IN THE SUPREME COURT OF IOWA

No. 23-0156

HEARTLAND CO-OP,
Plaintiff-Appellant

vs.

NATIONWIDE AGRIBUSINESS INSURANCE CO.,
Defendant-Appellee

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE JEFFREY D. BERT
POLK COUNTY NO. LACL152428

APPELLANT'S FINAL REPLY BRIEF

ORAL ARGUMENT REQUESTED

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In order to affirm the district court's and Nationwide's interpretation of the Policy, the Court must find that Heartland's interpretation is unreasonable. Heartland offers a reasonable interpretation of the Policy based on its plain language, and thus Heartland must be permitted to prove at trial that it sustained multiple losses within the meaning of the Policy.

The Policy Nationwide issued to Heartland provides Heartland business income coverage, referred to as "Earnings and Extra Expense" coverage, with limits "for any one loss." (App. 223.) The parties agree that the Income Coverage Part sets a *per loss limit*, and "[u]nder the terms of the Policy's Income Coverage, the $3,000,000 limit applies to Earnings and Extra Expense coverage 'for any one loss.' " (App. 11 ¶ 33; *see also* App. 623 ("The Income Coverage Part imposes a per loss limit.").) The Policy does not, as the district court and Nationwide conclude, provide a limit for "any one occurrence," "any one peril," nor an "aggregate" or "blanket" limit for the Policy period that limits Heartland's coverage for more than one loss.

Nationwide's brief repeatedly mischaracterizes Heartland's position to be that the Policy imposes a *per location* limit; but Heartland's argument is, and always has been, that the Policy sets a *per loss* limit. The meaning of "any one loss" is the issue for appeal. And, because the Policy provides Earnings and Extra Expense coverage "for any one loss," Heartland must be given the opportunity to prove each and every one of its losses under the Policy at trial. The Court should reverse the district court's grant of summary judgment in Nationwide's favor, remand with instructions for the district court to grant Heartland's Motion for Partial Summary Judgment, and allow the case to proceed to trial.

I. THE INCOME COVERAGE PART OF THE POLICY PROVIDES A $3 MILLION LIMIT FOR "ANY ONE LOSS" AND DOES NOT PROVIDE A BLANKET OR AGGREGATE LIMIT

Nationwide admits that "[t]he COP Income Coverage Part imposes a *per loss* limit on coverage" and "[t]hus, the Policy limits coverage under the COP Income Coverage Part to $3,000,000 for 'any one loss.' " (Appellee's Br. 15). Heartland agrees.[1] Nationwide then cites at random

[1] "COP" is an acronym for "Commercial Output Program," which refers to the Policy and includes the Income Coverage Part at issue in this appeal.

to other provisions of the Policy claiming that when "read together" these provisions somehow define the undefined phrase "any one loss" to limit coverage on a per *occurrence* basis. The Policy includes no such "per occurrence" limit for Earnings and Extra Expense Coverage, although it does for other types of coverage. The Court should reject the arguments made by Nationwide.

First, Nationwide confusingly cites to the "insuring agreement" and the Valuation section of the Income Coverage Part and concludes, without explanation, that the provisions when read together define "any one loss" as the "occurrence . . . of direct physical loss or damage at a covered location as a result of a covered peril that interrupts, wholly or partially, an insured's business." (Appellee's Br. 17.) Neither the insuring agreement nor the Valuation section define the phrase "any one loss," and they certainly do not support the definition proposed by Nationwide. This interpretation is not true simply because Nationwide says that it is.

The insuring agreement states that Nationwide "provide[s] the coverages described below," in the Income Coverage Part, when Heartland's business is "wholly or partially interrupted by direct physical loss of or damage to property at *a* 'covered location' . . . ." (App. 218)

(emphasis added). The insuring agreement does not define "any one loss" nor provide any limit on coverage for "any one loss." *Id.* But it does tie business interruption, which is covered, to direct physical loss or damage: at "*a* coverage location." (Emphasis added.) Heartland asks to be covered for nothing more than Nationwide promised.

Similarly, the Valuation section does not define nor provide a limit on coverage for "any one loss." (App. 222.) Further, as pointed out in Heartland's appellate brief, the Valuation section explicitly states it will value Heartland's losses according to Heartland's "accounting procedures and financial records," for which Heartland has provided evidence to show it suffered multiple losses at each covered location. (App. 222, ; 636–39, 655–80.) The Policy expressly makes relevant Heartland's accounting procedures at each of its covered locations when determining what is a "loss" under the Policy.

Nationwide cites to the terms of the Property Coverage Part of the Policy regarding deductibles for property damage. The coverage limits for Earnings and Extra Expense and the deductible for property are two different matters. The Property Coverage Part provides that a deductible applies to property damage "in any one occurrence." (App. 214.)

Nationwide incorrectly assumes that because deductibles are clearly and expressly determined "per occurrence" in the Property Coverage Part, the limits for Earnings and Extra Expense coverage must also be "per occurrence." This argument highlights the fact that Nationwide chose different language for calculating deductibles (*viz.* "each occurrence") than it did when drafting the Earnings and Extra Expense limits. The language for those limits refers only to "any one loss" and makes no mention of "occurrence." On this point, the district court correctly found that "occurrence" and "loss" do not mean the same thing. (App. 130.) Yet Nationwide's Policy interpretation, like the district court's, necessarily requires that they do.

What the district court and Nationwide fail to acknowledge is the fact that while the Policy uses "occurrence" language to describe how deductibles apply it does not use "occurrence" language to describe how Earnings and Extra Expense limits apply—this is a compelling reason for the Court to interpret them differently, rather than the same. *See Boelman v. Grinnell Mut. Reinsurance Co.*, 826 N.W.2d 494, 502 (Iowa 2013) (citations omitted) ("We will not interpret an insurance policy to render any part superfluous, unless doing so is reasonable and necessary

to preserve the structure and format of the provision. Moreover, we interpret the policy language from a reasonable rather than a hypertechnical viewpoint."); *Amish Connection, Inc. v. State Farm Fire & Cas. Co.*, 861 N.W.2d 230, 239 n.2 (Iowa 2015) ("The State Farm policy uses the term 'Specified Causes of Loss' in some provisions and the term 'insured loss' in others. We read the policy as a whole. The terms are not coextensive. . . . Rather, it is clear from reading State Farm's policy as a whole that the terms 'Specified Causes of Loss' and 'insured loss' have different meanings, and a specified cause of loss is not a covered loss under some circumstances."); *Miller v. Marshall Cnty.*, 641 N.W.2d 742, 749 (Iowa 2002) (citations omitted) ("We assume the legislature intends different meanings when it uses different terms in different portions of a statute. If the legislature wanted to refer to annual payments in both qualifications, it could have done so. . . . Each term is to be given effect, so that no single part is rendered insignificant or superfluous.").

Nationwide clearly knew how to draft limits on a per-occurrence basis and deliberately chose instead to provide Earnings and Extra Expense limits *per loss*. When Nationwide intended to set limits "per occurrence," it said so. And when Nationwide intended an "aggregate"

limits for all losses, it said so. For example, as Heartland's summary judgment briefing pointed out, the Supplemental Income Coverage[2] for Computer Virus and Hacking provides:

> d. **Applicable Limit** -- The most "we" pay *in any one occurrence* under this [i.e., Computer Virus and Hacking] Supplemental Income Coverage is $25,000.
>
> The most "we" pay for all covered losses under this Supplemental Income Coverage during each 12-month period of this policy is $75,000.

(App. 220 (emphasis added); App. 54–55). Similarly, the Supplemental Income Coverage for Contract Penalty provides that "[t]he most 'we' pay *in any one occurrence* under this Supplemental Income Coverage is $25,000." (App. 222) (emphasis added). This "per occurrence" language is found in the Income Coverage Part—the very same six page endorsement that provides for the Earnings and Extra Expense coverage claimed by Heartland. But while the "per occurrence" language limits Supplemental Income Coverage (which Heartland does not claim in this case), Nationwide did not use that language to limit the coverage which Heartland claims. Nationwide could have drafted the Earnings and

[2] Heartland is not making a claim under the Supplemental Income Coverages. However, language establishing limits for the Supplemental Income Coverages is relevant for interpreting the limits claimed here by virtue of the very different language used.

Extra Expense provision of the Policy, like it did the Supplemental Income Coverage, to say: " 'We' pay no more than the Income Coverage 'limit' indicated on the 'schedule of coverages' for any one *occurrence*," but it did not. Instead, the Policy reads " 'We' pay no more than the Income Coverage 'limit' indicated on the 'schedule of coverages' for *any one loss*." (App. 223) (emphasis added). The Court must give different meanings to the different words that Nationwide chose to use in setting various coverage limits in the Policy.

II. THE SCHEDULE OF COVERAGES PROVIDES A $3 MILLION LIMIT FOR "ANY ONE LOSS," BUT DOES NOT CREATE A BLANKET OR AGGREGATE LIMIT

Nationwide correctly points out that the Income Coverage Part's "How Much We Pay" provision refers to the schedule of coverages to determine the limit "for any one loss." (App. 223.) The schedule of coverages for the Income Coverage Part instructs the parties to "Refer To Scheduled Locations" for the coverage limit. (App. 227.) The Location Schedule, then provides:

AAIS
CO 1052 04 02

LOCATION SCHEDULE

(The entries required to complete this endorsement
will be shown below or on the "schedule of coverages".)

Coverage provided by the Commercial Output Program coverage parts applies only to the "covered locations" described below. Refer to "schedule of coverages" for applicable "limits", additional coverages, and applicable coinsurance percentage.

SCHEDULE

Loc. No.	Covered Locations (Describe)
087	ALL "COVERED LOCATIONS"

Covered Property/Coverage Provided (Describe)	Limit
FENCES AT "COVERED LOCATIONS"	$50,000
RAILROAD TRACKS AT "COVERED LOCATIONS"	$2,000,000
BUSINESS PERSONAL PROPERTY CONSISTING OF SIGNS	$50,000
EARNINGS AND EXTRA EXPENSE	$3,000,000
BUSINESS PERSONAL PROPERTY CONSISTING OF "COMPUTERS"	$2,000,000

(App. 230.) The Location Schedule does *not* provide an aggregate limit on coverage for "all covered locations." The reference to "ALL 'COVERED LOCATIONS'" merely provides that the Policy does not limit business income coverage to particular locations, i.e., the Policy provides business income coverage to all covered locations with a limit of $3,000,000 "for any one loss."

Nationwide argues that the Location Schedule provides an aggregate $3 million per occurrence limit, but Nationwide can only do so by changing the language of the Income Coverage Part from: "'We' pay no more than the Income Coverage 'limit' indicated in the 'schedule of coverages' for any one loss," to what it argues is an "equivalent" phrase from the Locations Schedule: "'We' pay no more than $3,000,000 for All Covered Locations for any one loss." (Appellee's Br. 20). The fact that Nationwide must change the Policy language to reach its interpretation shows the Policy does not provide the "blanket" or aggregate limit Nationwide claims. Further, Nationwide has inserted the preposition "for" so that it precedes "ALL 'COVERED LOCATIONS'" and Nationwide has reversed the order of the phrase "All Covered Locations" and "$3,000,000" from how they appear in the Location Schedule. (*See* App.

230.) If, instead, the Court conducts the same exercise using the words exactly as they appear in the Location Schedule, the Court would reach a different result:

> "We" pay no more than ~~the Income Coverage "limit" indicated in the "schedule of coverages"~~ – *All "Covered Locations"* – *$3,000,000* – for any one loss.

(*Compare* App. 223, *with* App. 230.)[3] Reading the Income Coverage Part limitation in this way quotes the Policy verbatim, maintains the order of the Policy language, and does not add any words. This illustration supports Heartland's reasonable interpretation that there is a $3 million limit "for any one loss," and the per loss limit potentially applies to all locations.

Finally, Nationwide argues that Heartland "could have checked the other box in the schedule of coverages" to reach its interpretation of the Policy, and that it "elected not to purchase" the coverage Heartland now claims. But this argument suffers from two problems. First, there is no evidence that Heartland "chose" not to "check the box"; there is no evidence at all as to why the box is not checked. The district court made

[3] The italicized language comes directly from the Locations Schedule; the hyphens do not appear in the Policy and are used to represent page or text breaks.

an improper inference against Heartland and in Nationwide's favor regarding Heartland's actions, decisions, or intentions surrounding this checked box. This is contrary to the summary judgment standard which requires the Court to construe all reasonable inferences in favor of the non-moving party. *See Morris v. Steffes Grp., Inc.*, 924 N.W.2d 491, 495 (Iowa 2019).[4] And, critically, the district court made this impermissible adverse inference on a point which it considered the "answer turns on." (App. 133.) The Court on appeal must therefore disregard any notion that Heartland made a "choice" not to elect per-loss Earnings and Extra Expense coverage.

Second, the limits provided by the Income Coverage Part and the limit option in the Schedule of Coverage are entirely different. The Earnings and Extra Expense limits in the Policy are "for any one loss," and the limits in the unchecked box in the Schedule are "for loss at any one 'covered location.'" These phrases are not equivalents; they do not mean the same thing. The limit provided by the Policy "for any one loss"

[4] Nationwide and Heartland both filed cross-motions for summary judgment, but the court must still view the record in the light most favorable to the non-moving party. When the district court considered Nationwide's motion, it was required to construe all facts and inferences in Heartland's favor.

does not impose an aggregate limit; there could be a separate limit that applies for different losses at the same location. The limit provided if the "box" were checked imposes a per location aggregate limit. The parties, however, agree that the Policy does not have an aggregate limit for the Earnings and Extra Expense coverage sold to Heartland—without an aggregate limit, there can be more than one loss at a covered location or more than one loss at multiple covered locations. Nationwide is obligated to pay each loss. If the "box" were checked, Nationwide would not be obligated to do so.

Had the "box" in the Schedule of Coverages been checked, Heartland agrees there would most certainly have been a per location aggregate limit. This is not Heartland's interpretation of the Policy, and the district court was simply wrong in concluding that "Heartland's core argument falls directly under the unmarked box." (App. 133.) As previously noted, Heartland has always argued that the Policy provides a "per loss" limit and not simply a "per location" limit. (Appellant's Br. 24). Heartland is arguing that it must be permitted under the Policy to prove each of its losses, that it suffered distinct Earnings and Extra

Expense losses at each of its covered locations, and that each of its losses are limited to the $3 million limit provided by the Location Schedule.

III. THE PLAIN LANGUAGE OF THE POLICY DOES NOT CREATE AN AGGREGATE OR BLANKET LIMIT

Heartland has offered a reasonable interpretation of the Policy based on its plain language. The Iowa Supreme Court has declared the word "any" to be unambiguous. *Lange v. Lange*, 520 N.W.2d 113, 117 (Iowa 1994). And the supreme court interpreted the word "any" in a way that was actually favorable to the insurer. *See Thomas v. Progressive Cas. Ins. Co.*, 749 N.W.2d 678, 683–84 (Iowa 2008) (approving the interpretation of the word "any" in an insurance exclusion to "'mean [ ] "every," "all," "the whole of," and "without limit"'"). The Court may not disregard the plain meaning of the word "any" just because it favors the insured in this case. The word "any" should be given no other, or more restrictive, meaning in the description of the coverage limits for Earnings and Extra Expense in the Policy.

Nationwide claims that its interpretation is the only reasonable interpretation, but Nationwide's interpretation is internally inconsistent. First, Nationwide acknowledges that the Policy provides a "per loss" limit. (App. 22, ¶ 33; *see also* App. 622.) Next, Nationwide

acknowledges that the Policy permits multiple losses during the Policy period and that each successive loss under the Policy is covered up to the $3 million limit in the Locations Schedule. (Appellee's Br. 34–35 ("Nationwide's policy contains a 'restoration of limits' clause specifying . . . that any loss paid under the COP Coverages *does not reduce the limits applying to a later loss*." (emphasis added)).) Yet, Nationwide (and the district court) conclude that the phrase "any one loss," is limited on an aggregate, blanket basis to all covered locations and thus does not permit Heartland to show it sustained multiple losses from the windstorms. If Nationwide's argument were correct, then the Policy would not permit successive losses, which Nationwide has already admitted that it does.

Heartland does not ask the Court to replace the word "ALL 'COVERED LOCATIONS'" to "EACH 'COVERED LOCATION'" in the Locations Schedule. As noted above, the "all covered locations" language in the Locations Schedule simply indicates that the $3 million limit for any one loss applies to all covered locations, consistent with Heartland's interpretation that it must be permitted to prove it suffered distinct losses from the derecho.

Nationwide makes a muddled argument regarding the distinction between Supplemental Income Coverages and Income Coverage Extensions. Heartland has not made a claim under either of these provisions. The Income Coverage Extensions Part provides that the coverage extensions "are part of and not in addition to the applicable Income Coverage 'limit.'" (App. 219.) By contrast, the Supplemental Income Coverages state that "[u]nless otherwise indicated, the following Supplemental Income Coverages apply separately to each 'covered location.'" (App. 220.) Clearly, the Supplemental Income Coverages are separate and distinct from the core coverage for Earnings and Extra Expense. The former coverages should not be used to limit or restrict the latter.

Nationwide then points to other portions of the Policy where coverage is limited on a per location or per occurrence basis—these portions of the Policy favor Heartland's argument that the Court must give meaning to Nationwide's choice, as the drafter of the Policy, to impose a per *loss* limit for Earnings and Extra Expense coverage under the Income Coverage Part. *See Boelman*, 826 N.W.2d at 502; *Amish*

Connection, Inc., 861 N.W.2d at 239 n.2; *McKinley*, 860 N.W.2d at 882; *Miller*, 641 N.W.2d at 749.

Nationwide finally resorts to an absurdity argument based on completely separate coverage under the Property Coverage Part for Business Personal Property Consisting of Computers. This section of coverage is irrelevant to whether Heartland's Earnings and Extra Expense losses are covered under the Policy. Further, there is no record evidence as to why Nationwide provided *any* of the coverage, deductibles, or limits that it did—presumably Nationwide weighed the risks and benefits of the coverage it provided Heartland. Nationwide has not introduced any record evidence regarding how it weighed these risks and balances, thus it cannot now claim it would be absurd for it to have provided a per loss limit for Earnings and Extra Expense coverage.

One reason Nationwide *might* provide $2,000,000 coverage for computers and $10,000,000 coverage for mobile equipment, but provide $90,000 coverage for remaining building and business personal property is that at the particular location Nationwide did not find value in much of the remaining property. For example, at many other locations, the coverage provided for business personal property excluding stock, mobile

equipment, and computers is a seven-figure limit. (*See, e.g.*, App. 247 (providing over $13 million coverage for Des Moines, Iowa location), 252 (providing over $23 million coverage for Fairfield, Iowa location), 254 (providing over $34 million coverage for Gilman, Iowa location).) Other locations omit coverage for the remaining business personal property all together. (*See, e.g.*, App. 262 (Imogene, Iowa).) It is not Heartland's burden to prove why or how Nationwide assessed the risks associated with the Policy—Nationwide has not met its burden to prove it would be absurd for it to provide $3 million Earnings and Extra Expenses for each of Heartland's losses, as Nationwide promised to do.

In the same vein, Nationwide argues that because the premium it charged "pales in comparison to" other premiums it charged, this indicates the Policy was not intended to cover $3 million for each of Heartland's distinct losses. This argument fails for two reasons.

First, the cases cited by Nationwide regarding the extent Iowa courts consider premiums when determining the scope of coverage are inapposite because in those cases the insurer presented evidence that the premium charged was relevant based on the language of the policy or the negotiations between the parties. In *Boelman v. Grinnell Mutual*

Reinsurance Co., the plaintiffs purchased a policy where the particular endorsement at issue explicitly stated a particular exclusion of coverage applied "[i]n consideration of the premium charged." 826 N.W.2d 494, 499 (Iowa 2013). The plaintiffs argued the endorsement made the policy ambiguous as to whether it removed all exclusions under the policy or just one particular exclusion. *Id.* at 502–03. The Iowa Supreme Court concluded that the endorsement clearly modified the policy and did not make the policy ambiguous. *Id.* The court reasoned that "[t]here is no indication in the record that the parties intended the endorsement to have the sweeping effect of removing other policy exclusions" and "[t]he fact that Grinnell Mutual only charged $27 annually in premiums for the added protection under the endorsement does not correlate with the substantially elevated risk they would have assumed if they had removed all exclusions." *Id.* at 505. The court only considered evidence of the premium where the endorsement claimed the modification to the policy was in exchange for the premium charged. By contrast, no portion of the Policy nor any other evidence indicates the premium Nationwide charged Heartland for Earnings and Extra Expense coverage was calculated with any reference to any other coverage Nationwide provided.

Nationwide stretches other cases which only briefly reference the word "premium" to create a non-existent policy of Iowa courts to consider premiums when determining the scope of coverage. *Nat'l Sur. Corp. v. Westlake Inv., LLC*, 880 N.W.2d 724 (Iowa 2016) (discussing standard-form commercial general liability premium which historically differed depending on whether insured purchased an optional endorsement to expand coverage); *N. Star Mut. Ins. Co. v. Holty*, 402 N.W.2d 452 (Iowa 1987) (finding separate policies were issued for farm liability and motor vehicle insurance because motor vehicle liability "is a separate and distinct risk" from farm liability for which a separate premium would be issued); *Iowa Nat. Mut. Ins. Co. v. Fid. & Cas. Co. of New York*, 128 N.W.2d 891 (Iowa 1964) (discussing policy that charged one premium for one vehicle and a different premium for a different vehicle). There is no broad-reaching policy of Iowa courts to determine the scope of an insurance policy's coverage based merely on the amount of a premium charged and without any extrinsic evidence that the premium charged was based on or resulted from a particular policy provision, endorsement, or negotiation between the parties.

Second, Nationwide has not introduced any evidence that it calculated Heartland's premiums based on the scope of its Earnings and Extra Expense coverage, as Nationwide attempts to interpret that scope here. Thus, it has no basis to conclude that the premium charged "pales" in comparison to what the premium would have been if Nationwide imposed the per occurrence limit it claims applies. To the extent the Court has previously considered the premium charged when determining the scope of coverage, it has only done so when the parties presented evidence related to how the premium was calculated or the policy explicitly stated that coverage was based on the premium charged.

More importantly, Nationwide claims that "[n]o reasonable insured could expect $258,000,000 worth of coverage . . . for a premium of $2,760 given the comparable premiums and limits for the other coverages." (Appellee's Br. 29.) The district court appeared troubled by the idea that the Policy provided unlimited coverage for "each and every loss" without a per location or per occurrence limit. (App. 134–35.) But Nationwide admits that the Policy permits separate limits for successive losses, i.e., that there could be multiple losses during the Policy period each with a $3 million limit. (Appellee's Br. 34–35) ("[A]ny loss paid under the COP

Coverages does not reduce the limits applying to a later loss. . . . Nationwide has never taken the position that the earnings and extra expense coverage limit applies to all losses during a given policy period."). In fact, as Nationwide must admit, the Policy contemplates the insured may have an *unlimited* number of Earnings and Extra Expense losses, each with its own a $3 million limit. And because the Policy covers each and every one of these losses, Nationwide cannot argue that it would have charged Heartland a lower premium for the coverage it must admit the Policy provides.

Assume that on August 10, 2020, windstorms physically damaged one of Heartland's covered locations in western Iowa, and then later in the day a fire physically damaged one of Heartland's covered locations in eastern Iowa. Assume each location suffered business income and extra expense losses that together exceeded $3,000,000. Do these losses each constitute a separate loss such that Nationwide would be obligated to pay for each loss subject to two separate limits of $3,000,000? Nationwide must admit that in this hypothetical it would be obligated to pay for each of Heartland's losses up to $3,000,000. The question remains: why, under the Policy, is this scenario any different than the argument advanced by

Heartland? The Policy does not make a distinction between the nature of the "occurrence" or the type of the "peril" that might cause a business interruption loss at one location on a particular day and a different type of event that might cause a business interruption loss at a different location on the same day. The type of peril could be the same—in this case, windstorms—but the *losses* are separate and distinct at each location.

Nationwide engages in hindsight bias to conclude the premium it charged for the coverage it provided was unreasonable based on the events that happened after the Policy was in place. It is entirely reasonable that Nationwide would have charged a low premium for the amount of coverage it provided if it concluded there was a low risk that Heartland would suffer severe losses at a majority of its locations. That Nationwide may have charged a higher premium for the amount of coverage it is now required to provide does not change the amount of coverage Nationwide provided under the Policy.

The Court is capable of interpreting the plain meaning of the phrase "any one loss." As noted in Heartland's opening brief, the phrase "any one loss" provides coverage for *each and every* Earning and Extra Expense

loss Heartland has suffered, so long as the loss is within the Policy period and the loss results from physical damage to a covered location. Heartland has introduced sufficient evidence that it sustained multiple losses to survive summary judgment. Heartland requests the Court reverse the district court and allow Heartland to prove the losses it sustained under the Policy at trial.

IV. The Policy Imposes A "Per Loss" Limit Without Regarding To Whether There is A Single or Multiple Covered Perils.

Nationwide next argues that "given the nature of earnings and extra expense coverage," the Policy does not permit Heartland to sustain multiple losses from a covered peril. Nationwide first argues that Heartland's losses are "determined in the aggregate" because the Policy states it covers "actual loss of net income." (Appellee's Br. 31; App. 218.) The Policy provides:

> **EARNINGS**
>
> "We" cover "your" *actual loss of net income (net profit or loss before income taxes)* that would have been earned or incurred and continuing operating expenses normally incurred by "your" "business", including but not limited to payroll expense.

(App. 218) (emphasis added). Further, the "insuring agreement," as Nationwide refers to it, states:

COVERAGE

"We" provide the following coverage unless the coverage is excluded or subject to limitations.

"We" provide the coverages described below during the "restoration period" when "your" "business" is necessarily wholly or partially *interrupted by direct physical loss of or damage to property at a "covered location"* or in the open (or in vehicles) within 1,000 feet thereof as a result of a covered peril.

(App. 218) (emphasis added). The italicized language shows that the "loss" under the Income Coverage Part is based on the interruption due to physical loss or damage at *a covered location* and not the "interruption" to the company as a whole as Nationwide suggests. This interpretation is consistent with the restoration period, as noted in Heartland's opening brief, because the restoration period for each loss begins at a different time that each covered location sustained a direct physical loss or damage to property. (App. 377.)

The supreme court has previously considered business interruption coverage and opined that "[a] business interruption policy provides use and occupancy coverage tied to the insured premises." *Steel Prod. Co. v. Millers Nat. Ins. Co.*, 209 N.W.2d 32, 38 (Iowa 1973) (*citing* 4 Appleman, Insurance Law and Practice s 2329 (1969)). Further, "[i]t is the effect of interruption of such *use and occupancy* on gross earnings of the business

which is insured. Interruption of use and occupancy continues from the date of damage to the date of substantial restoration of the insured *premises*." *Id.* Thus, the supreme court has previously acknowledged that a business interruption "loss" is necessarily tied to the damage or destruction of the insured's physical property. Similarly, in this case, the loss of "use and occupancy" for each of Heartland's locations covered by the Policy was different and the restoration period was different. Nationwide should be required to honor the purpose of business income coverage and treat Heartland's losses of use and occupancy at each location as separate losses subject to separate limits.

Thus, the Policy language is consistent with Heartland's interpretation that it is entitled to prove each of its losses, at each of its covered locations, up to the $3 million limitation in the Location Schedule.

Nationwide briefly discusses the Income Coverage Part's provision which states " 'We' cover 'your' actual loss of net income (net profit or loss before income taxes) that would have been earned or incurred and continuing operating expenses normally incurred by 'your' 'business.' " (App. 218.) What Nationwide is really arguing is whether Heartland is

one or multiple "businesses," which is irrelevant. Regardless as to whether Heartland could be considered one or multiple businesses, Heartland sustained multiple *losses* under the Policy.

Further, "loss of net income" in the context of business income coverage does not refer to whether the company as a whole made a profit on its balance sheet at the end of the year. Richard P. Lewis & Nicholas M. Insua, *Business Income Insurance Disputes* § 3.03. For example, in *Orrill, Cordell, & Beary, L.L.C. v. CNA Ins. Co.*, the insurance company argued that the business income policy did "not insure [plaintiff] for contingency fee losses, but rather [plaintiff's] business income as a whole," and because the insured's "business income *increased* . . . during the period of restoration," the insurance company argued it was not required to pay for any business income loss. No. CIV.A. 07-8234, 2009 WL 701714, at *2 (E.D. La. Mar. 16, 2009). The court found that because the insured showed a loss to its contingency fee income, even if it had an increase in other "stream[s] of income," it was entitled to recover the amount of its loss of the contingency fee income. *Id.* at *2–3. Importantly, the Policy's Coverage section, provides that it covers the "actual loss of net income" that "would have been earned" but for the "interrupt[ion] by

a direct physical loss of or damage to property at a 'covered location.' " (App. 218.) Heartland has produced sufficient evidence to show it had an actual loss of net income that would have been earned but for the interruption at each of its covered locations.

Nationwide next cites to an affidavit of Ryan Boswell in support of its assertion that Heartland only sustained one loss because it "reported a single claim with damage at 48 locations" and Nationwide "applied a single deductible." (Appellee's Br. 31; App. 797.) But Nationwide's argument is not supported by its reference to the record—Mr. Boswell's affidavit stated that "Heartland's Derecho Claim reported damage at 48 locations in Iowa," correctly stating that Heartland claimed losses at multiple locations, but does not state that Heartland filed a "single" claim. (App. 797, ¶ 4.) Nationwide paid what it believed was the limit for Income and Extra Expense loss; there is no evidence Nationwide required Heartland to submit a loss claim based on the actual loss of net income for the entire company at all locations. In fact, Nationwide represented to Heartland that its $3,000,000 payment "towards the business interruption portion of the claim . . . does not prevent [Heartland] from making further inquiries regarding the earnings and extra expense

coverage." (App. 626.) Nationwide cannot argue that Heartland was required to submit multiple claims for each of its losses.

Nationwide argues that because two endorsements in particular, The Occurrence Deductible Endorsement and Windstorm or Hail Deductible Endorsement use the term "occurrence," it "reveals an intention to treat all loss or damage from a weather condition such as a windstorm as a single occurrence with a corresponding deductible and coverage limit as opposed to separate losses." (Appellee's Br. 33–34). Any arguments regarding deductibles are illogical because, first, Heartland does not make a claim under either the Windstorm or Hail Deductible Endorsement nor The Occurrence Deductible Endorsement. And, second, there is no applicable deductible under the Income Coverage Part as the Policy refers to "the deductible amount stated on the 'schedule of coverages,'" and there is no deductible under the Income Coverage Part of the Schedule of Coverages. (App. 214, 227–28.) The Court should disregard Nationwide's references to deductibles entirely.

Nationwide claims its act of charging Heartland a single deductible is a "course of conduct" which "reveals the parties' intent." (Appellee's Br. 31). This argument fails for several reasons. First, Nationwide has failed

to preserve error on any "course of conduct" argument. There is no evidence of any "course of conduct" by Heartland that it reported a "single claim with damage at 48 locations." The parties agreed that the loss at location No. 9 (Chelsea) exceeded the $3,000,000 Policy limit; Nationwide (because of the position it took and has taken in these proceedings on the limit) paid $3,000,000. Nationwide applied no deductible. (App. 798.) The evidence shows no course of conduct by the parties that provides any support for Nationwide's position, which is why Nationwide did not advance a course of conduct argument in the district court.

Nationwide does not claim a "course of conduct," *i.e.*, a series of transactions, communications, or some other events showing an ongoing relationship between the parties, but rather claims that in one transaction, by Nationwide unilaterally applying a single deductible after Heartland submitted its claim to Nationwide,[5] there is evidence of a course of conduct.

[5] As noted earlier, Nationwide's argument that it charged Heartland a "single deductible" is not supported by its reference to the record and is puzzling because the Policy *does not even have* a deductible for Earnings and Extra Expense coverage. (*See* App. 214, 227–28.) This is yet another reason for the Court to disregard Nationwide's arguments.

Second, Nationwide continues to mischaracterize Heartland's reasonable interpretation of the Policy. Heartland does not claim the Policy provides a per location limit—it provides a *per loss limit*, and thus any applicable deductible would be applied *per loss* rather than per location. As it happens, the proof of each loss relates to different locations. Third, even if there *were* a deductible for coverage under the Income Coverage Part, the fact that the deductible is applied "per occurrence" does not mean that the limits for Earnings and Extra Expense coverage are also "per occurrence," when the language describing those limits refers only to "any one loss" without reference to an "occurrence."

Finally, as discussed above, the fact that the Policy uses "occurrence" language to describe how deductibles apply but does not use "occurrence" language to describe how Earnings and Extra Expense limits apply is a compelling reason for the Court to interpret them differently, rather than the same. Nationwide clearly knew how to draft limits on coverage "per occurrence" and decided not to do so with regards to Business Income Coverage. The Court must give meaning to the different words, *loss* versus *occurrence* that Nationwide chose to use.

V. Heartland's Claim *Does* Involve Successive Losses, Which Nationwide Admits Are Covered Under the Policy

Contrary to Nationwide's argument that "Heartland's claim does not involve successive losses," Heartland's claim *does* involve successive losses under the Restoration of Limits clause. (Appellee's Br. 34–35.) The Restoration of Limits is entirely consistent with Heartland's interpretation of the Earnings and Extra Expense limits, it provides:

> [A]ny loss 'we' pay under the Commercial Output Coverage Program coverage does not reduce the 'limits' applying to a later loss.

(App. 216.) Heartland could and did experience losses at different times. The reports of the derecho utilized by Nationwide in its Motion for Summary Judgement reflect that the windstorms did not strike all covered locations simultaneously. (App. 793.) The Restoration of Limits clause indicates that the limit applicable to a loss suffered at one covered location early in the day would not reduce the "limits" that apply to a later loss in the day at a different covered location, so long as Heartland suffered distinct losses at each location. (App. 216.) The Policy then provides that Nationwide will pay Heartland for "any one loss," up to the $3 million limit as indicated in the Location Schedule. (App. 223, 227, 230.) Thus, the Policy clearly permits an insured to incur multiple Earnings and Extra Expense losses, each with a limit of up to $3 million

in coverage. Heartland must be permitted to prove each of the losses it sustained at trial up to the $3 million limit "for any one loss." (App. 223.)

VI. Heartland Preserved Error On Its Claim That The Derecho Involved Multiple Storms

Nationwide claims that Heartland failed to preserve error on its alternative argument that there is a factual dispute regarding whether the derecho is a single or multiple covered perils based on Iowa Rule of Appellate Procedure 6.903(2)(g). Rule 6.903 requires that a party provide where in the record "the issue was raised and decided," the standard and scope of appellate review, and citations of authority in support of an issue. Heartland's appellate brief noted that the district court found the derecho constituted only one storm, that the scope of review on summary judgment is for corrections of errors at law, and that the Court must view the record in the light most favorable to the non-moving party under various cases. Appellant's Br. 20–21, 34 n.1. If the Court finds it must reach this issue by defining "loss" based on whether there is one or multiple covered perils, contrary to the language of the Policy, then Heartland has preserved error on its argument that there is a genuine dispute of material fact as to whether there was a single covered peril.

Heartland repeatedly stated that whether the derecho was a single storm was a factual dispute distinct from the district court's interpretation of "any one loss" in its summary judgment briefing. (*See* App. 36, n.1 ("Whether the windstorms on August 10, 2020 should be regarded as a single 'occurrence' is the subject of a factual dispute. For purposes of Heartland's Motion, this factual dispute is immaterial. Heartland's Motion rests on the premise that Nationwide's BI Coverage limits are a function of the number of "losses" Heartland suffered; whether there is one or more "occurrence" is irrelevant to the policy language the court is asked to interpret and to Heartland's Motion."); App. 110 ("Whether the derecho was one 'occurrence' or several should ultimately prove immaterial to the pending summary judgment motions. This is a factual dispute but one which has nothing whatsoever to do with the meaning of 'any one loss.'"); App. 110, n.1 ("If the Court were to determine that the limits of BI Coverage are somehow a function of an 'occurrence,' a trial would be necessary to resolve the factual dispute as to whether the derecho was one 'occurrence' or more than one 'occurrence.' For the reasons set out in Heartland's briefs, such a trial is completely unnecessary."); App. 113 ("The 'causation' test discussed by

Nationwide assumes a per occurrence limit. As noted earlier, if there were a per occurrence limit for BI Coverage, which there most certainly is not, there is a factual issue for trial on the question of whether the derecho was one or more than one occurrence." (citations omitted)).) As stated above, the Court's interpretation of the phrase "any one loss" in the Policy is immaterial to whether the derecho was one or multiple storms, but if the Court finds it must reach this issue it is an issue of fact that cannot be decided by the Court as a matter of law.

CONCLUSION

Heartland respectfully requests the Court interpret the plain language of the Policy and find that the different terms Nationwide used throughout the Policy—loss, blanket, and occurrence—provide different types of coverage. The Court must give meaning to the Policy's unambiguous language that provides Earnings and Extra Expense coverage for "any one loss" under the Policy and allow Heartland to prove its distinct losses, at each covered location, at trial. For the reasons stated above and previously in Heartland's appellate brief, the Court should reverse the district court's grant of summary judgment and remand to

direct the district court with instructions to grant Heartland's Motion for Partial Summary Judgment.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rules of Appellate Procedure 6.903(1)(d) and 6.903(1)(g)(1) because:

This brief has been prepared in a proportionally spaced typeface using Century Schoolbook in 14 font size and contains 6,961 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

July 5, 2023 */s/ Amanda Mason*

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on July 5, 2023, the foregoing document was electronically filed with the Clerk of the Iowa Supreme Court through EDMS, which provides service to all counsel of record.

Clerk of the Iowa Supreme Court

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