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

FINAL BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Heartland's insurance policy with Nationwide has limits of $3,000,000 "for any one loss" because of "'business' . . . interrupted by direct physical loss or damage to property at a 'covered location.'" Many of Heartland's covered locations across Iowa were physically damaged by windstorms on August 10, 2020. Heartland claims the $3,000,000 limit applies to any business income and extra expense loss at a covered location that was damaged. Is Heartland's "per loss" interpretation of the policy's limits for business interruption coverage reasonable?

II. If the $3,000,000 policy limits for earnings and extra expense coverage are determined to be for a per peril combined loss, as the district court concluded, is there a genuine dispute of material fact as to whether there was more than one windstorm (*i.e.*, more than one covered peril) that physically damaged Heartland's covered property on August 10, 2020?

ROUTING STATEMENT

A derecho crossed Iowa on August 10, 2020, entering western parts of the state in the morning, moving through its center during the day, and finally leaving over the eastern border in the afternoon. Plaintiff, Heartland Co-op ("Heartland"), owned a number of business locations across Iowa which were insured by Defendant, Nationwide Agribusiness Insurance Co. ("Nationwide"). Many of Heartland's covered locations were physically damaged by the windstorms at different times of the day. Business operations were interrupted for different periods during the time it took to repair each damaged property.

The Iowa Supreme Court has not interpreted the meaning of the phrase "any one loss" in an insurance policy and whether the phrase "any one loss" permits an insured to suffer more than one business income and extra expense "loss" during a policy period. The Court has recently looked at triggers for business income coverage related to Covid-19, *Wakonda Club v. Selective Ins. Co. of Am.*, 973 N.W.2d 545 (Iowa 2022), but the issues are much different here. Instead of coverage triggers, this case involves the application of business income coverage limits to separate covered locations from weather events that impacted each location at

different times and resulted in different business income and extra expense loss at each location. It is an issue of first impression the Supreme Court should retain. Iowa R. App. P. 6.1101(2)(*c*).

STATEMENT OF THE CASE

I. Nature of the Case

This is a breach of contract and declaratory judgment action. (App. 11–13.) Heartland purchased an insurance policy from Nationwide, policy number COP106061A, in effect from July 1, 2020 through July 1, 2021 ("Policy"). (App. 173–613.) By endorsement, the Policy includes an Income Coverage Part which provides, among other benefits, Earnings and Extra Expenses coverage. (App. 218.) This particular type of insurance covers lost net income and extra expenses because of business interruption at a covered location which has been physically damaged; it pays benefits during the reasonable time it takes to restore the insured property. (Id.) The limits for Heartland's Earnings and Extra Expense coverage are $3,000,000 "for any one loss." (App. 223, 230.)

Heartland sustained direct physical damage at 67 of Heartland's scheduled locations from the windstorms passing through Iowa on August 10, 2020. (App. 16, ¶ 6.) Windstorm is a covered cause of loss. (App. 17, ¶ 14.) Heartland claims that it sustained an Earnings and Extra Expense loss at each of the covered locations that were damaged. Heartland's claims for separate losses are supported by physical damage

that occurred at different times at the different locations, different "restoration periods" for each location, and business records that were regularly maintained by Heartland reporting profit and loss for each respective location. (App. 377, 636–39, 655–80.) The total for all of Heartland's Earnings and Extra Expense losses exceeds $3,000,000. (App. 655–80.) Nationwide, however, paid Heartland only $3,000,000 for all of Heartland's business income losses; Nationwide denied that there was any coverage for losses exceeding the amount it paid. (App. 23 ¶¶ 38–39; App. 622–27, 616–20, 633.) Heartland claims this was a breach of Nationwide's Policy.

II. Disposition of the case in the district court

Heartland filed a Petition for breach of contract and declaratory judgment against Nationwide. (App. 7–14.) The matter was transferred to the Iowa Business Specialty Court. Heartland then filed a Motion for Partial Summary Judgment. (App. 29–30.) Nationwide filed its own Motion for Summary Judgment. (App. 76–77.) The parties' motions asked the district court to interpret the meaning of the phrase "any one loss" as applied to the limits of the Earnings and Extra Expense coverage.

After a hearing on October 28, 2022, the district court issued a Ruling denying Heartland's Partial Motion for Summary Judgment and granting Nationwide's Motion for Summary Judgment. (App. 122–41.) The district court concluded: "that the phrase 'any one loss' means the $3 million limit applies to the *combined loss at all covered locations as a result of a covered peril*," and that the derecho occurring on August 10, 2020 was a "single weather event," which, in the district court's view, was a single "peril." (App. 138, 140) (emphasis added). The district court then dismissed Heartland's Petition. (App. 141.) Heartland timely appealed. (App. 143.)

STATEMENT OF THE FACTS

A. The Parties

Heartland operates a member-owned cooperative that provides agricultural products and services to farmers across Iowa and other states. (App. 16, ¶ 5.) Heartland conducts a diverse set of business operations at each location, which at any particular location may include: storing and trading grain, selling fuel, or selling agronomy-related products and services. (App. 636–39.) Nationwide is a property and casualty insurance company based in Iowa. (App. 15, ¶¶ 2–3.)

B. The Policy

The Policy includes two coverage forms that insure business income and extra expense losses: (1) the Commercial Output Program Income Coverage Part (the "Income Coverage Part"); and (2) an endorsement that amends the definition of "restoration period" in the Income Coverage Part. (App. 218–23, 377.) The principal coverage provided by the Income Coverage Part is for Earnings and Extra Expense. (App. 218.) The "restoration period" is integral for determining and measuring losses covered under the Income Coverage Part. (App. 377.)

The Policy language describing the limits for Earnings and Extra Expense coverage is found in the following provision:

> **HOW MUCH WE PAY**
>
> ...
>
> "We" pay no more than the Income Coverage "limit" indicated on the "schedule of coverages" *for any one loss*. Payment for earnings, extra expense, and "rents" combined does not exceed the "limit".

(App. 223) (emphasis added). 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. 23 ¶ 33; *see also* App. 622 ("The Income Coverage Part imposes a per loss limit.").)

The insuring clause for Earnings and Extra Expense coverage provides:

> **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"

(App. 218.) This insuring clause triggers Earnings and Extra Expense coverage for Heartland's "'business' . . . interrupted by direct physical loss of or damage to property at a 'covered location.'" (Id.)

The Policy provides two types of general coverage under the Income Coverage Part: Earnings and Extra Expense. The Earnings coverage 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," … .

(Id.) The Extra Expense coverage provides:

> **EXTRA EXPENSE**
>
> "We" cover only the extra expenses that are necessary during the "restoration period" 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 peril.
>
> ….
>
> "We" will also cover any extra expense to reduce the interruption of "business" if it is not possible for "you" to continue operating during the "restoration period".
>
> To the extent that they reduce a loss otherwise payable under this Coverage Part, "we" will cover any extra expenses to:
>
> 1. repair, replace, or restore any property;
>
> ….

(*Id.*) The Income Coverage Part also contains a Valuation section, which—significantly—states in part that: "[i]n determining an earnings loss 'we' consider . . . 'your' accounting procedures and financial records." (App. 222.)

By endorsement, the Income Coverage Part defines the "restoration period" as:

> 1. The time it should reasonably take to resume "your" "business" to a similar level of service beginning:

> a. for earnings, after the first 72 hours (unless otherwise indicated on the "schedule of coverages") following the direct physical loss of or damage to property at a "covered location" that is caused by a covered peril; and
>
> b. for extra expenses, immediately following the direct physical loss of or damage to property at a "covered location" that is caused by a covered peril.
>
> The "restoration period" ends on the date the property should be rebuilt, repaired, or replaced or the date business is resumed at a new permanent location. This is not limited by the expiration date of the policy.

(App. 377.) The start of the "restoration period" is measured for lost earnings in hours following direct physical loss to a particular covered location; it is measured immediately after physical loss for extra expense. (Id.) The start of the restoration period is different for each location where damage was sustained at a different time of the day. (Id.). And the end of the restoration period is also different for each covered location depending on when a particular location was or could reasonably have been restored to operations. (Id.)

A "covered location" under the Policy is "any location or premises where 'you' [*i.e.* Heartland] have buildings, structures, or business personal property covered under this coverage." (App. 188.) There is no dispute that Heartland's claims are based on physical damaged to covered locations.

The limits "for any one loss" provided by the Earnings and Extra Expense coverage refer to the "schedule of coverages." (App. 218.) Two Policy schedules are relevant to determine the amount of those limits: (1) the Schedule of Coverages; and (2) the Location Schedule. (App. 224–30.) The Schedule of Coverages for the Income Coverage Part simply refers to the Location Schedule; the Location Schedule provides the limits at issue in this case:

> **Loc.**
>
> **No.** **Covered Locations (Describe)**
>
> 087 **ALL "COVERED LOCATIONS"**
>
> **Covered Property/Coverage Provided (Describe)**
> **Limit**
>
> …
>
> EARNINGS AND EXTRA EXPENSE $3,000,000

(App. 230.) These $3,000,000 limits are the limits that apply "for any one loss." (App. 223, 230.)

C. The Physical Damage Resulting from the August 2020 Derecho

On August 10, 2020, a derecho passed through Iowa causing extremely strong winds, heavy rain, and several tornadoes. (App. 16, ¶ 6.) A derecho is a widespread, long-lived wind storm that is associated

with a band of rapidly moving individual showers and thunderstorms. (App. 647.) When a storm's damage extends more than 240 miles and includes wind gusts of at least 58 mph along most its length, then the event may be classified as a derecho. (Id.) This derecho began at approximately 6 a.m. on August 10, 2020 in eastern Nebraska and moved east across Iowa, Illinois, Wisconsin, Michigan, Indiana and western Ohio before it weakened around 8 p.m. (Id.) The derecho traveled 770 miles in about 14 hours with an average forward speed of 55 mph and produced estimated straight line winds of 140 mph in Cedar Rapids, Iowa. (Id.)

Heartland owns and operates a number of business locations across Iowa and in other states, with each separate location being a "covered location" under the Policy. (App. 16, ¶¶ 5–6.) Heartland accounts for its business operations, including profit and loss, separately at each of these covered locations. (App. 222.) The August 2020 derecho physically damaged many covered locations at different times during the day. (App. 644–54.) This fact is relevant for purposes of starting the 72 hour "restoration period" for net earnings loss and the immediate start of coverage for extra expense. (App. 377.) In addition, repairs were made

and operations resumed at different times for the various covered locations that were damaged. (App. 636–39). These facts are relevant for purposes of ending the applicable "restoration period" for a particular damaged location. (App. 377.)

D. Claim Submission and Denial

Heartland submitted claims to Nationwide for its Earnings and Extra Expense losses. (App. 616–18.) Nationwide issued Heartland a letter on September 29, 2020 denying coverage for all of Heartland's losses above $3,000,000, regardless of location. (Id.) In that letter, Nationwide quoted language from the Policy without explaining how that language applies to the limits for Earnings and Extra Expense coverage. (Id.) Nationwide then stated:

> The CO1052 location schedule on page 58 of 331 of the Heartland policy states that the Earnings and Extra Expense limit for all "covered locations" is $3,000,000. The schedule states that the coverage provided by the Commercial Output Program coverage parts applies only to the "covered locations" described in the schedule. The schedule lists blanket location #087 as all "covered locations".

(App. 617.) The Location Schedule does not include the preposition "for" in describing how the $3,000,000 limits applies to "All 'Covered

Locations.'" (App. 230.) The Location Schedule also does not include the adjective "blanket" in describing the limits. (Id.)

Nationwide then concluded its denial letter with a statement that its underwriting department charged a single "blanket" premium "for all locations." (App. 617.) There is no evidence in the summary judgment record that this secret intention of Nationwide's underwriting department was ever communicated to Heartland, or that Heartland agreed to it.

Heartland pointed out several omissions and deficiencies in the denial letter. (App. 621.) In particular, Heartland pointed out that the denial did not refer to the operative language in the Income Coverage Part that sets the limits of $3,000,000 "for any one loss." (Id.)

In response, Nationwide sent a second letter and reiterated the idea that the Policy provides a "blanket" limit for Earnings and Extra Expense coverage even though the word "blanket" does not appear in the applicable coverage forms. Nationwide then raised—*for the first time*—the fact that: "If the parties had intended the limit to apply to each location, then they would have checked the per location limit in the box under the Schedule of Coverages for the Income Coverage Part." (App.

624.) Nationwide stood on its denial and refused to pay more than $3,000,000 for all of Heartland's Earnings and Extra Expense losses. (App. 23, ¶¶ 38–39.)

E. Undisputed Facts – Summary Judgment

In support of its Motion for Partial Summary Judgment, Heartland offered evidence related to its losses at six of its Iowa locations; the purpose of this evidence was to demonstrate how different business income losses occurred at each physically damaged location. (App. 44–46, 636–39, 655–80.) The evidence offered by Heartland showed that each location was acquired by Heartland at a different time, had its own office building, provided different services, functioned independently, and that Heartland's accounting procedures and financial records accounted for profit and loss separately by each covered location. (Id.) The detailed evidence from the summary judgment record that supports these points may be found in the Appendix. (App. 655–80.)

Heartland and Nationwide agree on several points concerning the Policy limits. The parties agree that the Income Coverage Part imposes a *per loss* limit: not a *per peril* limit, as the district court concluded. (*Compare* App. 136–37, *with* App. 19 ¶ 20*, and* App. 222.) They agree that

the $3,000,000 Earnings and Expense limits in the Schedule of Locations applies "for any one loss": not "for all combined loss," as the district court held. (*Compare* App. 139, *with* App. 22 ¶ 33, *and* App. 623.) Finally, Heartland and Nationwide agree that the limits are not an aggregate limit for the Policy Period: this means that there could potentially be more than one loss within the Policy Period to which a separate $3 million limit might apply. (App. 64 ("Nationwide has never taken the position that the earnings and extra expense coverage limit applies to all losses during a given policy period.").) The reasoning of the district court, which was used to support its holding, is inconsistent with the parties' agreement on these points.

ARGUMENT

Error Preservation

Heartland preserved error through its Motion for Partial Summary Judgment and resistance to Nationwide's Motion for Summary Judgment.

Scope and Standard of Appellate Review

Appellate review of the district court's grant of summary judgment is for corrections of errors at law. *Lennette v. State*, 975 N.W.2d 380, 388

(Iowa 2022). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* When parties agree summary judgment is proper and file cross-motions for summary judgment, the Court must still view the record in the light most favorable to the nonmoving party. *See id.*; *see also Wright v. Keokuk Cnty. Health Ctr.*, 399 F. Supp. 2d 938, 946 (S.D. Iowa 2005) ("When faced with cross-motions, the normal course for the trial court is to 'consider each motion separately, drawing inferences against each movant in turn.'" (*quoting EEOC v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 603 n.8 (1st Cir. 1995)); *Thompson-Harbach v. USAA Fed. Sav. Bank*, 359 F. Supp. 3d 606, 614 (N.D. Iowa 2019) ("Where a court confronts cross motions for summary judgment, the court views the record in the light most favorable to plaintiff when considering defendant's motion, and the court views the record in the light most favorable to defendant when considering plaintiff's motion.").

I. The District Court Erred in Defining the Phrase "Any One Loss"

No court may rewrite an insurance policy. *See Jesse's Embers, LLC v. Western Agricultural Insurance Company*, 973 N.W.2d 507, 511 (Iowa

2022). The district court first erred in defining "any one loss" by adding terms and conditions that do not stem from any word used in the applicable coverage parts. The district court determined that the phrase "any one loss" is "an unambiguous phrase that means an indiscriminate singular amount of financial detriment *suffered at all locations as a result of a covered peril*." (App. 137) (emphasis added). The district court then went on to restate this holding and "find[] that the phrase 'any one loss' means the $3 million limit applies to the *combined loss at all covered locations as a result of a covered peril*." (App. 138) (emphasis added).

But the limiting condition "suffered at all locations as a result of a covered peril," and the phrase "combined loss at all covered locations as a result of a covered peril," are inapposite to the phase "any one loss." The district court effectively added to the Policy a requirement that the Earnings and Extra Expense limits were "for" an amount that was "*suffered* at all locations"; the limits were only "for" a "*combined* loss;" and the limits were only "for" loss resulting from a single "peril." No longer were the limits simply "for any one loss," as stated in the Income Coverage Part. (App. 223.)

The district court reached this result by aggregating Heartland's Earnings and Extra Expense losses and restricting the limits to those losses that were the result of a single covered peril. The first newly-imposed requirement—aggregation—conflicts with the Policy language extending the limits to "any one loss" and the parties' agreement that the limits were not aggregate limits for the Policy period. The second newly-imposed requirement created what is for all practical purposes a *per occurrence* limit, when the Policy actually provides, and the parties agreed, that it is simply and plainly a *per loss* limit.

The district court's holding also conflicts with its own reasoning. A "peril" is an event that *causes* a "loss"; it is not the loss. A "peril" includes what is generally referred to as an "occurrence"—that is a particular type of accidental event resulting in loss. But the district court made clear—and correctly so—that an "occurrence" is not a "loss." (App. 136) (defining "occurrence" and concluding that "occurrence" and "loss" do not have the same meaning). Yet the district court incorporated into its interpretation of the phrase "any one loss" the additional requirement that the limits are restricted to "a covered peril"; in other words, the district court

imposed an additional "per event" or per "happening" limit when the Policy has none.

The district court justifies its interpretation principally based on a "box" in the Location Schedule that was "not marked." (App. 133.) As it provides critical reasoning for district court's decision, this part of the Ruling should be carefully reviewed:

> Ultimately, the Court finds that the answer turns on the box that is not marked with an "X". The COP's Income Coverage Part does not have the Income Coverage Limit box marked. ***Heartland's core argument falls directly under the unmarked box that had no amount across from it.*** The unmarked box states:
>
> [ ] Income Coverage Limit – The most "we" pay for loss at any one "covered location" is: (Heartland's App. p. 55; Nationwide's App. p. 55).
>
> ***Heartland argues that the policy requires Nationwide to pay up to $3 million for "each and every one" of its covered locations.*** But that is not what the Policy says. The Court notes that if the Income Coverage Limit box had been marked and there had been no amount across from it, then there would be ambiguity. To accept Heartland's argument would render meaningless the ***decision*** to leave the box blank next to the Income Coverage Limit. Further, there would be no reason for the Income Coverage Limit option. The location schedule applies to "ALL 'COVERED LOCATIONS'" whereas the unmarked box contemplates the limit for "any one 'covered location." The Court cannot strain the policy's phrases to find Nationwide liable ***for coverage that Heartland elected not to purchase***.

(Id.) (emphasis added).

Heartland's argument has consistently been, and continues to be, that the Policy's language provides "per loss" limits for Earnings and Extra Expense Coverage. In this case, because the evidence shows that there are separate Earnings and Extra Expense losses at each of the covered locations that were physically damaged, there has been more than one covered loss. (App. 169, Tr. 24:8–19.) This claim is based on when the damage occurred, when the damage was repaired, and how Heartland accounted for its losses in the ordinary course of its business. It is not simply by virtue of a claim that the Policy provides a $3,000,000 limit for each covered location.

The district court erroneously concluded: "Heartland's core argument falls directly under the unmarked box that had no amount across from it." (App. 133.) This conclusion is simply incorrect. Heartland has never claimed that the Policy provides a per location limit. If the box for a per location limit had been marked, this would have provided different coverage than Heartland claims it purchased. The box is not, as the district court concluded, "irrelevant." Had the box been marked, Earnings and Extra Expense coverage during the Policy period for a

particular location could have been exhausted by a $3,000,000 payment for loss at that location. But the coverage Heartland claims, and that Heartland purchased, would not be exhausted in such a way. "Marking the box" would not have given Heartland the same coverage it purchased. The district court erroneously concluded otherwise.

The district court should have drawn an adverse factual inference from Nationwide's belated and untimely point about the unmarked box: made for the first time in its second denial letter. Rather than reflecting the parties' "intent" at the time the Policy was executed, it merely reflects an argument Nationwide developed *after* Heartland pointed out the inadequacies of Nationwide's first denial. But the district court did not draw any adverse inference from Nationwide's afterthought and, on the contrary, concluded that Nationwide's afterthought was the "answer" to the parties' intent when they executed the policy.

Had this unmarked box actually been the critical factor in determining the parties' intent, Nationwide would have relied on it when Nationwide first denied coverage. It did not.

Of equal importance is plain error in the district court's additional reasoning on this point, which is entirely inconsistent with summary

judgment standards. The district court viewed the "box not marked" as a "decision" of Heartland's or of the parties'. The district court made a factual finding that Heartland "elected not to purchase" per location coverage. (Id.)

There is absolutely no evidence in the record that the "box not marked" was because of a "decision" Heartland made. There is absolutely no evidence in the record that the "box not marked" was the result of Heartland's "election" not to purchase per location coverage. This is because there is no evidence in the summary judgment record reflecting why the "box" was "not marked." There is certainly no evidence in the record that Heartland and Nationwide had any communications reflecting an agreement about why the "box" was "not marked."

The district court reached its findings about a "decision" or "election" by Heartland by *inferring* Heartland's intentions from these facts. The inferences made by the district court concerning Heartland's intentions were favorable to Nationwide, the moving party. A court may not properly make any factual inference that favors a party moving for summary judgment. *Morris v. Steffes Grp., Inc.*, 924 N.W.2d 491, 495 (Iowa 2019) ("In ruling on a motion for summary judgment, the court

must look at the facts in a light *most favorable to the nonmoving party*.") (emphasis added). But this is exactly what the district court did for the question which, in the court's view, the "answer turns on." (App. 133.)

The district court also felt compelled to engage in the logical fallacy of absurdity when it concluded that Heartland's argument could lead to a separate "loss" for each grain elevator that was damaged at a covered location. (App. 134–35.) Heartland never argued this and neither did Nationwide. It could not be justified based on Heartland's accounting procedures and financial records—which the parties made relevant by the express terms of the Policy and on which Heartland actually relies to make its claims.

The district court concluded that "Heartland's interpretation of the Policy is not reasonable." (App. 135.) But this conclusion is based on the district court's fallacious argument about individual grain elevators. It is not based on Heartland's claims, which are shown by Heartland's historical accounting procedures and financial records.

If the Policy were clear, unambiguous, and susceptible to only one reasonable interpretation, it would not have been necessary for the district court to formulate a definition of "any one loss" with language not

found in the Policy and which does not define the particular words actually used in the Policy.

The Court should "give each policy term not defined in the policy its ordinary meaning." *Nat'l Sur. Corp. v. Westlake Inv., LLC*, 880 N.W.2d 724, 734 (Iowa 2016). "[I]f there is no ambiguity, the court will not rewrite the policy for the parties." *Farm Bureau Life Ins. Co. v. Holmes Murphy & Associates, Inc.*, 831 N.W.2d 129, 134 (Iowa 2013). Importantly, if there is ambiguity, it must be interpreted in favor of the insured. *A.Y. McDonald Industries, Inc. v. Insurance Co. of North America*, 475 N.W.2d 607, 619 (Iowa 1991).

"[A]n insurer should clearly and explicitly define any limitations or exclusions to coverage expressed by broad promises." *Id.* The $3,000,000 limits promised by Nationwide "for any one loss" are certainly a broad promise of coverage. If Nationwide's broad promises were limited to the definition adopted by the district court, Nationwide was obligated to "clearly and expressly define" the limit it as such, but it did not.

Nowhere in the Policy is there language that sets a limit of $3,000,000 for "the *combined* loss at all covered locations." (App. 132) (emphasis added). Nowhere in the Policy is there language that sets a

$3,000,000 Earnings and Extra Expense limit as a result of a single "covered *peril*." (Id.) (emphasis added).

II. Heartland's Interpretation of the Phrase "Any One Loss" Is Reasonable

Heartland proposes a reasonable meaning of the Policy, one that is consistent with accepted rules of interpretation and summary judgment. This interpretation allows Heartland to prove at trial that it suffered more than one business interruption loss at each covered location which sustained physical damage; and that each business interruption loss is subject to a $3,000,000 limit.

Heartland's interpretation begins with the language of the Policy limits, which are "for any one loss." (App. 223.). The Supreme Court has previously determined that the word "any" means "all or every." *Thomas v. Progressive Cas. Ins. Co.*, 749 N.W.2d 678, 683 (Iowa 2008) ("We have previously held that the use of the word 'any' in a statute 'means all or every.'" (collecting cases)); *Lange v. Lange*, 520 N.W.2d 113, 117 (Iowa 1994) ("[W]e do not believe the term 'any' is ambiguous. *See Wenthe v. Hospital Serv., Inc.*, 100 N.W.2d 903, 905 (1960) ('any' means 'one or all; some; indiscriminately of whatever quantity; one or more'); Black's Law

Dictionary 86 (5th ed. 1979) ('any' defined as 'some; one out of many; an indefinite number').").

In the phrase "any one," the word "any" modifies "one" to mean *each and every singular* thing. The words "any" and "one" then modify the word "loss" to mean *each and every singular loss*. The phrase recognizes that there may be more than one "loss"; and that the $3 million limit applies to *each and every* "loss." "[A]ny one" is an *expansive* phrase meant to extend coverage limits to an indefinite number of losses. The only Policy limitations as to time or space are that the losses must be within the Policy period and the losses must be because of physical damage to a covered location.

Clearly, the Policy contemplates that there may be more than one loss, and a limit of $3,000,000 will apply to each one. Nationwide's Policy, however, does not define the meaning of "loss"; it does not define what constitutes a single loss for which a limit of no more than $3,000,000 applies.

"'An insurer assumes a duty to define any limitations or exclusionary clauses in clear and explicit terms.'" *Hornick v. Owners Ins. Co.*, 511 N.W.2d 370, 374 (Iowa 1993). The $3,000,00 "limit" "for any one

loss" is, undoubtedly a "limitation" for which Nationwide was obligated to define clearly, explicitly, and unambiguously. But it did not do so.

The Court is left to interpret the term. The Court may interpret the meaning of "loss" in the context of other terms in the Income Coverage Part and in light of the rules of insurance policy interpretation. Heartland's interpretation is consistent with these principles.

"Loss" may first be understood in the context of the insuring clause of the Income Coverage Part, which triggers coverage:

> 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" . . . .

(App. 218.) The insurance provided here relates to "business" interruption at "a 'covered location'" during a "restoration period." The adjective and indefinite article "a," modifying "covered location," certainly includes business interruption at "any" covered location. *Any*, The New Shorter Oxford English Dictionary, at 91 (1993). Heartland reasonably ties the idea of business interruption to a covered location (*i.e.*, any covered location) as provided in the insuring clause.

The insuring clause also ties the concept of business interruption (and therefore business interruption "loss") to a "restoration period."

There is no dispute that Heartland had different covered locations that were physically damaged at different times; "restoration period" under the Policy commences "72 hours" after damage is sustained for lost net income and immediately for extra expense; and business operations were interrupted at different times during the day of August 10, 2020. (App. 377.) Heartland's interpretation is therefore consistent with the idea that "restoration periods," which are a contractual measure of loss, are unique to each physically damaged covered location based on the time at which operations were interrupted.

Heartland's interpretation is also consistent with the Policy terms that require the district court (and Nationwide) to consider Heartland's accounting procedures and financial records. (App. 223.) Heartland's business records show that the covered locations that were damaged were acquired at different times, had their own operations, and were accounted for in terms of profit and loss separately. (App. 655–80.) Heartland's interpretation is consistent with the history and the historical treatment of each location.

When an exclusionary provision is fairly susceptible to two reasonable constructions, the construction most favorable to the insured

will be adopted. *Cairns v. Grinnell Mut. Reinsurance Co.*, 398 N.W.2d 821, 824 (Iowa 1987). The district court should only be affirmed if the interpretation it proposes is the *only* reasonable interpretation. *See e.g., Hagenow v. American Family Mut. Ins. Co.*, 846 N.W.2d 373, 383 (Iowa 2014) ("We believe the … policy is susceptible of only one reasonable interpretation."). If the Court finds the phrase "any one loss" is ambiguous as to whether it includes multiple losses from a single covered peril, the Court should rule in Heartland's favor; Heartland has advanced a reasonable interpretation of the Policy.[1]

Other courts interpreting the phrase "any one loss" have found the phrase "any one loss" permits the insured to recover for *each* loss it sustained during the policy period. In *O'Bryan v. Columbia Insurance Group*, the insured purchased a policy that provided $40,000 of coverage

[1] The Court need not reach Heartland's argument that the August 2020 derecho constituted multiple storms, and thus multiple covered perils, because the Policy permits Heartland to recover for multiple losses regardless of whether there was just one or instead there were multiple covered perils causing the losses. However, to the extent the Court finds the phrase "any one loss" is defined by whether there was a single covered peril, as the district court found, Heartland disputes that the derecho was a single covered peril. In such case, Heartland should be permitted to prove at trial that the derecho constituted multiple covered perils from which Heartland sustained multiple covered losses.

for a dwelling where a fire occurred, the insurer paid approximately $37,000 for the loss from the fire, and then a few months later another fire occurred at the same dwelling and the insured submitted another claim for $40,000. 56 P.3d 789, 791 (Kan. 2002). The policy stated that the insurer would "not be liable in *any one loss* . . . for more than the applicable limit of liability." *Id.* at 793 (emphasis added). The Kansas Supreme Court found that "because the policy does not specifically provide whether the $40,000 is the limit of liability for the entire policy period or per loss," the insured's interpretation of a per-loss limit must prevail and the insured was ordered to pay each loss in amounts up to the per loss limit. *Id.* at 796.

Similarly, in *First Nat'l Realty of Eagan, Inc. v. Minnesota FAIR Plan*, the insured purchased a policy that provided up to $100,000 coverage; a fire occurred and the insurer paid out the policy limit for the fire loss, but then a few months later another fire occurred and caused more damage estimated at approximately $98,000. No. A06-1754, 2007 WL 2034481, at *1–2 (Minn. Ct. App. July 17, 2007). The insured argued he was entitled to receive the policy limit of $100,000 for the second fire. *Id.* at *2. The policy stated that the insurer would "not be liable in *any*

one loss . . . for more than the applicable limit of liability." *Id.* (emphasis added). The Court of Appeals of Minnesota found the phrase "any one loss" was "straightforward and unambiguous"—"[t]he insurer agrees to pay up to the policy limits for 'any one loss'" and there was "no language in paragraph two, or any other provision of the policy, that limits the number of losses or claims that may be paid during the applicable policy period." *Id.* at *3. The court concluded that the policy requires the insurer to pay the value of the building at each time of each loss, and found genuine issues of fact existed regarding the amount of the second loss. *Id.* at *4–5.

The Court should similarly find that the phrase "any one loss" creates a per loss limit that requires Nationwide to pay for *each and every loss* sustained under the Policy during the Policy period. Heartland should thus be permitted to prove each of its losses at trial. Heartland should be able to prove at trial that it sustained distinct net income and extra expense losses at each of its covered locations.

CONCLUSION

The district court rewrote the Policy when it found the phrase "any one loss" imposes a blanket limit for all combined losses Heartland

sustained at all covered locations as a result of a single peril. The plain language of the phrase "any one loss" imposes a per loss limit for which Heartland can recover for every singular business income loss that it can prove under the Policy. Because Heartland suffered separate losses at each of its damaged covered locations, accounts separately for its business at each location, and the Policy considers Heartland's accounting procedures when valuing Heartland's losses, Heartland should be permitted to prove it sustained covered losses at each covered location. The Court should reverse the district court's ruling and remand with instructions for the district court to grant Heartland's Partial Motion for Summary Judgment, deny Nationwide's Motion for Summary Judgment, and proceed to trial on the issues relating to the number and amounts of Heartland's business income losses.

REQUEST FOR ORAL SUBMISSION

Heartland requests oral argument.

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CERTIFICATE OF COMPLIANCE

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:

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/s/ *Amanda Mason*

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2023, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

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