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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

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:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size and contains 6,319 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

/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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IN THE SUPREME COURT OF IOWA

No. 23-0156

HEARTLAND CO-OP,
Plaintiff-Appellant,

v.

NATIONWIDE AGRIBUSINESS INSURANCE COMPANY,
Defendants-Appellee,

ON APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE JEFFREY D. BERT
Case No. LACL152428

DEFENDANT-APPELLEE'S FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Treatises

STATEMENT OF THE ISSUES

I. Whether the District Court correctly held that Nationwide's policy limits Heartland to a total of $3,000,000 in earnings and extra expense coverage for loss at all covered locations as opposed to each covered location as a result of the derecho on August 10, 2020.

II. Whether the District Court correctly held the derecho caused one loss to Heartland's business under the policy's earnings and extra expense coverage.

ROUTING STATEMENT

This case should be transferred to the Iowa Court of Appeals pursuant to Iowa R. App. P. 6.1101(3)(a) as it presents the application of existing legal principles.

STATEMENT OF THE CASE

This case involves an insurance coverage dispute arising from the August 10, 2020 derecho (the "Derecho"). Heartland Co-op ("Heartland") seeks to recover loss of earnings and extra expense coverage under a policy issued by Nationwide Agribusiness Insurance Company ("Nationwide") due to damage caused by the Derecho at a number of Heartland's locations in Iowa. Heartland's policy provides Nationwide will pay "no more than the Income Coverage 'limit' indicated in the 'schedule of coverages' for any one loss." (D's SMJ App. at 51; App. at 223). The phrase "any one loss" refers to the occurrence (or "happening") of direct physical loss or damage as a result a covered peril that interrupts, wholly or partially, an insured's business. The schedule of coverages for the Income Coverage lists a limit of $3,000,000 for earnings and extra expense coverage that applies to "All 'Covered Locations'." (D's SMJ App. at 58; App. at 230). This means the District Court correctly held Heartland has a total of $3,000,000 in coverage for earnings and extra expense loss caused by the Derecho at all locations. (Ruling at 17, 19; App. at 138, 140).

Heartland's attempt to re-write the policy to apply the $3,000,000 limit to each location must be rejected as contrary to the express policy terms and the principles of contract interpretation. The District Court also

correctly found that no material question of fact exists that the Derecho caused one loss to Heartland's business under the policy's earnings and extra expense coverage. (Ruling at 19; App. at 140). Any suggestion that the Derecho involved multiple storms must be rejected as contrary to meteorological science and insurance principles.

STATEMENT OF FACTS

I. The Parties

Heartland operates a diversified cooperative at a number of locations that it owns throughout the states of Iowa, Nebraska, New Mexico and Texas. See Plaintiff's Petition at ¶¶ 1, 5; (D's SMJ App. at 4, 58-145; App. at 7). Heartland's business operations include the storage and trading of grain, fuel sales, and various agronomy related products and services. (D's SMJ App. at 477-480; App. at 636–39). Nationwide exists as an Iowa corporation and maintains a license as an Iowa Stock Fire and Casualty Insurance Company. (D's Answer at ¶ 3; App. at 15).

II. The Policy

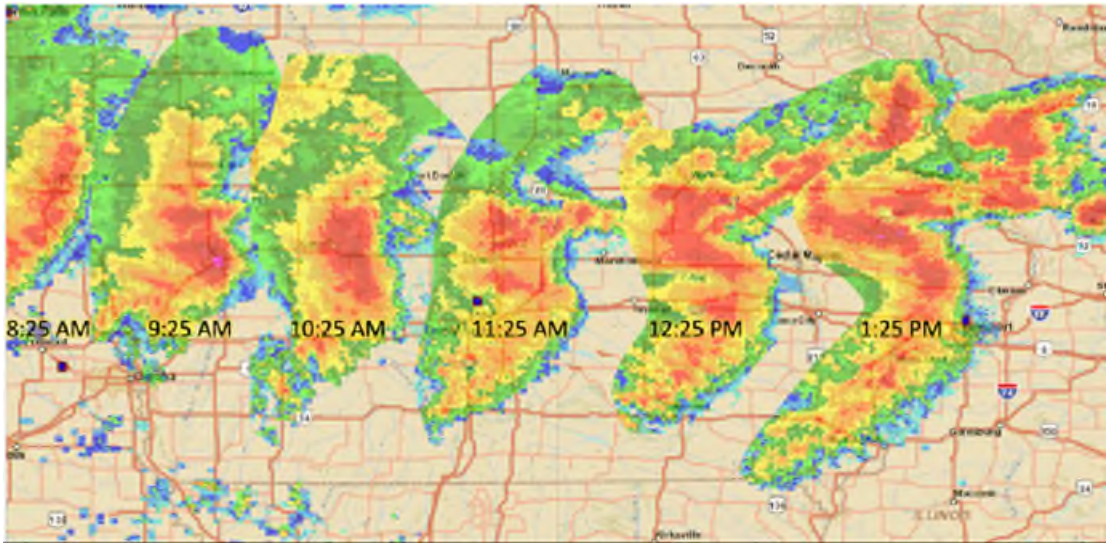
Nationwide provided Heartland with a quote for its CommercialGuard Plus Insurance Proposal, and Heartland accepted. (D's SMJ App. at 332-441; App. at 682–791). Nationwide accordingly issued Heartland Policy No. COP106061A, with effective dates of coverage from July 1, 2020 to

July 1, 2021 (the "Policy"). (D's SMJ App. at 1-331; App. at 173–503). The Policy contains a Location Schedule listing 86 covered locations. (D's SMJ App. at 58–145; App. at 230–317). The Location Schedule lists specific limits of insurance at each location for "Building and Personal Property Consisting of 'Stock'" and "Building Property and Business Personal Property Excluding 'Stock', 'Mobile Equipment', and 'Computers'." (D's SMJ App. at 60–145; App. at 232–317). None of the individual locations provide a separate limit for Earnings and Extra Expense coverage. (Ruling at 12; App. at 133). Instead, the Location Schedule includes an entry listing coverage limits for "All 'Covered Locations'", including an Earnings and Expense Limit of $3,000,000. (D's SMJ App. at 58; App. at 230). The parties dispute how this limit applies to Heartland's claim, and it will be discussed further below.

III. The Derecho

On August 10, 2020, the Derecho swept eastward across Iowa and states east of Iowa. (D's SMJ App. at 465; App. at 792). A derecho has been defined as a "widespread convectively-induced straight-line windstorm". (D's SMJ App. at 465; App. at 792). Damaging straight-line winds in a derecho are caused by downbursts in severe thunderstorms that are organized into a fast-moving band or bow that persists for hundreds of

miles and several hours. (D's SMJ App. at 465; App. at 792). Wide area radar images of the derecho show a north to south band of severe thunderstorms that moved rapidly eastward across Iowa, which developed a bow-like shape over the eastern part of the state:



(D's SMJ App. at 466; App. at 793). Some locations experienced multiple downbursts, with straight-line winds gusting over 100 mph, during the 30-minute to nearly one-hour period that it took for the Derecho to traverse that particular location. (D's SMJ App. at 466; App. at 793).

IV. The Insurance Claim

Heartland submitted a claim to Nationwide reporting damage at 48 locations in Iowa. (D's SMJ App. at 495; App. at 797). Nationwide investigated the claim, and it tendered payments to Heartland totaling $131,284,460.86. (D's SMJ App. at 495; App. at 797). A dispute has

arisen, however, concerning the amount of coverage available to Heartland for its earnings and expense claim.

Heartland suggested the $3,000,000 earnings and extra expense limit applies for each location and is triggered with the property damage part of the claim. (D's SMJ App. at 442-43; App. at 614). Nationwide explained the Policy lists a $3,000,000 earnings and extra expense limit for all covered locations on a blanket basis. (D's SMJ App. at 471; App. at 617). Heartland challenged Nationwide's position by arguing the limit applies to any one loss, and it suffered damages from multiple storms as opposed to one windstorm. (D's SMJ App. at 446; App. at 621). Nationwide responded by reaffirming its position on the application of the limit. (D's SMJ App. at 447–49; App. at 622–24). Nationwide consulted with Lee Branscome, a meteorologist, to review Heartland's multiple storms argument. (D's SMJ App. at 449; App. at 624). Branscome reviewed readings made at weather stations, data reported by Doppler weather radar stations, weather satellite data and imagery, on-the-ground observations made by professional and volunteer weather observers, and post-storm reports of damage to structures and vegetation. (D's SMJ App. at 465; App. at 792). He authored a report analyzing this data, and he advised that "in general, the derecho is considered by meteorologists, including myself, to be a single weather

event." (D's SMJ App. at 467; App. at 794). Based on Branscome's Report, Nationwide continued to view the Derecho as a single event and occurrence. (D's SMJ App. at 449; App. at 624). Nationwide paid Heartland the $3,000,000 limit for its earnings and extra expense coverage. (D's SMJ App. at 473; App. at 626).

V. The Lawsuit

Heartland responded by filing the subject lawsuit asserting Nationwide breached the Policy by failing to pay Heartland earnings and extra expense loss in excess of $3,000,000. (Plaintiff's Petition at Count I; App. at 11–13). The parties engaged in limited discovery. Heartland provided a summary of income and extra expense losses at six sample locations. (P's SMJ App. at 444–51; App. at 636–43). Heartland also designated as an expert witness its own meteorologist, Michael McClellan. McClellan's report focused on what can be characterized as the storm within the storm. He explained:

> As noted previously, derecho winds are the product of what meteorologists call ***downbursts***. A downburst is a concentrated area of strong wind produced by a convective downdraft. Downbursts have horizontal dimensions of about 4 to 6 miles (8 to 10 kilometers), and may last for several minutes. The convective downdrafts that comprise downbursts form when air is cooled by the evaporation, melting, and/or sublimation (the direct change to vapor phase) of precipitation in thunderstorms or other convective clouds. Because the

> chilled air is denser than its surroundings, it becomes negatively buoyant and accelerates down toward the ground. Derechos occur when meteorological conditions support the repeated production of downbursts within the same general area. The ***"downburst clusters"*** that arise in such situations may attain overall lengths of up to 50 or 60 miles (80 to 100 kilometers), and persist for several tens of minutes. Within individual downbursts there sometimes exist smaller pockets of intense winds called ***microbursts***. Microbursts occur on scales (approximately 2 1/2 miles or 4 km) that are very hazardous to aircraft; several notable airline mishaps in recent decades resulted from unfortunate encounters with microbursts. Still smaller areas of extreme wind within microbursts are called ***burst swaths***. Burst swaths range from about 50 to 150 yards (45 to 140 meters) in length. The damage they produce may resemble that caused by a tornado.
>
> A typical derecho consists of numerous downburst clusters ("families of downburst clusters") that are, in turn, composed of many smaller downbursts, microbursts, and burst swaths.

(D's SMJ App. at 487; App. at 646). McClellan reported four conclusions:

- On August 10, 2020, a severe derecho swept across Iowa, causing very strong winds, extremely heavy rain and spawning several tornadoes.
- A derecho by definition is a widespread, long-lived wind storm that is associated with a band of rapidly moving individual showers and/or thunderstorms....

- It is important to note that there were dozens of individual thunderstorm cells creating multiple downburst clusters within this derecho that formed the long-lived wind storm. Each individual thunderstorm cell has its own characteristics such as cloud height, hail size, rainfall rate, wind speed and direction of movement. See figures 1, 2, 3, 4 & 5.
- Following detailed weather analysis of this wind event for each of the Heartland Co-op locations, it is very clear that each location was impacted by a gust front and then by individual thunderstorm cells which created their own damage path and intensity.

(D's SMJ App. at 488; App. at 647). McClellan did not, however, challenge Branscome's statement that meteorologists considered the derecho to be a single weather event.

The parties filed cross motions for summary judgment. The District Court issued a ruling that reached two primary conclusions. First, the District Court found "that under the policy Heartland is entitled to $3,000,000 total for all coverage locations in earnings and extra expense coverage as a result of the derecho." (Ruling at 19; App. at 140). Second, the District Court further found "that no material question of fact exists that the derecho caused one loss to Heartland's business under the policy's earnings and extra expense coverage," thereby limiting Heartland's earnings and extra expense coverage to the $3,000,000 Nationwide had already paid.

Id. Accordingly, the District Court dismissed Heartland's petition. This appeal followed.

ARGUMENT

I. The District Court Correctly Held that Nationwide's Policy Unambiguously Limits Heartland to a Total of $3,000,000 in Earnings and Extra Expense Coverage for Loss at All Covered Locations as Opposed to Each Covered Location as a Result of the Derecho.

A. Error Preservation and Standard of Review

Nationwide agrees Heartland preserved error through its Motion for Partial Summary Judgment and resistance to Nationwide's Motion for Summary Judgment on its argument articulated in Brief Points I and II of its appeal brief. Appellate courts review the district court's grant of summary judgment for correction of errors at law. *Sallee v. Stewart*, 827 N.W.2d 128, 132 (Iowa 2013).

B. The COP Income Coverage Part's "How Much We Pay" Provision Caps Coverage for "Any One Loss" to the Limit Indicated in the Schedule of Coverages.

Heartland argues the District Court erred when it determined "that under the policy Heartland is entitled to $3,000,000 total for all covered locations in earnings and extra expense coverage as a result of the derecho on August 10, 2020." (Ruling at 19; App. at 140). A general overview of the coverage afforded by the Policy helps to explain why the $3,000,000

earnings and extra expense coverage limit applies to loss at all covered locations rather than to each location. The Policy consists of a series of forms. The two primary forms at issue here are the Commercial Output Program ("COP") Property Coverage Part that provides coverage for buildings and business personal property, and the COP Income Coverage Part that provides coverage for loss of earnings and extra expense in addition to other coverages. (D's SMJ App. at 15–51; App. at 187–223). Coverage under the COP Income Coverage Part is subject to the terms and conditions of the COP Property Coverage Part. (D's SMJ App. at 46; App. at 218).

The insuring agreement for the COP Income Coverage Part provides:

> "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.

(D's SMJ App. at 46; App. at 218). The COP Income Coverage Part contains coverage for "Earnings", "Extra Expense", "Income Coverage Extensions", and "Supplemental Income Coverages". (D's SMJ App. at 46, 48–50; App. at 218, 220–22).

The COP Income Coverage Part imposes a per loss limit on coverage:

HOW MUCH WE PAY

Other "terms" relating to How Much We Pay also apply. These "terms" are described in the Commercial Output Program - Property Coverage Part.

"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".

(D's SMJ App. at 51; App. at 223) (emphasis added). Thus, the Policy limits coverage under the COP Income Coverage Part to $3,000,000 for "any of loss."

C. Reading the COP Income Coverage Part's Insuring Agreement, "Valuation" Provision, and "How Much We Pay" Provision Together, the Phrase "Any One Loss" Means the Occurrence of Direct Physical Loss or Damage at a Covered Location as a Result a Covered Peril that Interrupts, Wholly or Partially, an Insured's Business.

So, what does "any one loss" mean? The District Court found "under the totality of the words' plain meanings, 'any one loss' is an unambiguous phrase that means an indiscriminate singular amount of financial detriment suffered at all covered locations as a result of a covered peril." (Ruling at 15–16; App. at 136–37). Applying this definition, the District Court further found "the $3 million limit applies to the combined loss as all covered locations as a result of a covered peril." (Ruling at 17; App. at 138).

The District Court's ultimate holdings should be affirmed because the Policy language commands it. A familiar rule of interpretation provides an insurance policy must be read as a whole in light of all declarations, riders or endorsements attached. *Ferguson v. Allied Mut. Ins. Co.,* 512 N.W.2d 296, 299 (Iowa 1994). As previously mentioned, the COP Income Coverage Part's insuring agreement provides coverage "during the 'period of restoration' when 'your business' is necessarily wholly or partially interrupted by direct physical loss of or damage to property at a 'covered location' … as a result of a covered peril." The COP Income Coverage Part's "Valuation" provision further provides:

> 1. **Earnings** -- In determining an earnings loss "we" consider:
>
> a. the experience of "your" "business", before the loss and the probable experience during the time of interruption had no loss occurred;

b. "your" continuing operating expenses normally incurred by "your" "business", including but not limited to payroll expense necessary to resume "business" to a similar level of service that existed before the occurrence of direct physical loss or damage; and

c. pertinent sources of information and reports including:

1) "your" accounting procedures and financial records;
2) bills, invoices, and other vouchers;
3) contracts, deeds, and liens;
4) reports on feasibility and status; and
5) records documenting "your" budget and marketing objectives and results.

(D's SMJ App. at 50; App. at 222) (emphasis added). Reading these provisions together with the "How Much We pay for Loss" provision, "any one loss" means the occurrence (which the District Court interpreted as meaning the "happening") 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. (Ruling at 15; App. at 136). If there has been no occurrence of direct physical loss or damage to property at a covered location as a result a covered peril that interrupted the insured's business, then there can be no loss of earnings or extra expense coverage according to the terms of the COP Income Coverage Part.

D. The COP Income Coverage Part Earnings and Extra Expense Limit Applies Per Occurrence Consistent with the Deductible and Restoration of Limits Provisions of the COP Property Coverage Part.

This interpretation remains consistent with the terms of the COP Property Coverage Part, which are incorporated by the "How Much We Pay" provision in the COP Income Coverage Part. The COP Property Coverage Part's "How Much We Pay" section specifies how the Policy's deductible applies:

> 2. **Deductible** -- "We" pay only that part of "your" loss over the deductible amount stated on the "schedule of coverages" in any one occurrence. The deductible applies to the loss before application of any coinsurance or reporting provisions.

(D's SMJ App. at 42; App. at 214). A condition in the COP Property Coverage Part explains how the policy limits apply to multiple losses during the policy period:

> 10. **Restoration of Limits** -- Except as indicated under Supplemental Coverages - Pollutant Cleanup and Removal and Supplemental Marine Coverages - Virus and Hacking Coverage, any loss "we" pay under the Commercial Output Program coverages does not reduce the "limits" applying to a later loss.

(D's SMJ App. at 44; App. at 216). These provisions provide that both the policy limits and the deductible apply on a per occurrence basis, subject to certain exceptions not relevant here. In other words, the policy limits provisions must be read in harmony with the deductible provision to properly interpret the coverage afforded by the Policy.

E. The Schedule of Coverages Lists an Earning and Extra Expense Limit of $3 Million For All Covered Locations.

As provided in the COP Income Coverage Part's "How Much We Pay" provision, one must consult the schedule of coverages to determine the limit for any one loss. The schedule of coverages for the COP Income Coverage Part states:

COVERAGE (check one)

[ ] Income Coverage Does Not Apply

[ ] Earnings, Rents, and Extra Expense

[X] Earnings and Extra Expense

[ ] Rents and Extra Expense

[ ] Extra Expense Only

LIMIT (check one)

[ ] Income Coverage Limit - The most "we" pay for loss at any one "covered location" is:

[X] Refer to Scheduled Locations (check if applicable)

(D's SMJ App. at 55; App. at 227). In turn, the Locations Schedule lists a total of 86 numbered locations with geographic descriptions (town and state), starting with the following designation for Location No. 87:

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

(D's SMJ App. at 58–145; App. at 230–317). Reading these provisions together, the $3,000,000 limit for earnings and extra expense coverage applies for any one loss at all covered locations rather than to each location. For example, if we take the text from the locations schedule as directed by the schedule of coverages and insert it into the How Much We Pay provision, it results in the following illustration:

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

(D's SMJ App. at 51; App. at 223) (emphasis added). The District Court correctly reasoned that if Heartland desired the earnings and extra expense coverage it seeks in this action, it simply could have checked the other box in the schedule of coverages and inserted the $3,000,000 limit there. (Ruling

at 12; App. at 133). This Court cannot strain the Policy's phrases to find Nationwide liable for coverage that Heartland elected not to purchase. *Id.*

F. Applying the Plain Language of the Policy and the Rules of Interpretation, the Earnings and Extra Expense Limit of $3,000,000 Applies to Loss at All Covered Locations Rather Than Each Location.

Heartland contends its "more than one loss" argument constitutes a reasonable interpretation of the Policy, and any ambiguity must be construed in its favor. (Appellant's Proof Brief at 29–36). The District Court rightfully found Nationwide's proffered interpretation constitutes the only reasonable interpretation under Iowa's rules of interpretation for a number of reasons. (Ruling at 13; App. at 133).

First, courts give undefined terms in an insurance policy their ordinary meaning. *A.Y. McDonald Indus. v. Ins. Co. of N. Am.*, 475 N.W.2d 607, 619 (Iowa 1991). In searching for the ordinary meaning of undefined terms, courts commonly refer to dictionaries. *Id.* The District Court applied definitions from Merriram-Webster Dictionary and Black's Law Dictionary to find "any" means "one, some, or all indiscriminately of whatever quantity", "one" means "a single unit or thing", and "loss" means "[t]he amount of financial detriment caused by … an insured's property damage … ." (Ruling at 11; App. at 132). The District Court's conclusion that the phrase "any one loss" means "an indiscriminate singular amount of financial

detriment suffered at all covered locations as a result of a covered peril" remains consistent with these definitions. (Ruling at 15–16; App. at 136–37).

Second, under the rules of interpretation, Iowa courts determine the intent of the parties by looking at what the policy itself says, and the court will not strain the words or phrases of the policy in order to find liability that the policy did not intend and the insured did not purchase. *Boelman v. Grinnell Mut. Reinsurance Co.*, 826 N.W.2d 494, 501 (Iowa 2013). In the present matter, Heartland asks this court to replace the word "all" with the word "each" in the Locations Schedule. For example, under Heartland's interpretation of the Policy, the Locations Schedule would apply the coverage limit to "~~All~~ Each 'Covered Location~~s~~'". This is not what the policy says, so Heartland's suggestion violates the rules of interpretation.

Third, the court must strive to avoid interpreting an insurance policy to render any part superfluous. *Boelman,* 826 N.W.2d at 501. As previously mentioned, if the parties had intended the limit to apply to each location, then they would have checked the box under the schedule of coverages for the COP Income Coverage Part and inserted the applicable limit:

COVERAGE (check one)

[ ] Income Coverage Does Not Apply

[ ] Earnings, Rents, and Extra Expense

[X] Earnings and Extra Expense

[ ] Rents and Extra Expense

[ ] Extra Expense Only

LIMIT (check one)

[ ] Income Coverage Limit - The most "we" pay for loss at any one "covered location" is:

[X] Refer to Scheduled Locations (check if applicable)

(D's SMJ App. at 55; App. at 227) (emphasis added). They did not. Interpreting the limit to apply on a per location basis would render the "Refer to Scheduled Locations" language superfluous in violation of the rules of construction.

Fourth, as previously mentioned, the rules of interpretation require that an insurance policy be read as a whole in light of all declarations, riders or endorsements attached. *Ferguson,* 512 N.W.2d at 299. Applying the earnings and extra expense limit to the total loss at all locations remains consistent with other provisions in the COP Income Coverage Part that draw distinctions between per occurrence versus per location versus aggregate limits. The COP Income Coverage "limit" applies differently to the "Income Coverage Extensions" than it does to the "Supplemental Income Coverages". The lead in paragraph for the "Income Coverage Extensions"

states the limit for the extensions are a part of and not in addition to the Income Coverage limit:

> The following Income Coverage Extensions indicate an applicable "limit" or limitation. This "limit" or limitation may also be shown on the "schedule of coverages". If a different "limit" or limitation is indicated on the "schedule of coverages", that "limit" or limitation will apply instead of the "limit" or limitation shown below.
>
> The following Income Coverage Extensions are part of and not in addition to the applicable Income Coverage "limit".

(D's SMJ App. at 47; App. at 219) (emphasis added). The "Supplemental Income Coverages" state they apply separately to each covered location and, unless otherwise indicated, the limits are separate from and not a part of the COP Income Coverage limit:

> Unless otherwise indicated, the following Supplemental Income Coverages apply separately to each "covered location".
>
> The following Supplemental Income Coverages indicate an applicable "limit". This "limit" may also be shown on the "schedule of coverages". If a different "limit" is indicated on the "schedule of coverages", that "limit" will apply instead of the "limit" shown below.
>
> Unless otherwise indicated, a "limit" for a Supplemental Income Coverage provided below is separate from, and not part of, the applicable Income Coverage "limit". The "limit" available for coverage described under a Supplemental Income Coverage:
>
> a. is the only "limit" available for the described coverage; and
>
> b. is not the sum of the "limit" indicated for a Supplemental Income Coverage and the Income Coverage "limit".
>
> The "limit" provided under a Supplemental Income Coverage cannot be combined or added to the "limit" for any other Supplemental Income Coverage.

(D's SMJ App at 48; App. at 220) (emphasis added). Thus, the language of the COP Income Coverage Part draws a distinction between the per loss limit and per location limits.

Within the "Supplemental Income Coverages", the COP Income Coverage Part draws further distinctions for the application of policy limits. For example, the Dependent Locations Coverage applies on a per occurrence basis:

> The most "we" pay in any one occurrence under this Supplemental Income Coverage is $100,000.

(D's SMJ App. at 49; App. at 221). The Pollutant Cleanup and Removal Coverage applies on a per location and per occurrence basis:

> The most "we" pay in any one occurrence or at any one location under this Supplemental Income Coverage is $25,000.

(D's SMJ App. at 49; App. at 221). The Contract Penalty Coverage applies on a per occurrence and annual or aggregate limit:

> The most "we" pay in any one occurrence under this 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 $100,000.

(D's SMJ App. at 50; App. at 222). Given all of the options contemplated by the Policy, it becomes apparent that the policy language as a whole dictates the limit for earnings and extra expense coverage applies to the loss at all locations on a per occurrence basis.

Fifth, to conclude otherwise would lead to an absurd result. *See Central Bearings Co. v. Wolverine Ins.,* 179 N.W.2d 443, 445 (Iowa 1970) (insurance policies must be construed to achieve a fair and practical interpretation); *Boelman*, 826 N.W.2d at 501 (the court will not strain the words or phrases of the policy in order to find liability that the policy did not intend and the insured did not purchase). The Locations Schedule lists several other coverages that apply at "All 'Covered Locations'" including

Business Personal Property Consisting of "Computers" with a limit of $2,000,000. The Locations Schedule lists the following limits for other types of property at the Glenwood, Iowa location:

Loc. No.	Covered Locations (Describe)
024	GLENWOOD, IA

Covered Property/Coverage Provided (Describe)	Limit
BUSINESS PERSONAL PROPERTY CONSISTING OF "STOCK"	$30,000
BUILDING PROPERTY AND BUSINESS PERSONAL PROPERTY EXCLUDING "STOCK", "MOBILE EQUIPMENT", AND "COMPUTERS"	$90,000

(D's SMJ App. at 83; App. at 255). It makes no sense to have a $2,000,000 coverage limit for computers at a location where the limit for building property and business personal property excluding stock, mobile equipment, and computers is only $90,000. This further illustrates why the phrase "All 'Covered Locations'" means in the aggregate as opposed to each location.

The District Court also recognized the absurdity if Heartland's "each and every loss" argument was taken to its logical conclusion. Each of Heartland's elevators produces separate income streams, and if one elevator were out of operation longer than another, it would generate two separate and distinct losses of earnings and extra expense. The fact that the elevators were at the same location would not matter because the Policy provides coverage for "each and every loss." The District Court correctly concluded

the parties did not intend such an interpretation under the Policy. (Ruling at 13–14; App. at 134–35).

Finally, Iowa courts consider the amount of the premium charged in relation to the risk when interpreting insurance policies. *Boelman,* 826 N.W.2d at 505 (considering the premium charged when construing endorsement to farm guard policy); *National Sur. Corp. v. Westlake Inv., LLC*, 880 N.W.2d 724, 741 (Iowa 2016) (discussing the underwriting history and premiums for commercial general liability policies); *North Star Mut. Ins. Co. v. Holty,* 402 N.W.2d 452, 456 (Iowa 1987) (considering the type of risk and the premium charged when interpreting the meaning of the motor vehicle exclusion in farm liability policy); *Iowa Nat. Mut. Ins. Co. v. Fidelity & Cas. Co.. of New York*, 128 N.W.2d 891, 894 (Iowa 1964) (considering the amount of the premium charged when evaluating the reasonableness of insurer's proffered policy interpretation of auto liability policy).

Here, Nationwide quoted Heartland the following premiums for the COP coverage:

Property/COP Premium

Covered Property	Summary of Values	Rate	Premium
Bldg Prop & BPP excl. "Stock"	$906,034,623	0.119	$1,078,181
"Stock"	$870,090,274	0.076	$297,568
Earnings/EE	$3,000,000	0.092	$2,760
Equipment Breakdown			$90,429
Owned Railcars Coverage	$2,000,000		$5,000
Non-Owned Railcars Coverage	$10,000,000		$20,000
Business Personal Property consisting of "Mobile Equipment"	$10,000,000		$30,000
Flood coverage in adverse flood zones			$3,750
Railroad Track	$2,000,000		$16,000
Vehicles	$1,000,000		$10,000
Terrorism Premium*			$15,539
Total Estimated Premium			**$1,569,227**

D's SMJ App. at 4, 385; App. at 176, 735). As one can see, the premium and the limit for the earnings and extra expense coverage pales in comparison to the premiums for the building, business personal property, and stock coverages. No reasonable insured could expect $258,000,000 worth of coverage ($3,000,000 limit x 86 locations = $258,000,000) for a premium of $2,760 given the comparable premiums and limits for the other coverages.

G. The Policy Does Not Contemplate Multiple Earnings and Extra Expense Losses from a Single Covered Peril.

Heartland argues that because there may be different periods of restoration at different locations due to damage caused by the Derecho, the coverage limit should apply to each location. (Appellant's Proof Brief at

32–33). Heartland further argues the earnings and extra expense limit should be applied to each location because Heartland's procedures and records treat each location as a separate source of income. (Appellant's Proof Brief at 33). The language of the policy simply does not support such an interpretation, and Heartland's arguments lack merit given the nature of earnings and extra expense coverage.

The COP Income Coverage Part provides, in relevant part:

> **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.
>
> …
>
> **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.

(D's SMJ App. at 46; App. at 218). The Policy offers this definition for the terms "you" and "your":

> **DEFINITIONS**
>
> 1. The words "you" and "your" mean the persons or organizations named as the insured on the "schedule of coverages".

(D's SMJ App. at 15; App. at 187). The schedule of coverages lists Heartland as the named insured. (D's SMJ App. at 4; App. at 176). Heartland seeks to recover loss of earnings and extra expense. While it may operate at multiple locations and track the profitability of each location, Heartland's loss of earnings are determined in the aggregate according to the terms of the Policy (i.e., "actual loss of net income"). In other words, Heartland seeks to recover for a loss of earnings and extra expense due to damage caused by the Derecho. The various locations from which it operates are all a part of its integrated business operation, as the District Court correctly noted. (Ruling at 13; App. at 134). *Primary Care Med. Ctr. v. Peerless Indem. Ins. Co.,* 780 F.Supp.2d 554 (W.D. Ky. 2011) (intrepretting business income and extra expense limit to apply to loss by the named insured corporation) rather than each individual physician and employee of the corporation).

Heartland did not report a separate claim for each location; rather, it reported a single claim with damage at 48 locations. (D's SMJ App. at 495; App. at 797). Nationwide did not charge a separate deductible for each location; rather, it applied a single deductible. (D's SMJ App. at 496; App. at 798). This course of conduct reveals the parties' intent and further supports Nationwide's application of the coverage limit. *Boelman*, 826

N.W.2d at 501 (the cardinal rule for construing insurance policies holds the intent of the parties must control); *The Phoenix Ins. Co. v. Infogroup, Inc.,* 147 F.Supp.3d 815, 822 (S.D. Iowa 2015) (contract terms must be examined in the context of the entire agreement in accordance with the customs, practices, usages and terminaology generally undestood in the particular trade or business); *Peak v. Adams,* 799 N.W.2d 535, 544 (Iowa 2011) (when interpreting contracts, Iowa courts may look to extrinsic evidence, including the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties).

The topic of the deductible warrants further discussion. As mentioned above, the COP Income Coverage Part incorporates the terms of the COP Property Coverage Part, and the COP Property Coverage Part contains a deductible provision that applies to loss "in any one occurrence." (D's SMJ App. at 42; App. at 214). Two endorsements further clarify the application of the deductible. The Occurrence Deductible Endorsement provides, in relevant part:

This endorsement modifies insurance provided under the following:

COMMERCIAL OUTPUT PROGRAM - PROPERTY COVERAGE PART

SCHEDULE

Commercial General Liability Policy
Business Auto Policy
Commercial Output Program – Property Policy

The following is added to the Deductible provisions:

DEDUCTIBLE APPLYING TO LOSS UNDER MORE THAN ONE POLICY

If an occurrence gives rise to a loss under more than one policy issued by us and shown in the Schedule of this endorsement, only one deductible shall apply to all damages arising from such an occurrence, which are covered by any policy issued by us and shown in the above Schedule.

In determining which deductible applies, we will use the largest of the policy deductibles applying to the loss for any coverage provided by the applicable policies issued by us and shown in the Schedule of this endorsement.

(D's SMJ App. at 225; App. at 397) (emphasis added). This endorsement addresses how to apply the deductible when an occurrence gives rise to a loss under more than one policy, and it illustrates the connection between an occurrence (the peril causing damage) and the loss (the pecuniary injury resulting from the occurrence).

The Windstorm or Hail Deductible Endorsement creates a special flat or percentage deductible for losses caused by or resulting from windstorm or hail.[1] (D's SMJ App. at 194; App. at 366). This endorsement further provides:

[1] The Windstorm or Hail Deductible applies only to the scheduled locations in Texas or New Mexico. (D's MSJ App. at 189–93; App. at 361–65).

1. **Applicable Deductible** -- The Windstorm Or Hail Deductible indicated on the Windstorm Or Hail Schedule is applicable to loss or damage to covered property caused directly or indirectly by the perils of windstorm or hail.

2. **Weather Condition Other Than Windstorm Or Hail** -- Loss or damage resulting from a covered weather condition, other than windstorm or hail, will be considered to be caused by windstorm or hail and will be considered part of the windstorm or hail occurrence if the loss or damage would not have occurred without the weather conditions of windstorm or hail.

Id. The language of these provisions 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.

H. Heartland's Claim Does Not Involve Successive Losses.

Heartland's Brief discusses case law from other jurisdictions interpreting how coverage limits apply to successive losses. (Appellant's Proof Brief at 34–36). These cases are irrelevant to the present matter because Heartland's claim does not involve successive losses. Rather, Heartland's claim arises from the Derecho, a single storm event. (D's SMJ App. at 467; App. at 794). Moreover, Nationwide's policy contains a "restoration of limits" clause specifying, subject to several exceptions not applicable here, that any loss paid under the COP Coverages does not reduce

the limits applying to a later loss. (D's SMJ App. at 44; App. at 216). The policies in the cited cases did not contain such a provision. Nationwide has never taken the position that the earnings and extra expense coverage limit applies to all losses during a given policy period.

In summary, Heartland's policy provides Nationwide will pay "no more than the Income Coverage 'limit' indicated in the 'schedule of coverages' for any one loss." The phrase "any of loss" refers to the occurrence of direct physical loss or damage as a result a covered peril that interrupts, wholly or partially, an insured's business. The schedule of coverages for the Income Coverage lists a limit of $3,000,000 for earnings and extra expense coverage that applies to "All 'Covered Locations'." This means Heartland has a total of $3,000,000 in coverage for earnings and extra expense loss at all locations caused by the Derecho. Nationwide already paid Heartland this limit, so this Court should affirm the District Court's ruling granting Nationwide summary judgment and dismissing Heartland's breach of contract claim as a matter of law.

II. The Derecho Caused One Loss Under the Policy's Earnings and Extra Expense Coverage

Heartland says in a footnote in its brief that if the Court finds the phrase "any one loss" is defined by whether there was a single covered peril, as the District Court found, then it disputes the Derecho was a single

covered peril. (Appellant's Proof Brief at 34, fn 1). This statement does not comply with Iowa Rule of Appellate Procedure 6.903(2)(g), and it may be deemed a waiver. *City of Marquette v. Gaede*, 672 N.W.2d 829, 835 (Iowa 2003) (applying Iowa R. App. P. 6.14(1)(c) which is now rule 6.903(2)(g)(3) and deeming an argument waived for failure to cite supporting authority); *Soo Line R. Co. v. Iowa Dept. of Transp.*, 521 N.W.2d 685, 691 (Iowa 1994) (reiterating the "random mention of [an] issue, without elaboration or supportive authority, is insufficient to raise the issue for [appellate] consideration"); *Hubby v. State*, 331 N.W.2d 690, 694 (Iowa 1983) ("Moreover, issues are deemed waived or abandoned when they are not stated on appeal by brief; random discussion of difficulties, unless assigned as an issue, will not be considered."). If this Court addresses the argument, it should review the district court's grant of summary judgment for correction of errors at law. *Sallee*, 827 N.W.2d at 132.

Whether a storm event constitutes a single occurrence under a property insurance policy appears to be a matter of first impression for Iowa courts. Three tests have emerged in the case law from other jurisdictions for determining the number of occurrences: (1) the "cause" test in which the number of occurrences equates to the number of causes of injury; (2) the "effects" test in which the number of occurrences equates to the number of

different injuries that result; and (3) the "event" or "continuous process" test which looks to the number of damage causing processes that were continuous, repetitive, and interrelated. *See* Francis F Mahoney III, *The Application of "Per-Occurrence" Deductible Provisions in First-Party Property Claims,* 37 Tort & Ins. L.J. 921, 924-25 (2002) (citing *Unigard Ins. Co. v. U.S. Fidelity & Guar. Co.,* 728 P.2d 780 (Idaho Ct. App. 1986)). The vast majority of jurisdictions follow the cause test. *Id.* at 925; Insurance Claims and Disputes § 11:24 (6th ed.) (see cases cited therein). A federal court applying Iowa law adopted the cause test in determining the number of occurrences under a commercial general liability policy, *Pella Corp. v. Liberty Mut. Ins. Co.*, 246 F. Supp. 3d 1247, 1257 (S.D. Iowa 2017), and the Iowa Supreme Court adopted the cause test for determining the number of accidents under an auto liability policy. *Just v. Farmers Auto. Ins. Ass'n*, 877 N.W.2d 467, 480 (Iowa 2016). Pursuant to the "cause" test, courts generally hold where one proximate, uninterrupted, and continuing cause resulted in all the injuries and damage, then there exists a single accident or occurrence. *Just,* 877 N.W.2d at 472.

Applying the "cause" test here, the Derecho must be deemed a single occurrence for numerous reasons. As evidenced by Doppler radar, the Derecho moved across Iowa and caused damage at Heartland's various

locations in one proximate, uninterrupted and continuous event. (D's SMJ App. at 465–66; App. at 792–93). Meteorologists view the Derecho as a single storm event. (D's SMJ App. at 467; App. at 794).

The insurance industry agrees. For example, Verisk, a provider of insurance products and services, offers the PCS Catastrophe Loss Index. (D's SMJ App. at 502; App. at 804). PCS assigns a catastrophe serial number to loss events in the United States, Puerto Rico, and the U.S. Virgin Islands that cause $25 million or more in insured property losses and affect a significant number of policy holders and insurers. (D's SMJ App. at 502; App. at 804). The PCS catastrophe serial number lets insurers track losses and reserves related to a single discrete event. (D's SMJ App. at 502; App. at 804). Many reinsurance contracts use PCS serial numbers to determine which losses will trigger reinsurance coverage. (D's SMJ App. at 502; App. at 804). PCS assigned serial number 2046 to the Derecho. (D's SMJ App. at 502; App. at 804). Consistent with industry practice, Nationwide reported the Derecho as a single occurrence under its reinsurance program. (D's SMJ App. at 502; App. at 804).

Finally, what happened in Iowa on August 10, 2020, would commonly be described as a single storm. *See Just,* 877 N.W.2d at 472 (explaining a two-collision sequence of events would be commonly referred

to as a multi-vehicle accident). Any suggestion that a contrary conclusion can be reached under the facts of this case would not be a reasonable one. The District Court agreed, and this Court should affirm and conclude as a matter of law that the Derecho constitutes a single occurrence under the Policy. (Ruling at 18–19; App. at 139–40).

CONCLUSION

For the reasons explained above, Nationwide's Policy provides Heartland with a total of $3,000,000 in earnings and extra expense coverage for loss at all locations caused by the Derecho. Heartland's attempt to re-write the policy to apply the $3,000,000 limit to each location must be rejected as contrary to the express policy terms and the rules of interpretation. Any suggestion that the Derecho involved multiple storms must also be rejected as contrary to meteorological science and insurance principles.

CONTINGENT REQUEST FOR ORAL ARGUMENT

Appellee requests to be heard in oral argument if Appellant is granted oral argument.

Respectfully submitted,

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CERTIFICATE OF COST

I hereby certify that the costs of printing the Appellee's brief was $0.00, exclusive of sales tax, delivery, and postage.

By: */s/ Sean M. O'Brien*

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rules of Appellate Procedure 6.903(1)(d); 6.903(1)(g)(l); and 6.906(4) because this brief has been prepared in a proportionally spaced typeface using Times New Roman font in 14-point size and contains 5,973 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(l).

By: */s/ Sean M. O'Brien*

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of Defendant-Appellee's Proof Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and was served via EDMS on July 5, 2023.

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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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

ARGUMENT

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.

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