsurance, does not apply to this Coverage Form at the described premises to which this Optional Coverage applies.
- b. The most we will pay for loss of Business Income in each period of 30 consecutive days after the beginning of the “period of restoration” is:
  - (1) The Limit of Insurance, multiplied by

- (2) The fraction shown in the Declarations for this Optional Coverage.

**Example**

When:

The Limit of Insurance is: \$120,000

The fraction shown in the  
Declarations for this Optional  
Coverage is: 1/4

The most we will pay for loss  
in each period of 30 consecutive  
days is: \$30,000

$(\$120,000 \times 1/4 = \$30,000)$

If, in this example, the actual amount of loss is:

Days 1-30: \$40,000

Days 31-60: \$20,000

Days 61-90: \$30,000

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\$ 90,000

We will pay:

Days 1-30: \$30,000

Days 31-60: \$20,000

Days 61-90: \$30,000

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\$ 80,000

The remaining \$10,000 is not covered.

### **3. Business Income Agreed Value**

a. To activate this Optional Coverage:

- (1) A Business Income Report/Work Sheet must be submitted to us and must show financial data for your “operations”:
  - (a) During the 12 months prior to the date of the Work Sheet; and
  - (b) Estimated for the 12 months immediately following the inception of this Optional Coverage.
- (2) The Declarations must indicate that the Business Income Agreed Value Optional Coverage applies, and an Agreed Value must be shown in the Declarations. The Agreed Value should be at least equal to:
  - (a) The Coinsurance percentage shown in the Declarations; multiplied by
  - (b) The amount of Net Income and operating expenses for the following 12 months you report on the Work Sheet.

b. The Additional Condition, Coinsurance, is suspended until:

- (1) 12 months after the effective date of this Optional Coverage; or
- (2) The expiration date of this policy;

whichever occurs first.

c. We will reinstate the Additional Condition, Coinsurance, automatically if you do not submit a new Work Sheet and Agreed Value:

- (1) Within 12 months of the effective date of this Optional Coverage; or
- (2) When you request a change in your Business Income Limit of Insurance.

d. If the Business Income Limit of Insurance is less than the Agreed Value, we will not pay more of any loss than the amount of loss multiplied by:

- (1) The Business Income Limit of Insurance; divided by
- (2) The Agreed Value.

### **Example**

When:

The Limit of Insurance is: \$100,000

The Agreed Value is: \$200,000

The amount of loss is: \$80,000

Step (1):  $\$100,000 \div \$200,000 = .50$

Step (2):  $.50 \times \$80,000 = \$40,000$

We will pay \$40,000. The remaining \$40,000 is not covered.

## **4. Extended Period Of Indemnity**

Under Paragraph A.5.c., Extended Business Income, the number 30 in Subparagraphs (1)(b) and (2)(b) is replaced by the number shown in the Declarations for this Optional Coverage.

## **F. Definitions**

1. "Finished stock" means stock you have manufactured.

“Finished stock” also includes whiskey and alcoholic products being aged, unless there is a Coinsurance percentage shown for Business Income in the Declarations.

“Finished stock” does not include stock you have manufactured that is held for sale on the premises of any retail outlet insured under this Coverage Part.

2. “Operations” means:

- a. Your business activities occurring at the described premises; and
- b. The tenantability of the described premises, if coverage for Business Income Including “Rental Value” or “Rental Value” applies.

3. “Period of restoration” means the period of time that:

a. Begins:

- (1) 72 hours after the time of direct physical loss or damage for Business Income Coverage; or
- (2) Immediately after the time of direct physical loss or damage for Extra Expense Coverage;

caused by or resulting from any Covered Cause of Loss at the described premises; and

b. Ends on the earlier of:

- (1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or

- (2) The date when business is resumed at a new permanent location.

“Period of restoration” does not include any increased period required due to the enforcement of any ordinance or law that:

- (1) Regulates the construction, use or repair, or requires the tearing down, of any property; or
- (2) Requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of “pollutants”.

The expiration date of this policy will not cut short the “period of restoration”.

4. “Pollutants” means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

5. “Rental Value” means Business Income that consists of:

- a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred as rental income from tenant occupancy of the premises described in the Declarations as furnished and equipped by you, including fair rental value of any portion of the described premises which is occupied by you; and

- b. Continuing normal operating expenses incurred in connection with that premises, including:
  - (1) Payroll; and
  - (2) The amount of charges which are the legal obligation of the tenant(s) but would otherwise be your obligations.
- 6. "Suspension" means:
  - a. The slowdown or cessation of your business activities; or
  - b. That a part or all of the described premises is rendered untenable, if coverage for Business Income Including "Rental Value" or "Rental Value" applies.



## **EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA**

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This endorsement modifies insurance provided under the following:

### **COMMERCIAL PROPERTY COVERAGE PART STANDARD PROPERTY POLICY**

A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.

B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

However, this exclusion does not apply to loss or damage caused by or resulting from “fungus”, wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.

C. With respect to any loss or damage subject to the exclusion in Paragraph B., such exclusion supercedes any exclusion relating to “pollutants”.

D. The following provisions in this Coverage Part or Policy are hereby amended to remove reference to bacteria:

1. Exclusion of “Fungus”, Wet Rot, Dry Rot And Bacteria; and

2. Additional Coverage—Limited Coverage for “Fungus”, Wet Rot, Dry Rot And Bacteria, including any endorsement increasing the scope or amount of coverage.

E. The terms of the exclusion in Paragraph B., or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy.

## CAUSES OF LOSS – SPECIAL FORM

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### COMMERCIAL PROPERTY

CP 10 30 06 07

Words and phrases that appear in quotation marks have special meaning. Refer to Section G., Definitions.

#### **A. Covered Causes of Loss**

When Special is shown in the Declarations, Covered Causes of Loss means Risks Of Direct Physical Loss unless the loss is:

1. Excluded in Section B., Exclusions; or
2. Limited in Section C., Limitations; that follow.

#### **B. Exclusions**

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

##### **a. Ordinance Or Law**

The enforcement of any ordinance or law:

- (1) Regulating the construction, use or repair of any property; or
- (2) Requiring the tearing down of any property, including the cost of removing its debris.

This exclusion, Ordinance Or Law, applies whether the loss results from:

- (a) An ordinance or law that is enforced even if the property has not been damaged;  
or
  - (b) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property, or removal of its debris, following a physical loss to that property.
- b. Earth Movement
- (1) Earthquake, including any earth sinking, rising or shifting related to such event;
  - (2) Landslide, including any earth sinking, rising or shifting related to such event;
  - (3) Mine subsidence, meaning subsidence of a man-made mine, whether or not mining activity has ceased;
  - (4) Earth sinking (other than sinkhole - collapse), rising or shifting including soil conditions which cause settling, cracking or other disarrangement of foundations or other parts of realty. Soil conditions include contraction, expansion, freezing, thawing, erosion, improperly compacted soil and the action of water under the ground surface.

But if Earth Movement, as described in b.(1) through (4) above, results in fire or explosion, we will pay for the loss or damage caused by that fire or explosion.

- (5) Volcanic eruption, explosion or effusion. But if volcanic eruption, explosion or effusion results in fire, building glass breakage or Volcanic Action, we will pay for the loss or damage caused by that fire, building glass breakage or Volcanic Action.

Volcanic Action means direct loss or damage resulting from the eruption of a volcano when the loss or damage is caused by:

- (a) Airborne volcanic blast or airborne shock waves;
- (b) Ash, dust or particulate matter; or
- (c) Lava flow.

All volcanic eruptions that occur within any 168-hour period will constitute a single occurrence.

Volcanic Action does not include the cost to remove ash, dust or particulate matter that does not cause direct physical loss or damage to the described property.

c. Governmental Action

Seizure or destruction of property by order of governmental authority.

But we will pay for loss or damage caused by or resulting from acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread, if the fire would be covered under this Coverage Part.

d. Nuclear Hazard

Nuclear reaction or radiation, or radioactive contamination, however caused.

But if nuclear reaction or radiation, or radioactive contamination, results in fire, we will pay for the loss or damage caused by that fire.

e. Utility Services

The failure of power, communication, water or other utility service supplied to the described premises, however caused, if the failure:

- (1) Originates away from the described premises; or
- (2) Originates at the described premises, but only if such failure involves equipment used to supply the utility service to the described premises from a source away from the described premises.

Failure of any utility service includes lack of sufficient capacity and reduction in supply.

Loss or damage caused by a surge of power is also excluded, if the surge would not have occurred but for an event causing a failure of power.

But if the failure or surge of power, or the failure of communication, water or other utility service, results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

Communication services include but are not limited to service relating to Internet access

or access to any electronic, cellular or satellite network.

f. War And Military Action

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

g. Water

- (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;
- (2) Mudslide or mudflow;
- (3) Water that backs up or overflows from a sewer, drain or sump; or
- (4) Water under the ground surface pressing on, or flowing or seeping through:
  - (a) Foundations, walls, floors or paved surfaces;
  - (b) Basements, whether paved or not; or
  - (c) Doors, windows or other openings.

But if Water, as described in g.(1) through g.(4) above, results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion or sprinkler leakage.

h. “Fungus”, Wet Rot, Dry Rot And Bacteria

Presence, growth, proliferation, spread or any activity of “fungus”, wet or dry rot or bacteria.

But if “fungus”, wet or dry rot or bacteria results in a ‘specified cause of loss”, we will pay for the loss or damage caused by that ‘Specified cause of loss”.

This exclusion does not apply:

- 1 When “fungus”, wet or dry rot or bacteria results from fire or lightning; or
2. To the extent that coverage is provided in the Additional Coverage — Limited Coverage For “Fungus”, Wet Rot, Dry Rot And Bacteria with respect to loss or damage by a cause of loss other than fire or lightning.

Exclusions B.1.a. through B.1.h. apply whether or not the loss event results in wide-spread damage or affects a substantial area

2. We will not pay for loss or damage caused by or resulting from any of the following:

- a. Artificially generated electrical, magnetic or electromagnetic energy that damages, disturbs, disrupts or otherwise interferes with any:



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- (1) Electrical or electronic wire, device, appliance, system or network; or
- (2) Device, appliance, system or network utilizing cellular or satellite technology.

For the purpose of this exclusion, electrical, magnetic or electromagnetic energy includes but is not limited to:

- (a) Electrical current, including arcing;
- (b) Electrical charge produced or conducted by a magnetic or electromagnetic field;
- (c) Pulse of electromagnetic energy; or
- (d) Electromagnetic waves or microwaves.

But if fire results, we will pay for the loss or damage caused by that fire.

- b. Delay, loss of use or loss of market.
- c. Smoke, vapor or gas from agricultural smudging or industrial operations.
- d.
  - (1) Wear and tear;
  - (2) Rust or other corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;
  - (3) Smog;
  - (4) Settling, cracking, shrinking or expansion;
  - (5) Nesting or infestation, or discharge or release of waste products or secretions, by insects, birds, rodents or other animals.

- (6) Mechanical breakdown, including rupture or bursting caused by centrifugal force. But if mechanical breakdown results in elevator collision, we will pay for the loss or damage caused by that elevator collision.
- (7) The following causes of loss to personal property:
  - (a) Dampness or dryness of atmosphere;
  - (b) Changes in or extremes of temperature; or
  - (c) Marring or scratching.

But if an excluded cause of loss that is listed in 2.d.(1) through (7) results in a “specified cause of loss” or building glass breakage, we will pay for the loss or damage caused by that “Specified cause of loss” or building glass breakage.

- e. Explosion of steam boilers, steam pipes, steam engines or steam turbines owned or leased by you, or operated under your control. But if explosion of steam boilers, steam pipes, steam engines or steam turbines results in fire or combustion explosion, we will pay for the loss or damage caused by that fire or combustion explosion. We will also pay for loss or damage caused by or resulting from the explosion of gases or fuel within the furnace of any fired vessel or within the flues or passages through which the gases of combustion pass.

- f. Continuous or repeated seepage or leakage of water, or the presence or condensation of humidity, moisture or vapor, that occurs over a period of 14 days or more.
- g. Water, other liquids, powder or molten material that leaks or flows from plumbing, heating, air conditioning or other equipment (except fire protective systems) caused by or resulting from freezing, unless:
  - (1) You do your best to maintain heat in the building or structure; or
  - (2) You drain the equipment and shut off the supply if the heat is not maintained.
- h. Dishonest or criminal act by you, any of your partners, members, officers, managers, employees (including leased employees), directors, trustees, authorized representatives or anyone to whom you entrust the property for any purpose:
  - (1) Acting alone or in collusion with others; or
  - (2) Whether or not occurring during the hours of employment.

This exclusion does not apply to acts of destruction by your employees (including leased employees); but theft by employees (including leased employees) is not covered.
- i. Voluntary parting with any property by you or anyone else to whom you have entrusted the property if induced to do so by any

fraudulent scheme, trick, device or false pretense.

- j. Rain, snow, ice or sleet to personal property in the open.
- k. Collapse, including any of the following conditions of property or any part of the property:
  - (1) An abrupt falling down or caving in;
  - (2) Loss of structural integrity, including separation of parts of the property or property in danger of falling down or caving in; or
  - (3) Any cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion as such condition relates to (1) or (2) above.

But if collapse results in a Covered Cause of Loss at the described premises, we will pay for the loss or damage caused by that Covered Cause of Loss.

This exclusion, k., does not apply:

- (a) To the extent that coverage is provided under the Additional Coverage—Collapse; or
- (b) To collapse caused by one or more of the following:
  - (i) The “specified causes of loss”;
  - (ii) Breakage of building glass;
  - (iii) Weight of rain that collects on a roof; or

(iv) Weight of people or personal property.

1. Discharge, dispersal, seepage, migration, release or escape of “pollutants” unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the “specified causes of loss”. But if the discharge, dispersal, seepage, migration, release or escape of “pollutants” results in a “Specified cause of loss”, we will pay for the loss or damage caused by that ‘Specified cause of loss’.

This exclusion, I., does not apply to damage to glass caused by chemicals applied to the glass.

- m. Neglect of an insured to use all reasonable means to save and preserve property from further damage at and after the time of loss.

3. We will not pay for loss or damage caused by or resulting from any of the following, 3.a. through 3.c. But if an excluded cause of loss that is listed in 3.a. through 3.c. results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

- a. Weather conditions. But this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in Paragraph 1. above to produce the loss or damage.

- b. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.
- c. Faulty, inadequate or defective:
  - (1) Planning, zoning, development, surveying, siting;
  - (2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
  - (3) Materials used in repair, construction, renovation or remodeling; or
  - (4) Maintenance;of part or all of any property on or off the described premises.

#### 4. Special Exclusions

The following provisions apply only to the specified Coverage Forms.

- a. Business Income (And Extra Expense) Coverage Form, Business Income (Without Extra Expense) Coverage Form, Or Extra Expense Coverage Form

We will not pay for:

- (1) Any loss caused by or resulting from:
  - (a) Damage or destruction of “finished stock”; or
  - (b) The time required to reproduce “finished stock”.

This exclusion does not apply to Extra Expense.

- (2) Any loss caused by or resulting from direct physical loss or damage to radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers.
  - (3) Any increase of loss caused by or resulting from:
    - (a) Delay in rebuilding, repairing or replacing the property or resuming “operations”, due to interference at the location of the rebuilding, repair or replacement by strikers or other persons; or
    - (b) Suspension, lapse or cancellation of any license, lease or contract. But if the suspension, lapse or cancellation is directly caused by the “suspension” of “operations”, we will cover such loss that affects your Business Income during the “period of restoration” and any extension of the “period of restoration” in accordance with the terms of the Extended Business Income Additional Coverage and the Extended Period Of Indemnity Optional Coverage or any variation of these.
  - (4) Any Extra Expense caused by or resulting from suspension, lapse or cancellation of any license, lease or contract beyond the “period of restoration”.
  - (5) Any other consequential loss.
- b. Leasehold Interest Coverage Form

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- (1) Paragraph B.1.a., Ordinance Or Law, does not apply to insurance under this Coverage Form.
  - (2) We will not pay for any loss caused by:
    - (a) Your cancelling the lease;
    - (b) The suspension, lapse or cancellation of any license; or
    - (c) Any other consequential loss.
- c. Legal Liability Coverage Form
- (1) The following exclusions do not apply to insurance under this Coverage Form:
    - (a) Paragraph B.1.a., Ordinance Or Law;
    - (b) Paragraph B.1.c., Governmental Action;
    - (c) Paragraph 8.1.d., Nuclear Hazard;
    - (d) Paragraph B.1.e., Utility Services; and
    - (e) Paragraph B.1.f., War And Military Action.
  - (2) The following additional exclusions apply to insurance under this Coverage Form:
    - (a) Contractual Liability

We will not defend any claim or “suit”, or pay damages that you are legally liable to pay, solely by reason of your assumption of liability in a contract or agreement. But this exclusion does not apply



to a written lease agreement in which you have assumed liability for building damage resulting from an actual or attempted burglary or robbery, provided that:

- (i) Your assumption of liability was executed prior to the accident; and
  - (ii) The building is Covered Property under this Coverage Form.
- (b) Nuclear Hazard

We will not defend any claim or “suit”, or pay any damages, loss, expense or obligation, resulting from nuclear reaction or radiation, or radioactive contamination, however caused.

#### 5. Additional Exclusion

The following provisions apply only to the specified property.

#### LOSS OR DAMAGE TO PRODUCTS

We will not pay for loss or damage to any merchandise, goods or other product caused by or resulting from error or omission by any person or entity (including those having possession under an arrangement where work or a portion of the work is outsourced) in any stage of the development, production or use of the product, including planning, testing, processing, packaging, installation, maintenance or repair. This exclusion applies to any effect that compromises the form, substance or quality of the product. But if such error or omission results in a Covered Cause of Loss, we

will pay for the loss or damage caused by that Covered Cause of Loss.

### **C. Limitations**

The following limitations apply to all policy forms and endorsements, unless otherwise stated.

1. We will not pay for loss of or damage to property, as described and limited in this section. In addition, we will not pay for any loss that is a consequence of loss or damage as described and limited in this section.

- a. Steam boilers, steam pipes, steam engines or steam turbines caused by or resulting from any condition or event inside such equipment. But we will pay for loss of or damage to such equipment caused by or resulting from an explosion of gases or fuel within the furnace of any fired vessel or within the flues or passages through which the gases of combustion pass.
- b. Hot water boilers or other water heating equipment caused by or resulting from any condition or event inside such boilers or equipment, other than an explosion.
- c. The interior of any building or structure, or to personal property in the building or structure, caused by or resulting from rain, snow, sleet, ice, sand or dust, whether driven by wind or not, unless:
  - (1) The building or structure first sustains damage by a Covered Cause of Loss to

its roof or walls through which the rain, snow, sleet, ice, sand or dust enters; or

- (2) The loss or damage is caused by or results from thawing of snow, sleet or ice on the building or structure.
- d. Building materials and supplies not attached as part of the building or structure, caused by or resulting from theft.

However, this limitation does not apply to:

- (1) Building materials and supplies held for sale by you, unless they are insured under the Builders Risk Coverage Form; or
- (2) Business Income Coverage or Extra Expense Coverage.
- e. Property that is missing, where the only evidence of the loss or damage is a shortage disclosed on taking inventory, or other instances where there is no physical evidence to show what happened to the property.
- f. Property that has been transferred to a person or to a place outside the described premises on the basis of unauthorized instructions.

2. We will not pay for loss of or damage to the following types of property unless caused by the “specified causes of loss” or building glass breakage:

- a. Animals, and then only if they are killed or their destruction is made necessary.
- b. Fragile articles such as statuary, marbles, chinaware and porcelains, if broken. This restriction does not apply to:

- (1) Glass; or
- (2) Containers of property held for sale.
- c. Builders' machinery, tools and equipment owned by you or entrusted to you, provided such property is Covered Property.

However, this limitation does not apply:

- (1) If the property is located on or within 100 feet of the described premises, unless the premises is insured under the Builders Risk Coverage Form; or
- (2) To Business Income Coverage or to Extra Expense Coverage.

3. The special limit shown for each category, a. through d., is the total limit for loss of or damage to all property in that category. The special limit applies to any one occurrence of theft, regardless of the types or number of articles that are lost or damaged in that occurrence. The special limits are:

- a. \$2,500 for furs, fur garments and garments trimmed with fur.
- b. \$2,500 for jewelry, watches, watch movements, jewels, pearls, precious and semi-precious stones, bullion, gold, silver, platinum and other precious alloys or metals. This limit does not apply to jewelry and watches worth \$100 or less per item.
- c. \$2,500 for patterns, dies, molds and forms.
- d. \$250 for stamps, tickets, including lottery tickets held for sale, and letters of credit.

These special limits are part of, not in addition to, the Limit of Insurance applicable to the Covered Property.

This limitation, C.3., does not apply to Business Income Coverage or to Extra Expense Coverage.

4. We will not pay the cost to repair any defect to a system or appliance from which water, other liquid, powder or molten material escapes. But we will pay the cost to repair or replace damaged parts of fire-extinguishing equipment if the damage:

- a. Results in discharge of any substance from an automatic fire protection system; or
- b. Is directly caused by freezing.

However, this limitation does not apply to Business Income Coverage or to Extra Expense Coverage.

#### **D. Additional Coverage—Collapse**

The coverage provided under this Additional Coverage—Collapse applies only to an abrupt collapse as described and limited in D.1. through D.7.

1. For the purpose of this Additional Coverage—Collapse, abrupt collapse means an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose.

2. We will pay for direct physical loss or damage to Covered Property, caused by abrupt collapse of a building or any part of a building that is insured under this Coverage Form or that contains Covered Property insured under this Coverage Form, if such collapse is caused by one or more of the following:

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- a. Building decay that is hidden from view, unless the presence of such decay is known to an insured prior to collapse;
- b. Insect or vermin damage that is hidden from view, unless the presence of such damage is known to an insured prior to collapse;
- c. Use of defective material or methods in construction, remodeling or renovation if the abrupt collapse occurs during the course of the construction, remodeling or renovation.
- d. Use of defective material or methods in construction, remodeling or renovation if the abrupt collapse occurs after the construction, remodeling or renovation is complete, but only if the collapse is caused in part by:
  - (1) A cause of loss listed in 2.a. or 2.b.;
  - (2) One or more of the ‘specified causes of loss’;
  - (3) Breakage of building glass;
  - (4) Weight of people or personal property;  
or
  - (5) Weight of rain that collects on a roof.

3. This Additional Coverage — Collapse does not apply to:

- a. A building or any part of a building that is in danger of falling down or caving in;
- b. A part of a building that is standing, even if it has separated from another part of the building; or

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- c. A building that is standing or any part of a building that is standing, even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.

4. With respect to the following property:

- a. Outdoor radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers;
- b. Awnings, gutters and downspouts;
- c. Yard fixtures;
- d. Outdoor swimming pools;
- e. Fences;
- f. Piers, wharves and docks;
- g. Beach or diving platforms or appurtenances;
- h. Retaining walls; and
- i. Walks, roadways and other paved surfaces;

if an abrupt collapse is caused by a cause of loss listed in 2.a. through 2.d., we will pay for loss or damage to that property only if:

- (1) Such loss or damage is a direct result of the abrupt collapse of a building insured under this Coverage Form; and
- (2) The property is Covered Property under this Coverage Form.

5. If personal property abruptly falls down or caves in and such collapse is not the result of abrupt collapse of a building, we will pay for loss or damage to Covered Property caused by such collapse of personal property only if:

- a. The collapse of personal property was caused by a cause of loss listed in 2.a. through 2.d.;
- b. The personal property which collapses is inside a building; and
- c. The property which collapses is not of a kind listed in 4., regardless of whether that kind of property is considered to be personal property or real property.

The coverage stated in this Paragraph 5. does not apply to personal property if marring and/or scratching is the only damage to that personal property caused by the collapse.

6. This Additional Coverage—Collapse does not apply to personal property that has not abruptly fallen clown or caved in, even if the personal property shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.

7. This Additional Coverage—Collapse will not increase the Limits of Insurance provided in this Coverage Part.

8. The term Covered Cause of Loss includes the Additional Coverage—Collapse as described and limited in D.1. through D.7.

**E. Additional Coverage—Limited Coverage For ‘Fungus’, Wet Rot, Dry Rot And Bacteria**

1. The coverage described in E.2. and E.6. only applies when the “fungus”, wet or dry rot or bacteria is the result of one or more of the following causes that occurs during the policy period and only if all reasonable means were used to save and preserve the property



from further damage at the time of and after that occurrence.

- a. A “specified cause of loss” other than fire or lightning; or
- b. Flood, if the Flood Coverage Endorsement applies to the affected premises.

2. We will pay for loss or damage by “fungus”, wet or dry rot or bacteria. As used in this Limited Coverage, the term loss or damage means:

- a. Direct physical loss or damage to Covered Property caused by “fungus”, wet or dry rot or bacteria, including the cost of removal of the “fungus”, wet or dry rot or bacteria;
- b. The cost to tear out and replace any part of the building or other property as needed to gain access to the “fungus”, wet or dry rot or bacteria; and
- c. The cost of testing performed after removal, repair, replacement or restoration of the damaged property is completed, provided there is a reason to believe that “fungus”, wet or dry rot or bacteria are present.

3. The coverage described under E.2. of this Limited Coverage is limited to \$15,000. Regardless of the number of claims, this limit is the most we will pay for the total of all loss or damage arising out of all occurrences of “specified causes of loss” (other than fire or lightning) and Flood which take place in a 12-month period (starting with the beginning of the present annual policy period). With respect to a particular occurrence of loss which results in “fungus”, wet or dry rot or bacteria, we will not pay more than a total of

\$15,000 even if the “fungus”, wet or dry rot or bacteria continues to be present or active, or recurs, in a later policy period.

4. The coverage provided under this Limited Coverage does not increase the applicable Limit of Insurance on any Covered Property. If a particular occurrence results in loss or damage by “fungus”, wet or dry rot or bacteria, and other loss or damage, we will not pay more, for the total of all loss or damage, than the applicable Limit of Insurance on the affected Covered Property.

If there is covered loss or damage to Covered Property, not caused by “fungus”, wet or dry rot or bacteria, loss payment will not be limited by the terms of this Limited Coverage, except to the extent that “fungus”, wet or dry rot or bacteria causes an increase in the loss. Any such increase in the loss will be subject to the terms of this Limited Coverage.

5. The terms of this Limited Coverage do not increase or reduce the coverage provided under Paragraph F.2. (Water Damage, Other Liquids, Powder Or Molten Material Damage) of this Causes Of Loss Form or under the Additional Coverage—Collapse.

6. The following, 6.a. or 6.b., applies only if Business Income and/or Extra Expense Coverage applies to the described premises and only if the “suspension” of “operations” satisfies all terms and conditions of the applicable Business Income and/or Extra Expense Coverage Form.

- a. If the loss which resulted in “fungus”, wet or dry rot or bacteria does not in itself necessitate a “suspension” of “operations”, but such “suspension” is necessary due to loss or

damage to property caused by ‘Fungus’, wet or dry rot or bacteria, then our payment under Business Income and/or Extra Expense is limited to the amount of loss and/or expense sustained in a period of not more than 30 days. The days need not be consecutive.

- b. If a covered “suspension” of “operations” was caused by loss or damage other than “fungus”, wet or dry rot or bacteria but remediation of “Fungus”, wet or dry rot or bacteria prolongs the “period of restoration”, we will pay for loss and/or expense sustained during the delay (regardless of when such a delay occurs during the “period of restoration”), but such coverage is limited to 30 days. The days need not be consecutive.

## **F. Additional Coverage Extensions**

### **1. Property in Transit**

This Extension applies only to your personal property to which this form applies.

- a. You may extend the insurance provided by this Coverage Part to apply to your personal property (other than property in the care, custody or control of your salespersons) in transit more than 100 feet from the described premises. Property must be in or on a motor vehicle you own, lease or operate while between points in the coverage territory.
- b. Loss or damage must be caused by or result from one of the following causes of loss:

- (1) Fire, lightning, explosion, windstorm or hail, riot or civil commotion, or vandalism.
  - (2) Vehicle collision, upset or overturn. Collision means accidental contact of your vehicle with another vehicle or object. It does not mean your vehicle's contact with the roadbed.
  - (3) Theft of an entire bale, case or package by forced entry into a securely locked body or compartment of the vehicle. There must be visible marks of the forced entry.
- c. The most we will pay for loss or damage under this Extension is \$5,000.

This Coverage Extension is additional insurance. The Additional Condition, Coinsurance, does not apply to this Extension.

## 2. Water Damage, Other Liquids, Powder Or Molten Material Damage

If loss or damage caused by or resulting from covered water or other liquid, powder or molten material damage loss occurs, we will also pay the cost to tear out and replace any part of the building or structure to repair damage to the system or appliance from which the water or other substance escapes. This Coverage Extension does not increase the Limit of Insurance.

## 3. Glass

- a. We will pay for expenses incurred to put up temporary plates or board up openings if

repair or replacement of damaged glass is delayed.

- b. We will pay for expenses incurred to remove or replace obstructions when repairing or replacing glass that is part of a building. This does not include removing or replacing window displays.

This Coverage Extension, F.3., does not increase the Limit of Insurance.

## **G. Definitions**

1. “Fungus” means any type or form of fungus, including mold or mildew, and any mycotoxins, spores, scents or by-products produced or released by fungi.

2. “Specified causes of loss” means the following: fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire-extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.

- a. Sinkhole collapse means the sudden sinking or collapse of land into underground empty spaces created by the action of water on limestone or dolomite. This cause of loss does not include:
  - (1) The cost of filling sinkholes; or
  - (2) Sinking or collapse of land into manmade underground cavities.
- b. Falling objects does not include loss or damage to:
  - (1) Personal property in the open; or

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- (2) The interior of a building or structure, or property inside a building or structure, unless the roof or an outside wall of the building or structure is first damaged by a falling object.
- c. Water damage means accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of a plumbing, heating, air conditioning or other system or appliance (other than a sump system including its related equipment and parts), that is located on the described premises and contains water or steam.

## **WATER EXCLUSION ENDORSEMENT**

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### **COMMERCIAL PROPERTY**

CP 10 32 08 08

This endorsement modifies insurance provided under the following:

### **COMMERCIAL PROPERTY COVERAGE PART STANDARD PROPERTY POLICY**

A. The exclusion in Paragraph B. replaces the Water Exclusion in this Coverage Part or Policy.

#### **B. Water**

1. Flood, surface water, waves (including tidal wave and tsunami), tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driven by wind (including storm surge);
2. Mudslide or mudflow;
3. Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment;
4. Water under the ground surface pressing on, or flowing or seeping through:
  - a. Foundations, walls, floors or paved surfaces;
  - b. Basements, whether paved or not; or
  - c. Doors, windows or other openings; or
5. Waterborne material carried or otherwise moved by any of the water referred to in Paragraph t, 3. or 4., or material carried or otherwise moved by mudslide or mudflow.

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This exclusion applies regardless of whether any of the above, in Paragraphs 1. through 5., is caused by an act of nature or is otherwise caused. An example of a situation to which this exclusion applies is the situation where a dam, levee, seawall or other boundary or containment system fails in whole or in part, for any reason, to contain the water.

But if any of the above, in Paragraphs 1. through 5., results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion or sprinkler leakage (if sprinkler leakage is a Covered Cause of Loss).



## WINDSTORM OR HAIL EXCLUSION

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### COMMERCIAL PROPERTY

CP 10 54 06 07

This endorsement modifies insurance provided under the following:

CAUSES OF LOSS —BASIC FORM  
CAUSES OF LOSS —BROAD FORM  
CAUSES OF LOSS —SPECIAL FORM  
STANDARD PROPERTY POLICY

### SCHEDULE

Premises Number	Building Number
See Schedule	
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

With respect to the location(s) indicated in the Schedule, the following provisions apply.

- A. The following is added to the Exclusions section and is therefore not a Covered Cause of Loss:

We will not pay for loss or damage:

1. Caused directly or indirectly by Windstorm or Hail, regardless of any other cause or event that contributes concurrently or in any sequence to the loss or damage; or
2. Caused by rain, snow, sand or dust, whether driven by wind or not, if that loss or damage would not have occurred but for the Windstorm or Hail.

But if Windstorm or Hail results in a cause of loss other than rain, snow, sand or dust, and that resulting cause of loss is a Covered Cause of Loss, we will pay for the loss or damage caused by such Covered Cause of Loss. For example, if the Windstorm or Hail damages a heating system and fire results, the loss or damage attributable to the fire is covered subject to any other applicable policy provisions.

- B. The terms of the Windstorm Or Hail exclusion, or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this policy.
- C. Under Additional Coverage—Collapse, in the Causes Of Loss Broad Form, Windstorm or Hail is deleted from Paragraph 2.a.
- D. In the Causes Of Loss—Special Form, Windstorm or Hail is deleted from the “specified causes of loss”.
- E. Under Additional Coverage Extensions—Property In Transit, in the Causes Of Loss—Special Form, Windstorm or Hail is deleted from Paragraph b.(1).

**LOSS PAYABLE PROVISIONS**

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**COMMERCIAL PROPERTY**

CP 12 18 06 07

This endorsement modifies insurance provided under the following:

**BUILDING AND PERSONAL PROPERTY  
COVERAGE FORM**

**BUILDERS' RISK COVERAGE FORM**

**CONDOMINIUM ASSOCIATION COVERAGE FORM**

**CONDOMINIUM COMMERCIAL UNIT-OWNERS  
COVERAGE FORM**

**STANDARD PROPERTY POLICY**

**SCHEDULE**

Premises Number:	Building Number:	001 /001	Applicable Clause (Enter C., D., E., or F.):	F
Description Of Property: Building Loss Payee Name: JBST Inc. Loss Payee Address: 2884 SW 27th Avenue, Miami, FL USA 33133				
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.				

- A. When this endorsement is attached to the Standard Property Policy CP 00 99, the term Coverage Part in this endorsement is replaced by the term Policy.
- B. Nothing in this endorsement increases the applicable Limit of Insurance. We will not pay any Loss Payee more than their financial interest in the Covered Property, and we

will not pay more than the applicable Unit of Insurance on the Covered Property.

The following is added to the Loss Payment Loss Condition, as indicated in the Declarations or in the Schedule:

C. Loss Payable Clause

For Covered Property in which both you and a Loss Payee shown in the Schedule or in the Declarations have an insurable interest, we will:

1. Adjust losses with you; and
2. Pay any claim for loss or damage jointly to you and the Loss Payee, as interests may appear.

D. Lender's Loss Payable Clause

1. The Loss Payee shown in the Schedule or in the Declarations is a creditor, including a mortgageholder or trustee, whose interest in Covered Property is established by such written instruments as:
  - a. Warehouse receipts;
  - b. A contract for deed;
  - c. Bills of lading;
  - d. Financing statements; or
  - e. Mortgages, deeds of trust, or security agreements.

2. For Covered Property in which both you and a Loss Payee have an insurable interest:
  - a. We will pay for covered loss or damage to each Loss Payee in their order of precedence, as interests may appear.
  - b. The Loss Payee has the right to receive loss payment even if the Loss Payee has started foreclosure or similar action on the Covered Property.
  - c. If we deny your claim because of your acts or because you have failed to comply with the terms of the Coverage Part, the Loss Payee will still have the right to receive loss payment if the Loss Payee:
    - (1) Pays any premium due under this Coverage Part at our request if you have failed to do so;
    - (2) Submits a signed, sworn proof of loss within 60 days after receiving notice from us of your failure to do so; and
    - (3) Has notified us of any change in ownership, occupancy or substantial change in risk known to the Loss Payee.

All of the terms of this Coverage Part will then apply directly to the Loss Payee.

- d. If we pay the Loss Payee for any loss or damage and deny payment to you because of your acts or because you have failed to comply with the terms of this Coverage Part:
  - (1) The Loss Payee's rights will be transferred to us to the extent of the amount we pay; and
  - (2) The Loss Payee's rights to recover the full amount of the Loss Payee's claim will not be impaired.

At our option, we may pay to the Loss Payee the whole principal on the debt plus any accrued interest. In this event, you will pay your remaining debt to us.

- 3. If we cancel this policy, we will give written notice to the Loss Payee at least:
  - a. 10 days before the effective date of cancellation if we cancel for your nonpayment of premium; or
  - b. 30 days before the effective date of cancellation if we cancel for any other reason.
- 4. If we elect not to renew this policy, we will give written notice to the Loss Payee at least 10 days before the expiration date of this policy.

E. Contract Of Sale Clause

1. The Loss Payee shown in the Schedule or in the Declarations is a person or organization you have entered a contract with for the sale of Covered Property.
2. For Covered Property in which both you and the Loss Payee have an insurable interest we will:
  - a. Adjust losses with you; and
  - b. Pay any claim for loss or damage jointly to you and the Loss Payee, as interests may appear.
3. The following is added to the Other Insurance Condition:

For Covered Property that is the subject of a contract of sale, the word “you” includes the Loss Payee.

F. Building Owner Loss Payable Clause

1. The Loss Payee shown in the Schedule or in the Declarations is the owner of the described building, in which you are a tenant.
2. We will adjust losses to the described building with the Loss Payee. Any loss payment made to the Loss Payee will satisfy your claims against us for the owner’s property.
3. We will adjust losses to tenants’ improvements and betterments with you, unless the lease provides otherwise.

**BUSINESS INCOME CHANGES-TIME PERIOD**

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**COMMERCIAL PROPERTY**

CP 55 21 03 11

This endorsement modifies insurance provided under the following:

ACTUAL LOSS BUSINESS INCOME  
ENDORSEMENT  
BUSINESS INCOME (AND EXTRA EXPENSE)  
COVERAGE FORM  
BUSINESS INCOME (WITHOUT EXTRA  
EXPENSE) COVERAGE FORM

**SCHEDULE**

Select Either A., B., C., D. Or E.

A. 72-Hour Time Period Is  
Replaced By 48 Hours

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. If the Schedule indicates that the 72-hour time period is replaced by 48 hours, then:

1. The 72-hour time period in the definition of “period of restoration” is replaced by 48 hours. Therefore, the period of restoration for Business Income Coverage begins 48 hours after the time of direct physical loss or damage, subject to all other provisions of the definition of “period of restoration”; and
2. The 72-hour time period in the Civil Authority Additional Coverage is replaced by 48 hours. Therefore, cover-



age under the Additional Coverage—Civil Authority begins 48 hours after the time of action of civil authority, subject to all other provisions of that Additional Coverage.

- B. If the Schedule indicates that the 72-hour time period is replaced by 48 hours, then:
  - 1. The 72-hour time period in the definition of “period of restoration” is replaced by 24 hours. Therefore, the period of restoration for Business Income Coverage begins 24 hours after the time of direct physical loss or damage, subject to all other provisions of the definition of “period of restoration”; and
  - 2. The 72-hour time period in the Civil Authority Additional Coverage is replaced by 24 hours. Therefore, coverage under the Additional Coverage—Civil Authority begins 24 hours after the time of action of civil authority, subject to all other provisions of that Additional Coverage.
- C. If the Schedule indicates that the 72-hour time period is replaced by 12 hours, then:
  - 1. The 72-hour time period in the definition of “period of restoration” is replaced by 12 hours. Therefore, the period of restoration for Business Income Coverage begins 12 hours after the time of direct physical loss or damage, subject to all other provisions of the definition of “period of restoration”; and

2. The 72-hour time period in the Civil Authority Additional Coverage is replaced by 12 hours. Therefore, coverage under the Additional Coverage—Civil Authority begins 12 hours after the time of action of civil authority, subject to all other provisions of that Additional Coverage.
- D. If the Schedule indicates that the 72-hour time period is eliminated, Then:
1. The 72-hour time period in the definition of “period of restoration” is deleted. Therefore, the period of restoration for Business Income Coverage begins at the time of direct physical loss or damage, subject to all other provisions of the definition of “period of restoration”: and
  2. The 72-hour time period in the Civil Authority Additional Coverage is deleted. Therefore, coverage under the Additional Coverage—Civil Authority begins at the time of action of civil authority, subject to all other provisions of that Additional Coverage.
- E. If the Schedule indicates that the 72-hour time period is replaced by the number of hours listed in the Schedule, then:
1. The 72-hour time period in the definition of “period of restoration” is replaced by the number of hours listed in the Schedule. Therefore, the period of restoration for Business Income Coverage begins 48 hours after the time of direct physical loss or damage, subject to all other

provisions of the definition of “period of restoration”; and

2. The 72-hour time period in the Civil Authority Additional Coverage is replaced by the number of hours listed in the Schedule. Therefore, coverage under the Additional Coverage — Civil Authority begins the number of hours listed in the Schedule after the time of action of civil authority, subject to all other provisions of that Additional Coverage.

## FLORIDA CHANGES

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### COMMERCIAL PROPERTY

CP 01 25 02 12

This endorsement modifies insurance provided under the following:

#### COMMERCIAL PROPERTY COVERAGE PART

A. When this endorsement is attached to Standard Property Policy CP 00 99, the term Coverage Part in this endorsement is replaced by the term Policy.

B. The following provision applies when a Coinsurance percentage is shown in the Declarations:

Florida law states as follows:

Coinsurance contract: The rate charged in this policy is based upon the use of the coinsurance clause attached to this policy, with the consent of the Insured.

C. The following is added:

If windstorm is a Covered Cause of Loss and loss or damage to Covered Property is caused by or results from windstorm, the following exclusion applies in:

1. Broward County;
2. Dade County;
3. Martin County;
4. Monroe County;
5. Palm Beach County; and
6. All the areas east of the west bank of the Intracoastal Waterway in the counties of:

- a. Indian River; and
- b. St. Lucie.

Windstorm Exterior Paint And Waterproofing  
Exclusion

We will not pay for loss or damage caused  
by windstorm to:

- 1. Paint; or
- 2. Waterproofing material;

applied to the exterior of buildings unless  
the building to which such loss or damage  
occurs also sustains other loss or damage by  
windstorm in the course of the same storm  
event. But such coverage applies only if  
windstorm is a Covered Cause of Loss.

When loss or damage to exterior paint or  
waterproofing material is excluded, we will  
not include the value of paint or waterproofing  
material to determine:

- a. The amount of the Windstorm or Hail  
Deductible; or
- b. The value of Covered Property when  
applying the Coinsurance Condition.

D. The Loss Payment Condition dealing with the  
number of days within which we must pay for  
covered loss or damage is replaced by the following:

Provided you have complied with all the terms of  
this Coverage Part, we will pay for covered loss or  
damage upon the earliest of the following:

- (1) Within 20 days after we receive the sworn proof of loss and reach written agreement with you;
- (2) Within 30 days after we receive the sworn proof of loss and:
  - (a) There is an entry of a final judgment; or
  - (b) There is a filing of an appraisal award with us; or
- (3) Within 90 days of receiving notice of an initial, reopened or supplemental claim, unless we deny the claim during that time or factors beyond our control reasonably prevent such payment. If a portion of the claim is denied, then the 90-day time period for payment of claim relates to the portion of the claim that is not denied.

Paragraph (3) applies only to the following:

- (a) A claim under a policy covering residential property;
- (b) A claim for building or contents coverage if the insured structure is 10,000 square feet or less and the policy covers only locations in Florida; or
- (c) A claim for contents coverage under a tenant's policy if the rented premises are 10,000 square feet or less and the policy covers only locations in Florida.

#### E. Sinkhole Collapse Coverage Removed

Sinkhole Collapse coverage is removed, as indicated in Paragraphs E.1. through E.4.; and coverage for

Catastrophic Ground Cover Collapse is added instead as set forth in Paragraph F.

1. In the Causes Of Loss—Basic Form and in the Standard Property Policy, Sinkhole Collapse is deleted from the Covered Causes of Loss and sinkhole collapse is no longer an exception to the Earth Movement Exclusion.
2. In the Causes Of Loss—Broad Form, Sinkhole Collapse is deleted from the Covered Causes of Loss and from the Additional Coverage—Collapse; and sinkhole collapse is no longer an exception to the Earth Movement Exclusion.
3. In the Causes Of Loss—Special Form, Sinkhole Collapse is deleted from the “specified causes of loss” and is no longer an exception to the Earth Movement Exclusion.
4. In the Mortgageholders Errors And Omissions Coverage Form, Sinkhole Collapse is deleted from the Covered Causes of Loss under Coverage B and from the “specified causes of loss”, and is no longer an exception to the Earth Movement Exclusion.

Further, this Coverage Part does not insure against Sinkhole Loss as defined in Florida law unless an endorsement for Sinkhole Loss is made part of this policy. However, if Sinkhole Loss causes Catastrophic Ground Cover Collapse, coverage is provided for the resulting Catastrophic Ground Cover Collapse even if an endorsement for Sinkhole Loss is not made part of this policy.

F. The following is added to this Coverage Part as a Covered Cause of Loss. In the Causes Of Loss-

Special Form and Mortgageholders Errors And Omissions Coverage Form, the following is also added as a “specified cause of loss”. However, as a “specified cause of loss”, the following does not apply to the Additional Coverage—Collapse.

#### Catastrophic Ground Cover Collapse

We will pay for direct physical loss or damage to Covered Property caused by or resulting from catastrophic ground cover collapse, meaning geological activity that results in all of the following:

1. The abrupt collapse of the ground cover;
2. A depression in the ground cover clearly visible to the naked eye;
3. “Structural damage” to the building, including the foundation; and
4. The insured structure being condemned and ordered to be vacated by the governmental agency authorized by law to issue such an order for that structure.

However, damage consisting merely of the settling or cracking of a foundation, structure or building does not constitute loss or damage resulting from a catastrophic ground cover collapse.

The Earth Movement Exclusion and the Collapse Exclusion do not apply to coverage for Catastrophic Ground Cover Collapse.

Coverage for Catastrophic Ground Cover Collapse does not increase the applicable Limit of Insurance. Regardless of whether loss or damage attributable to catastrophic ground cover collapse also qualifies as Sinkhole Loss or Earthquake (if either or both of



those causes of loss are covered under this Coverage Part), only one Limit of Insurance will apply to such loss or damage.

G. The following applies to the Additional Coverage—Civil Authority under the Business Income (And Extra Expense) Coverage Form, Business Income (Without Extra Expense) Coverage Form and Extra Expense Coverage Form:

1. The Additional Coverage—Civil Authority includes a requirement that the described premises are not more than one mile from the damaged property. With respect to described premises located in Florida, such one-mile radius does not apply.
2. The Additional Coverage—Civil Authority is limited to a coverage period of up to four weeks. With respect to described premises located in Florida, such four-week period is replaced by a three-week period.
3. Civil Authority coverage is subject to all other provisions of that Additional Coverage.

H. The following provisions are added to the Duties In The Event Of Loss Or Damage Loss Condition:

- (1) A claim, supplemental claim or reopened claim for loss or damage caused by hurricane or other windstorm is barred unless notice of claim is given to us in accordance with the terms of this policy within three years after the hurricane first made landfall or a windstorm other than hurricane caused the covered damage. (Supplemental claim or

reopened claim means an additional claim for recovery from us for losses from the same hurricane or other windstorm which we have previously adjusted pursuant to the initial claim.)

This provision concerning time for submission of claim, supplemental claim or reopened claim does not affect any limitation for legal action against us as provided in this policy under the Legal Action Against Us Condition, including any amendment to that condition.

- (2) Any inspection or survey by us, or on our behalf, of property that is the subject of a claim, will be conducted with at least 48 hours' notice to you. The 48-hour notice may be waived by you.

I. The following definition of structural damage is added with respect to the coverage provided under this endorsement:

“Structural damage” means a covered building, regardless of the date of its construction, has experienced the following.

1. Interior floor displacement or deflection in excess of acceptable variances as defined in ACI 117-90 or the Florida Building Code, which results in settlement related damage to the interior such that the interior building structure or members become unfit for service or represent a safety hazard as defined within the Florida Building Code;
2. Foundation displacement or deflection in excess of acceptable variances as defined in

ACI 318-95 or the Florida Building Code, which results in settlement related damage to the primary structural members or primary structural systems that prevents those members or systems from supporting the loads and forces they were designed to support to the extent that stresses in those primary structural members or primary structural systems exceed one and one-third the nominal strength allowed under the Florida Building Code for new buildings of similar structure, purpose, or location;

3. Damage that results in listing, leaning, or buckling of the exterior load bearing walls or other vertical primary structural members to such an extent that a plumb line passing through the center of gravity does not fall inside the middle one-third of the base as defined within the Florida Building Code;
4. Damage that results in the building, or any portion of the building containing primary structural members or primary structural systems, being significantly likely to imminently collapse because of the movement or instability of the ground within the influence zone of the supporting ground within the shear plane necessary for the purpose of supporting such building as defined within the Florida Building Code; or
5. Damage occurring on or after October 15, 2005, that qualifies as substantial structural damage as defined in the Florida Building Code.

**COMMERCIAL GENERAL LIABILITY  
COVERAGE PART SUPPLEMENTAL  
DECLARATIONS**

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SPARTA INSURANCE COMPANY

[Policy Number 053CP00228]

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Named Insured: Mama Jo's Inc. DBA: Berries

Effective Date: 09-19-13

12:01 A.M, Standard Time

Agent Name: PROHOST USA, INC.

Agent No.: 00029

**Item 1.** Business Description: Restaurant

**Item2.** Limits of Insurance

<b>Coverage</b>	Aggregate Limits of Liability
<b>Limit of Liability</b>	
\$ 2,000,000	Products/ Completed Operations Aggregate
\$ 2,000,000	General Aggregate (other than Products/Completed Operations)
<b>Coverage A</b>	Bodily Injury and Property Damage Liability
<b>Limit of Liability</b>	
\$ 1,000,000	any one occurrence subject to the Products/Completed Operations and General Aggregate Units of Liability

## App.187a

<b>Coverage A</b>	Damage To Premises Rented To You
<b>Limit of Liability</b>	
\$ 1,000,000	any one premises subject to the Coverage A occurrence and the General Aggregate Limits of Liability
<b>Coverage B</b>	Personal and Advertising Injury Liability
<b>Limit of Liability</b>	
\$ 1,000,000	any one person or organization subject to the General Aggregate Units of Liability
<b>Coverage C</b>	Medical Payments
<b>Limit of Liability</b>	
NOT COVERED	any one person subject to the Coverage A occurrence and the General Aggregate Limits of Liability

### Item 3. Retroactive Date

This Insurance does not apply to “bodily injury”, “property damage” or “personal and advertising injury” which occurs before the Retroactive Date, if any, shown here:

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(Enter Date or “None” if no Retroactive Date applies)

**Item 4. Form of Business and Location of Premises**

Forms of Business: Corporation

Location of All Premises You Own, Rent or Occupy:

*See Schedule of Locations*

**Item 5. Forms and Endorsements**

Form(s) and Endorsement(s) made a part of this policy at time of issue:

*See Schedule of Forms and Endorsements*

**Item 6. Premiums**

Coverage Part Premium: \$12,878.00

Other Premium:

Total Premium: \$12,878.00

**COMMERCIAL GENERAL LIABILITY  
COVERAGE SCHEDULE**

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SPARTA INSURANCE COMPANY

[Policy Number 053CP00228]

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Named Insured: Mama Jo's Inc. DBA: Berries

Effective Date: 09-19-13

12:01 A.M, Standard Time

Agent Name: PROHOST USA, INC.

Agent No.: 00029

<b>Item 5. Location of Premises</b>		
Location of All Premises You Own, Rent or Occupy: See Schedule of Location		
<b>Code No:</b> 16910	<b>Premium Basis</b> Gross Sales/Nearest Thousand	
<b>Location:</b> 001/001		<b>Exposure:</b> \$4,000,000
<b>Classification:</b> Restaurants-With Sale of Alcoholic Beverages That Are Less Than 30% of the Annual Receipts of the Restaurants With Table Service		
<b>Premises/ Operations</b>	<b>Rate</b>	<b>Premium</b>
	2.558	10,232.00

App.190a

<b>Premises/Completed Operations</b>	<b>Rate</b>	<b>Premium</b>
	.268	1,072.00
<b>Code No: 58161</b>	<b>Premium Basis</b> Gross Sales/Nearest Thousand	
<b>Location: 001/001</b>		<b>Exposure: \$6,000,000</b>
<b>Classification:</b> Restaurants, Taverns, Hotels, Motels, Including Package Sales		
<b>Premises/ Operations</b>	<b>Rate</b>	<b>Premium</b>
	2.206	1,324.00
<b>Premises/Completed Operations</b>	<b>Rate</b>	<b>Premium</b>
		INCL
<b>Code No: 16910</b>	<b>Premium Basis</b>	
<b>Location:</b>		<b>Exposure:</b>
<b>Classification:</b> Amended Additional Insured		
<b>Premises/ Operations</b>	<b>Rate</b>	<b>Premium</b>
		250.00
<b>Premises/Completed Operations</b>	<b>Rate</b>	<b>Premium</b>



**LIQUOR LIABILITY COVERAGE PART  
DECLARATIONS**

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SPARTA INSURANCE COMPANY

[Policy Number 053CP00228]

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Named Insured: Mama Jo's Inc. DBA: Berries

Effective Date: 09-19-13

12:01 A.M, Standard Time

Agent Name: PROHOST USA, INC.

Agent No.: 00029

**Item 1. Limits of Insurance**

Aggregate Limit

\$2,000,000

Each Common Cause Limit/Loss Of Means Of  
Support Or Loss Of Society Limit

\$1,000,000

**Item 2. Retroactive Date (CG 00 34 only)**

Section I of this insurance does not apply to  
"bodily injury", "property damage" or "personal and  
advertising injury" which occurs before the  
Retroactive Date, if any shown here:

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(Enter Date or "None" if no Retroactive Date applies)

**Item 3. Business Description and Location Premises**

Forms of Business: Corporation

Business Description: Restaurant

Location of All Premises You Own, Rent or Occupy:

See Schedule of Locations

<b>Item 4. Premium</b>		
<b>Code No:</b>	<b>Premium Basis</b>	
<b>Location:</b>	<b>Exposure:</b>	
<b>Classification:</b> See Commercial General Liability Coverage Schedule		
<b>Premises/ Operations</b>	<b>Rate</b>	<b>Premium</b>
<b>Premises/Completed Operations</b>	<b>Rate</b>	<b>Premium</b>

**Item 5. Schedule of Forms and Endorsements**

Form(s) and Endorsement(s) made a part of this Policy at time of issue:

See Schedule of Forms and Endorsements

**TOTAL POLLUTION EXCLUSION  
ENDORSEMENT**

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**COMMERCIAL GENERAL LIABILITY**

CG 21 49 07 99

This endorsement modifies insurance provided under the following:

**Commercial General Liability Coverage Part**

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

This insurance does not apply to:

**(f) Pollution**

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

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

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

## FUNGI OR BACTERIA EXCLUSION

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### COMMERCIAL GENERAL LIABILITY

CG 21 67 12 04

This endorsement modifies insurance provided under the following:

A. The following exclusion is added to Paragraph 2. Exclusions of Section I—Coverage A—Bodily Injury and Property Damage Liability:

#### 2. Exclusions

This insurance does not apply to:

Fungi or Bacteria

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

## App.195a

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

B. The following exclusion is added to Paragraph 2. Exclusions of Section I—Coverage B—Personal and Advertising Injury Liability:

### 2. Exclusions

This insurance does not apply to:

Fungi or Bacteria

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

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

“Fungi” means any type or form of fungus, including mold or mildew and any mycotoxins,

## App.196a

spores, scents or by products produced or released by fungi.

## **SILICA OR SILICA-RELATED DUST EXCLUSION**

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### **COMMERCIAL GENERAL LIABILITY**

CG 21 96 03 05

This endorsement modifies insurance provided under the following:

#### **Commercial General Liability Coverage Part**

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

##### **2. Exclusions**

This insurance does not apply to:

##### **Silica Or Silica-Related Dust**

- a. “Bodily injury” arising, in whole or in part, out of the actual, alleged, threatened or suspected inhalation of, or ingestion of, “silica” or “silica-related dust”.
- b. “Property damage” arising, in whole or in part, out of the actual, alleged, threatened or suspected contact with, exposure to, existence of, or presence of, “silica” or “silica-related dust”.
- c. Any loss, cost or expense arising, in whole or in part, out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to or assessing the effects of, “silica” or “silica-related dust”, by any insured or by any other person or entity.

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

2. Exclusions

This insurance does not apply to:

Silica Or Silica-Related Dust

- a. “Personal and advertising injury” arising, in whole or in part, out of the actual, alleged, threatened or suspected inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, “silica” or “silica-related dust”.
- b. Any loss, cost or expense arising, in whole or in part, out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to or assessing the effects of, “silica” or “silica-related dust”, by any insured or by any other person or entity.

C. The following definitions are added to the Definitions Section:

- a. “Silica” means silicon dioxide (occurring in crystalline, amorphous and impure forms), silica particles, silica dust or silica compounds.
- b. “Silica-related dust” means a mixture or combination of silica and other dust or particles.



**EXCLUSION—ASBESTOS  
ADVISORY NOTICE TO POLICYHOLDERS**

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**COMMERCIAL GENERAL LIABILITY**

GL P 001 07 08

This Notice does NOT form a part of your insurance contract. The Notice is designed to alert you to coverage changes when the exclusion for asbestos is attached to this policy. If there is any conflict between this Notice and the policy (including its endorsements), the provisions of the policy (including its endorsements) apply. Please read your policy, and the endorsements attached to your policy, carefully.

This Notice contains a brief synopsis of the following endorsement:

- GL 45 01 02 08—Asbestos Exclusion

When the above referenced endorsement is attached to your policy, coverage is excluded for bodily injury under Coverage A arising in whole or in part, out of the actual, alleged, threatened or suspected inhalation of, or ingestion of, asbestos. In addition, coverage is excluded for property damage under Coverage A and personal and advertising injury under Coverage B arising in whole or in part, out of actual, alleged, threatened or suspected contact with, exposure to, existence of, or presence of, asbestos.

The attachment of this endorsement may result in a restriction of coverage.

**EXCLUSION-LEAD  
ADVISORY NOTICE TO POLICYHOLDERS**

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**COMMERCIAL GENERAL LIABILITY**

**GL P 002 07 08**

This Notice does NOT form a part of your insurance contract. The Notice is designed to alert you to coverage changes when the exclusion for lead is attached to this policy. If there is any conflict between this Notice and the policy (including its endorsements), the provisions of the policy (including its endorsements) apply. Please read your policy, and the endorsements attached to your policy, carefully.

This Notice contains a brief synopsis of the following endorsement'

- **GL 45 02 02 08—Lead Exclusion**

When the above referenced endorsement is attached to your policy, coverage is excluded for bodily injury under Coverage A arising in whole or in part, out of the actual, alleged, threatened or suspected inhalation of, or ingestion of, lead. In addition, coverage is excluded for property damage under Coverage A and personal and advertising injury under Coverage B arising in whole or in part, out of actual, alleged, threatened or suspected contact with, exposure to, existence of, or presence of lead.

The attachment of this endorsement may result in a restriction of coverage.

**FLORIDA CHANGES—  
CANCELLATION AND NONRENEWAL**

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**COMMERCIAL GENERAL LIABILITY**

**CG 02 20 03 12**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL  
LIABILITY COVERAGE PART  
ELECTRONIC DATA LIABILITY COVERAGE PART  
LIQUOR LIABILITY COVERAGE PART  
POLLUTION LIABILITY COVERAGE PART  
PRODUCT WITHDRAWAL COVERAGE PART  
PRODUCTS/COMPLETED OPERATIONS  
LIABILITY COVERAGE PART**

A. Paragraph 2. of the Cancellation Common Policy Condition is replaced by the following:

**2. Cancellation of Policies in Effect**

**a. For 90 Days or Less**

If this policy has been in effect for 90 days or less, we may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation, accompanied by the reasons for cancellation, at least:

- (1) 10 days before the effective date of cancellation if we cancel for non-payment of premium; or
- (2) 20 days before the effective date of cancellation if we cancel for any other reason, except we may cancel immediately if there has been:

(a) A material misstatement or misrepresentation; or

(b) A failure to comply with the underwriting requirements established by the insurer.

b. For More Than 90 Days

If this policy has been in effect for more than 90 days, we may cancel this policy only for one or more of the following reasons:

- (1) Non-payment of premium;
- (2) The policy was obtained by a material misstatement;
- (3) Failure to comply with underwriting requirements established by the insurer within 90 days of the effective date of coverage;
- (4) A substantial change in the risk covered by the policy; or
- (5) The cancellation is for all insureds under such policies for a given class of insureds.

If we cancel this policy for any of these reasons, we will mail or deliver to the first Named Insured written notice of cancellation, accompanied by the reasons for cancellation, at least:

- (a) 10 days before the effective date of cancellation if we cancel for non-payment of premium; or

- (b) 45 days before the effective date of cancellation if we cancel for any of the other reasons stated in Paragraph 2.b.

B. Paragraph 3. of the Cancellation Common Policy Condition is replaced by the following:

- 3. We will mail or deliver our notice to the first Named Insured at the last mailing address known to us.

C. Paragraph 5. of the Cancellation Common Policy Condition is replaced by the following:

- 5. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. If the return premium is not refunded with the notice of cancellation or when this policy is returned to us, we will mail the refund within 15 working days after the date cancellation takes effect, unless this is an audit policy.

If this is an audit policy, then, subject to your full cooperation with us or our agent in securing the necessary data for audit, we will return any premium refund due within 90 days of the date cancellation takes effect. If our audit is not completed within this time limitation, then we shall accept your own audit, and any premium refund due shall be mailed within 10 working days of receipt of your audit.

## App.204a

The cancellation will be effective even if we have not made or offered a refund.

D. The following is added and supersedes any other provision to the contrary:

### Nonrenewal

- (1) If we decide not to renew this policy, we will mail or deliver to the first Named Insured written notice of nonrenewal, accompanied by the reason for nonrenewal, at least 45 days prior to the expiration of this policy.
- (2) Any notice of nonrenewal will be mailed or delivered to the first Named Insured at the last mailing address known to us. If notice is mailed, proof of mailing will be sufficient proof of notice.

**PRODUCTS/COMPLETED  
OPERATIONS HAZARD REDEFINED**

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COMMERCIAL GENERAL LIABILITY

CG 24 07 01 96

POLICY NUMBER: 053CP00228

This endorsement modifies insurance provided under the following:

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

**SCHEDULE**

Description of Premises and Operations:

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

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

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

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

“Products-completed operations hazard”:

## App.206a

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



## ASBESTOS EXCLUSION

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### COMMERCIAL GENERAL LIABILITY

GL 45 01 02 08

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL  
LIABILITY COVERAGE FORM  
OWNERS AND CONTRACTORS PROTECTIVE  
LIABILITY COVERAGE FORM  
PRODUCTS/COMPLETED OPERATIONS  
LIABILITY COVERAGE FORM

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

2. Exclusions

This insurance does not apply to:

Asbestos

1. “Bodily injury”, “property damage” or “personal and advertising injury” related to the actual, alleged, or threatened presence of, or exposure to “asbestos” in any form, or to harmful substances emanating from “asbestos”. This includes ingestion, inhalation, absorption, contact with, existence or presence of, or exposure to “asbestos”. Such injury from or exposure to “asbestos” also includes, but is not limited to:
  - a. The existence, installation, storage, handling or transportation of “asbestos”;

- b. The removal, abatement or containment of “asbestos” from any structures, materials, goods, products, or manufacturing process;
- c. The disposal of “asbestos”;
- d. Any structures, manufacturing processes, or products containing “asbestos”;
- e. Any obligation to share damages with or repay someone else who must pay damages because of such injury or damage; or
- f. Any supervision, instructions, recommendations, warnings or advice given or which should have been given in connection with the above.

2. Any loss, cost or expense, including, but not limited to payment for investigation or defense, fines, penalties and other costs or expenses, arising out of any:

- a. Claim, “suit”, demand, judgment, obligation, order, request, settlement, or statutory or regulatory requirement that any insured or any other person or entity test for, monitor, clean up, remove, contain, mitigate, treat, neutralize, remediate, or dispose of, or in any way respond to, or assess the actual or alleged effects of ‘asbestos’; or
- b. Claim, “suit”, demand, judgment, obligation, request, or settlement due to any actual, alleged, or threatened injury or damage from “asbestos” or testing for, monitoring, cleaning up, removing, containing, mitigating, treat-

ing, neutralizing, remediating, or disposing of, or in any way responding to or assessing the actual or alleged effects of, ‘asbestos’ by any insured or by any other person or entity;  
Or

- C. Claim, “suit”, demand, judgment, obligation, or request to investigate which would not have occurred, in whole or in part, but for the actual or alleged presence of or exposure to ‘asbestos’.

This exclusion applies regardless of who manufactured, produced, installed, used, owned, sold, distributed, handled, stored or controlled the “asbestos”.

B. The following definition is added to the Section V Definitions:

“Asbestos” means any type or form of asbestos, asbestos fibers, asbestos dust, asbestos products, or asbestos materials, including any products, goods, or materials containing asbestos or asbestos fibers, products or materials and any gases, vapors, scents or by-products produced or released by asbestos, or buildings, structures, or other real or personal property.

## **LEAD EXCLUSION**

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### **COMMERCIAL GENERAL LIABILITY**

GL 45 02 02 08

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL  
LIABILITY COVERAGE PART  
OWNERS AND CONTRACTORS PROTECTIVE  
LIABILITY COVERAGE FORM  
PRODUCTS/COMPLETED OPERATIONS  
LIABILITY COVERAGE FORM**

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

**2. Exclusions**

This insurance does not apply to:

**Lead**

1. “Bodily injury”, “property damage” or “personal and advertising injury” or related to the actual, alleged, or threatened presence of, or exposure to lead in any form. This includes ingestion, inhalation, absorption, contact with, existence or presence of, or exposure to lead, paint containing lead, or any other material or substance containing lead; also includes, but is not limited to:
  - (a) The existence, installation, storage, handling or transportation of lead;

- (b) The removal, abatement or containment of lead from any structures, materials, goods, products, or manufacturing process;
- (c) The disposal of lead;
- (d) Any structures, manufacturing processes, or products containing lead;
- (e) Any obligation to share damages with or repay someone else who must pay damages because of such injury or damage; or
- (f) Any supervision, instructions, recommendations, warnings or advice given or which should have been given in connection with the above.

2. Any loss, cost or expense, including, but not limited to payment for investigation or defense, fines, penalties and other costs or expenses, arising out of any:

- a. Claim, “suit”, demand, judgment, obligation, order, request, settlement, or statutory or regulatory requirement that any insured or any other person or entity test for, monitor, clean up, remove, contain, mitigate, treat, neutralize, remediate, or dispose of, or in any way respond to, or assess the actual or alleged effects of lead paint containing lead, or any other material or substance containing lead; or
- b. Claim, “suit”, demand, judgment, obligation, request, or settlement due to any actual, alleged, or threatened injury or damage

from lead, paint containing lead, or any other material or substance containing lead; or testing for, monitoring, cleaning up, removing, containing, mitigating, treating, neutralizing, remediating, or disposing of, or in any way responding to or assessing the actual or alleged effects of, lead, paint containing lead, or any other material or substance containing lead; by any insured or by any other person or entity; or

- c. Claim, “suit”, demand, judgment, obligation, or request to investigate which would not have occurred, in whole or in part, but for the actual or alleged presence of or exposure to lead, paint containing lead, or any other material or substance containing lead.

This exclusion applies regardless of who manufactured, produced, installed, used, owned, sold, distributed, handled, stored or controlled the lead, paint containing lead, or any other material or substance containing lead.