

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA**

QBE INSURANCE)	
CORPORATION,)	
)	
Petitioner,)	
)	
v.)	CASE NO.:10-0456-CG-N
)	
ESTES HEATING & AIR)	
CONDITIONING, INC.)	
)	
Respondent.)	

QBE INSURANCE CORPORATION’S MOTION FOR SUMMARY JUDGMENT

COMES NOW Petitioner QBE Insurance Corporation (hereinafter referred to as “QBE”), pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rules 7.1 and 7.2 of the United States District Court for the Southern District of Alabama, and moves this Honorable Court to enter summary judgment in favor of QBE, finding that QBE owes no duty to defend or indemnify Estes Heating & Air Conditioning, Inc. (hereinafter referred to as "Estes") under the Commercial General Liability Policy QBE issued Estes relative to certain claims presented by multiple plaintiffs against Estes in two lawsuits filed in the Circuit Court of Mobile County, Alabama. Those cases, styled *Diges E. Little, et al. v. The Mitchell Company, Inc., et al.*, with civil action number CV-09-901153, and *Robert W. Henderson, et al. v. The Mitchell Company, Inc., et al.*, with civil action number CV-2009-901381 (hereinafter referred to as "the Underlying Suit"), have been consolidated with another civil case arising from the same operative facts, *Housing Authority of the City of Prichard v. The Mitchell Company, Inc., et al.*, CV-09-901118, also in the Circuit Court of Mobile County. QBE offers the following in support of its requested relief:

- I. Narrative of Undisputed Facts filed contemporaneously herewith;
- II. Memorandum of Law filed contemporaneously herewith;
- III. Exhibits to Memorandum of Law in Support of Motion for Summary Judgment;
- IV. Pleadings;

WHEREFORE, THE ABOVE PREMISES CONSIDERED, QBE moves this Honorable Court to grant summary judgment in its favor as there is no genuine issue of material fact and QBE is entitled to judgment as a matter of law as to all issues before this Court. QBE respectfully requests this Honorable Court find as follows:

A. Declare and decree that under the QBE CGL Policy ANM19903-6, QBE does not owe a duty to defend Estes with regard to the Underlying Suit;

B. Declare and decree that the QBE CGL Policy ANM19903-6 does not afford coverage to Estes for the Underlying Suit and as such QBE does not owe a duty to indemnify Estes in the Underlying Suit;

C. Declare and decree that the QBE CGL Policy ANM19903-6 does not afford coverage to Estes for the Underlying Suit and as such Estes is not entitled to any benefits under the QBE CGL Policy ANM19903-6;

D. Afford QBE such other and further relief as the Court may deem proper.

Respectfully submitted,

/s/ Michael W. Kelley, II

Thomas T. Gallion, III (ASB-5295-L74T)

Michael W. Kelley, II (ASB-7825-I25K)

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document has been served upon the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed, on this the 29th day of September, 2011.

Thomas M. Galloway, Jr.
Post Office Box 16629
Mobile, Alabama 36616
TEL: (251) 476-4493

/s/Michael W. Kelley, II
OF COUNSEL

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**IN THE UNITED STATES DISTRICT COURT
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QBE INSURANCE)	
CORPORATION,)	
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v.)	CASE NO.:10-0456-CG-N
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ESTES HEATING & AIR)	
CONDITIONING, INC.)	
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Respondent.)	

**NARRATIVE OF UNDISPUTED FACTS IN SUPPORT OF QBE INSURANCE
CORPORATION’S MOTION FOR SUMMARY JUDGMENT**

COMES NOW Petitioner QBE Insurance Corporation (hereinafter referred to as “QBE”), pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rules 7.1 and 7.2 of the United States District Court for the Southern District of Alabama, and submits this Narrative of Undisputed Facts in Support of its Motion for Summary Judgment. QBE moves this Honorable Court to enter summary judgment in favor of QBE, finding that QBE owes no duty to defend or indemnify Estes Heating & Air Conditioning, Inc. (hereinafter referred to as "Estes") under the Commercial General Liability Policy QBE issued to Estes relative to certain claims presented by multiple plaintiffs ("Plaintiffs") against Estes in two lawsuits filed in the Circuit Court of Mobile County, Alabama. Those cases, styled *Diges E. Little, et al. v. The Mitchell Company, Inc., et al.*, with civil action number CV-09-901153, and *Robert W. Henderson, et al. v. The Mitchell Company, Inc., et al.*, with civil action number CV-2009-901381 (hereinafter referred to as "the Underlying Suit"), have been consolidated with another civil case arising from the same operative facts, *Housing Authority of the City of Prichard v. The Mitchell Company, Inc., et al.*, CV-09-901118, also in the Circuit Court of Mobile County. The Complaints filed in the

Underlying Suit are substantially identical, including the most recent Amended Complaints filed in each, the Fifth Amended Complaint in *Little* and Sixth Amended Complaint in *Henderson*, with the exception that the *Henderson* Sixth Amended Complaint contains one additional cause of action. [See Fifth Amended Complaint, *Henderson*, Sixth Amended Complaint, *Little*, hereinafter referred to as "Underlying Suit Complaint" or "Complaint"]. QBE offers the following Narrative of Undisputed Facts in support of its requested relief:

A. NARRATIVE OF UNDISPUTED FACTS

i. Facts of Underlying Case

1. The Underlying Suit arises as from the construction of residential housing in Prichard, Alabama in a housing project named the Hope IV Family Sales Subdivision or "Bessemer Subdivision". [See Complaint, attached hereto as Exhibit "A"; ¶¶16-17].

2. Between 2003 and 2008, the developer for the Bessemer Subdivision, The Mitchell Company, Inc. (hereinafter referred to as "The Mitchell Company"), constructed and sold homes in the Bessemer Subdivision pursuant to an agreement it had with the Prichard Housing Authority. [Ex. A, ¶17].

3. On January 17, 2006, Estes was retained as an HVAC subcontractor by general contractor The Mitchell Company to install HVAC systems at the Bessemer Subdivision [See Affidavit of Cindy Dunn, attached hereto as Exhibit "B", ¶¶6-7; See Subcontract Agreement, attached hereto as Exhibit "C", Bates #Estes 201].

4. Under the subcontract agreement, Estes was to provide all labor and materials necessary to install 36, three-ton HVAC units in the Bessemer Subdivision housing occupied by the Plaintiffs. [Ex. B, ¶8; Ex. C, Bates #Estes 206].

5. Estes was to perform its work "in strict accordance with the specifications,

schedules and drawings . . . prepared by Creative Designs, architect" and which were provided to Estes. [Ex. B, ¶9; Ex: C, Bates #Estes 201].

6. Estes followed the design specifications provided to it by The Mitchell Company and/or architect Creative Designs, and installed the units as instructed by the plans and specifications, doing no calculations of its own as to the appropriate HVAC systems to be installed. [Ex. B, ¶10; See Investigation Report, attached hereto as Exhibit "D", Bates #Estes108-109; See Deposition of Gary Estes, attached hereto as Exhibit "E", pp. 13-15, 45-46, 66-67, 94].

7. The HVAC systems as installed by Estes were inspected by city officials and passed inspection. [Ex. B, ¶11; Ex. D, Bates #Estes108-109].

8. According to the Complaint, in May of 2009 the Plaintiffs became aware of alleged defects in the Chinese drywall materials that had been used in the homes and also of alleged defects in the HVAC systems installed by Estes. [Ex. A, ¶28].

9. These alleged defects allegedly caused the Plaintiffs to suffer damages both to their person and property. [Ex. A, ¶29].

10. In general, the Plaintiffs allege that their claims arise out of the construction and sale or lease of their residential homes, "and the manufacture, formulation, design, processing, distribution, delivery, importation, supplying, inspection, testing, marketing, sale, warranting, advertising, use, installation, application, servicing and or failure to warn concerning Chinese drywall and/or the HVAC system which the Defendants knew or should have known was defective" or unsuited for its purpose. [Ex. A, ¶2].

11. They allege that due to the Defendants' conduct, the defective Chinese drywall and inadequate HVAC systems were installed in their homes and has injured them and their property. [Ex. A, ¶3].

12. Further, they allege that the HVAC systems were supplied, installed and serviced by Estes and that they were defective and not the proper size, and either caused damage to their property and health, or exacerbated the damage caused by the Chinese drywall. [Ex. A, ¶¶3, 12, 30].

13. According to the Complaint, Chinese drywall materials were made from waste materials collected from scrubbers at coal-fired plants in China or were made from Gypsum, a substance mined in China that contains high levels of sulfur. [Ex. A, ¶22].

14. Allegedly, the drywall materials emit a combination of sulfide gases which produce a chemical odor and can cause corrosion of copper and other metal materials such as those used in HVAC, electrical, and gas fuel systems, and other appliances, electronics and equipment commonly found in residential homes. [Ex. A, ¶23].

15. Plaintiffs allege that one of the gases emitted by the drywall is Hydrogen Sulfide, which is a broad spectrum poison which can cause serious health problems in the human body. Plaintiffs aver that low level exposure to this gas over time can lead to irritated, itchy eyes and skin, difficulty breathing, sore throat, persistent cough, nausea, bloody noses, headaches, fatigue, appetite loss, impaired memory function, sinus infection, allergic reactions and asthma attacks. [Ex. A, ¶24].

16. The Plaintiffs in the Underlying Suit allege that the Defendants knew or should have known of the defective nature of the Chinese drywall product and the HVAC systems before putting them in their homes but concealed or suppressed this knowledge from them. [Exhibit A, ¶¶27-28].

17. Specifically, they allege that as a result of the defective HVAC systems, the gas producing properties of the defective Chinese drywall were worsened to their injury. [Ex. A,

¶26].

18. Further, the Plaintiffs state that they could not have discovered the defects in the Chinese drywall until December of 2008 when press reports touting the dangers of the product were first issued and that they did not receive actual notice of the use of Chinese drywall in their homes until May of 2009. Nor could they have discovered the defective nature of the HVAC systems supplied and installed by Estes until May of 2009 after investigation of the Chinese drywall. [Ex. A, ¶28].

19. Regarding injuries, the Plaintiffs allege that as a result of the gas emissions and the conduct of the Defendants they have suffered the following damages:

- (a) Personal injuries in the form of one or more of the above identified signs, symptoms and conditions associated with exposure to the sulfide gases emitted by the defective Chinese drywall ;
- (b) Permanent injuries, or alternatively the permanent aggravation of pre-existing conditions;
- (c) Pain and suffering;
- (d) Mental anguish;
- (e) Loss of enjoyment of their home;
- (f) Increased utility and servicing costs;
- (g) Past and future medical expenses, including the cost of medical monitoring;
- (h) Past and future lost earnings;
- (i) Property damage;
- (j) Costs of extensive remedial measures, tear-out, disposal and re-construction to correct the defective drywall and affected construction;
- (k) Property damage to the HVAC system, electrical systems, and gas fuel systems in their home;
- (l) Property damage to appliances, electronics, equipment and other items located in their

home;

- (m) The diminished value of their home occasioned by the damage caused by the stigma associated with Chinese drywall construction;
- (n) Loss of or impaired marketability of their home;
- (o) Relocation expenses and costs;
- (p) Cleaning expenses and costs;
- (q) The loss of financial and time investment in their home;
- (r) The loss of funds paid in the form of rent, loan interest, and the loss of equity in their homes;
- (s) Such severe, regular and systematic failures of the HVAC systems, electrical systems and gas fuel systems and other residential home systems/components so as to render their home unreliable, unsafe, uninhabitable and unfit for human occupation and use.

[Ex. A, ¶29].

20. The damages as enumerated were also allegedly "directly and proximately caused, exacerbated and worsened by the HVAC system which was improperly manufactured, formulated, designed, processed, distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, applied and/or serviced, and which was so provided without adequate warnings." [Ex. A, ¶30].

21. The Plaintiffs allege twelve causes of action against Estes in the Underlying Suit:¹

- Count I- Negligence/Wantonness
- Count II – Strict Products Liability
- Count III – Unjust Enrichment
- Count IV – Implied Warranty of Habitability
- Count V – Implied Warranty of Fitness for a Particular Purpose

¹ A thirteenth cause of action is contained in the Fifth Amended Complaint in the *Henderson* action, but only contains allegations against the Prichard Housing Authority.

- Count VI – Implied Warranty of Merchantability
- Count VII – Express Warranty
- Count VIII – Violation of Alabama’s Deceptive and Unfair Trade Practices Act
- Count IX – Breach of Contract
- Count X – Fraudulent Misrepresentation
- Count XI – Fraudulent Concealment/Suppression
- Count XII - Failure to Secure Performance Bond.

[Ex. A].

ii. QBE Policy

22. QBE issued to Estes a Commercial General Liability Insurance policy bearing policy number ANM19903-6 for the policy period of November 29, 2008 to November 29, 2009.

[Ex. B, ¶12; See QBE’s Commercial General Liability Policy, ANM19903-6, attached hereto as Exhibit “F” hereinafter referred to as the “CGL Policy”].

23. The limit of the liability coverage provided under the CGL Policy is subject to various coverage provisions, endorsements, terms, conditions, limitations, and exclusions.

[Exhibit B, ¶14; Ex. F].

24. The CGL Policy includes (among other things) the following general provisions regarding coverage²:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to**

² Only portions of the Policy are cited here; however, a complete copy of the Policy is attached as Exhibit “F”. By highlighting portions of the Policy and not others, QBE does not intend to waive its right to rely upon any other provision within the Policy that may not be cited herein.

defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
- (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

- b. This insurance applies to “bodily injury” and “property damage” only if:
 - (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”; and
 - (2) The “bodily injury” or “property damage” occurs during the policy period.

...

2. Exclusions

This insurance does not apply to:

- a. **Expected Or Intended Injury**
“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect persons or property.
- b. **Contractual Liability**
“Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
 - (1) That the insured would have in the absence of the contract or agreement; or
 - (2) Assumed in a contract or agreement that is an “insured contract”, provided the “bodily injury” or “property damage” occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an “insured contract”, reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of “bodily injury” or “property damage”, provided:
 - (a) Liability to such party for, or for the cost of, that party’s defense has also been assumed in the same “insured contract”; and
 - (b) Such attorney fees and litigation expenses are for defense of

that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

...

f. Pollution

- (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants".**
 - (a) At or from any premises, site or location which is or was at any time owned or occupied by or rented or loaned to, any insured. However, this subparagraph does not apply to:**
 - (i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot from equipment used to heat that building.**
 - (ii) "Bodily injury" or "property damage" for which you may be held liable. If you are a contractor and the owner lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or**
 - (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile" fire;**
 - (b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;**
 - (c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any insured or any person or organization for whom you may be legally responsible; or**
 - (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:**
 - (i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them.**

This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;

- (ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or
 - (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".
- (e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants".
2. Any loss, cost or expense arising out of any:
- (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
 - (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to or assessing the effects or, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

...

j. Damage to Property
"Property damage" to:

- (1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;

- (2) Premises you sell, give away or abandon, if the “property damage” arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody or control of the insured;
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the “property damage” arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to “property damage” (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III – Limits of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are “your work” and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to “property damage” included in the “products-completed operations hazard”.

k. Damage to Your Product

“Property damage” to “your product” arising out of it or any part of it.

l. Damage to Your Work

“Property Damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard”.

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage to Impaired Property or Property Not Physically Injured

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

n. Recall of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property";

If such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

...

SECTION V- DEFINITIONS

...

3. "Bodily Injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

...

9. "Insured contract" means:

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
- b. A sidetrack agreement;
- c. An easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; or
 - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's

rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

...

13. **“Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.**

...

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

...

17. **“Property damage” means:**

- a. **Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or**
- b. **Loss of use of tangible property that is not physically injured. All such losses of use shall be deemed to occur at the time of the “occurrence” that caused it.**

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

...

- 21 **“Your product”:**

- a. **Means**
 - (1) **Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:**
 - (a) **You;**
 - (b) **Others trading under your name; of**
 - (c) **A person or organization whose business or assets you have acquired; and**
 - (2) **Containers (other than vehicles), materials, parts or equipment furnished in connection with such good or products.**
- b. **Includes:**
 - (1) **Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your product”; and**
 - (2) **The providing of or failure to provide warnings or instructions.**
- c. **Does not include vending machines or other property rented to or located for the use of others but not sold.**

22. **“Your work”:**
- a. **Means**
 - (1) **Work or operations performed by you or on your behalf; and**
 - (2) **Materials, parts or equipment furnished in connection with such work or operations.**
 - b. **Includes**
 - (1) **Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your work”, and**
 - (2) **The providing of or failure to provide warnings or instructions.**

...

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

POLLUTANTS DEFINITION AMENDMENT

All Coverage Parts or Coverage Forms included in this policy are subject to the following:

The definition of “pollutants” is replaced in its entirety by the following:

“Pollutants” mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor soot, fumes, acids, alkalis, radiation or radioactive contamination, dioxins, polychlorinated biphenols, pathogenic or poisonous biological or chemical materials and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

...

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

TOTAL POLLUTION EXCLUSION ENDORSEMENT

**This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART**

Exclusion f. under Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability is replaced by the following:

This insurance does not apply to:

- f. **Pollution**
 - (1) **“Bodily injury” or “property damage” which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of “pollutants” at any time.**
 - (2) **Any loss, cost or expense arising out of any:**
 - (a) **Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of “pollutants”;** or

- (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

...

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

AMENDMENT OF INSURED CONTRACT DEFINITION

**This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART**

**Paragraph 9. of the Definitions Section is replaced by
the following:**

9. "Insured contract" means:

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
- b. A sidetrack agreement;
- c. An easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, provided the "bodily injury" or "property damage" is caused, in whole or in part, by you or those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; or
 - (b) Giving directions or instructions, or failing to give them, if that

- is the primary cause of the injury or damage; or
- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

...

[Ex. B, ¶15; Ex. F].

25. Upon receiving notice of the Underlying Suit, and pursuant to a Reservation of Rights, QBE obtained outside field adjusters to complete an investigation of this claim. [Ex. B; ¶5].

26. QBE is currently defending Estes pursuant to a Reservation of Rights. [Ex. B, ¶16; See Reservation of Rights Letter, Attached hereto as Exhibit "G"].

27. Recently, the Underlying Suit was stayed by the Circuit Court of Mobile County at the request of one of the defendants in that suit. [See Order Granting Stay, attached hereto as Exhibit "H"].

Respectfully submitted,

/s/ Michael W. Kelley, II

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document has been served upon the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed, on this the 29th day of September, 2011.

Thomas M. Galloway, Jr.
Post Office Box 16629
Mobile, Alabama 36616
TEL: (251) 476-4493

/s/Michael W. Kelley, II
OF COUNSEL

02391-1123
373150_1

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA**

QBE INSURANCE)	
CORPORATION,)	
)	
Petitioner,)	
)	
v.)	CASE NO.:10-0456-CG-N
)	
ESTES HEATING & AIR)	
CONDITIONING, INC.)	
)	
Respondent.)	

**MEMORANDUM OF LAW IN SUPPORT OF QBE INSURANCE CORPORATION'S
MOTION FOR SUMMARY JUDGMENT**

COMES NOW Petitioner QBE Insurance Corporation (hereinafter referred to as "QBE"), pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rules 7.1 and 7.2 of the United States District Court for the Southern District of Alabama, and submits this Memorandum of Law in Support of its Motion for Summary Judgment. QBE offers the following in support of its requested relief:

A. DISCUSSION

i. Alabama Courts Have Set Out Clear Guidelines for Interpretation of Insurance Contracts, Which Is a Question of Law in Alabama.

In *Twin City Fire Insurance Co. v. Alfa Mutual Insurance Co.*, 817 So. 2d 687, 691-92 (Ala. 2001), the Alabama Supreme Court summarized the law in Alabama governing interpretation of insurance contracts:

A contract of insurance, like other contracts, is governed by the general rules of contracts. *Pate v. Rollison Logging Equip., Inc.*, 628 So. 2d 337 (Ala.1993). Insurance companies are entitled to have their policy contract enforced as written. *Gregory v. Western World Ins. Co.*, 481 So. 2d 878 (Ala.1985). "Insurance contracts, like other contracts, are construed so as to give effect to the intention of the parties, and, to determine this intent, a court must examine more than an isolated sentence or term; it must read each phrase in the

context of all other provisions." *Attorneys Ins. Mut. of Alabama, Inc. v. Smith, Blocker & Lowther, P.C.*, 703 So. 2d 866, 870 (Ala.1996).

If an insurance policy is clear and unambiguous in its terms, then there is no question of interpretation or construction. *American & Foreign Ins. Co. v. Tee Jays Mfg. Co.*, 699 So. 2d 1226 (Ala.1997). The fact that the parties interpret the insurance policy differently does not make the insurance policy ambiguous. *Tate v. Allstate Ins. Co.*, 692 So. 2d 822 (Ala.1997). While ambiguities or uncertainties in an insurance policy should be resolved against the insurer, ambiguities are not to be inserted by strained or twisted reasoning. *Kelly v. Royal Globe Ins. Co.*, 349 So. 2d 561 (Ala.1977). Where the parties disagree on whether the language in an insurance contract is ambiguous, a court should construe language according to the meaning that a person of ordinary intelligence would reasonably give it. *Western World Ins. Co. v. City of Tuscumbia*, 612 So.2d 1159 (Ala.1992).

Where an insurance policy defines certain words or phrases, a court must defer to the definition provided by the policy. *St. Paul Fire & Marine Ins. Co. v. Edge Mem'l Hosp.*, 584 So.2d 1316 (Ala.1991). . . . An undefined word or phrase in an insurance policy does not create an inherent ambiguity. To the contrary, where questions arise as to the meaning of an undefined word or phrase, the court should simply give the undefined word or phrase the same meaning that a person of ordinary intelligence would give it. *Carpet Installation & Supplies of Glenco v. Alfa Mut. Ins. Co.*, 628 So.2d 560 (Ala.1993).

Twin City, 817 So. 2d at 691-692.

Further, the Alabama Supreme Court "has held that an insurance company has the right to limit its liability and write a policy with narrow coverage but that, when doubt exists as to whether an insurance policy provides coverage, the language used by the insurer must be construed liberally for the benefit of the insured and strictly against the insurance company."

Turner v. State Farm Fire & Cas. Co., 614 So. 2d 1029 (Ala. 1993).

Regarding policy exclusions, "[t]he law in Alabama is clear that insurance companies have the right, in the absence of statutory provisions to the contrary, to limit their liability and write policies with narrow coverage; the insured has the option to purchase the policy or look elsewhere It is also true that the courts must enforce insurance contracts as written"

Aetna Ins. Co. v. Pete Wilson Roofing & Heating Co., 289 Ala. 719, 723, 272 So. 2d 232 (1972).

Regarding endorsements, the Alabama Supreme Court has also clarified that “endorsements” to insurance policies are provisions added to an insurance contract altering its scope or application that take precedence over printed portions of the policy in conflict therewith. *Commercial Standard Ins.Co. v. Gen. Trucking Co.*, 423 So. 2d 168 (Ala. 1982).

ii. Duty to Defend Standard

The standard of review when determining whether an insurer owes its insured a duty to defend is well established:

“Whether an insurance company owes its insured a duty to provide a defense in proceedings instituted against the insured is determined primarily by the allegations contained in the complaint.” *Tanner v. State Farm Fire & Cas. Co.*, 874 So.2d 1058, 1063 (Ala.2003). Under Alabama law, “[i]f the allegations of the injured party's complaint show an accident or occurrence which comes within the coverage of the policy, the insurer is obligated to defend regardless of the ultimate liability of the insured.” *Gunnin v. State Farm and Cas. Co.*, 508 F.Supp.2d 998, 1002 (M.D.Ala.2007) (citation omitted). However, a court is not constrained to consider only the allegations of the underlying complaint, but may additionally look to facts which may be proved by admissible evidence. *Tanner*, 874 So.2d at 1064; *see also Hartford Cas. Ins. Co. v. Merchants & Farmers Bank*, 928 So.2d 1006, 1010 (Ala.2005) (in deciding whether the allegations of the complaint show a covered accident or occurrence, “the court is not limited to the bare allegations of the complaint ... but may look to facts which may be proved by admissible evidence”) (citations omitted). The test, ultimately, is this: “The insurer owes no duty to defend only if neither does the complaint against the insured allege a covered accident or occurrence nor does the evidence in the litigation between insurer and insured prove a covered accident or occurrence.” *Tanner*, 874 So.2d at 1065.

Essex Ins. Co. v. Foley, Civil Action No. 10–0511–WS–M 2011 WL 1706214, 3 (S.D. Ala., May 5, 2011).

"It is well-established under Alabama law that 'the insured bears the burden to establish coverage by demonstrating that a claim falls within the policy, while the insurer bears the burden to prove that any policy exclusion applies.'" *Auto-Owners Ins. Co. v. L. Thomas Dev., Inc.*, Civ. Action No. 2:07cv1041-MHT, 2010 WL 2308190, *3 (M.D. Ala. June 9, 2010) (Thompson, J.)

(citing *Thorn v. Am. States Ins. Co.*, 266 F. Supp. 2d 1346, 1349 (M.D. Ala. 2002) (Thompson, J.)). "To ascertain whether [the insurer] owes [the insured] a duty to defend, the court focuses on the factual allegations in the complaint, not on the legal theories asserted." *Cotton States Mut. Ins. Co. v. Daniel*, 2008 WL 4999097, 6 (M.D. Ala., Nov. 20, 2008) (citing *Hartford*, 928 So. 2d at 1011).

Where facts are alleged in the complaint to support a cause of action, it is the facts, not the legal phraseology, that determine whether an insurer has a duty to defend its insured in the action. As we have said: "[I]f there is any uncertainty as to whether the complaint alleges *facts* that would invoke the duty to defend, the insurer must investigate the *facts* surrounding the incident ... to determine whether it has a duty to defend...."

Hartford, *supra*, at 1012. (citing *Acceptance Ins. Co. v. Brown*, 832 So.2d at 14) (quoting *Blackburn v. Fid. & Deposit Co. of Maryland*, 667 So. 2d 661, 668 (Ala.1995) (emphasis original)).

iii. No Coverage is Afforded to Estes for the Underlying Suit Because there has been no "Occurrence" as to the Work Performed by Estes.

(a) There is no Accident, Thus no "Occurrence", Which Caused "Bodily Injury" or "Property Damage" to the Underlying Suit Plaintiffs.

The QBE CGL Policy provides coverage for "bodily injury" and/or "property damage caused by an "occurrence". An "occurrence" is defined in the Policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Though the word "accident" is not defined in the Policy, Alabama courts have held, "[t]he term accident means 'an unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could be reasonably anticipated' or 'something unforeseen, unexpected, or unusual.'" *U.S. Liability Ins. Co. v. Sternberg Constr.*, Civ. Action No. 2:10-cv-374-MEF, 2011 WL 3585261, *6 (M.D. Ala., August 16, 2011) (Fuller, M.) (quoting *Hartford*, *supra*) See also *Auto Owners*, *supra*. Therefore, when making a determination as to whether an

event is an "occurrence", this Court "must consider whether the insured **expected or intended the conduct** alleged in the underlying complaint. *Id.* (citing *Auto Owners*, 2010 WL 2308190 at *3) (emphasis added).

With regard to review of the underlying complaint, it "must contain factual allegations to support legal causes of action within the scope of the policy's coverage; it is not enough for an insured to rely on bare legal conclusions without factual support to establish the underlying claims are within the scope of the insurance coverage." *Id.* Additionally, if it is unclear whether the factual allegations in the underlying complaint answer the coverage question, a court may consider facts outside the complaint as long as they are proven by admissible evidence. *Id.*

Here, neither the factual allegations in the Underlying Suit Complaint nor the facts discovered outside the Complaint state an "occurrence" within the policy as there is no allegation or evidence that an accident occurred during Estes' performance. There are no allegations, nor is there any evidence, that Estes' conduct in installing the HVAC systems was anything other than the way Estes intended and expected to install them.

The underlying Complaint alleges facts collectively as to all defendants, that said "[d]efendants manufactured, formulated, designed, processed, distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, applied, serviced and/or failed to warn concerning an inadequate, defective and miss-sized HVAC system in the Plaintiffs' home." [Ex. A, ¶26]. As to negligent conduct, the Complaint alleges legal conclusions that the defendants collectively breached a duty owed to the Plaintiffs to "exercise reasonable and ordinary care in the manufacture, formulation, design, processing, distribution, delivery, importation, supplying, inspection, testing, marketing, sale, warranting, advertising, use, installation, application, servicing and/or warnings concerning the Chinese drywall and the

HVAC system" and "further failed to warn the Plaintiffs and others of the defective nature of the Chinese drywall and HVAC system" [Ex. A, ¶¶35, 36].

In this instance, it is unclear whether the factual allegations in the Underlying Complaint answer the coverage question because the Complaint is patently vague and does not allege any conduct specific to Estes nor explain in what manner Estes' performance could have been negligent. Therefore, a coverage determination cannot be made regarding whether there is an alleged accident or "occurrence" by a simple reading of the Complaint. Because of this, the Court should look to the facts outside the Complaint to make such a determination.

A review of the facts outside the Complaint show that there has been no accident in this case as to Estes' conduct, and therefore there can be no "occurrence". Specifically, review of the subcontract agreement between Estes and general contractor The Mitchell Company, the investigation report and the Insured's testimony show that Estes did nothing other than strictly comply with the subcontract agreement by installing the exact number and size HVAC systems it was instructed to in the agreement and as called for in the specifications prepared by Creative Designs, the architect for the project. [Ex B, ¶10; Ex. C, Bates #Estes 206; Ex. D, Bates #Estes 108-09; Ex. E, pp. 13-15, 45-46, 66-67, 94]. The subcontract provides as follows:

ARTICLE I - Subcontractor shall furnish all labor and/or materials and perform all work necessary to complete the part or parts of the work described on Exhibit "A" attached hereto, herein referred to as the "Scope of Work".

Exhibit "A"

SCOPE OF WORK
Bessener Family Sales
Estes Heating and Air Conditioning, Inc.
HVAC
15-120

Furnish all labor, material, equipment and supplies to install a complete, fully functioning heating and cooling system as described in project specifications and indicated on project plans by Creative Designs sheets A1-A21 and M1-M10. The equipment shall consist of 36 condensing units, and 36 air handlers (3 ton units) as shown on the attached Payment Schedule and Equipment Specifications.

[Ex. C, Bates #Estes 201, 206].

Based on the above facts, it is clear that Estes was merely instructed by The Mitchell Company on exactly the number and size of units to install in the Bessemer Subdivision and performed that job as it intended to do. According to Estes, it "did not compute the HVAC system load calculations," rather those were given to it by The Mitchell Company. [Ex. D, Bates #Estes 108-09]. According to the subcontract agreement, the systems to be installed by Estes were those "as described in project specifications and indicated on project plans by Creative Designs Sheets A1-A21 and M1-M10. [Ex. C, Bates #Estes 206]. Estes holds the opinion that "the units were of appropriate size and design to perform the task they were intended, explaining that the mechanical engineers specifications concurred with what he would have installed in the homes." [Ex. D, Bates #Estes 108-09]. Had Estes done something during the process of installing the HVAC systems, such as, for example, making an error in calculation resulting in the wrong size units being installed, then there may exist grounds for the finding of an accident. *See e.g. Cook v. Admiral Ins. Co.*, Civil Action No. 10-10722, 2011 WL 3652590, *3 (5th Cir. Aug. 19, 2011) (Under CGL Policy with definition of "occurrence" identical to that in QBE Policy, a mistake in counting amount of casing needed for oil well was accident under Texas law which defined accident as a fortuitous, unexpected, and unintended event," similar to Alabama definition of accident). However, under these facts, there is no such alleged error or mistake on the part of Estes, therefore there is no accident, and thus no "occurrence."

Even though there is no "occurrence" with regard to Estes' conduct, QBE does recognize the possibility that there has been an "occurrence" in this case, at least as to the party that installed the Chinese drywall. While QBE can find no law in Alabama specifically stating that the "property damage" and "bodily injury" caused by the off-gassing from Chinese drywall is

caused by an "occurrence", other jurisdictions have reached the conclusion that when sulfide gases emitted from Chinese drywall cause damage to persons or property other than the drywall itself, there has been an "occurrence". Specifically, other jurisdictions have held that while damages to the drywall itself do not constitute an "occurrence", damages resulting from emissions from the drywall are accidental and thus "occurrences". *See Dragas Mgmt. Corp. v. Hanover Ins. Co.*, 2011 WL 2982097, *4 (E.D.Va., July 21, 2011) ("Therefore, under the Fourth Circuit's precedent, this court holds that the replacement of the defective drywall is not an occurrence under the policy; however, any repair or replacement of non-defective components of the homes at The Hampshires and Cromwell Park or personal property of the homeowners constituted an occurrence under the Citizens policies at issue."); *In re Chinese Manufactured Drywall Prod. Liab. Litig.*, 759 F. Supp. 2d 822, 835 (E.D. La. 2010) ("the Court finds that the damage caused by Chinese drywall in the homes of Plaintiffs' insured under ASI Lloyds and Allstate's homeowners' policies constitutes covered "accidental," "sudden," "physical," "loss."); *Builders Mut. Ins. Co. v. Dragas Mgmt. Corp.*, 709 F. Supp. 2d 441, 446 (E.D. Va. 2010) (allegations of damage to "other building components of homes at the Developments and personal property in those homes" sufficient to allege "occurrence" such that motion to dismiss was denied).

Nevertheless, because there is no allegation or evidence that Estes had anything to do with the manufacture, procurement or installation of the drywall, there can be no "occurrence" as to the work done by Estes. According to the Complaint, "Estes Heating & Air, Inc. supplied, installed and serviced the HVAC system in the Plaintiffs' homes." [Ex. A, ¶12]. Conversely, defendants Mitchell Company, Inc., Interior-Exterior Building Supply Company, L.P., Creola Ace Hardware, Inc., Rightway Drywall, Inc., Smokey Mountain Materials, Inc., George Drywall,

Inc., Knauf USA Polystyrene, Inc., and Knauf Insulation GMBH were the parties involved with the sales, marketing, distribution, installation, etc. of the defective Chinese drywall. [Ex. A, ¶18]. In fact, Estes confirmed that its installation of the HVAC systems had nothing to do with the installation of the drywall. [Ex. D, Bates #Estes 110].

(b) **There is no Coverage for Repair or Replacement of the HVAC Systems Themselves Because any Damage to Those Would be the Result of Estes' Faulty Workmanship, Which is not an "Occurrence" Under Alabama Law.**

Under Alabama law, faulty workmanship of either a general contractor or a subcontractor on behalf of an insured does not constitute an “occurrence.” Accordingly, there is no coverage for faulty workmanship claims under commercial general liability policies. *See U.S. Fid. & Guar. Co. v. Warwick Dev. Co., Inc.*, 446 So. 2d 1021 (Ala. 1984) (Faulty workmanship does not constitute an “occurrence”) (*See also Berry v. South Carolina Ins. Co.*, 495 So. 2d 511 (Ala. 1985); *U.S. Fid. & Guar. Co. v. Bonitz Insulation Co. of Ala.*, 424 So. 2d 569 (Ala. 1982).

Citing both *Bonitz* and *Berry*, in June of 2010 the United States District Court for the Middle District of Alabama again recognized that faulty workmanship claims are not covered claims under CGL policies in *Auto Owners, supra*. In that case, Judge Myron Thompson held that there was no coverage for the faulty workmanship performed by a general contractor hired to build a home for the homeowners when the foundation was negligently installed causing resulting damage to the rest of the home. Holding that the entire home was the general contractor's work product, the Court interpreted policy provisions identical to those in the QBE CGL Policy and explained that these provisions meant that "faulty workmanship is explicitly not covered" under the CGL policy. *Id.* at *4. The Court further reaffirmed that this finding was "in line with the pervasive legal understanding of general-liability insurance, the purpose of which is to protect the insured against accidents, unforeseen disasters, and the misfeasance of others, such

as subcontractors; it is not intended to make the insurance company a guarantor of the insured's work." *Id.* at *5. (citing *Auto-Owners Ins. Co. v. Toole*, 947 F.Supp. 1557, 1564 (M.D. Ala. 1996)).

Likewise, the Eleventh Circuit Court of Appeals has recently held that several subcontractors' faulty workmanship did not constitute an "occurrence" under a commercial general liability policy and therefore any damage resulting from that faulty work was not covered. *Hathaway Dev. Co. v. Illinois Union Ins. Co.*, 274 Fed. App'x. 787 (11th Cir. 2008). In *Hathaway*, the Court reviewed de novo the grant of summary judgment by the federal district court for the insurer, Illinois Union Insurance Co., against the insured, Hathaway Development Co. ("Hathaway"), in a case where Hathaway sought to recover its construction costs of repair for faulty workmanship performed by subcontractors on three separate apartment complex projects. *Id.* at 789. Hathaway raised several issues on appeal.

Of primary importance to the instant case, Hathaway argued that the district court had erred in determining that there was no "occurrence" as that term was defined in the policy. *Id.* at 791. The terms of the commercial general liability policy in *Hathaway* provided that the insurance applied "to 'bodily injury' and 'property damage' only if . . . [t]he 'bodily injury' or 'property damage' is caused by an 'occurrence' . . ." *Id.* The policy further defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful condition." *Id.* Upon review, the Eleventh Circuit agreed with the grant of summary judgment by the district court, affirming the decision on the reasoning that the subcontractors' faulty workmanship was 'an injury accidentally caused by intentional acts.' *Id.* Quoting *Owners Ins. Co. v. James*, 295 F. Supp. 2d 1354, 1364 N.D. Ga. 2003). The work therefore did not constitute an accident under the policy language, could not then be an

“occurrence” under that definition and any damage resulting from that faulty workmanship was not covered. *Id.*

The language in the subject QBE Policy at issue in the instant case is identical to the language as cited in *Hathaway* above. The definition of “occurrence” in the QBE Policy therefore requires that there be an accident before there can be an “occurrence” such that coverage is triggered. The allegations made by the Plaintiffs in the Underlying Suit pertain only to the faulty workmanship of Estes in installing HVAC systems that were of improper size. There is no accident alleged such that there would be an “occurrence” under the Policy, only at best “an injury accidentally caused by intentional acts” as referenced in *Hathaway*, and pursuant to *Hathaway* there is no coverage under such a fact scenario.

Based upon the foregoing, there is no coverage for either the repair or replacement of Estes' work associated with the allegedly inadequately sized HVAC units as those damages would constitute faulty workmanship and thus are not caused by an "occurrence" under the QBE Policy.

iv. The Total Pollution Exclusion Applies to Bar Coverage for all Claims Due to the Discharge, Dispersal or Release of Sulfide Gases from Allegedly Defective Chinese Drywall.

The subject QBE policy issued to Estes contains what has become known nationwide, according to its name, as “The Total Pollution Exclusion.” It states as follows:

This insurance does not apply to:

- f. Pollution
 - (1) “Bodily injury” or “property damage” which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of “pollutants”¹ at any time.
 - (2) Any loss, cost or expense arising out of any:
 - (a) Request, demand, order or statutory or regulatory requirement that any

¹ The alleged “pollutant” in the underlying Complaint is Hydrogen Sulfide. Recent court decisions from other jurisdictions have held that Hydrogen Sulfide is a “pollutant.” *See Wakefield Pork, Inc. v. Ram Mut. Ins. Co.*, 731 N.W.2d 154 (Mn. Ct. App. 2007) *United Nat. Ins. Co. v. Hydro Tank, Inc.*, 525 F.3d 400 (5th Cir. 2008).

- insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of “pollutants”; or
- (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, “pollutants”.

[Ex. F].

The scope of this exclusion has been repeatedly litigated and has spawned a national debate, from which have emanated conflicting judicial decisions throughout the country. *Apana v. TIG Ins. Co.*, 574 F.3d 679 (9th Cir. 2009) (citing *Porterfield v. Audubon Indem. Co.*, 856 So. 2d 789, 800 (Ala. 2002) (“[T]here exists not just a split of authority, but an absolute fragmentation of authority.”). Two primary judicial schools of rationale have developed. Most State courts fall roughly into one of two broad camps. *Id.* According to the *Apana* court, the first group of courts applies the exclusion literally because they find the terms to be clear and unambiguous. *Id.*² The other group of courts has limited the exclusion to situations involving traditional environmental pollution, either because they find the terms of the exclusion to be ambiguous or because they find that the exclusion contradicts policyholders' reasonable

² See *Whittier Props., Inc. v. Ala. Nat. Ins. Co.*, 185 P.3d 84, 89-92 (Alaska 2008); *TerraMatrix, Inc. v. U.S. Fire Ins. Co.*, 939 P.2d 483, 487-88 (Colo. Ct. App.1997); *Heyman Assocs. No. 1 v. Ins. Co. of State of Pa.*, 231 Conn. 756, 653 A.2d 122, 129-33 (Conn. 1995); *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135, 1137-41 (Fla. 1998); *Reed v. Auto-Owners Ins. Co.*, 284 Ga. 286, 667 S.E.2d 90, 92 (Ga. 2008); *Bituminous Cas. Corp. v. Sand Livestock Sys., Inc.*, 728 N.W.2d 216, 220-22 (Iowa 2007); *McKusick v. Travelers Indem. Co.*, 246 Mich.App. 329, 632 N.W.2d 525, 529-32 (2001); *Auto-Owners Ins. Co. v. Hanson*, 588 N.W.2d 777, 779-81 (Minn. Ct. App. 1999); *Heringer v. Am. Family Mut. Ins. Co.*, 140 S.W.3d 100, 102-06 (Mo. Ct. App. 2004); *Sokoloski v. Am. W. Ins. Co.*, 294 Mont. 210, 980 P.2d 1043, 1044-45 (1999); *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112, 118-21 (2001); *Bituminous Cas. Corp. v. Cowen Constr., Inc.*, 55 P.3d 1030, 1033-35 (Okla. 2002); *Madison Const. Co. v. Harleysville Mut. Ins. Co.*, 557 Pa. 595, 735 A.2d 100, 106-08 (1999); *S.D. State Cement Plant Comm'n v. Wausau Underwriters Ins. Co.*, 616 N.W.2d 397, 405-07 (S.D. 2000); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517, 521-22 (Tex. 1995); *City of Chesapeake v. States Self-Insurers Risk Retention Group, Inc.*, 271 Va. 574, 628 S.E.2d 539, 541 (2006); *Peace ex rel. Lerner v. Nw. Nat'l Ins. Co.*, 228 Wis.2d 106, 596 N.W.2d 429, 438-46 (Wis. 1999).

expectations.³ See *Porterfield, supra*. Other courts have expanded the scope of pollution excluded under the provision beyond traditional environmental pollution to include non-environmental claims involving pollutants. *Id.*⁴

Despite Alabama's inclusion in the group of states that have generally limited the

³ See also *Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 199 Ariz. 43, 13 P.3d 785, 790-92 (Ariz.Ct.App.2000); *Minerva Enters., Inc. v. Bituminous Cas. Corp.*, 312 Ark. 128, 851 S.W.2d 403, 404-06 (1993); *MacKinnon v. Truck Ins. Exch.*, 31 Cal.4th 635, 3 Cal.Rptr.3d 228, 73 P.3d 1205, 1208-18 (2003); *Danbury Ins. Co. v. Novella*, 45 Conn.Supp. 551, 727 A.2d 279, 281-83 (1998) (distinguishing *Heyman Assocs. No. 1 v. Ins. Co. of State of Pa.*, 231 Conn. 756, 653 A.2d 122 (1995), listed above); *Am. States Ins. Co. v. Koloms*, 177 Ill.2d 473, 227 Ill.Dec. 149, 687 N.E.2d 72, 75-82 (1997); *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 948-49 (Ind.1996); *Motorists Mut. Ins. Co. v. RSJ, Inc.*, 926 S.W.2d 679, 680-82 (Ky.Ct.App.1996); *Doerr v. Mobil Oil Corp.*, 774 So.2d 119, 125-28, 134-36 (2000); *Sullins v. Allstate Ins. Co.*, 340 Md. 503, 667 A.2d 617, 620-24 (1995); *W. Alliance Ins. Co. v. Gill*, 426 Mass. 115, 686 N.E.2d 997, 999-1001 (1997); *W. Am. Ins. Co. v. Tufco Flooring E., Inc.*, 104 N.C.App. 312, 409 S.E.2d 692, 697-98 (1991), *overruled on other grounds by Gaston County Dyeing Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293, 524 S.E.2d 558, 565 (2000); *Weaver v. Royal Ins. Co. of Am.*, 140 N.H. 780, 674 A.2d 975, 977-78 (1996); *Nav-Its, Inc. v. Selective Ins. Co. of Am.*, 183 N.J. 110, 869 A.2d 929, 932-39 (2005); *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 763 N.Y.S.2d 790, 795 N.E.2d 15, 18-21 (2003); *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 757 N.E.2d 329, 332-34 (2001); *Kent Farms, Inc. v. Zurich Ins. Co.*, 140 Wash.2d 396, 998 P.2d 292, 294-96 (2000); *Gainsco Ins. Co. v. Amoco Prod. Co.*, 53 P.3d 1051, 1062-66 (Wyo.2002).

⁴ See also *Nascimento v. Preferred Mut. Ins. Co.*, 513 F.3d 273, 279 (1st Cir. 2008) (holding that pursuant to Massachusetts law, home heating oil which leaked from an underground storage tank was a “pollutant”); *Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997, 1005, 29 Env'tl. L. Rep. 20324 (4th Cir. 1998); *American States Ins. Co. v. Nethery*, 79 F.3d 473, 477 (5th Cir. 1996); *St. Leger v. American Fire and Cas. Ins. Co.*, 870 F. Supp. 641 (E.D. Pa. 1994), judgment aff'd, 61 F.3d 896 (3d Cir. 1995); *Hartford Underwriter's Ins. Co. v. Estate of Turks*, 206 F. Supp. 2d 968, 977 (E.D. Mo. 2002); *Essex Ins. Co. v. Tri-Town Corp.*, 863 F. Supp. 38, 41 (D. Mass. 1994); *Cold Creek Compost, Inc. v. State Farm Fire and Cas. Co.*, 156 Cal. App. 4th 1469, 1482, 68 Cal. Rptr. 3d 216, 226 (1st Dist. 2007), review denied, (Feb. 20, 2008) (holding that odors which emanated from a composting facility constituted an environmental pollutant where the applicable exclusion's definition of a pollutant included a “gaseous ... irritant or contaminant”); *Deni Associates of Florida, Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1138, 28 Env'tl. L. Rep. 21069 (Fla. 1998); *McGregor v. Allamerica Ins. Co.*, 449 Mass. 400, 403, 868 N.E.2d 1225, 1227 (2007) (holding that home heating oil that leaked from a supply line during the installation of a furnace constituted a pollutant); *Heringer v. American Family Mut. Ins. Co.*, 140 S.W.3d 100, 105-106 (Mo. Ct. App. W.D. 2004); *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 755, 635 N.W.2d 112, 119, 32 Env'tl. L. Rep. 20360 (2001); *Matcon Diamond, Inc. v. Penn Nat. Ins. Co.*, 2003 PA Super 22, 815 A.2d 1109, 1112 (2003); *United Nat. Ins. Co. v. Hydro Tank, Inc.*, 497 F.3d 445 (5th Cir. 2007), opinion amended on denial of reh'g, 525 F.3d 400 (5th Cir. 2008) (Under Texas law, pollution exclusion clause applies whenever pollutant causes harm by physical mechanism enumerated in policy, irrespective of where injury took place or whether pollutant was released into environment); *Firemen's Ins. Co. of Washington, D.C. v. Kline & Son Cement Repair, Inc.*, 474 F. Supp. 2d 779, 796-99 (E.D. Va. 2007) (Pursuant to Virginia law, an unambiguous pollution exclusion clause which barred coverage for “discharge, dispersal, seepage, migration, release or escape” of pollutants was applicable where the insured properly applied a floor sealant in the normal course of business, resulting in toxic fumes that caused respiratory injuries to a person working in the same building, as the policy did not limit the exclusion to situations of traditional or environmental pollution); *Nautilus Ins. Co. v. Country Oaks Apartments, Ltd.*, 556 F. Supp. 2d 611 (W.D. Tex. 2008) (Carbon monoxide emitting from a properly functioning furnace constituted a pollutant under an exclusion which unambiguously defined a pollutant as “any solid, liquid, gaseous, or thermal irritant or contaminant,” and thus the insurer had no duty to defend the insured against a claim for an injury to an apartment resident from exposure to high levels of carbon monoxide fumes from the furnace which accumulated when a roof vent was blocked).

pollution exclusion to situations involving traditional environmental pollution via *Porterfield*, there is precedent where Alabama has deviated from that traditional notion of the pollution exclusion's intent. Specifically, in *Shalimar Contractors, Inc. v. American States Insurance Co.*, 975 F. Supp. 2d 1450 (M.D. Ala. 1997), the United States District Court for the Middle District of Alabama held that flaking lead paint was a "pollutant" which triggered the "Absolute Pollution Exclusion" such that coverage was excluded for a contractor whose work at the Riverside Heights housing project in Montgomery, Alabama had caused a child there to suffer lead poisoning. While it is true that five years later *Porterfield* examined and distinguished *Shalimar* in a similar fact scenario regarding flaking lead paint in the same Montgomery housing project, it is crucial to note the marked difference between the Absolute Pollution Exclusion interpreted in *Porterfield* and the Total Pollution exclusion in the case at bar. Specifically, the language of the "Absolute Pollution Exclusion" is much more limiting than that of the "Total Pollution Exclusion" found in QBE's Policy. The Absolute Pollution Exclusion from *Porterfield* stated that the insurance did not apply to:

“f.(1) ‘Bodily injury’ or ‘property damage’ arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:

“(a) At or from premises you own, rent or occupy;

“(b) At or from any site or location used by or for you or others for the handling, storage, disposal, processing or treatment of waste;

“(c) Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or

“(d) At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:

“(i) if the pollutants are brought on or to the site or location in connection with such operations; or

“(ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.

“(2) Any loss, cost, or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

As interpreted by the *Porterfield* Court, in order for the Absolute Pollution Exclusion to have been applicable, three elements must be present: "the bodily injury or property damage in question must have been caused by exposure to a 'pollutant'; that exposure must have arisen out of the actual, alleged, or threatened discharge, dispersal, release, or escape of the pollutant; and that discharge, dispersal, release, or escape must have occurred at or from certain locations or have constituted 'waste.'" 856 So.2d at 801. In comparison, QBE's Total Pollution Exclusion is much broader, requiring only two of those elements: "Bodily injury" or "property damage" "which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." The requirement of a specific location of discharge, etc. of the "pollutant" as found in the Absolute Pollution Exclusion has been replaced with wording in the QBE Policy that the discharge of a pollutant "at any time" will trigger the Total Pollution Exclusion.

Regarding the newer language contained in QBE's Total Pollution Exclusion, though QBE could find no Alabama case interpreting this language, many courts from other jurisdictions have. As with the prior pollution exclusions, it seems there is a split of authority on the interpretation of this version of the pollution exclusion as well.⁵ As stated above in footnote one

⁵ See *Devcon International Corp. v. Reliance Ins. Co.*, 609 F.3d 214 (3rd Cir. 2010) (dust and other materials from airport runway construction job dispersed onto homes nearby were pollutants and identical pollution exclusion was interpreted to exclude coverage for contractor); *Nautilus Ins. Co. v. Country Oaks Apartments, LTD*, 566 F.3d 452 (5th Cir. 2009) (identical pollution exclusion added by amendment to CGL policy held to exclude coverage for carbon monoxide gas poisoning when too much carbon monoxide was dispersed into plaintiff's apartment causing injury); *First Specialty Ins. Corp. v. GRS Management Assc., Inc.*, 2009 WL 2524613 (S.D. Fla., Aug. 17, 2009) (identical pollution exclusions from two different insurance policies issued to same insured held to exclude coverage for health problems of child who became ill from ingesting pool water containing microbes); *Nova Cas. Co. v. Waserstein*, 424 F. Supp. 2d 1325 (S.D. Fla. 2006) (identical absolute pollution exclusion barred coverage for injuries to employees of tenant in office building who were injured by exposure to chemicals, microbes, etc. used and released during renovation work on building); *but see, cf. Meridian Mut. Ins. Co. v. Kellman*, 197 F.3d 1178 (6th Cir. 2000) (interpreting identical pollution exclusion, court determined that exclusion did not apply to situation where teacher was injured by fumes from chemical sealant used on floor above area where she was working); *Jones v. Francis Drilling Fluids, LTD.*, 642 F. Supp. 2d 643 (S.D. Tex 2009) (identical pollution exclusion and pollutant definition policy provisions did not exclude coverage for worker's injuries due to exposure to chemicals on board a tanker due to application of traditional Louisiana law holding that pollution exclusion clauses were designed to

of this memorandum, courts from other jurisdictions have held that sulfide gases such as those emitted, released, discharged, dispersed etc. from defective Chinese drywall do constitute "pollutants" as such were defined in their respective Policies. Under the QBE Policy, "pollutants" are defined, in pertinent part, as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes" etc. [Ex. F].

QBE strongly contends that there can be little debate that sulfide gases constitute "pollutants" as defined in the QBE Policy, especially with the supporting case law from other jurisdictions and the allegations made by the Underlying Suit Plaintiffs as to the "bodily injury" the gases have caused them. These gases which are emitted by the Chinese drywall are clearly a gaseous irritant or contaminant, whether the gas is classified as vapor, fumes or some other form of gas. Therefore, the only question for this Court to determine is whether the sulfide gases were effectively released, discharged, dispersed or escaped from the Chinese drywall in the Bessemer Subdivision residential housing such that the Total Pollution Exclusion would apply to bar coverage for Estes for all claims of "bodily injury" and "property damage" caused in whole or in part by the sulfide gases as alleged by the Plaintiffs in the Underlying Suit.

Another crucial distinction between *Porterfield* and the instant case is the *Porterfield* Court's intentional limitation on the application of its holding, specifically to the context of flaking and peeling lead paint in a residential apartment. 856 So. 2d at 806. *Porterfield* held, that in the context of peeling or flaking lead paint only, "the terms 'discharge,' 'dispersal,' 'release,' or 'escape' were ambiguous. *Id.* The instant case does not involve the peeling or chipping of lead paint, rather the dispersal, discharge, emanation, etc. of noxious sulfide gases. Therefore, the *Porterfield* decision does not prevent this Court from concluding that, under the specific facts

apply to environmental pollution only and cannot be applied to all contact with substances that may be classified as pollutants).

and circumstances of the instant case, sulfide gases emitted from Chinese drywall are "pollutants" that have been discharged, dispersed, released or could have escaped as those terms are included in the Total Pollution Exclusion Endorsement in QBE's Policy.

Based on the plain language of the Policy and the foregoing analysis, it is QBE's contention that the Total Pollution Exclusion in the Policy is unambiguous and clearly should apply to bar coverage for Estes for all claims such that QBE has no duty to defend or indemnify Estes for the same.

v. There is no Coverage for the Alleged Negligence in Count I of the Underlying Suit Because the Complaint only Alleges Expected or Intended Injury.

In Count I, the Complaint alleges that Estes knew or should have known that the HVAC system was defective and would cause other portions of the building to fail prematurely, cause physical injury to the Plaintiffs, damage to the Plaintiffs' home and that Estes' employees also engaged in wrongful conduct "with the active and knowing participation of Estes' officers, directors or managers". [Ex. A, ¶¶37-40]. These allegations bring the claim squarely within the Expected or Intended Injury Exclusion. Specifically, the Expected or Intended Injury exclusion bars coverage for "'Bodily injury' or 'property damage' expected or intended from the standpoint of the insured." Based on the above allegations, Plaintiffs in the Underlying Suit plainly allege that Estes expected or intended the injuries suffered by the Plaintiffs due to their alleged conduct.

For the foregoing reasons, QBE owes no coverage to Estes for the Underlying Suit Plaintiffs' claims of negligence against it.

vi. There is no Coverage for Alleged Wantonness in Count I of the Underlying Suit as the Count Alleges Intentional Conduct and Expected or Intended Injury.

Within Count I of the Underlying Suit Complaint, Plaintiffs' allege that the "Defendants' conduct also constituted wantonness in that it was so willful, wanton, reckless or wanting in care

that it constituted a conscious disregard or indifference to health, safety and rights of others." [Ex. A, ¶41]. 'To establish wantonness, the plaintiff must prove that the defendant, with reckless indifference to the consequences, consciously and intentionally did some wrongful act or omitted some known duty ... that ... proximately cause[d] the injury of which the plaintiff complains.' *Spain v. Brown & Williamson Tobacco Corp.* 363 F.3d 1183, 1197 (11th Cir. 2004) (quoting *Martin v. Arnold*, 643 So. 2d 564, 567 (Ala. 1994)). Based on the above law and allegations in the Complaint, and because wantonness requires intentional conduct, there is no accident and therefore no "occurrence" under the Policy as to the wantonness claims.

Further, as was the case with the Plaintiffs' negligence claim, because the Complaint alleges the Estes knew or should have known that the HVAC system was defective and would cause other portions of the building to fail prematurely, cause physical injury to the Plaintiffs, damage to the Plaintiffs' home and that Estes' employees also engaged in wrongful conduct "with the active and knowing participation of Estes' officers, directors or managers", the Expected or Intended Injury Exclusion applies to bar coverage for the Plaintiffs' wantonness claim. Based on the above allegations, Plaintiffs in the Underlying Suit plainly assert that Estes expected or intended the injuries suffered by the Plaintiffs due to its alleged conduct.

For the foregoing reasons, QBE owes no coverage to Estes for the Underlying Suit Plaintiffs' claims of wantonness against it.

vii. There is no Coverage for Count II of the Underlying Suit, Strict Products Liability, Because There is no Alleged "Occurrence" and Because of the Applicability of the Expected or Intended Injury Exclusion.

In Count II of the Complaint, Plaintiffs allege strict products liability against all defendants, presenting multiple factual allegations to support the necessary elements of a strict products liability claim. However, most importantly with regard to QBE's coverage obligations

as to Estes, Plaintiffs' allege that "Defendants wrongful conduct, alleged in the foregoing paragraphs, was intentional and or reckless, in the Defendants' managing agents, primary owners, and/or officers or directors acted with actual or constructive knowledge of the wrongfulness of their conduct and of the high probably of injury or damage to the Plaintiffs would result and, despite that knowledge, intentionally or recklessly sold . . . an inadequate, defective and/or miss-sized HVAC system" [Ex. A, ¶54]. Plaintiffs further again allege that Estes' employees also engaged in wrongful conduct "with the active and knowing participation of Estes' officers, directors or managers" and that Estes conduct "was so willful, wanton, reckless or wanting in care that it constituted a conscious disregard or indifference to health, safety and rights of others." [Ex. A, ¶¶55-56].

Based on the above factual and legal allegations as contained in the Complaint and the law and Policy language previously cited in this brief, Count II of the Complaint does not allege an accident because only intentional conduct is alleged. Therefore, there is no alleged "occurrence" and no coverage. Furthermore, the allegations in Count II assert that Estes acted with knowledge of the high probability that injury to the Plaintiffs would result from its conduct. This allegation triggers the Expected or Intended Injury exclusion such that no coverage would be afforded even if Count II did allege an "occurrence".

For the foregoing reasons, QBE owes no coverage to Estes for the Underlying Suit Plaintiffs' claims of strict products liability against it.

viii. The Expected or Intended Injury Exclusion Bars Coverage for Count III of the Underling Suit, Unjust Enrichment.

Likewise, because Count III for unjust enrichment alleges only intentional conduct by Estes which was/is intended or expected to injure the Plaintiffs, there is no "occurrence" and the Expected or Intended Injury exclusion applies to bar coverage even if there were an

"occurrence". Specifically, Plaintiffs readopt their prior factual allegations regarding Estes' wrongful conduct and allege that "Defendants have continued to acquire funds and profits despite their knowledge of the defectiveness of, and risks posed by, the defective Chinese drywall and HVAC system." [Ex. A, ¶¶58-60]. In other words, Estes knows that the HVAC systems are defective, yet continues to profit from the Plaintiffs to their injury despite its knowledge that the HVAC systems pose risks to the Plaintiffs. There is no accident, thus no "occurrence", but the Expected or Intended Injury exclusion would apply even if there were an "occurrence" alleged.

For the foregoing reasons, QBE owes no coverage to Estes for the Underlying Suit Plaintiffs' claims of unjust enrichment against it.

ix. There is no Coverage for Breach of Contract, Breach of Warranties, Violation of Unfair Trade Practices Act or Fraud Counts in the Plaintiffs' Complaint as None Allege an "Occurrence" Under the QBE Policy or Alabama Law.

In the Complaint, Plaintiffs allege that all defendants collectively either expressly or impliedly contracted with them either directly or as third party beneficiaries. [Ex. A, ¶110]. Further, Plaintiffs allege that defendants breached these contracts by failing to provide homes suitable for human habitation and which were built within acceptable construction standards. [Ex. A, ¶111]. Also sounding in contract, Plaintiffs allege breach of an implied warranty of habitability, implied warranty of fitness for a particular purpose, implied warranty of merchantability and express warranty against Estes.

Additionally, Plaintiffs allege that the defendants, including Estes, knowingly and intentionally made false misrepresentations to them with the intent of defrauding them and also intentionally concealed or omitted material facts concerning the harmful nature of the HVAC systems with the intent that the Plaintiffs would continue to rely on the inadequate HVAC

systems. [Ex. A, ¶¶103-05, 115-18, 126-28].

Both Alabama and other jurisdictions have consistently held that breach of contract does not constitute an “occurrence” under liability policies where the policy defines an occurrence as an accident. *See Hartford, supra* (secured party’s assertion of a superior security interest did not give rise to “accident” or “occurrence” within the meaning of the CGL policy); *Auto-Owners Ins. Co. v. Toole*, 947 F. Supp. 1557 (M.D. Ala. 1996) (Under Alabama law, counts of purchasers’ complaint challenging insured automobile salesman’s sales and financing arrangements as being unconscionable and as constituting breach of contract did not allege “occurrence” as required for coverage under insured’s commercial liability and garage liability policies, and thus insurer had no duty to defend insured against those counts, where counts essentially asserted claims arising out of business dispute, albeit in context of consumer contractual transaction, and it was apparent from reading policies that they were not intended to cover business transactions and business ventures, whether of consumer nature or of another kind.); *Reliance v. Wyatt, Inc.*, 540 So. 2d 688, 691 (Ala.1988) (breach of contract is not an occurrence); *City of Burlington v. Nat’l Union Fire Ins. Co.*, 163 Vt. 124, 655 A.2d 719, 722 (1994); *Jakobson Shipyard, Inc. v. Aetna Cas. & Sur. Co.*, 961 F.2d 387, 389 (2d Cir. 1992) (no accident where insured shipbuilder provided tug boat with defective steering mechanism contrary to contract specifications); *Pace Constr. Co. v. U. S. Fid. & Guar. Ins. Co.*, 934 F.2d 177, 180 (8th Cir. 1991) (no accident where insured subcontractor breached contractual duty to procure insurance for contractor); *Magic Valley Potato Shippers v. Cont’l Ins.*, 112 Idaho 1073, 739 P.2d 372, 375-76 (1987) (no accident where buyer failed to pay for and pick up goods in violation of existing contract).

Further, certain exclusions apply to bar coverage for claims of "bodily injury" and "property damage" assumed by the Insured in contract and for warranties associated with the

Insured's work. Specifically, the QBE Policy contains a Contractual Liability exclusion which states that this insurance does not apply to: "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement." [Ex. F]. Additionally, the Damage to "Your Work" exclusion precludes coverage for warranties as fully discussed in the section of this brief immediately below.

Two recent cases from the Federal District Courts in Alabama, *Assurance Company of America v. Admiral Insurance Company*, Civil Action No. 10-0117-GC-C, 2011 WL 1897589 (S.D. Ala., May 18, 2011) (Granade, J.) and *Hermitage Insurance Company v. Champion*, Civil Action No. 2:09cv398-MHT, 2010 WL 1711049 (M.D. Ala., April 27, 2010) (Thompson, J.), are instructive as to how the courts handle demands for defense and indemnification under Complaints and facts involving construction defect cases such as the instant case where breach of contract, breach of warranties and fraud are alleged against contractors.

In *Assurance*, this Court reviewed coverage for Byrd Homes, Inc. ("Byrd Homes") under a CGL policy issued it by Scottsdale Insurance Company ("Scottsdale"). 2011 WL1897589 at *1. In that case, Scottsdale denied a defense to Byrd Homes for an underlying lawsuit brought by a homeowner who had hired Byrd Homes to build a custom home for him. *Id.* Specifically, the homeowner sued Byrd Homes alleging breach of contract, breach of the implied warranty of habitability, breach of implied warranty of fitness and fraud in connection with allegedly defective construction of the home. *Id.* Taking one count at a time, this Court first held that there was no coverage for Byrd Homes pursuant to the fraud claim under the Scottsdale Policy because there was no "occurrence". *Id.* at *5. Specifically stated, "fraudulent misrepresentation cannot be considered an 'occurrence' involving accidental injury or property damage." *Id.* Next, this Court held that coverage was excluded by the contractual liability exclusion for all claims

sounding in contract, including breach of warranty. *Id.* at *8.

Likewise, in *Champion*, Judge Myron Thompson in the Middle District of Alabama found no coverage for a homeowner, Champion, or general contractor, Gallops Home Builders, LLC ("Gallops"), as against Gallops' commercial general liability carrier, Hermitage Insurance Company ("Hermitage"), for claims of breach of contract, negligence, breach of warranty of habitability, breach of warranty, and fraud incident to the construction of a new, custom home. 2010 WL 1711049. Specifically, Gallops was hired by Champion to build a custom home and was ultimately sued by Champion when foundation problems developed causing damage throughout the home. *Id.* at *1.

When Gallops presented the lawsuit to Hermitage for defense, Hermitage denied coverage and refused to defend it in Champions' underlying lawsuit in state court. *Id.* at *2. Hermitage took the position that the injuries as alleged by Champion were not caused by an "occurrence" and that certain policy exclusions applied to bar coverage. *Id.* Taking each count in turn, Judge Thompson agreed that there was no coverage for Gallops under the Hermitage Policy. *Id.* at *3-5. As to the claims sounding in contract, foregoing a discussion on whether those contract claims even constituted an "occurrence", the court held that the contractual liability exclusion, containing language identical to that in the QBE Policy, clearly barred coverage for Champion's breach of contract, breach of warranty of habitability and breach of warranty claims. *Id.* at *3-4. Further, regarding the fraud claims, the court quoted its prior decision and the Eleventh Circuit's affirmance in *Thorn v. American States Ins. Co.*, 266 F. Supp. 2d 1346 (M.D. Ala. 2002) (Thompson, J.) *aff'd*, 66 Fed. Appx. 846 (11th Cir. 2003), for its holding that fraud, whether intentional or negligent, is not an "occurrence". In *Thorn*:

The court stated that extending coverage to fraud claims would be improper because "the policy ... was clearly designed to protect the plaintiffs from liability

for essentially accidental injury to another person, or property damage to another's possessions" *Id.* at 1352. The court explained that, "To allow coverage here would have the effect of transforming [the insurance company] into 'a sort of silent business partner' to the consumer transactions between the [] plaintiff and [the defendant]." *Id.* at 1352. (quotation and citation omitted), and "[t]his would cause an 'enormous' expansion of the scope of the insurer's liability without corresponding compensation," *id.* ; *Auto-Owners Ins. Co. v. Toole*, 947 F.Supp. 1557, 1564 (M.D. Ala. 1996) (Thompson, C.J.) ("this court would distort the purpose of the liability insurance policies in this case by applying them to the consumer transactions").

266 F. Supp. 2d at 1352. Based on the foregoing, the *Champion* Court held that the insurer had no duty to defend its insured contractor for claims of breach of contract, breach of warranties and fraud in said construction defect case.

Finally, even if the fraud counts did allege an "occurrence", coverage for the same would still be excluded by the Expected or Intended Injury exclusion. Again, the allegations in the Complaint only assert intentional actions by Estes which were specifically intended to injure the Plaintiffs. Therefore, the QBE Policy provides no coverage for Estes as to the Fraud Counts and QBE has no duty to defend Estes for the same.

Based on the above, and as most recently set forth by this Court in *Assurance*, QBE owes no duty to defend or indemnify Estes for Count IX (Breach of Contract), Count IV (Implied Warranty of Habitability), Count V (Implied Warranty of Fitness for a Particular Purpose), Count VI (Implied Warranty of Merchantability) or Count VII (Express Warranty) because there is no alleged "occurrence" and because of the applicability of the contractual liability exclusion as all these claims sound in contract. Further, QBE owes no duty to defend or indemnify Estes for Count VIII (Violation of Alabama's Deceptive and Unfair Trade Practices Act), Count X (Fraudulent Misrepresentation and Count XI (Fraudulent Concealment/Suppression) as those counts do not allege an "occurrence" and/or would be barred by the Expected or Intended Injury exclusion.

x. The Damage to "Your Work" Exclusion Also Bars Coverage for Counts, IV-VII of the Underlying Suit Alleging Breaches of Implied and Express Warranties.

Further, regarding counts alleging breach of warranty, the Damage to "Your Work" exclusion specifically bars coverage for any alleged warranties for the work done by Estes. That exclusion states that the insurance does not apply as follows:

1. Damage to Your Work

“Property Damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard”.

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

Under the Policy, the definition of "your work" includes: "Warranties or representations made any time with respect to fitness, quality, durability, performance or use of "your work" or "your product". It is apparent that this exclusion was meant to bar coverage for claims of breach of warranties made by Estes in conjunction with its normal operations as long as those operations were completed as described in the "products completed operations hazard" and were not performed by a subcontractor. In this instance, the Complaint alleges and the facts show that the installation of the HVAC systems was done entirely by Estes' employees and the HVAC systems started having problems after the installations had been completed.

Returning to *Champion*, that Court quickly disposed of the coverage question regarding the breach of warranty claims via application of the Damage to "Your Work" exclusion stating, "the Hermitage policy does not apply to 'warranties or representations made at any time with respect to the fitness, quality durability, performance or use of 'your work.'" 2010 WL 1711049 at *4. Coverage for breach of warranties was therefore excluded. *Id.* QBE's Policy contains the same exculpatory language as the Hermitage policy with regard to warranties. Therefore, the Damage to "Your Work" exclusion applies to bar coverage for all claims of breach of warranty,

both express and implied, and QBE owes no duty to defend or indemnify Estes for said claims.

- xi. There is no Coverage for Count XII, Failure to Secure a Performance Bond, Because there is no Alleged "Property Damage". Further, there is no Coverage for Certain Damages Alleged in the Underlying Suit as they Constitute Purely Economic Damages and are not "Bodily Injury" or "Property Damage".**

The twelfth cause of action as added to the Plaintiffs' Complaint alleges that the defendants failed to comply with Alabama Code §39-1-1 which requires entities that contract with an awarding public authority for the performance of public works to procure a performance bond with the penalty being 100% of the contract amount. [Ex. A, ¶132]. Plaintiffs allege that because the Defendants did not execute the required performance bonds, they cannot levy claims against those bonds which they would have been entitled to do. [Ex. A, ¶134].

Under the Policy, there is only coverage for "bodily injury" or "property damage" caused by an "occurrence." "Bodily injury" is defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." Further, "property damage" is defined as "a. physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or b. loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it." [Ex. F].

Clearly, there is no allegation of "bodily injury" in Count Twelve. The alleged injury to the Plaintiffs under this Count relates strictly to the loss of their ability to file a claim against a surety bond that was to have been procured by the defendants. Therefore, the only way there could be coverage for Estes under this Count is if there is "property damage" alleged. The question then is whether the loss of the Plaintiffs' ability to file a claim under the code section is "property damage" to tangible property.

In *Prince v. Higgins*, 572 So. 2d 1217 (Ala. 1990), the Alabama Supreme Court accepted the following definitions of “tangible property” and “intangible property”:

“Tangible property is that which may be felt or touched; such property as may be seen, weighed, measured, and estimated by the physical senses; that which is visible and corporeal; having substance and body as contrasted with incorporeal property rights such as franchises, choices in action, copyrights, the circulation of a newspaper, annuities and the like. Tangible property must necessarily be corporeal, but it may be either real or personal.”

“Intangible property is property which has no intrinsic and marketable value, but is merely the representative or evidence of value, such as certificates of stock, bonds, promissory notes, and franchises. Intangible property is held secretly; that is, it cannot be readily located, and there is no method by which its existence or ownership can be ascertained in the state of its situs, except, perhaps, in the case of mortgages or shares of stock. The value of intangible property is not easily ascertained.”

572 So. 2d at 1219.

In this context, tangible property is property that is capable of being handled, touched or physically possessed. Purely economic losses are not included in this definition. *Oxford Lumber Co. v. Lumbermen’s Mut. Ins. Co.*, 472 So. 2d 973 (Ala. 1985) (employee’s claim for insured’s failure to provide medical benefits not covered); *Keating v. National Union Fire Ins. Co. of Pittsburgh*, 995 F.2d 154 (9th Cir. 1993) (economic loss is not damage or injury to tangible property covered by a comprehensive general liability policy); *Allstate Ins. Co. v. Russo*, 829 F.Supp.2d (D.R.I. 1993) (lost investments and lost deposits not tangible property); *Graber v. State Farm Fire & Case. Co.*, 244 Mont. 265, 797 P.2d 214 (1990) (lost business and injury to reputation and goodwill are not damage to tangible property under a business owner’s policy); *Travelers Indem. Co. v. State*, 140 Ariz. 194, 680 P.2d 1255 (Ariz. App. 1984) (loss of investment represented by an investment certificate not a loss of tangible property); *L. Ray Packing Co. v. Commercial Union Ins. Co.*, 469 A.2d 832 (Me. 1983) (antitrust action claiming loss of profits and financial interests resulting from insured’s alleged price-fixing scheme not

covered).

Similarly, the Alabama Supreme Court held in *American States Insurance Company v. Martin*, 662 So. 2d 245 (Ala. 1995) that strictly economic losses like lost profits, loss of an anticipated benefit of a bargain, and loss of an investment, do not constitute damage or injury to “tangible” property. The language used in the American States policy is nearly identical to that of QBE’s Policy and is based upon the assumption that tangible property, unlike an economic interest, is generally subject to physical damage or destruction. As the Alabama Supreme Court found in *American States, supra*, here there is no coverage for Estes because there is no damage to “tangible property” under the definitions within the Policy and/or bodily injuries, and such damage is necessary to bring such claims within the Policy coverage. *See American States, supra; citing Reliance Ins. Co. v. Gary C. Wyatt, Inc.*, 540 So. 2d 688 (Ala. 1988); *Warwick, supra; Oxford Lumber, supra*.

Based on the foregoing law, there is no coverage afforded Estes for Count Twelve in the Complaint because there is no covered “bodily injury” or “property damage” alleged in that count. The loss of the ability to levy a claim under statutory authority that provides for a penalty of the purely economic recovery of 100% of the contract price is not an allegation of damage to tangible property and the loss is purely economic in nature.

Additionally, review of the Underlying Suit Complaint indicates that, while certain damages as alleged in the Complaint would constitute "property damage" and/or "bodily injury" under the QBE Policy, others do not. Specifically, based upon the foregoing law, the QBE Policy does not afford coverage for increased utility and servicing costs, past and future lost earnings, diminished values of their homes, loss of marketability of their homes, relocation expenses and costs, cleaning expenses and costs, loss of financial and time investment in homes and loss of

rents, loan interest and equity. Those losses are purely economic losses and/or are not tangible property which would fall within the definition of "property damage" within the Policy.

xii. Count XIII of the Underlying Suit for Failure to Comply with the Alabama Residential Landlord-Tenant Act only Contains Allegations Against the Prichard Housing Authority, and thus no Coverage Applies to Estes.

The Fifth Amended Complaint in the *Henderson* portion of the Underlying Suit contains one additional count, Count XIII, for Failure to Comply with the Alabama Residential Landlord-Tenant Act. A cursory review of this count reveals that the only allegations made by the Plaintiffs are claims against the Prichard Housing Authority, and not as to all defendants collectively as the prior counts had been. Therefore, because there are no allegations made against Estes in this count, likewise there is no duty to defend or indemnify Estes triggered under the QBE Policy based on said allegations.

xiii. Duty to Indemnify

In its Declaratory Judgment Complaint brought pursuant to the Declaratory Judgment Act, 28. U.S.C. § 2201, QBE has requested this Court determine its duties to both defend and indemnify Estes. [See Declaratory Judgment Complaint, attached hereto as Exhibit "I", p. 17]. As stated above, the Underlying Suit has not concluded and has in fact been stayed by the Circuit Court of Mobile County. [Ex. H]. As such, Estes' ultimate liability or lack thereof to the Underlying Suit Plaintiffs has not been adjudicated.

While QBE requests this Court to declare its rights and obligations as to its duty to indemnify Estes at this time, QBE does so make this request with the full understanding that it is within this Court's discretion to refrain from doing so based upon ripeness of the issue. *See Essex, supra* ("Any discussion of the duty to indemnify would be premature . . . given the lack of any final adjudication of the Underlying Action.").

Based on the above, QBE requests that this Court exercise its discretion and declare and decree that it has no duty to indemnify Estes for the allegations in the Underlying Suit Complaint, however, should the Court decide the issue is premature, QBE requests any such other relief as to its duty to indemnify Estes as the Court deems appropriate such that QBE may preserve its right to litigate this issue if and when it becomes ripe, including, but not limited to, a dismissal of the issue without prejudice.

B. Conclusion

QBE believes and avers that the Underlying Suit is not covered by and/or is excluded from coverage under the CGL Policy. QBE avers that no coverage is afforded to the Estes for this loss based upon the lack of an "occurrence" as to the work performed by Estes and the applicability of certain exclusions in the QBE Policy including the Total Pollution, Expected or Intended Injury, Contractual Liability, and Damage to "Your Work" exclusions.

WHEREFORE, THE ABOVE PREMISES CONSIDERED, QBE prays that this Honorable Court:

A. Declare and decree that under the CGL Policy QBE Insurance Corporation does not owe a duty to defend Estes Heating & Air Conditioning, Inc. with regard to the Underlying Suit;

B. Declare and decree that under the CGL Policy QBE Insurance Corporation does not owe a duty to indemnify Estes Heating & Air Conditioning, Inc. with regard to the Underlying Suit;

C. Afford QBE such other and further relief as the Court may deem proper.

Respectfully submitted,

/s/ Michael W. Kelley, II

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Michael W. Kelley, II (ASB-7825-I25K)
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document has been served upon the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed, on this the 29th day of September, 2011.

Thomas M. Galloway, Jr.
Post Office Box 16629
Mobile, Alabama 36616
TEL: (251) 476-4493

/s/Michael W. Kelley, II
OF COUNSEL

02391-1123
372510_1

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA**

QBE INSURANCE)	
CORPORATION,)	
)	
Petitioner,)	
)	
v.)	CASE NO.:10-0456-CG-N
)	
ESTES HEATING & AIR)	
CONDITIONING, INC.)	
)	
Respondent.)	

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02391-1123
372988_1

EXHIBIT A

[Complaint]

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

ROBERT W. HENDERSON, et al.,

Plaintiffs,

vs.

THE MITCHELL COMPANY, INC.; et al.,

Defendants.

*
 *
 * Civil Action Case Number:
 *
 * CV-2009-901381
 *
 * Consolidated with
 *
 * CV-09-901118- MAY
 *
 *

FIFTH AMENDED COMPLAINT

The Plaintiffs in the above styled action hereby amend the previously filed Complaint(s) for purposes of adding Davian Barnes and Christopher Douglas, minors, as Plaintiffs and the THIRTEENTH CAUSE OF ACTION. The Complaint, as amended, shall now read as follows:

STATE OF ALA. HONORABLE
 I HEREBY CERTIFY
 PLEADING WAS FILED
 2010 MAR -8 PM 4:15
 J. P. Anderson
 CLERK CIRCUIT COURT

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

ROBERT W. HENDERSON, individually, and
TAFFIANY RODGERS, individually and as mother and
next friend of **LABARRON RODGERS**, and
MAHOGANY HENDERSON, minors;

*
*
*

TIFFANY GROVE, individually and as mother and next
friend of **TREVORIS GROVE** and **TREVIN GROVE**,
minors;

* **Civil Action Case Number:**

* **CV-2009-901381**

SAMONE C. RADCLIFF, individually, and as mother and
next friend of **VON S. CONWAY, JR.**, individually;

*
*

MOLLIE PAYNE PRIM, individually and as mother and
next friend of **TYANGELO CUMMINGS**, a minor, and
MELVIN PAYNE individually and as father and next
friend of **TYJA AGNEW**, a minor;

*
*

* **Consolidated with**

* **CV-09-901118- MAY**

TELIMEA W. SANDERS, individually, and as mother
and next friend of **MEGAN M. SANDERS, MARCUS L.
SANDERS, II**, and **MCKENZIE A. MURPHY**, minors;

*
*

VERONICA MARSH, individually, and as mother and
next friend of **RICKI D. MARSH, JEREMY E. MARSH**,
and **DEVIN E. MARSH** individually;

*
*

YOLANDA Y. PRUITT, individually, and as mother and
next friend of **SPENCER WHITE** minor, and **NATALIA C.
PRUITT**, individually and as mother and next friend of
CHRISTI DOUGLAS and **CHRISTOPHER DOUGLAS**
minors;

*
*

CHARLEEN P. HENDERSON, individually, and as
mother and next friend of **CHANDREA J. STEWART**
minor;

*
*

TYRONE JUNIOR, individually, and **KAREN JUNIOR**,
individually and as mother and next friend of
SHAWNZORRICA JUNIOR, ALEXANDRIA JUNIOR
and **EBONIE JUNIOR**, minors;

*
*

MORRISHA WILLIAMS, individually and as mother and
next friend of **HANNAH WILLIAMS**, and **JUSTIN
BROOKS**, minors;

*
*

VALERIE O. BANKS, individually and as mother and next friend of **JAZEMINE BANKS** and **SHANNON BANKS**, minors and **JA'MYIA BANKS**, individually and as mother and next friend of **DAVIAN BARNES**, a minor;

Plaintiffs,

vs.

THE MITCHELL COMPANY, INC.; THE MITCHELL COMPANY; CREOLA ACE HARDWARE, INC.; GEORGE DRYWALL, INC.; KNAUF INSULATION GMBH; THE HOUSING AUTHORITY OF THE CITY OF PRICHARD, ALABAMA; THE PRICHARD HOUSING BOARD; INTERIOR & EXTERIOR BUILDING SUPPLY COMPANY, L.P.; JUST-RIGHT SUPPLY COMPANY, INC.; ESTES HEATING & AIR, INC.; Fictitious Defendants A; B; C; D and/or E, whether singular or plural, being those persons, firms, or other legal entities that contracted to construct, sell or lease a residential home to the Plaintiffs; Fictitious Defendants F; G; H; I and/or J, whether singular or plural, being those persons, firms, or other legal entities that manufactured, formulated, designed and/or processed distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, serviced, applied and/or failed to warn concerning the defective drywall at issue and/or the inadequate and defective HVAC system at issue; Fictitious Defendants K; L; M; N and/or O, whether singular or plural, being those persons, firms, or other legal entities that misrepresented the condition, content and fitness of the defective drywall at issue and/or the defective HVAC system at issue, or who acted or conspired to act to suppress, misrepresent, conceal, cover up and hide the defects and prevent discovery; Defendants P; Q; R; S and/or T, whether singular or plural, being those persons, firms, or other legal entities that breached the sales contract and/or violated Alabama's Deceptive Trade Practices Act; all whose true and correct identities are unknown to the Plaintiffs at this time, but will be added by amendment, jointly and individually when ascertained,

Defendants.

FIFTH AMENDED COMPLAINT

The Plaintiffs in the above styled action allege the following against the Defendants, including all Fictitious Defendants, separately and severally:

1. The Plaintiffs bring this action seeking actual damages, equitable relief (including restitution and disgorgement of profits), and all other relief available under the laws of the State of Alabama.

2. The claims set forth below arise out of the construction and lease of the Plaintiffs' residential homes, and the manufacture, formulation, design, processing, distribution, delivery, importation, supplying, inspection, testing, marketing, sale, warranting, advertising, use, installation, application, servicing and or failure to warn concerning Chinese drywall and/or the HVAC system which the Defendants knew or should have known was defective and fundamentally unsuitable for its intended purpose.

3. As a direct and proximate result of the Defendants' conduct, both individually and in concert or conspiracy with one another, defective, unfit and unsuitable Chinese drywall was installed in the Plaintiffs' homes, and has and continues to injure and damage the Plaintiffs and their property. Moreover, an inadequate, defective and miss-sized HVAC system was installed which exacerbated the drywall condition, and otherwise damaged the Plaintiffs herein.

PARTIES, JURISDICTION AND VENUE

4. The Plaintiffs in the above Action are over nineteen (19) years of age unless otherwise identified as a minor suing through a designated representative, and

are residents of the State of Alabama. Between 2006 and the present, the Plaintiffs leased or lived in homes leased from Defendant THE HOUSING AUTHORITY OF THE CITY OF PRICHARD, ALABAMA. The homes are all located in the HOPE VI Family Sales Subdivision, sometimes referred to as the "Bessemer Subdivision", in Mobile County, Alabama. The Plaintiffs and the homes at issue are specifically identified as follows:

- a. ROBERT W. HENDERSON, individually, and TAFFIANY RODGERS, individually and as mother and next friend of LABARRON RODGERS and MAHOGANY HENDERSON, minors, renting the home. The street address is 826 McCrory Avenue, Prichard, Alabama.
- b. TIFFANY GROVE, individually and as mother and next friend of TREVORIS GROVE and TREVIN GROVE, minors, renting the home. The street address is 509 Sgt. Harrison Street, Prichard, Alabama.
- c. SAMONE C. RADCLIFF, individually, and as mother and next friend of VON S. CONWAY, JR., individually, renting the home. The street address is 824 McCrory Avenue, Prichard, Alabama.
- d. MOLLIE PAYNE PRIM, individually and as mother and next friend of TYANGELO CUMMINGS, a minor, and MELVIN PAYNE individually, and as father and next friend of TYJA AGNEW, a minor, renting the home. The street address is 825 McCrory Avenue, Prichard, Alabama.
- e. TELIMEA W. SANDERS, individually, and as mother and next friend of MEGAN M. SANDERS, MARCUS L. SANDERS, II, and MCKENZIE A. MURPHY, minors, renting the home. The street address is 806 McCrory Avenue, Prichard, Alabama.
- f. VERONICA MARSH, individually, and as mother and next friend of RICKI D. MARSH, JEREMY E. MARSH, and DEVIN E. MARSH, minors, renting the home. The street address is 804 McCrory Avenue, Prichard, Alabama.
- g. YOLANDA Y. PRUITT, individually, and as mother and next friend of SPENCER WHITE minor, and NATALIA C. PRUITT, individually and as mother and next friend of CHRISTI DOUGLAS and CHRISTOPHER DOUGLAS, minors, renting the home. The street address is 808 McCrory Avenue, Prichard, Alabama.

- h. CHARLEEN P. HENDERSON, individually, and as mother and next friend of CHANDREA J. STEWART minor, renting the home. The street address is 826 McCrory Avenue, Prichard, Alabama
- i. TYRONE JUNIOR, individually, and KAREN JUNIOR, individually and as mother and next friend of SHAWNZORRICA JUNIOR, ALEXANDRIA JUNIOR and EBONIE JUNIOR, minors, renting the home. The street address is 503 Sgt. Harrison Street, Prichard, Alabama.
- j. MORRISHA WILLIAMS, individually and as mother and next friend of HANNAH WILLIAMS, and JUSTIN BROOKS, minors, renting the home. The street address is 800 McCrory Avenue, Prichard, Alabama
- k. VALERIE O. BANKS, individually and as mother and next friend of JAZEMINE BANKS, and SHANNON BANKS, minors, and JA'MYIA BANKS, individually and as mother and next friend of DAVIAN BARNES, a minor, renting the home. The street address is 508 Sgt. Harrison Brown Street, Prichard, Alabama

5. The Defendant, **THE MITCHELL COMPANY, INC.**, is an Alabama Corporation with its principle place of business in Mobile County, Alabama. The Defendant, **THE MITCHELL COMPANY, INC.**, is a construction company and has built homes and/or apartments in several states, including Alabama. The Defendant, **THE MITCHELL COMPANY, INC.**, built the Plaintiffs' homes.

5-a. The Defendant **THE MITCHELL COMPANY**, is an Alabama General Partnership organized under the laws of the State of Alabama, and having offices in Mobile County, Alabama. The Defendant **THE MITCHELL COMPANY** acted as the developer for the "Bessemer Subdivision" project.

6. The Defendant, **THE HOUSING AUTHORITY OF THE CITY OF PRICHARD, ALABAMA**, is a non-profit governmental entity which, in the regular course of its business, provides administrative services toward housing programs in and for the City of Prichard, Alabama. This action is filed within six (6) months of the discovery and accrual of the actions set forth herein, and thus complies with the

presentment of claim requirements of §11-47-23 *Ala. Code* (1975). See *Diemert v. City of Mobile*, 474 So.2d 663, 666 (Ala. 1985).

7. The Defendant, **THE PRICHARD HOUSING BOARD**, is a non-profit governmental entity which, in the regular course of its business, provides administrative services toward housing programs in and for the City of Prichard, Alabama. This action is filed within six (6) months of the discovery and accrual of the actions set forth herein, and thus complies with the presentment of claim requirements of §11-47-23 *Ala. Code* (1975). See *Diemert v. City of Mobile*, 474 So.2d 663, 666 (Ala. 1985).

8. The Defendant **INTERIOR & EXTERIOR BUILDING SUPPLY COMPANY, L.P.** is a limited partnership with its principal place of business in Louisiana. Defendant **INTERIOR & EXTERIOR BUILDING SUPPLY COMPANY, L.P.** is a building supply company with offices in four states, and has shipped and/or supplied building products into the State of Alabama such that it is doing business in this State.

9. [Omitted].

10. [Omitted].

11. The Defendant **JUST-RIGHT SUPPLY COMPANY, INC.** is a corporation organized in Mississippi, with its principal place of business in Mississippi. Defendant **JUST-RIGHT SUPPLY COMPANY, INC.** is a building supply company with offices in Mississippi, and has shipped and/or supplied building products in the State of Alabama such that it is doing business in this State.

12. The Defendant **ESTES HEATING & AIR, INC.** is an Alabama Corporation with its principle place of business in Mobile County, Alabama. Defendant **ESTES**

HEATING & AIR, INC supplied, installed and serviced the HVAC system in the Plaintiffs' homes.

12-a. The Defendant **CREOLA ACE HARDWARE, INC.** is an Alabama Corporation with its principle place of business in Mobile County, Alabama. Defendant **CREOLA ACE HARDWARE, INC.**, shipped, supplied, installed and sold the drywall in the Plaintiffs' homes.

12-b. Defendant **GEORGE DRYWALL, INC.**, is an Alabama Corporation with its principle place of business in Mobile County, Alabama. Defendant **GEORGE DRYWALL, INC.**, shipped, supplied, installed and sold the drywall in the Plaintiffs' homes.

12-c. [Omitted].

12-d. The Defendant **KNAUF INSULATION GMBH** is an Indiana Corporation with its principle place of business in Shelbyville, Indiana. Defendant, **KNAUF INSULATION GMBH** has shipped and/or supplied building products in the State of Alabama such that it is doing business in this State. The Defendant **KNAUF INSULATION GMBH** brokered the sale of the drywall and misrepresented the condition and fitness of the drywall.

13. Fictitious Defendants A through T are the persons, firms, or other legal entities that contracted to construct, sell or lease a residential home to the Plaintiffs herein; that manufactured, formulated, designed and/or processed distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, applied and/or failed to warn concerning the defective drywall at issue and the inadequate HVAC system at issue; that misrepresented the condition, content

and fitness of the defective drywall at issue and the HVAC system, who acted or conspired to act to suppress, misrepresent, conceal, cover up and hide the defects and their discovery; and/or that breached the sales contract and/or violated Alabama's Deceptive Trade Practices Act; all whose true and correct identities are unknown to the Plaintiffs at this time, but will be added by amendment, jointly and individually, when ascertained, or who are presently non-US entities suspected of wrongdoing, but who are unavailable for practical and affordable service due to treaties or conventions.

14. This Court has personal jurisdiction over Defendants because they are engaged in substantial and not insulated activity within this state. Additionally, Plaintiff's causes of action arise from Defendants personally, or through their agents, causing injury to real and personal property within the State of Alabama and at the time of the injury, products, materials, or things manufactured, distributed and supplied by the defendants were used and consumed within the state of Alabama in the ordinary course of commerce, trade, or use. Said products were distributed, installed and serviced by Defendants **THE MITCHELL COMPANY, INC., THE MITCHELL COMPANY; THE HOUSING AUTHORITY OF THE CITY OF PRICHARD, ALABAMA; THE PRICHARD HOUSING BOARD; INTERIOR & EXTERIOR BUILDING SUPPLY COMPANY, L.P.; CREOLA ACE HARDWARE, INC.; GEORGE DRYWALL, INC.; KNAUF INSULATION GMBH; JUST-RIGHT SUPPLY COMPANY, INC.;** and **ESTES HEATING & AIR, INC.** in the ordinary course of commerce, trade or use and shipped into the state of Alabama.

15. Venue and jurisdiction are proper in this Court.

FACTS

16. Plaintiffs are all tenants or reside with tenants in a subdivision commonly known as the HOPE IV Family Sales Subdivision, sometimes referred to as the "Bessemer Subdivision", located in Prichard, Alabama.

17. Between 2003 and 2008, Defendant MITCHELL COMPANY, INC (hereinafter "MITCHELL COMPANY") and/or Fictitious Defendants A through T, constructed, warranted and sold homes in this subdivision pursuant to an agreement with the City of Prichard and/or the Prichard Housing Authority.

18. In the course of constructing these homes, Defendant MITCHELL COMPANY and/or Defendant MITCHELL distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, applied and/or failed to warn concerning the drywall materials purchased from suppliers, including but not necessarily limited to, Defendants INTERIOR & EXTERIOR BUILDING SUPPLY COMPANY, L.P. (hereinafter "IN-EX SUPPLY"), CREOLA ACE HARDWARE, INC. (hereinafter "CREOLA ACE"); RIGHTWAY DRYWALL, INC. (hereinafter "RIGHTWAY"), SMOKEY MOUNTAIN MATERIALS, INC., (hereinafter "SMOKEY MOUNTAIN"; JUST-RIGHT SUPPLY COMPANY, INC. (hereinafter "JUST-RIGHT"), GEORGE DRYWALL, INC. (hereinafter "GEORGE DRYWALL"); KNAUF USA POLYSTYRENE, INC. (hereinafter "KNAUF USA"), KNAUF INSULATION GMBH (hereinafter "KNAUF INSULATION") and/or Fictitious Defendants A through T.

19. IN-EX SUPPLY, CREOLA ACE, RIGHTWAY, SMOKEY MOUNTAIN, JUST-RIGHT, GEORGE DRYWALL, KNAUF USA, KNAUF INSULATION and/or Fictitious Defendants A through T had purchased these drywall materials, directly or indirectly, from German and/or Chinese entities and/or from Fictitious Defendants A

through T.

20. The drywall materials in question were manufactured in China by Defendants or by Defendants' principals.

21. The Defendants improperly manufactured, formulated, designed, processed, distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, applied, serviced and/or failed to warn concerning the defective drywall materials.

22. Said drywall materials were and are uniformly and inherently defective when used for their intended purposes. The drywall materials were made from waste material – also known as "fly ash" – collected from scrubbers at coal-fired power plants located in China, or alternatively were made with gypsum mined from one or more locations in China where the natural gypsum contained high levels of sulfur.

23. The defective drywall materials emit a combination of sulfide gases which produce a distinctive chemical odor, and cause corrosion to copper and other metal materials such as those used in HVAC systems, electrical systems, gas fuel systems and many appliances, electronics, equipment and other items commonly located in residential dwellings.

24. Hydrogen Sulfide ("H₂S"), one of the gases emitted by the defective Chinese drywall materials, is a broad spectrum poison which affects multiple systems in the human body. It can form a complex bond with the body's enzymes which can block the binding properties of oxygen, thereby interfering with respiration.

25. Lower level exposures, especially over an extended time, can result in irritated and itchy eyes and skin, difficulty in breathing, sore throat, persistent cough,

nausea, bloody noses, runny noses, recurrent headaches, fatigue, loss of appetite, impaired memory function, sinus infection, allergic reactions and asthma attacks. Prolonged exposure has also been implicated in reproductive health issues.

26. Additionally, Defendants manufactured, formulated, designed, processed, distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, applied, serviced and/or failed to warn concerning an inadequate, defective and miss-sized HVAC system in the Plaintiffs' home. As a direct and proximate result of the defective HVAC system, the off-gassing properties of the defective Chinese drywall was exacerbated and worsened. The defective HVAC system further directly and proximately caused Plaintiff's increased costs and expenses.

27. The Defendants knew of the defective nature of the Chinese drywall materials and the defective HVAC system at the time they improperly manufactured, formulated, designed, processed, distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, applied, serviced and/or failed to warn concerning same. Alternatively, the Defendants should reasonably have known or discovered the defective nature of the Chinese drywall materials and HVAC system prior to its use in the Plaintiffs' home.

28. The Defendants suppressed, misrepresented, concealed, covered up and hid the defective nature of the Chinese drywall materials and HVAC system from the general public, including the Plaintiffs. The Plaintiffs could not reasonably have discovered the existence of the defect in the Chinese drywall material until December 2008 when initial press reports were issued, and in fact did not have actual notice of the said defect, and actual notice of the presence of defective Chinese drywall materials in

their home, until May, 2009. Further, Plaintiffs could not reasonably have discovered the defective nature of the HVAC system until investigation of the Chinese drywall defect after May 2009.

29. As a direct and proximate result of the gas emissions from the defective Chinese drywall materials used in the construction of their home, as well as a direct and proximate result of the conduct, breaches, acts and omissions of the defendants, each of the Plaintiffs has suffered the following damages:

- a. Personal injuries in the form of one or more of the above identified signs, symptoms and conditions associated with exposure to the sulfide gases emitted by the defective Chinese drywall;
- b. Permanent injuries, or alternatively the permanent aggravation of pre-existing conditions;
- c. Pain and suffering;
- d. Mental anguish;
- e. Loss of enjoyment of their home;
- f. Increased utility and servicing costs;
- g. Past and future medical expenses; including the cost of medical monitoring;
- h. Past and future lost earnings;
- i. Property damage;
- j. Property damage to the HVAC system, electrical systems, and gas fuel systems in their home;
- k. Property damage to appliances, electronics, equipment and other items located in their home;
- l. Relocation expenses and costs;
- m. Cleaning expenses and costs;

- n. The loss of the financial and time investment in their home;
- o. The loss of funds paid in the form of rent;
- p. Such severe, regular and systematic failures of the HVAC systems, electrical systems, gas fuel systems and other residential home systems/components so as to render their home unreliable, unsafe, uninhabitable and unfit for human occupation and use;

30. Said damages were also directly and proximately caused, exacerbated and worsened by the HVAC system which was improperly manufactured, formulated, designed, processed, distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, applied, and/or serviced, and which was so provided with inadequate warnings.

31. Plaintiffs were at all times intended third party beneficiaries of the multiple contracts, agreements and trade practices between and among the various defendants and others since the clear and manifest intent of the defendants was to primarily, directly and ultimately benefit the Plaintiffs. Each of the defendants at all relevant and material times knew, appreciated and understood this fact.

32. At all times relevant and material to the allegations contained herein, each of the defendants acted directly, or alternatively acted as the actual and/or apparent agent of one or more of the other defendants named herein, including Fictitious Defendants. The acts and omissions alleged herein were committed within the line and scope of one or more of such actual or apparent agency relationships, and/or were thereafter ratified by the principal with consequential benefit.

33. The defendants knew or had reason to know of the defective nature of the Chinese drywall and/or the HVAC system, or alternatively discovered the defect prior to the Plaintiffs. The defendants knew or had reason to know that the Plaintiffs could not

and would not discover the defective nature of the Chinese drywall and/or the HVAC system, or even the existence and presence of the Chinese drywall and the defective HVAC system in their home, due to Plaintiffs lack of knowledge and understanding of the origins and composition of the materials used in the construction of the home and its interaction with the HVAC system. Defendants thereafter suppressed, concealed, hid and failed to warn and advise the Plaintiffs of the dangers and risks associated with the defective Chinese drywall and defective HVAC system until after widespread and intense national media coverage of the nature of the defect and the accompanying signs of Chinese drywall presence.

FIRST CAUSE OF ACTION
(Negligence / Wantonness)

34. The Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

35. Defendants, including Fictitious Defendants A through T, owed a duty to Plaintiffs to exercise reasonable and ordinary care in the manufacture, formulation, design, processing, distribution, delivery, importation, supplying, inspection, testing, marketing, sale, warranting, advertising, use, installation, application, servicing and/or warnings concerning the Chinese drywall and the HVAC system.

36. Defendants negligently and/or wantonly breached their duty to Plaintiffs by formulating, inadequately testing, designing, manufacturing, marketing, advertising, selling, installing, using, applying, servicing or otherwise placing into the stream of commerce the defective Chinese drywall and HVAC system that is unsafe, unsuitable and unfit for its intended purpose. Defendants did so with the understanding,

appreciation and/or knowledge that it would ultimately be installed into the homes of ordinary consumers like the Plaintiffs. Defendants further failed to warn the Plaintiffs and others of the defective nature of the Chinese drywall and HVAC system and the risks created by its presence in a home. Defendants further failed to promptly remove or recall the drywall and HVAC system from the marketplace or take other appropriate remedial action.

37. Defendants knew or reasonably should have known that the Chinese drywall and/or the HVAC system was defective, unreasonably dangerous, posed health risks, would cause other building components and property to fail prematurely, was not suitable for its intended use in construction and otherwise was not as warranted and represented by the Defendants.

38. Defendants possessed superior knowledge about the composition and defective nature of the drywall and HVAC system, and also knew or reasonably should have known that the said defect would cause physical injury or damage to Plaintiffs, damage to Plaintiffs' home and property; would require medical care; would require additional monitoring; would require repair and/or replacement of damaged property; and would otherwise inflict significant damage on the Plaintiffs and their home.

39. As a direct and proximate result of the Defendants' negligence and/or wantonness, defective design, and/or manufacture of the drywall and HVAC system, and Defendants' sale, installation and/or use of the drywall and HVAC system, and the defendants placement of same into the stream of commerce, Plaintiffs have suffered or are substantially certain to suffer personal injuries or damages, including damage to property, and have incurred, or are substantially certain to incur, the costs of testing,

repairing and replacing defective Chinese drywall, HVAC system and other components, remediation of consequential and resulting property damage, personal injury, permanent injury, loss of earnings, loss of the use and enjoyment of their home, diminished value of their home, loss of the investment in their home, interest paid, pain, suffering and emotional distress, and other damages as alleged herein.

40. Defendants' employees also engaged in this wrongful conduct with the active and knowing participation of Defendants' officers, directors or managers.

41. Defendants' conduct also constituted wantonness in that it was so willful, wanton, reckless, or wanting in care that it constituted a conscious disregard or indifference to the health, safety and rights of Plaintiffs.

42. As a direct and proximate result of the Defendants' negligence and/or wantonness, the Plaintiff's suffered damages as set forth above.

WHEREFORE, the premises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally, for compensatory and punitive damages, equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

SECOND CAUSE OF ACTION
(Strict Products Liability)

43. The Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this complaint.

44. At all relevant times, Defendants, including Fictitious Defendants A through T, were engaged in the business of designing, manufacturing, marketing,

advertising, and/or selling into the stream of commerce the Chinese drywall and/or HVAC system that is the subject of this action.

45. The Chinese drywall and/or HVAC system installed in the Plaintiffs' home was and is defective and unfit for its intended use.

46. Defendants knew and expected that the Chinese drywall would reach, and it did reach, the Plaintiffs without any substantial change in its condition. The HVAC system was designed and installed in the Plaintiffs' home.

47. Under normal use, as alleged above, the Chinese drywall fails to perform in accordance with the reasonable expectations of Plaintiffs and ordinary consumers. The HVAC system, also under normal use, fails to perform as reasonably expected.

48. The risks of harm posed by the failure of the Chinese drywall and HVAC system outweigh the benefits of its design.

49. The Defendants, in exercising reasonable care, should have produced and used properly-designed drywall and a properly designed and sized HVAC system. Had they done so, this would have prevented or reduced the injury and damages suffered by Plaintiffs.

50. As a direct and proximate cause of the Defendants' defective design, and/or manufacture of the drywall and HVAC system, and Defendants' sale, installation and/or use of the drywall and HVAC system, and the defendants placement of same into the stream of commerce. Plaintiffs have suffered or are substantially certain to suffer personal injuries and damages, including damage to property, and have incurred, or are substantially certain to incur, the costs of testing, repairing and replacing defective Chinese drywall and other components, remediation of consequential and

resulting property damage, personal injury, permanent injury, loss of earnings, loss of the use and enjoyment of their home, diminished value of their home, loss of the investment in their home, interest paid, pain, suffering and emotional distress, and other damages as alleged herein.

51. Defendants knew or should have known of the risks posed by the Chinese drywall and HVAC system, and the risks of damage posed to those who purchased homes in which Defendants installed the Chinese drywall and HVAC system, but failed to provide adequate warnings of the known or foreseeable risks. Defendants had a duty not to put on the market products that posed a serious danger without first testing it and/or issuing warnings to the Plaintiffs and other consumers.

52. Defendants breached their duty to warn by unreasonably failing to provide warnings concerning any of the facts alleged herein to the Plaintiffs and other consumers.

53. Defendants' failure to warn as alleged herein, proximately caused reasonably foreseeable injuries to Plaintiffs. The Plaintiffs would have heeded legally adequate warnings, and not purchased the home containing the defective drywall and HVAC system, but would have purchased another home. The absence of warnings by the Defendants was the proximate cause of present and future damages sustained by Plaintiffs.

54. Defendants' wrongful conduct, alleged in the foregoing paragraphs, was intentional and or reckless, in that Defendants' managing agents, primary owners, and/or other officers or directors acted with actual or constructive knowledge of the wrongfulness of their conduct and of the high probability that injury or damage to the

Plaintiffs would result and, despite that knowledge, intentionally or recklessly sold Chinese drywall and/or an inadequate, defective and miss-sized HVAC system without proper testing, concealed the defect, and failed to warn purchaser's of the defective Chinese drywall and HVAC system.

55. Defendants' employees also engaged in this wrongful conduct with the active and knowing participation of Defendant entities and/or the knowing endorsement, ratification, and consent of Defendants' officers, directors, or managers.

56. Defendants' conduct also constituted wantonness, in that it was so willful, wanton, reckless, or wanting in care that it constituted a conscious disregard or indifference to the health, safety, and rights of Plaintiffs.

57. As a direct and proximate result of the Defendants' conduct, the Plaintiffs suffered damages as set forth above.

WHEREFORE, the premises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally, for compensatory and punitive damages, equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

THIRD CAUSE OF ACTION
(Unjust Enrichment)

58. The Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

59. Defendants, including Fictitious Defendants A through T, have been unjustly enriched in that they have wrongfully acquired a benefit, i.e., funds and profits,

by their wrongful behavior described above.

60. Defendants have continued to acquire funds and profits despite their knowledge of the defectiveness of, and risks posed by, the defective Chinese drywall and HVAC system.

61. The circumstances under which Defendants profited from the sale of the drywall and HVAC system make it inequitable for them to retain those funds and profits.

62. Plaintiffs demand that Defendants be ordered to disgorge, for the benefit of the Plaintiffs, all or part of their ill-gotten profits received from the sale of the defective drywall and HVAC system, and/or make full restitution to Plaintiffs for the injuries or damages as set forth herein.

WHEREFORE, the premises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally, for equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

FOURTH CAUSE OF ACTION
(Implied Warranty of Habitability)

63. The Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

64. Each of Defendants, including Fictitious Defendants A through T, are merchants, suppliers, distributors or installers of gypsum drywall and/or residential HVAC systems.

65. Under the law of Alabama, Defendants impliedly warranted directly to

Plaintiffs or to their predecessors in title, that the residential home containing the defective Chinese drywall and HVAC system was habitable and reasonably fit for human occupancy.

66. Plaintiffs are known, identified and/or intended third party beneficiaries of the warranties given by Defendants, and the clear and manifest intent of the Defendants sales contracts, agreements and trade practices was to primarily, directly and ultimately benefit the Plaintiffs.

67. At the time the defendants manufactured, formulated, designed, processed, distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, applied, serviced and/or failed to warn concerning the defective drywall materials and HVAC system, the said defendants knew or had reason to know that the Chinese drywall and HVAC system was being acquired for installation in the Plaintiffs' home, and that the Plaintiffs were relying upon the Defendants superior skill, judgment and experience to select and furnish materials and systems suitable and fit for construction of a habitable structure.

68. Defendants breached the implied warranty of habitability by selling certain Chinese drywall and HVAC system that was defective, unsafe, unsuitable and unfit for the ordinary purpose for which drywall and HVAC systems are used, and their presence in the Plaintiffs' home makes the said home uninhabitable and unfit for human occupancy.

69. Specifically, certain of the drywall supplied by Defendants and installed in the Plaintiffs' home is defective because it has caused damage to Plaintiffs or Plaintiffs' Property as alleged herein. Moreover, the HVAC system was not adequate, properly

sized and appropriate for the Plaintiffs' home, and thereby caused damage or exacerbated and worsened the defective drywall condition.

70. Defendants received actual notice of the defective Chinese drywall and the HVAC system, but have failed to repair or replace the defective Chinese drywall and/or HVAC system, or otherwise take remedial measures.

71. As a direct and proximate result of the Defendants' breach of the warranty of habitability, the Plaintiff's suffered damages as set forth above

WHEREFORE, the premises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally, for compensatory and punitive damages, equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

FIFTH CAUSE OF ACTION
(Implied Warranty of Fitness for a Particular Purpose)

72. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

73. Each of Defendants, including Fictitious Defendants A through T, are merchants, suppliers, distributors or installers of gypsum drywall and/or residential HVAC systems..

74. Under the law of Alabama, Defendants impliedly warranted directly to Plaintiffs or to their predecessors in title, that the drywall and HVAC system were reasonably fit for the ordinary purposes for which they are used.

75. Plaintiffs are known, identified and/or intended third party beneficiaries of

the warranties given by Defendants, and the clear and manifest intent of the Defendants sales contracts, agreements and trade practices was to primarily, directly and ultimately benefit the Plaintiffs.

76. At the time the defendants manufactured, formulated, designed, processed, distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, applied and/or failed to warn concerning the defective drywall materials and/or HVAC system, the said defendants knew or had reason to know that the Chinese drywall and/or HVAC system was being acquired for the particular purpose of installation in the Plaintiffs' home, and that the Plaintiffs were relying upon the Defendants superior skill, judgment and experience to select and furnish materials suitable and fit for this particular purpose.

77. Defendants breached the implied warranty of fitness for a particular purpose by selling certain Chinese drywall and/or HVAC system that was defective and not reasonably fit for the ordinary purpose for which they are used.

78. Specifically, certain of the drywall supplied by Defendants and installed in the Plaintiffs' home is defective because it has caused damage to Plaintiffs or Plaintiffs' Property as alleged herein. Moreover, the HVAC system was not adequate, properly sized and appropriate for the Plaintiffs' home, and thereby caused damage or exacerbated and worsened the defective drywall condition.

79. Defendants received actual notice of the defective Chinese drywall and the HVAC system, but have failed to repair or replace the defective Chinese drywall and/or HVAC system, or otherwise take remedial measures.

80. As a direct and proximate result of the Defendants' breach of the warranty

of fitness for a particular purpose, the Plaintiff's suffered damages as set forth above

WHEREFORE, the premises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally, for compensatory and punitive damages, equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

SIXTH CAUSE OF ACTION
(Implied Warranty of Merchantability)

81. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

82. Each of Defendants, including Fictitious Defendants A through T, are merchants, suppliers, distributors or installers of gypsum drywall and/or residential HVAC systems..

83. Under the law of Alabama, Defendants impliedly warranted directly to Plaintiffs or to their predecessors in title, that the drywall and HVAC system were merchantable and reasonably fit for the ordinary purposes for which they are used.

84. Plaintiffs are known, identified and/or intended third party beneficiaries of the warranties given by Defendants, and the clear and manifest intent of the Defendants sales contracts, agreements and trade practices was to primarily, directly and ultimately benefit the Plaintiffs.

85. At the time the defendants manufactured, formulated, designed, processed, distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, applied and/or failed to warn concerning the

defective drywall materials and/or the HVAC system, the said defendants knew or had reason to know that the Chinese drywall was being acquired for the purpose of installation in the Plaintiffs' home, and that the Plaintiffs were relying upon the Defendants superior skill, judgment and experience to select and furnish materials suitable, fit and merchantable for use in this manner.

86. Defendants breached the implied warranty of merchantability by selling certain Chinese drywall and HVAC system that were defective and not reasonably fit for the ordinary purposes for which they are used.

87. Specifically, certain of the drywall supplied by Defendants and installed in the Plaintiffs' home is defective because it has caused damage to Plaintiffs or Plaintiffs' Property as alleged herein. Moreover, the HVAC system was not adequate, properly sized and appropriate for the Plaintiffs' home, and thereby caused damage or exacerbated and worsened the defective drywall condition.

88. Defendants received actual notice of the defective Chinese drywall and the HVAC system, but have failed to repair or replace the defective Chinese drywall or otherwise take remedial measures.

89. As a direct and proximate result of the Defendants' breach of the warranty of merchantability, the Plaintiff's suffered damages as set forth above.

WHEREFORE, the premises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally, for compensatory and punitive damages, equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

SEVENTH CAUSE OF ACTION
(Express Warranty)

90. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

91. Defendants, including Fictitious Defendants A through T, provided express written warranties with the sale of the Plaintiffs' home.

92. Defendants, including Fictitious Defendants A through T, also expressly affirmed that the product they were selling and installing in Plaintiffs' home was gypsum drywall. By trade custom and practice, said warranty included an affirmation that the product was essentially gypsum, a paper backing, and nothing else. That affirmation constitutes an express warranty under the laws of Alabama. Plaintiffs relied on said express warranty in accepting the subject drywall.

93. Defendants further warranted that the HVAC system was adequate, properly sized and appropriate for the Plaintiffs' home.

94. Defendants breached said express warranties by selling a product that did not conform to said affirmations, namely that the product was contaminated with a compound containing high sulfur content such that it is not essentially gypsum.

95. Defendants further breached said express warranties by installing, selling and supplying an HVAC system that was not adequate, properly sized and appropriate for the Plaintiffs' home

96. Specifically, certain of the drywall supplied by Defendants and installed in the Plaintiffs' home is defective because it has caused damage to Plaintiffs or Plaintiffs' Property as alleged herein. Moreover, the HVAC system was not adequate, properly

sized and appropriate for the Plaintiffs' home, and thereby caused damage or exacerbated and worsened the defective drywall condition.

97. Defendants received actual notice of the defective Chinese drywall and the HVAC system, but have failed to repair or replace the defective Chinese drywall or otherwise take remedial measures.

98. As a direct and proximate result of the Defendants' breach of express warranties, the Plaintiff's suffered damages as set forth above.

WHEREFORE, the premises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally, for compensatory and punitive damages, equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

EIGHTH CAUSE OF ACTION

(Violation of Alabama's Deceptive and Unfair Trade Practices Act)

99. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

100. This action is brought to secure redress for the unlawful, deceptive and unfair trade practices perpetrated by Defendants.

101. Plaintiffs are "consumers" and the subject transactions are "trade or commerce" as defined by Alabama law.

102. Defendants', including Fictitious Defendants A through T's, actions and/or omissions as described herein violate the applicable Alabama Statutes that were enacted to protect the consuming public from those who engage in unfair methods of

competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.

103. Specifically, defendants misrepresented and omitted material information regarding the Chinese drywall and/or HVAC system by failing to disclose known risks.

104. Defendants' misrepresentations and concealment of material facts constitute unconscionable commercial practices, deception, fraud, false pretenses, misrepresentation and/or the knowing concealment, suppression, or omission of material facts with the intent that others rely on such concealment, suppression, or omission in connection with the sale and use of the Chinese drywall and HVAC system in violation of applicable Alabama laws.

105. Defendants violated the applicable Alabama laws by knowingly and falsely representing that Defendants' Chinese drywall and/or HVAC system was fit to be used for their intended purposes, when Defendants knew it was deceptive, dangerous, ineffective, unsafe and untested, and further by other acts alleged herein.

106. Defendants engaged in the deceptive acts and practices alleged herein in order to sell the Chinese drywall and/or an HVAC system to the public, including Plaintiffs.

107. Said acts and practices on the part of Defendants were and are illegal and unlawful pursuant to the applicable laws of the State of Alabama.

108. As a direct and proximate result of Defendants violations of Alabama Statutes, and applicable laws. Plaintiffs have suffered damages as set forth above. Plaintiffs are entitled to compensatory damages, enhanced statutory damages, equitable and declaratory relief, punitive damages, costs and reasonable attorney's

fees.

WHEREFORE, the premises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally, for compensatory and punitive damages, enhances statutory damages, equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

NINTH CAUSE OF ACTION
(Breach of Contract)

109. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

110. The Defendants, including Fictitious Defendants A through T, entered into an express and/or implied agreement with the Plaintiffs directly, and/or with the Plaintiffs as intended third party beneficiaries, to deliver, sell, convey, grant and provide a residential home suitable for human habitation, built within accepted construction standards and guidelines, and otherwise built in accordance with the contractual obligations undertaken.

111. The Defendants breached their contract with the Plaintiffs by failing to deliver, sell, convey, grant and provide a residential home suitable for human habitation, built within accepted construction standards and guidelines, and otherwise built in accordance with the contractual obligations undertaken.

112. As a direct and proximate result of the Defendants' said breach, the Plaintiff's suffered damages as set forth above.

WHEREFORE, the premises considered, the Plaintiffs demand judgment against

the Defendants, including Fictitious Defendants A through T, separately and severally, for compensatory and punitive damages, equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

TENTH CAUSE OF ACTION
(Fraudulent Misrepresentation)

113. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

114. Defendants, including Fictitious Defendants A through T, falsely and fraudulently represented to Plaintiff, the Plaintiff Class Members and/or the consuming public in general that Defendants' Chinese drywall had been tested and was found to be safe and/or effective for use.

115. Defendants, including Fictitious Defendants A through T, further falsely represented that the HVAC system was adequate, properly sized and appropriate for the Plaintiffs' home.

116. The representations made by Defendants were, in fact, false.

117. When said representations were made by Defendants, upon information and belief, they knew those representations to be false and they willfully, wantonly, and recklessly disregarded whether the representations were true.

118. These representations were made by Defendants with the intent of defrauding and deceiving the Plaintiffs and/or the consuming public, all of which evidence reckless, willful, indifference to the health, safety and welfare of the Plaintiffs.

119. At the time the aforesaid representations were made by the Defendants the Plaintiffs were unaware of the falsity of said representations and reasonably believed them to be true.

120. In reliance upon said representations, the Plaintiff's homes were built using Defendants' Chinese drywall, thereby sustaining damage and injury and/or being at an increased risk of sustaining damage and injury in the future. Further, the Plaintiffs' home was supplied with the defective HVAC system, thereby causing or exacerbating the Plaintiffs' damages.

121. Said Defendants knew and were aware, or should have been aware, that Defendants' Chinese drywall had not been sufficiently tested, was defectively manufactured and/or lacked adequate and/or sufficient warnings. Said defendants further knew or should have been aware that the HVAC system was inadequate, miss-sized and inappropriate, and/or lacked sufficient warnings.

122. Defendants knew, or should have known, that Defendants' Chinese drywall and HVAC system had a potential to, could, and would cause severe damage and injury to Plaintiffs and other consumers.

123. Defendants brought Defendants' Chinese drywall and the HVAC system to the market and acted fraudulently, wantonly, and maliciously to the detriment of the Plaintiffs.

124. As a direct and proximate result of the Defendants' said fraudulent misrepresentations, the Plaintiff's suffered damages as set forth above

WHEREFORE, the premises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally,

for compensatory and punitive damages, equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

ELEVENTH CAUSE OF ACTION
(Fraudulent Concealment/Suppression)

125. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

126. Defendants, including Fictitious Defendants A through T, fraudulently concealed, and/or intentionally omitted, the fact that Defendants' Chinese drywall used and installed in Plaintiffs' homes caused corrosion to air-conditioning and refrigerator units, electrical wires and copper tubes, and allergic reactions, coughing, sinus and throat infection, eye irritation, breathing hazards, bad smells, and other health concerns. Defendants further fraudulently concealed that the HVAC system was inadequate, miss-sized and inappropriate for the Plaintiffs' home.

127. Defendants were under a duty to disclose to Plaintiffs the aforementioned as it pertains to Defendants' Chinese drywall and the HVAC system.

128. Defendants' concealment and omissions of material facts concerning the harmful nature of the Chinese drywall and HVAC system was made purposefully, willfully, wantonly, and/or recklessly to mislead Plaintiffs and/or the consuming public into reliance and continued use of Defendants' product and system, and did in fact so mislead the Plaintiff's into such reliance and continued use.

129. Defendants knew that Plaintiffs and/or the consuming public had no way to determine the truth behind Defendants' concealment and omissions and that these included material omissions of facts surrounding Defendants' drywall and HVAC system

as alleged herein.

130. As a direct and proximate result of the Defendants' said fraudulent concealment/suppression, the Plaintiff's suffered damages as set forth above.

WHEREFORE, the premises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally, for compensatory and punitive damages, equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

TWELTH CAUSE OF ACTION
(Failure to Secure Performance Bond)

131. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

132. Defendants negligently, wantonly or willfully failed to strictly comply with §39-1-1 *Ala. Code* (1976) which requires any entity entering into a contract with an awarding authority for the prosecution of any public works to execute a performance bond with a penalty equal to 100% of the contract price.

133. The contract or contracts at issue in this matter exceeded \$50,000 in amount.

134. As a direct and proximate result of the defendants said failure, the Plaintiffs herein are unable to submit or file claims pursuant to a performance bond securing the completion of the contract, specifically those terms of the contract obligating the defendants to deliver, sell, convey, grant and provide a residential home suitable for human habitation, built within accepted construction standards and

guidelines, and otherwise built in accordance with the contractual obligations undertaken.

WHEREFORE, the premises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally, for compensatory and punitive damages, equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

THIRTEENTH CAUSE OF ACTION
(Failure to Comply With the Alabama Residential Landlord-Tenant Act)

135. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

136. Between January, 2007 and December, 2007, Defendant PHA as a landlord entered into residential lease agreements with Plaintiffs.

137. The Alabama Residential Landlord-Tenant Act (hereinafter referred to as "the Act") requires Defendant PHA as a landlord "to comply with the requirements of applicable building and housing codes materially affecting health and safety."

138. The Act requires Defendant PHA as a landlord "to make all repairs and do whatever is necessary to put and keep the premises in a habitable condition."

139. The Act requires Defendant PHA as a landlord to "maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning and other facilities and appliances supplied or required to be supplies by the landlord."

140. Defendant PHA failed to lease, provide and maintain a residential home built within accepted construction standards and guidelines, built in accordance with all

applicable building and housing codes materially affecting health and safety, suitable for human habitation and maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating and air-conditioning.

141. Defendant PHA failed in bad faith to lease, provide and maintain a residential home built within accepted construction standards and guidelines, built in accordance with all applicable building and housing codes materially affecting health and safety, suitable for human habitation and further failed in bad faith to maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating and air-conditioning.

142. The Act requires Defendant PHA as landlord to return the Plaintiffs' security deposit, less the amount of accrued rent and/or the amount of damages resulting from the Plaintiff's breach of the lease within thirty-five (35) days of the termination of the lease.

143. The Act requires Defendant PHA as landlord to deliver a written notice and an itemized list of accrued rent and/or damages and the security deposit to the Plaintiffs within thirty-five (35) days of the termination of the lease.

144. Defendant PHA has failed to return the Plaintiffs' security deposit or provide the Plaintiffs with an itemized list of accrued rent and/or damages deducted from the deposit.

145. As a direct and proximate result of Defendant PHA's failure to comply with the requirements of the Act, the Plaintiffs suffered damages as set forth above.

WHEREFORE, the premises considered, the Plaintiffs demand judgment against Defendant PHA for compensatory damages, mental anguish, emotional distress, actual

damages, interest, costs, appropriate and reasonable attorney's fees an amount equal to double the amount of the Plaintiffs' original security deposit and such other or further relief as may be warranted by the evidence and the findings of this court.

Respectfully submitted,

HOLSTON ◊ VAUGHAN ◊ ADDRESS, LLC
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PLAINTIFF RESPECTFULLY DEMANDS A TRIAL BY STRUCK JURY.

By: /s/ Richard H. Holston
RICHARD H. HOLSTON (HOL-052)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on the following by Notice of Electronic Filing, or, if the party served does not participate in Notice of Electronic Filing, by U.S. First Class Mail on this the 8th day of March, 2010.

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By: s/ Richard H. Holston
RICHARD H. HOLSTON (HOL-052)

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

DIGES E. LITTLE, et al.,

Plaintiffs,

vs.

THE MITCHELL COMPANY, INC.,

Defendants.

*
 *
 * Civil Action Case Number:
 *
 * CV-2009-901153
 *
 * Consolidated with
 *
 * CV-09-901118- MAY
 *

SIXTH AMENDED COMPLAINT

The Plaintiffs in the above styled action hereby amend the previously filed Complaint(s) for purposes of adding Javier Rowe as a Plaintiff. The Complaint, as amended, shall now read as follows:

STATE OF ALABAMA
 I HEREBY CERTIFY
 PLEADING WAS FILED
 2010 MAR -8 PM 4:15
 Clerk Circuit Court
J. J. [Signature]

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

DIGES E. LITTLE, individually and as mother and next friend of DESIREE L. PERRY, DEVONTE D. WILLIAMS and DORYAN M. WILLIAMS, minors;

*
*

FELICIA A. ALLBRITTON, individually and as mother and next friend of EDWARD J. STEVENSON, a minor, BETTY ALLBRITTON, individually and JAVIER ROWE, individually;

*
* Civil Action Case Number:

CV-2009-901153

JEROME LELAND, individually, and AUDRA WASHINGTON, individually and as mother and next friend of JERMESIA WASHINGTON, TIMOTHY WASHINGTON, LEKENNO WASHINGTON and JALEXIS WASHINGTON, minors;

*
*
*
* Consolidated with

GENNIES M. HILLARY, individually and as mother and next friend of CORINTHIA HILLERY, a minor;

*
* CV-09-901118- MAY

DEBORAH R. PORCHER, individually and as mother and next friend of KHRYSHAUNDA S. LETT and CHRISTOPHER D. LETT, minors; and TIFFANY K. PORCHER, individually and as mother and next friend of DELANTONIO PORCHER, a minor;

*
*
*

CHARLES R. PUGH, individually, JESSICA M. PUGH, individually and as mother and next friend of JAKENDRICK D. HOLMES and KAYLYN HOLMES a minors;

*
*
*

LETITIA G. WASHINGTON, individually and as mother and next friend of MALASIA K. WASHINGTON, TORIANNA C. WASHINGTON and MAKAYLA S. WASHINGTON, minors;

*
*
*

Plaintiffs,
vs.

*
*

THE MITCHELL COMPANY, INC.; THE MITCHELL COMPANY; CREOLA ACE HARDWARE, INC.; GEORGE DRYWALL, INC.; KNAUF INSULATION GMBH; THE HOUSING AUTHORITY OF THE CITY OF PRICHARD, ALABAMA; THE PRICHARD HOUSING

*
*
*

BOARD; INTERIOR & EXTERIOR BUILDING SUPPLY COMPANY, L.P.; JUST-RIGHT SUPPLY COMPANY, INC.; ESTES HEATING & AIR, INC.; Fictitious Defendants A; B; C; D and/or E, whether singular or plural, being those persons, firms, or other legal entities that contracted to construct, sell or lease a residential home to the Plaintiffs; **Fictitious Defendants F; G; H; I and/or J**, whether singular or plural, being those persons, firms, or other legal entities that manufactured, formulated, designed and/or processed distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, serviced, applied and/or failed to warn concerning the defective drywall at issue and/or the inadequate and defective HVAC system at issue; **Fictitious Defendants K; L; M; N and/or O**, whether singular or plural, being those persons, firms, or other legal entities that misrepresented the condition, content and fitness of the defective drywall at issue and/or the defective HVAC system at issue, or who acted or conspired to act to suppress, misrepresent, conceal, cover up and hide the defects and prevent discovery; **Defendants P; Q; R; S and/or T**, whether singular or plural, being those persons, firms, or other legal entities that breached the sales contract and/or violated Alabama's Deceptive Trade Practices Act; all whose true and correct identities are unknown to the Plaintiffs at this time, but will be added by amendment, jointly and individually when ascertained,

Defendants.

COMPLAINT

The Plaintiffs in the above styled action allege the following against the Defendants, including all Fictitious Defendants, separately and severally:

1. The Plaintiffs bring this action seeking actual damages, equitable relief (including restitution and disgorgement of profits), and all other relief available under the laws of the State of Alabama.

2. The claims set forth below arise out of the construction and sale of the

Plaintiffs' residential homes, and the manufacture, formulation, design, processing, distribution, delivery, importation, supplying, inspection, testing, marketing, sale, warranting, advertising, use, installation, application, servicing and or failure to warn concerning Chinese drywall and/or the HVAC system which the Defendants knew or should have known was defective and fundamentally unsuitable for its intended purpose.

3. As a direct and proximate result of the Defendants' conduct, both individually and in concert or conspiracy with one another, defective, unfit and unsuitable Chinese drywall was installed in the Plaintiffs' homes, and has and continues to injure and damage the Plaintiffs and their property. Moreover, an inadequate, defective and miss-sized HVAC system was installed which exacerbated the drywall condition, and otherwise damaged the Plaintiffs herein.

PARTIES, JURISDICTION AND VENUE

4. The Plaintiffs in the above action are over 19 years of age unless otherwise identified as a minor suing through a designated representative, and are residents of the State of Alabama. Between 2006 and the present, they all purchased or lived in homes purchased from Defendant THE HOUSING AUTHORITY OF THE CITY OF PRICHARD, ALABAMA. The homes are all located in the HOPE VI Family Sales Subdivision, sometimes referred to as the "Bessemer Subdivision", in Mobile County, Alabama. The Plaintiffs and the homes at issue are specifically identified as follows:

- a. DIGES E. LITTLE, individually and as mother and next friend of DESIREE

- L. PERRY, DEVONTE D. WILLIAMS and DORYAN M. WILLIAMS, minors, purchased and lived in the home located on lot # 28. The street address is 816 McCrory Avenue, Prichard, Alabama. The purchase occurred on or about July 6, 2007.
- b. FELICIA A. ALLBRITTON, individually and as mother and next friend of EDWARD J. STEVENSON, a minor; BETTY ALLBRITTON, individually; and JAVIER ROWE, individually, purchased and lived in the home located on lot # 5. The street address is 701 Hinson Avenue, Prichard, Alabama. The purchase occurred on or about February 29, 2008.
- c. JEROME LELAND, individually, and AUDRA WASHINGTON, individually and as mother and next friend of JERMESIA WASHINGTON, TIMOTHY WASHINGTON, LEKENNO WASHINGTON and JALEXIS WASHINGTON, minors, purchased and lived in the home located on lot # 22. The street address is 828 McCrory Avenue, Prichard, Alabama. The purchase occurred on or about March 19, 2007.
- d. GENNIES M. HILLARY, individually and as mother and next friend of CORINTHIA HILLERY, a minor, purchased and lived in the home located on lot # 35. The street address is 802 McCrory Avenue, Prichard, Alabama. The purchase occurred on or about November 2, 2007.
- e. DEBORAH R. PORCHER, individually and as mother and next friend of KHRYSHAUNDA S. LETT and CHRISTOPHER D. LETT, minors; and TIFFANY K. PORCHER, individually and as mother and next friend of DELANTONIO PORCHER, a minor, purchased and lived in the home located on lot # 11. The street address is 510 Riel Street, Prichard, Alabama. The purchase occurred on or about April 25, 2007.
- f. CHARLES R. PUGH, individually, JESSICA M. PUGH, individually and as mother and next friend of JAKENDRICK D. HOLMES and KAYLYN HOLMES, a minor, purchased and lived in the home located on lot # 25. The street address is 822 McCrory Avenue, Prichard, Alabama. The purchase occurred on or about July 26, 2007.
- g. LETITIA G. WASHINGTON, individually and as mother and next friend of MALASIA K. WASHINGTON, TORIANNA C. WASHINGTON and MAKAYLA S. WASHINGTON, minors, purchased and lived in the home located on lot # 21. The street address is 827 McCrory Avenue, Prichard, Alabama. The purchase occurred on or about August 15, 2007.
5. The Defendant, **THE MITCHELL COMPANY, INC.**, is an Alabama

Corporation with its principle place of business in Mobile County, Alabama. The Defendant, **THE MITCHELL COMPANY, INC.**, is a construction company and has built homes and/or apartments in several states, including Alabama. The Defendant, **THE MITCHELL COMPANY, INC.**, built the Plaintiffs' homes.

5-a. The Defendant, **THE MITCHELL COMPANY**, is an Alabama General Partnership organized under the laws of the State of Alabama, and having offices in Mobile County, Alabama. The Defendant **THE MITCHELL COMPANY** acted as the developer for the "Bessemer Subdivision" project.

6. The Defendant, **THE HOUSING AUTHORITY OF THE CITY OF PRICHARD, ALABAMA**, is a non-profit governmental entity which, in the regular course of its business, provides administrative services toward housing programs in and for the City of Prichard, Alabama. This action is filed within six (6) months of the discovery and accrual of the actions set forth herein, and thus complies with the presentment of claim requirements of §11-47-23 *Ala. Code* (1975). See *Diemert v. City of Mobile*, 474 So.2d 663, 666 (Ala. 1985).

7. The Defendant, **THE PRICHARD HOUSING BOARD**, is a non-profit governmental entity which, in the regular course of its business, provides administrative services toward housing programs in and for the City of Prichard, Alabama. This action is filed within six (6) months of the discovery and accrual of the actions set forth herein, and thus complies with the presentment of claim requirements of §11-47-23 *Ala. Code* (1975). See *Diemert v. City of Mobile*, 474 So.2d 663, 666 (Ala. 1985).

8. The Defendant **INTERIOR & EXTERIOR BUILDING SUPPLY COMPANY, L.P.** is a limited partnership with its principal place of business in

Louisiana. Defendant **INTERIOR & EXTERIOR BUILDING SUPPLY COMPANY, L.P.** is a building supply company with offices in four states, and has shipped and/or supplied building products into the State of Alabama such that it is doing business in this State.

9. [Omitted].

10. [Omitted].

11. The Defendant **JUST-RIGHT SUPPLY COMPANY, INC.** is a corporation organized in Mississippi, with its principal place of business in Mississippi. Defendant **JUST-RIGHT SUPPLY COMPANY, INC.** is a building supply company with offices in Mississippi, and has shipped and/or supplied building products in the State of Alabama such that it is doing business in this State.

12. The Defendant **ESTES HEATING & AIR, INC.** is an Alabama Corporation with its principle place of business in Mobile County, Alabama. Defendant **ESTES HEATING & AIR, INC** supplied, installed and serviced the HVAC system in the Plaintiffs' homes.

12-a. The Defendant **CREOLA ACE HARDWARE, INC.** is an Alabama Corporation with its principle place of business in Mobile County, Alabama. Defendant **CREOLA ACE HARDWARE, INC.**, shipped, supplied, installed and sold the drywall in the Plaintiffs' homes.

12-b. Defendant **GEORGE DRYWALL, INC.** is an Alabama Corporation with its principle place of business in Mobile County, Alabama. Defendant **GEORGE DRYWALL, INC.**, shipped, supplied, installed and sold the drywall in the Plaintiffs' homes.

12-c. [Omitted].

12-d. The Defendant **KNAUF INSULATION GMBH** is an Indiana Corporation with its principle place of business in Shelbyville, Indiana. Defendant, **KNAUF INSULATION GMBH** has shipped and/or supplied building products in the State of Alabama such that it is doing business in this State. The Defendant **KNAUF INSULATION GMBH** brokered the sale of the drywall and misrepresented the condition and fitness of the drywall.

13. Fictitious Defendants A through T are the persons, firms, or other legal entities that contracted to construct, sell or lease a residential home to the Plaintiffs herein; that manufactured, formulated, designed and/or processed distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, applied and/or failed to warn concerning the defective drywall at issue and the inadequate HVAC system at issue; that misrepresented the condition, content and fitness of the defective drywall at issue and the HVAC system, who acted or conspired to act to suppress, misrepresent, conceal, cover up and hide the defects and their discovery; and/or that breached the sales contract and/or violated Alabama's Deceptive Trade Practices Act; all whose true and correct identities are unknown to the Plaintiffs at this time, but will be added by amendment, jointly and individually, when ascertained, or who are presently non-US entities suspected of wrongdoing, but who are unavailable for practical and affordable service due to treaties or conventions.

14. This Court has personal jurisdiction over Defendants because they are engaged in substantial and not insolated activity within this state. Additionally, Plaintiff's causes of action arise from Defendants personally, or through their agents, causing

injury to real and personal property within the State of Alabama and at the time of the injury, products, materials, or things manufactured, distributed and supplied by the defendants were used and consumed within the state of Alabama in the ordinary course of commerce, trade, or use. Said products were distributed, installed and serviced by Defendants **THE MITCHELL COMPANY, INC., THE MITCHELL COMPANY; THE HOUSING AUTHORITY OF THE CITY OF PRICHARD, ALABAMA; THE PRICHARD HOUSING BOARD; INTERIOR & EXTERIOR BUILDING SUPPLY COMPANY, L.P.; CREOLA ACE HARDWARE, INC.; GEORGE DRYWALL, INC.; KNAUF INSULATION GMBH; JUST-RIGHT SUPPLY COMPANY, INC.;** and **ESTES HEATING & AIR, INC.** in the ordinary course of commerce, trade or use and shipped into the state of Alabama.

15. Venue and jurisdiction are proper in this Court.

FACTS

16. Plaintiffs are all homeowners or reside with homeowners in a subdivision commonly known as the HOPE IV Family Sales Subdivision, sometimes referred to as the "Bessemer Subdivision", located in Prichard, Alabama.

17. Between 2003 and 2008, Defendant MITCHELL COMPANY, INC (hereinafter "MITCHELL COMPANY") and/or Fictitious Defendants A through T, constructed, warranted and sold homes in this subdivision pursuant to an agreement with the City of Prichard and/or the Prichard Housing Authority. Said construction work was pursuant to a contract with THE MITCHELL COMPANY (hereinafter "MITCHELL", a General Partnership acting under a contract with the PHA as the developer for the project.

18. In the course of constructing these homes, Defendant MITCHELL COMPANY and/or Defendant MITCHELL distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, applied and/or failed to warn concerning the drywall materials purchased from suppliers, including but not necessarily limited to, Defendants INTERIOR & EXTERIOR BUILDING SUPPLY COMPANY, L.P. (hereinafter "IN-EX SUPPLY"), CREOLA ACE HARDWARE, INC. (hereinafter "CREOLA ACE"); JUST-RIGHT SUPPLY COMPANY, INC. (hereinafter "JUST-RIGHT"), GEORGE DRYWALL, INC. (hereinafter "GEORGE DRYWALL"); KNAUF INSULATION GMBH (hereinafter "KNAUF INSULATION") and/or Fictitious Defendants A through T.

19. INTERIOR & EXTERIOR, CREOLA ACE, JUST-RIGHT, GEORGE DRYWALL, KNAUF INSULATION and/or Fictitious Defendants A through T had purchased these drywall materials, directly or indirectly, from German and/or Chinese entities and/or from Fictitious Defendants A through T.

20. The drywall materials in question were manufactured in China by Defendants or by Defendants' principals.

21. The Defendants improperly manufactured, formulated, designed, processed, distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, applied, serviced and/or failed to warn concerning the defective drywall materials.

22. Said drywall materials were and are uniformly and inherently defective when used for their intended purposes. The drywall materials were made from waste material – also known as "fly ash" – collected from scrubbers at coal-fired power plants

located in China, or alternatively were made with gypsum mined from one or more locations in China where the natural gypsum contained high levels of sulfur.

23. The defective drywall materials emit a combination of sulfide gases which produce a distinctive chemical odor, and cause corrosion to copper and other metal materials such as those used in HVAC systems, electrical systems, gas fuel systems and many appliances, electronics, equipment and other items commonly located in residential dwellings.

24. Hydrogen Sulfide ("H₂S"), one of the gases emitted by the defective Chinese drywall materials, is a broad spectrum poison which affects multiple systems in the human body. It can form a complex bond with the body's enzymes which can block the binding properties of oxygen, thereby interfering with respiration.

25. Lower level exposures, especially over an extended time, can result in irritated and itchy eyes and skin, difficulty in breathing, sore throat, persistent cough, nausea, bloody noses, runny noses, recurrent headaches, fatigue, loss of appetite, impaired memory function, sinus infection, allergic reactions and asthma attacks. Prolonged exposure has also been implicated in reproductive health issues.

26. Additionally, Defendants manufactured, formulated, designed, processed, distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, applied, serviced and/or failed to warn concerning an inadequate, defective and miss-sized HVAC system in the Plaintiffs' home. As a direct and proximate result of the defective HVAC system, the off-gassing properties of the defective Chinese drywall was exacerbated and worsened. The defective HVAC system further directly and proximately caused Plaintiff's increased costs and expenses.

27. The Defendants knew of the defective nature of the Chinese drywall materials and the defective HVAC system at the time they improperly manufactured, formulated, designed, processed, distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, applied, serviced and/or failed to warn concerning same. Alternatively, the Defendants should reasonably have known or discovered the defective nature of the Chinese drywall materials and HVAC system prior to its use in the Plaintiffs' home.

28. The Defendants suppressed, misrepresented, concealed, covered up and hid the defective nature of the Chinese drywall materials and HVAC system from the general public, including the Plaintiffs. The Plaintiffs could not reasonably have discovered the existence of the defect in the Chinese drywall material until December 2008 when initial press reports were issued, and in fact did not have actual notice of the said defect, and actual notice of the presence of defective Chinese drywall materials in their home, until May, 2009. Further, Plaintiffs could not reasonably have discovered the defective nature of the HVAC system until investigation of the Chinese drywall defect after May 2009.

29. As a direct and proximate result of the gas emissions from the defective Chinese drywall materials used in the construction of their home, as well as a direct and proximate result of the conduct, breaches, acts and omissions of the defendants, each of the Plaintiffs has suffered the following damages:

- a. Personal injuries in the form of one or more of the above identified signs, symptoms and conditions associated with exposure to the sulfide gases emitted by the defective Chinese drywall;
- b. Permanent injuries, or alternatively the permanent aggravation of pre-

- existing conditions;
- c. Pain and suffering;
- d. Mental anguish;
- e. Loss of enjoyment of their home;
- f. Increased utility and servicing costs;
- g. Past and future medical expenses; including the cost of medical monitoring;
- h. Past and future lost earnings;
- i. Property damage to their home;
- j. Costs of extensive remedial measures, tear-out, disposal and re-construction to correct the defective drywall and affected construction
- k. Property damage to the HVAC system, electrical systems, and gas fuel systems in their home;
- l. Property damage to appliances, electronics, equipment and other items located in their home;
- m. The diminished value of their home occasioned by the damage caused by and the stigma associated with Chinese drywall construction;
- n. Loss of or impaired marketability of their home;
- o. Relocation expenses and costs;
- p. Cleaning expenses and costs;
- q. The loss of the financial and time investment in their home;
- r. The loss of funds paid in the form of loan interest, and the loss of equity in their home;
- s. Such severe, regular and systematic failures of the HVAC systems, electrical systems, gas fuel systems and other residential home systems/components so as to render their home unreliable, unsafe, uninhabitable and unfit for human occupation and use;

30. Said damages were also directly and proximately caused, exacerbated and worsened by the HVAC system which was improperly manufactured, formulated, designed, processed, distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, applied, and/or serviced, and which was so provided with inadequate warnings.

31. Plaintiffs were at all times intended third party beneficiaries of the multiple contracts, agreements and trade practices between and among the various defendants and others since the clear and manifest intent of the defendants was to primarily, directly and ultimately benefit the Plaintiffs. Each of the defendants at all relevant and material times knew, appreciated and understood this fact.

32. At all times relevant and material to the allegations contained herein, each of the defendants acted directly, or alternatively acted as the actual and/or apparent agent of one or more of the other defendants named herein, including Fictitious Defendants. The acts and omissions alleged herein were committed within the line and scope of one or more of such actual or apparent agency relationships, and/or were thereafter ratified by the principal with consequential benefit.

33. The defendants knew or had reason to know of the defective nature of the Chinese drywall and/or the HVAC system, or alternatively discovered the defect prior to the Plaintiffs. The defendants knew or had reason to know that the Plaintiffs could not and would not discover the defective nature of the Chinese drywall and/or the HVAC system, or even the existence and presence of the Chinese drywall and the defective HVAC system in their home, due to Plaintiffs lack of knowledge and understanding of the origins and composition of the materials used in the construction of the home and its

interaction with the HVAC system. Defendants thereafter suppressed, concealed, hid and failed to warn and advise the Plaintiffs of the dangers and risks associated with the defective Chinese drywall and defective HVAC system until after widespread and intense national media coverage of the nature of the defect and the accompanying signs of Chinese drywall presence.

FIRST CAUSE OF ACTION
(Negligence / Wantonness)

34. The Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

35. Defendants, including Fictitious Defendants A through T, owed a duty to Plaintiffs to exercise reasonable and ordinary care in the manufacture, formulation, design, processing, distribution, delivery, importation, supplying, inspection, testing, marketing, sale, warranting, advertising, use, installation, application, servicing and/or warnings concerning the Chinese drywall and the HVAC system.

36. Defendants negligently and/or wantonly breached their duty to Plaintiffs by formulating, inadequately testing, designing, manufacturing, marketing, advertising, selling, installing, using, applying, servicing or otherwise placing into the stream of commerce the defective Chinese drywall and HVAC system that is unsafe, unsuitable and unfit for its intended purpose. Defendants did so with the understanding, appreciation and/or knowledge that it would ultimately be installed into the homes of ordinary consumers like the Plaintiffs. Defendants further failed to warn the Plaintiffs and others of the defective nature of the Chinese drywall and HVAC system and the

risks created by its presence in a home. Defendants further failed to promptly remove or recall the drywall and HVAC system from the marketplace or take other appropriate remedial action.

37. Defendants knew or reasonably should have known that the Chinese drywall and/or the HVAC system was defective, unreasonably dangerous, posed health risks, would cause other building components and property to fail prematurely, was not suitable for its intended use in construction and otherwise was not as warranted and represented by the Defendants.

38. Defendants possessed superior knowledge about the composition and defective nature of the drywall and HVAC system, and also knew or reasonably should have known that the said defect would cause physical injury or damage to Plaintiffs, damage to Plaintiffs' home and property; would require medical care; would require additional monitoring; would require repair and/or replacement of damaged property; and would otherwise inflict significant damage on the Plaintiffs and their home.

39. As a direct and proximate result of the Defendants' negligence and/or wantonness, defective design, and/or manufacture of the drywall and HVAC system, and Defendants' sale, installation and/or use of the drywall and HVAC system, and the defendants placement of same into the stream of commerce, Plaintiffs have suffered or are substantially certain to suffer personal injuries or damages, including damage to property, and have incurred, or are substantially certain to incur, the costs of testing, repairing and replacing defective Chinese drywall, HVAC system and other components, remediation of consequential and resulting property damage, personal injury, permanent injury, loss of earnings, loss of the use and enjoyment of their home,

diminished value of their home, loss of the investment in their home, interest paid, pain, suffering and emotional distress, and other damages as alleged herein.

40. Defendants' employees also engaged in this wrongful conduct with the active and knowing participation of Defendants' officers, directors or managers.

41. Defendants' conduct also constituted wantonness in that it was so willful, wanton, reckless, or wanting in care that it constituted a conscious disregard or indifference to the health, safety and rights of Plaintiffs.

42. As a direct and proximate result of the Defendants' negligence and/or wantonness, the Plaintiff's suffered damages as set forth above.

WHEREFORE, the premises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally, for compensatory and punitive damages, equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

SECOND CAUSE OF ACTION
(Strict Products Liability)

43. The Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this complaint.

44. At all relevant times, Defendants, including Fictitious Defendants A through T, were engaged in the business of designing, manufacturing, marketing, advertising, and/or selling into the stream of commerce the Chinese drywall and/or HVAC system that is the subject of this action.

45. The Chinese drywall and/or HVAC system installed in the Plaintiffs' home was and is defective and unfit for its intended use.

46. Defendants knew and expected that the Chinese drywall would reach, and it did reach, the Plaintiffs without any substantial change in its condition. The HVAC system was designed and installed in the Plaintiffs' home.

47. Under normal use, as alleged above, the Chinese drywall fails to perform in accordance with the reasonable expectations of Plaintiffs and ordinary consumers. The HVAC system, also under normal use, fails to perform as reasonably expected.

48. The risks of harm posed by the failure of the Chinese drywall and HVAC system outweigh the benefits of its design.

49. The Defendants, in exercising reasonable care, should have produced and used properly-designed drywall and a properly designed and sized HVAC system. Had they done so, this would have prevented or reduced the injury and damages suffered by Plaintiffs.

50. As a direct and proximate cause of the Defendants' defective design, and/or manufacture of the drywall and HVAC system, and Defendants' sale, installation and/or use of the drywall and HVAC system, and the defendants placement of same into the stream of commerce, Plaintiffs have suffered or are substantially certain to suffer personal injuries and damages, including damage to property, and have incurred, or are substantially certain to incur, the costs of testing, repairing and replacing defective Chinese drywall and other components, remediation of consequential and resulting property damage, personal injury, permanent injury, loss of earnings, loss of the use and enjoyment of their home, diminished value of their home, loss of the

investment in their home, interest paid, pain, suffering and emotional distress, and other damages as alleged herein.

51. Defendants knew or should have known of the risks posed by the Chinese drywall and HVAC system, and the risks of damage posed to those who purchased homes in which Defendants installed the Chinese drywall and HVAC system, but failed to provide adequate warnings of the known or foreseeable risks. Defendants had a duty not to put on the market products that posed a serious danger without first testing it and/or issuing warnings to the Plaintiffs and other consumers.

52. Defendants breached their duty to warn by unreasonably failing to provide warnings concerning any of the facts alleged herein to the Plaintiffs and other consumers.

53. Defendants' failure to warn as alleged herein, proximately caused reasonably foreseeable injuries to Plaintiffs. The Plaintiffs would have heeded legally adequate warnings, and not purchased the home containing the defective drywall and HVAC system, but would have purchased another home. The absence of warnings by the Defendants was the proximate cause of present and future damages sustained by Plaintiffs.

54. Defendants' wrongful conduct, alleged in the foregoing paragraphs, was intentional and or reckless, in that Defendants' managing agents, primary owners, and/or other officers or directors acted with actual or constructive knowledge of the wrongfulness of their conduct and of the high probability that injury or damage to the Plaintiffs would result and, despite that knowledge, intentionally or recklessly sold Chinese drywall and/or an inadequate, defective and miss-sized HVAC system without

proper testing, concealed the defect, and failed to warn purchaser's of the defective Chinese drywall and HVAC system.

55. Defendants' employees also engaged in this wrongful conduct with the active and knowing participation of Defendant entities and/or the knowing endorsement, ratification, and consent of Defendants' officers, directors, or managers.

56. Defendants' conduct also constituted wantonness, in that it was so willful, wanton, reckless, or wanting in care that it constituted a conscious disregard or indifference to the health, safety, and rights of Plaintiffs.

57. As a direct and proximate result of the Defendants' conduct, the Plaintiff's suffered damages as set forth above.

WHEREFORE, the premises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally, for compensatory and punitive damages, equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

THIRD CAUSE OF ACTION
(Unjust Enrichment)

58. The Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

59. Defendants, including Fictitious Defendants A through T, have been unjustly enriched in that they have wrongfully acquired a benefit, i.e., funds and profits, by their wrongful behavior described above.

60. Defendants have continued to acquire funds and profits despite their knowledge of the defectiveness of, and risks posed by, the defective Chinese drywall and HVAC system.

61. The circumstances under which Defendants profited from the sale of the drywall and HVAC system make it inequitable for them to retain those funds and profits.

62. Plaintiffs demand that Defendants be ordered to disgorge, for the benefit of the Plaintiffs, all or part of their ill-gotten profits received from the sale of the defective drywall and HVAC system, and/or make full restitution to Plaintiffs for the injuries or damages as set forth herein.

WHEREFORE, the premises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally, for equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

FOURTH CAUSE OF ACTION
(Implied Warranty of Habitability)

63. The Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

64. Each of Defendants, including Fictitious Defendants A through T, are merchants, suppliers, distributors or installers of gypsum drywall and/or residential HVAC systems.

65. Under the law of Alabama, Defendants impliedly warranted directly to

Plaintiffs or to their predecessors in title, that the residential home containing the defective Chinese drywall and HVAC system was habitable and reasonably fit for human occupancy.

66. Plaintiffs are known, identified and/or intended third party beneficiaries of the warranties given by Defendants, and the clear and manifest intent of the Defendants sales contracts, agreements and trade practices was to primarily, directly and ultimately benefit the Plaintiffs.

67. At the time the defendants manufactured, formulated, designed, processed, distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, applied, serviced and/or failed to warn concerning the defective drywall materials and HVAC system, the said defendants knew or had reason to know that the Chinese drywall and HVAC system was being acquired for installation in the Plaintiffs' home, and that the Plaintiffs were relying upon the Defendants superior skill, judgment and experience to select and furnish materials and systems suitable and fit for construction of a habitable structure.

68. Defendants breached the implied warranty of habitability by selling certain Chinese drywall and HVAC system that was defective, unsafe, unsuitable and unfit for the ordinary purpose for which drywall and HVAC systems are used, and their presence in the Plaintiffs' home makes the said home uninhabitable and unfit for human occupancy.

69. Specifically, certain of the drywall supplied by Defendants and installed in the Plaintiffs' home is defective because it has caused damage to Plaintiffs or Plaintiffs' Property as alleged herein. Moreover, the HVAC system was not adequate, properly

sized and appropriate for the Plaintiffs' home, and thereby caused damage or exacerbated and worsened the defective drywall condition.

70. Defendants received actual notice of the defective Chinese drywall and the HVAC system, but have failed to repair or replace the defective Chinese drywall and/or HVAC system, or otherwise take remedial measures.

71. As a direct and proximate result of the Defendants' breach of the warranty of habitability, the Plaintiff's suffered damages as set forth above

WHEREFORE, the premises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally, for compensatory and punitive damages, equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

FIFTH CAUSE OF ACTION
(Implied Warranty of Fitness for a Particular Purpose)

72. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

73. Each of Defendants, including Fictitious Defendants A through T, are merchants, suppliers, distributors or installers of gypsum drywall and/or residential HVAC systems..

74. Under the law of Alabama, Defendants impliedly warranted directly to Plaintiffs or to their predecessors in title, that the drywall and HVAC system were reasonably fit for the ordinary purposes for which they are used.

75. Plaintiffs are known, identified and/or intended third party beneficiaries of the warranties given by Defendants, and the clear and manifest intent of the Defendants sales contracts, agreements and trade practices was to primarily, directly and ultimately benefit the Plaintiffs.

76. At the time the defendants manufactured, formulated, designed, processed, distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, applied and/or failed to warn concerning the defective drywall materials and/or HVAC system, the said defendants knew or had reason to know that the Chinese drywall and/or HVAC system was being acquired for the particular purpose of installation in the Plaintiffs' home, and that the Plaintiffs were relying upon the Defendants superior skill, judgment and experience to select and furnish materials suitable and fit for this particular purpose.

77. Defendants breached the implied warranty of fitness for a particular purpose by selling certain Chinese drywall and/or HVAC system that was defective and not reasonably fit for the ordinary purpose for which they are used.

78. Specifically, certain of the drywall supplied by Defendants and installed in the Plaintiffs' home is defective because it has caused damage to Plaintiffs or Plaintiffs' Property as alleged herein. Moreover, the HVAC system was not adequate, properly sized and appropriate for the Plaintiffs' home, and thereby caused damage or exacerbated and worsened the defective drywall condition.

79. Defendants received actual notice of the defective Chinese drywall and the HVAC system, but have failed to repair or replace the defective Chinese drywall and/or HVAC system, or otherwise take remedial measures.

80. As a direct and proximate result of the Defendants' breach of the warranty of fitness for a particular purpose, the Plaintiff's suffered damages as set forth above

WHEREFORE, the premises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally, for compensatory and punitive damages, equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

SIXTH CAUSE OF ACTION
(Implied Warranty of Merchantability)

81. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

82. Each of Defendants, including Fictitious Defendants A through T, are merchants, suppliers, distributors or installers of gypsum drywall and/or residential HVAC systems..

83. Under the law of Alabama, Defendants impliedly warranted directly to Plaintiffs or to their predecessors in title, that the drywall and HVAC system were merchantable and reasonably fit for the ordinary purposes for which they are used.

84. Plaintiffs are known, identified and/or intended third party beneficiaries of the warranties given by Defendants, and the clear and manifest intent of the Defendants sales contracts, agreements and trade practices was to primarily, directly and ultimately benefit the Plaintiffs.

85. At the time the defendants manufactured, formulated, designed,

processed, distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, applied and/or failed to warn concerning the defective drywall materials and/or the HVAC system, the said defendants knew or had reason to know that the Chinese drywall was being acquired for the purpose of installation in the Plaintiffs' home, and that the Plaintiffs were relying upon the Defendants superior skill, judgment and experience to select and furnish materials suitable, fit and merchantable for use in this manner.

86. Defendants breached the implied warranty of merchantability by selling certain Chinese drywall and HVAC system that were defective and not reasonably fit for the ordinary purposes for which they are used.

87. Specifically, certain of the drywall supplied by Defendants and installed in the Plaintiffs' home is defective because it has caused damage to Plaintiffs or Plaintiffs' Property as alleged herein. Moreover, the HVAC system was not adequate, properly sized and appropriate for the Plaintiffs' home, and thereby caused damage or exacerbated and worsened the defective drywall condition.

88. Defendants received actual notice of the defective Chinese drywall and the HVAC system, but have failed to repair or replace the defective Chinese drywall or otherwise take remedial measures.

89. As a direct and proximate result of the Defendants' breach of the warranty of merchantability, the Plaintiff's suffered damages as set forth above.

WHEREFORE, the premises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally, for compensatory and punitive damages, equitable relief, interest, costs, appropriate

and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

SEVENTH CAUSE OF ACTION
(Express Warranty)

90. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

91. Defendants, including Fictitious Defendants A through T, provided express written warranties with the sale of the Plaintiffs' home.

92. Defendants, including Fictitious Defendants A through T, also expressly affirmed that the product they were selling and installing in Plaintiffs' home was gypsum drywall. By trade custom and practice, said warranty included an affirmation that the product was essentially gypsum, a paper backing, and nothing else. That affirmation constitutes an express warranty under the laws of Alabama. Plaintiffs relied on said express warranty in accepting the subject drywall.

93. Defendants further warranted that the HVAC system was adequate, properly sized and appropriate for the Plaintiffs' home.

94. Defendants breached said express warranties by selling a product that did not conform to said affirmations, namely that the product was contaminated with a compound containing high sulfur content such that it is not essentially gypsum.

95. Defendants further breached said express warranties by installing, selling and supplying an HVAC system that was not adequate, properly sized and appropriate for the Plaintiffs' home

96. Specifically, certain of the drywall supplied by Defendants and installed in the Plaintiffs' home is defective because it has caused damage to Plaintiffs or Plaintiffs' Property as alleged herein. Moreover, the HVAC system was not adequate, properly sized and appropriate for the Plaintiffs' home, and thereby caused damage or exacerbated and worsened the defective drywall condition.

97. Defendants received actual notice of the defective Chinese drywall and the HVAC system, but have failed to repair or replace the defective Chinese drywall or otherwise take remedial measures.

98. As a direct and proximate result of the Defendants' breach of express warranties, the Plaintiff's suffered damages as set forth above.

WHEREFORE, the premises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally, for compensatory and punitive damages, equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

EIGHTH CAUSE OF ACTION
(Violation of Alabama's Deceptive and Unfair Trade Practices Act)

99. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

100. This action is brought to secure redress for the unlawful, deceptive and unfair trade practices perpetrated by Defendants.

101. Plaintiffs are "consumers" and the subject transactions are "trade or

commerce" as defined by Alabama law.

102. Defendants', including Fictitious Defendants A through T's, actions and/or omissions as described herein violate the applicable Alabama Statutes that were enacted to protect the consuming public from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.

103. Specifically, defendants misrepresented and omitted material information regarding the Chinese drywall and/or HVAC system by failing to disclose known risks.

104. Defendants' misrepresentations and concealment of material facts constitute unconscionable commercial practices, deception, fraud, false pretenses, misrepresentation and/or the knowing concealment, suppression, or omission of material facts with the intent that others rely on such concealment, suppression, or omission in connection with the sale and use of the Chinese drywall and HVAC system in violation of applicable Alabama laws.

105. Defendants violated the applicable Alabama laws by knowingly and falsely representing that Defendants' Chinese drywall and/or HVAC system was fit to be used for their intended purposes, when Defendants knew it was deceptive, dangerous, ineffective, unsafe and untested, and further by other acts alleged herein.

106. Defendants engaged in the deceptive acts and practices alleged herein in order to sell the Chinese drywall and/or an HVAC system to the public, including Plaintiffs.

107. Said acts and practices on the part of Defendants were and are illegal and unlawful pursuant to the applicable laws of the State of Alabama.

108. As a direct and proximate result of Defendants violations of Alabama Statutes, and applicable laws. Plaintiffs have suffered damages as set forth above. Plaintiffs are entitled to compensatory damages, enhanced statutory damages, equitable and declaratory relief, punitive damages, costs and reasonable attorney's fees.

WHEREFORE, the premises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally, for compensatory and punitive damages, enhances statutory damages, equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

NINTH CAUSE OF ACTION
(Breach of Contract)

109. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

110. The Defendants, including Fictitious Defendants A through T, entered into an express and/or implied agreement with the Plaintiffs directly, and/or with the Plaintiffs as intended third party beneficiaries, to deliver, sell, convey, grant and provide a residential home suitable for human habitation, built within accepted construction standards and guidelines, and otherwise built in accordance with the contractual obligations undertaken.

111. The Defendants breached their contract with the Plaintiffs by failing to deliver, sell, convey, grant and provide a residential home suitable for human habitation,

built within accepted construction standards and guidelines, and otherwise built in accordance with the contractual obligations undertaken.

112. As a direct and proximate result of the Defendants' said breach, the Plaintiff's suffered damages as set forth above.

WHEREFORE, the premises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally, for compensatory and punitive damages, equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

TENTH CAUSE OF ACTION
(Fraudulent Misrepresentation)

113. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

114. Defendants, including Fictitious Defendants A through T, falsely and fraudulently represented to Plaintiff, the Plaintiff Class Members and/or the consuming public in general that Defendants' Chinese drywall had been tested and was found to be safe and/or effective for use.

115. Defendants, including Fictitious Defendants A through T, further falsely represented that the HVAC system was adequate, properly sized and appropriate for the Plaintiffs' home.

116. The representations made by Defendants were, in fact, false.

117. When said representations were made by Defendants, upon information

and belief, they knew those representations to be false and they willfully, wantonly, and recklessly disregarded whether the representations were true.

118. These representations were made by Defendants with the intent of defrauding and deceiving the Plaintiffs and/or the consuming public, all of which evidence reckless, willful, indifference to the health, safety and welfare of the Plaintiffs.

119. At the time the aforesaid representations were made by the Defendants the Plaintiffs were unaware of the falsity of said representations and reasonably believed them to be true.

120. In reliance upon said representations, the Plaintiff's homes were built using Defendants' Chinese drywall, thereby sustaining damage and injury and/or being at an increased risk of sustaining damage and injury in the future. Further, the Plaintiffs' home was supplied with the defective HVAC system, thereby causing or exacerbating the Plaintiffs' damages.

121. Said Defendants knew and were aware, or should have been aware, that Defendants' Chinese drywall had not been sufficiently tested, was defectively manufactured and/or lacked adequate and/or sufficient warnings. Said defendants further knew or should have been aware that the HVAC system was inadequate, miss-sized and inappropriate, and/or lacked sufficient warnings.

122. Defendants knew, or should have known, that Defendants' Chinese drywall and HVAC system had a potential to, could, and would cause severe damage and injury to Plaintiffs and other consumers.

123. Defendants brought Defendants' Chinese drywall and the HVAC system to the market and acted fraudulently, wantonly, and maliciously to the detriment of the

Plaintiffs.

124. As a direct and proximate result of the Defendants' said fraudulent misrepresentations, the Plaintiff's suffered damages as set forth above

WHEREFORE, the promises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally, for compensatory and punitive damages, equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

ELEVENTH CAUSE OF ACTION
(Fraudulent Concealment/Suppression)

125. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

126. Defendants, including Fictitious Defendants A through T, fraudulently concealed, and/or intentionally omitted, the fact that Defendants' Chinese drywall used and installed in Plaintiffs' homes caused corrosion to air-conditioning and refrigerator units, electrical wires and copper tubes, and allergic reactions, coughing, sinus and throat infection, eye irritation, breathing hazards, bad smells, and other health concerns. Defendants further fraudulently concealed that the HVAC system was inadequate, miss-sized and inappropriate for the Plaintiffs' home.

127. Defendants were under a duty to disclose to Plaintiffs the aforementioned as it pertains to Defendants' Chinese drywall and the HVAC system.

128. Defendants' concealment and omissions of material facts concerning the

harmful nature of the Chinese drywall and HVAC system was made purposefully, willfully, wantonly, and/or recklessly to mislead Plaintiffs and/or the consuming public into reliance and continued use of Defendants' product and system, and did in fact so mislead the Plaintiff's into such reliance and continued use.

129. Defendants knew that Plaintiffs and/or the consuming public had no way to determine the truth behind Defendants' concealment and omissions and that these included material omissions of facts surrounding Defendants' drywall and HVAC system as alleged herein.

130. As a direct and proximate result of the Defendants' said fraudulent concealment/suppression, the Plaintiff's suffered damages as set forth above.

WHEREFORE, the premises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally, for compensatory and punitive damages, equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

TWELTH CAUSE OF ACTION
(Failure to Secure Performance Bond)

131. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

132. Defendants negligently, wantonly or willfully failed to strictly comply with §39-1-1 *Ala. Code* (1976) which requires any entity entering into a contract with an awarding authority for the prosecution of any public works to execute a performance

bond with a penalty equal to 100% of the contract price.

133. The contract or contracts at issue in this matter exceeded \$50,000 in amount.

134. As a direct and proximate result of the defendants said failure, the Plaintiffs herein are unable to submit or file claims pursuant to a performance bond securing the completion of the contract, specifically those terms of the contract obligating the defendants to deliver, sell, convey, grant and provide a residential home suitable for human habitation, built within accepted construction standards and guidelines, and otherwise built in accordance with the contractual obligations undertaken.

WHEREFORE, the premises considered, the Plaintiffs demand judgment against the Defendants, including Fictitious Defendants A through T, separately and severally, for compensatory and punitive damages, equitable relief, interest, costs, appropriate and reasonable attorney's fees, and such other or further relief as may be warranted by the evidence and the findings of this court.

Respectfully submitted,

HOLSTON ◊ VAUGHAN ◊ ANDRESS, LLC
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PLAINTIFF RESPECTFULLY DEMANDS A TRIAL BY STRUCK JURY.

By: /s/ Richard H. Holston
RICHARD H. HOLSTON (HOL-052)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on the following by Notice of Electronic Filing, or, if the party served does not participate in Notice of Electronic Filing, by U.S. First Class Mail on this the 8th day of March, 2010.

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By: s/ Richard H. Holston
RICHARD H. HOLSTON (HOL-052)

EXHIBIT B

[Affidavit of Cindy Dunn]

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA**

QBE INSURANCE)	
CORPORATION,)	
)	
Petitioner,)	
)	
v.)	CASE NO.:1:10cv456
)	
ESTES HEATING & AIR)	
CONDITIONING, INC.)	
)	
Respondent.)	

AFFIDAVIT OF CINDY DUNN

1. My name is Cindy Dunn. I am an adult over the age of nineteen.
2. I am employed by Anchor Managing General Agency, Inc. as a senior claims examiner.
3. Anchor Managing General Agency, Inc. serves as a third party administrator for QBE Insurance Corporation.
4. I am familiar with the above styled litigation and served as the examiner for the underlying claim upon which it is based.
5. Upon receiving notice of the Underlying Suit, and pursuant to a Reservation of Rights, QBE obtained outside field adjusters to complete an investigation of this claim.
6. Based upon my review of the investigation, Estes Heating Air Conditioning, Inc. was retained as an HVAC subcontractor by general contractor The Mitchell Company, Inc. to install HVAC systems at the Hope IV Family Sales Subdivision or "Bessemer Subdivision" located in Prichard, Alabama.
7. Estes Heating & Air entered into a subcontract agreement with The

Mitchell Company on January 17, 2006.

8. Under the subcontract agreement, Estes Heating & Air was to provide all labor and materials necessary to install 36, three-ton HVAC units in the Bessemer Subdivision housing occupied by the Underlying Suit Plaintiffs.

9. Estes Heating & Air was to perform its work in strict compliance with the plans and specifications provided to it by Creative Designs architect and which were provided to Estes Heating & Air.

10. Estes Heating & Air followed the design specifications provided to it, and installed the units as instructed by the plans and specifications, doing no calculations of its own as to the appropriate HVAC systems to be installed.

11. The HVAC systems as installed by Estes Heating & Air were inspected by city officials and passed inspection.

12. QBE issued a commercial general liability insurance policy bearing policy no. ANM19903-6, effective November 29, 2008 through November 29, 2009 to Estes Heating & Air.

13. Attached herewith is a certified copy of QBE's Commercial General Liability Policy, issued to Estes Heating & Air (hereinafter referred to as "CGL Policy").

14. The limit of the liability coverage provided under the CGL Policy is subject to various coverage provisions, endorsements, terms, conditions, limitations, and exclusions.

15. The CGL Policy includes (among other things) the following general provisions regarding coverage:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM
SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
- (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

b. This insurance applies to “bodily injury” and “property damage” only if:

- (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”; and
- (2) The “bodily injury” or “property damage” occurs during the policy period.

...

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

“Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an “insured contract”, provided the “bodily injury” or “property damage” occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an “insured contract”, reasonable attorney fees and necessary litigation expenses incurred

by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

- (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
- (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

...

f. Pollution

- (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants".
 - (a) At or from any premises, site or location which is or was at any time owned or occupied by or rented or loaned to, any insured. However, this subparagraph does not apply to:
 - (i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot from equipment used to heat that building.
 - (ii) "Bodily injury" or "property damage" for which you may be held liable. If you are a contractor and the owner lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or
 - (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile" fire;
 - (b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
 - (c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any insured or any person or organization for whom you may be legally responsible; or
 - (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such

operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:

- (i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;
 - (ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or
 - (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".
- (e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants".
2. Any loss, cost or expense arising out of any:
- (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
 - (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages

because of “property damage” that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or “suit” by or on behalf of a governmental authority.

...

j. Damage to Property

“Property damage” to:

- (1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;
- (2) Premises you sell, give away or abandon, if the “property damage” arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody or control of the insured;
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the “property damage” arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to “property damage” (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III – Limits of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are “your work” and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to “property damage” included in the “products-completed operations hazard”.

k. Damage to Your Product

“Property damage” to “your product” arising out of it or any part of it.

l. Damage to Your Work

“Property Damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard”.

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage to Impaired Property or Property Not Physically Injured

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

n. Recall of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by your or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) “Your product”;
- (2) “Your work”; or
- (3) “impaired property”;

If such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

...

SECTION V- DEFINITIONS

...

3. “Bodily Injury” means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

...

9. “Insured contract” means:

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an “insured contract”;
- b. A sidetrack agreement;
- c. An easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; or
 - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

...

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

...

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

...

17. "Property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such losses of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property. As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

...

21 "Your product":

- a. Means

- (1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
 - (a) You;
 - (b) Others trading under your name; of
 - (c) A person or organization whose business or assets you have acquired; and
 - (2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such good or products.
 - b. Includes:
 - (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your product”; and
 - (2) The providing of or failure to provide warnings or instructions.
 - c. Does not include vending machines or other property rented to or located for the use of others but not sold.
22. “Your work”:
- a. Means
 - (1) Work or operations performed by you or on your behalf; and
 - (2) Materials, parts or equipment furnished in connection with such work or operations.
 - b. Includes
 - (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your work”, and
 - (2) The providing of or failure to provide warnings or instructions.

...

POLLUTANTS DEFINITION AMENDMENT

All Coverage Parts or Coverage Forms included in this policy are subject to the following:

The definition of “pollutants” is replaced in its entirety by the following:

“Pollutants” mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor soot, fumes, acids, alkalis, radiation or radioactive contamination, dioxins, polychlorinated biphenols, pathogenic or poisonous biological or chemical materials and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

...

TOTAL POLLUTION EXCLUSION ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Exclusion f. under Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability is replaced by the following:

This insurance does not apply to:

- f. Pollution
 - (1) “Bodily injury” or “property damage” which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of “pollutants” at any time.
 - (2) Any loss, cost or expense arising out of any:
 - (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of “pollutants”; or
 - (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, “pollutants”.

...

AMENDMENT OF INSURED CONTRACT DEFINITION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Paragraph 9. of the Definitions Section is replaced by the following:

- 9. “Insured contract” means:
 - a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an “insured contract”;
 - b. A sidetrack agreement;
 - c. An easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
 - d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
 - e. An elevator maintenance agreement;
 - f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization, provided the “bodily injury” or “property damage” is caused, in whole or in part, by you or those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of

any contract or agreement.


Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; or
 - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

...

16. QBE is currently defending Estes Heating & Air pursuant to a Reservation of Rights.

Further the affiant sayeth not.

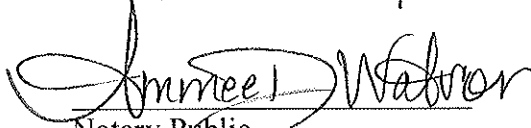


 CINDY DUNN

STATE OF ALABAMA)
 COUNTY OF MONTGOMERY)

I, Ammee Watson, a Notary Public in and for the State of Alabama at Large, hereby certify that Cindy Dunn, whose name is signed to the foregoing document and who is known to me, acknowledged before me on this day, that being informed of the contents of said document executed the same voluntarily on the day the same bears date.

WITNESS my hand and Notary Seal on this the 28th day of September, 2011.



 Notary Public

[SEAL}

My commission expires: 08.04.12

EXHIBIT C

[Subcontract Agreement, Estes201-209]

SUBCONTRACT AGREEMENT

This agreement entered into this 17th day of January, 2006, by and between The Mitchell Company, Inc. hereinafter called "Contractor", and Estes Heating & Air Conditioning, Inc. hereinafter called the "Subcontractor":

WITNESSETH, that, WHEREAS Contractor has heretofore entered into a General Contract with The Mitchell Company, Inc. hereinafter called the "Owner", to furnish all labor and/or materials and perform all work required for the construction of:

**Bessemer Family Sales
Prichard, AL**

in strict accordance with the specifications, schedules, and drawings (sheets A1-A21 and M1-M10) prepared by Creative Designs, architect which are made a part of said General Contract, and which are now made a part of this Contract insofar as they apply and the parties hereto desire to contract with reference to a part of said work.

NOW, THEREFORE, in consideration of the mutual agreements herein contained, it is agreed as follows:

ARTICLE I - Subcontractor shall furnish all labor and/or materials and perform all work necessary to complete the part or parts of the work described on Exhibit "A" attached hereto, herein referred to as the "Scope of Work".

ARTICLE II - (a) Contractor shall have the same rights and privileges as against the Subcontractor herein as the Owner in the General Contract has against Contractor.

(b) Subcontractor acknowledges that he has read the General Contract, if such document exists, and all plans and specifications and is familiar therewith and agrees to comply with and perform all provisions thereof applicable to Subcontractor. If there is a conflict between the plans and the specifications, Subcontractor agrees to comply with the more rigorous requirements as directed by the Contractor.

(c) All work shall be done under the direction of the Contractor; its decisions as to the true construction and meaning of the drawings and specifications shall be final. Subcontractor shall conform to and abide by any additional specifications, drawings or explanations furnished by the Contractor to illustrate the Work.

(d) Subcontractor shall procure at his own expense all required permits and licenses.

(e) Subcontractor agrees to comply with all Federal, State, County (Parish), and City laws, ordinances, rules and regulations, in the conduct of the Work. Subcontractor further agrees to indemnify and hold harmless the Contractor for any and all fines, penalties and related costs incurred by the Contractor as a result of the Subcontractors failure to comply with such laws, ordinances, rules, and regulations. This includes, but is not limited to compliance with (1) Section 107, Contract Work Hours and Safety Standards Act, as ended and, (2) Williams Steiger Occupation Safety and Health Act of 1970, as amended.

(f) The Contractor may assign this contract to any of its affiliates without the consent of the Subcontractor.

ARTICLE III - (a) Subcontractor shall begin work as soon as instructed by Contractor, and shall carry on said work promptly, efficiently, and at a speed that will not cause delay in the progress of Contractor's work or other branches of the work carried on by other Subcontractors. Contractor may require subcontractor to prosecute in preference to other parts of the work such part or parts as Contractor may specify.

(b) Any damages for delay caused by Subcontractor shall be deducted by Contractor from the agreed upon price for said Work as liquidated damages and not as a penalty.

(c) Subcontractor shall remove from the premises as often as directed by the Contractor, not to exceed once each working day, all rubbish and surplus material which may accumulate from the prosecution of Work. Should Subcontractor fail to do so, Contractor may remove same at Subcontractor's expense.

ARTICLE IV - Subcontractor shall make all alterations, furnish the material for and perform all extra work or omit any work Owner may require, without nullifying this Contract, at a reasonable addition to, or reduction from the subcontract price. No changes are to be made, however, except upon written order from Contractor, and Contractor shall not be held liable to Subcontractor for any extra labor, materials, or equipment furnished without such written order. The amount to be paid by Contractor, or allowed by Subcontractor, by virtue of same, shall be stated in such order, if the amount can be agreed upon, but if not then it shall be fixed by arbitration as provided in Article XI, but meanwhile the work shall proceed as directed.

ARTICLE V - Subcontractor shall provide safe and sufficient facilities at all times for inspection of the work by Contractor, the Owner, or their authorized representatives and shall within twenty-four (24) hours after receiving written notice from Contractor, proceed promptly to take down all portions of the Work and remove from the grounds and buildings all material, whether worked or unworked, which shall fail to meet the plans and specifications, and shall promptly make good all such Work, and all other Work damaged or destroyed in removing or making good said condemned Work.

ARTICLE VI - Subcontractor shall at all times supply adequate tools, appliances and equipment, a sufficient number of properly skilled workmen and a sufficient amount of materials and supplies of proper quality to efficiently and promptly Prosecute said Work and shall promptly pay for all material purchased and shall pay all workmen each week if required and obtain and furnish Contractor weekly with signed receipts from all workmen showing the date of Payment, amount paid, number of hours paid for, the days on which said work was performed, the classification of the labor so paid and the rate of wage per hour paid, and shall also supply Contractor weekly with two copies of payroll verified by affidavit.

ARTICLE VII - To secure performance by Subcontractor, and any funds extended by Contractor hereunder, Contractor shall have a lien upon all materials, tools, appliances and equipment of the Subcontractor on the premises or used in connection with said Work.

ARTICLE VIII - (a) Subcontractor shall turn said Work over to Contractor in good condition and free and clear of all claims, encumbrances or liens and shall protect and save harmless Contractor and Owner from all claims, encumbrances and liens growing out of the performance of this Contract, and Subcontractor will at his own cost and expense (including attorney's fees), defend all suits to establish such claims, and pay any such claim or lien so established.

(b) Subcontractor shall, as often as shall reasonably be requested by the Owner or by Contractor, and, in any case, whenever requested in connection with a draw or payment request, furnish a sworn statement showing all parties who furnished labor or materials to Subcontractor, with their names and addresses and the amount due or to become due each. The same statement may be required from any Subcontractors of the Subcontractor.

ARTICLE IX - (a) Subcontractor shall indemnify Contractor against all claims for damages arising from accidents to persons or property occasioned by the Subcontractor, his agents or employees and Subcontractor shall defend all suits brought against the Contractor on account of any such accidents and shall reimburse Contractor for any expense including reasonable attorney's fees sustained by Contractor by reason of such accidents.

(b) Subcontractor shall carry general liability insurance and also such employers liability or worker's compensation insurance as may be necessary to insure the liability of the parties hereto for any injuries to Subcontractor's employees, and all insurance required by the law of the place where the said work is to be done and shall cause his General Liability policy to be endorsed naming Contractor as "additional insured" and shall cause his Worker's Compensation/Employer's Liability policy to be endorsed with a "waiver of subrogation" in favor of Contractor, and shall furnish contractor with satisfactory evidence that such insurance has been obtained and paid for and will continue in force until the completion of said work, and if the Subcontractor should subcontract any of this Work, to a third party subcontractor, Subcontractor shall see that said third party shall do likewise.

No payments shall be made pursuant to this contract until the aforementioned certificates have been filed with the Contractor. At a minimum, the insurance policies referenced herein shall include the following:

1. General Liability Insurance
 - a. \$1,000,000 – each occurrence
 - b. \$2,000,000 – annual aggregate
 - c. Policy endorsed naming The Mitchell Company, Inc. as “additional insured”
2. Worker’s Compensation/Employer’s Liability Insurance
 - a. Statutory benefits per State Requirements
 - b. Employer’s Liability at \$100,000 limit
 - c. Policy endorsed granting a “waiver of subrogation” in favor of The Mitchell Company, Inc.

(c) The Subcontractor, as a part of the obligations assumed by him in this Contract, accepts exclusive liability for all taxes and contributions required of the Contractor or Subcontractor by the Federal Social Security Act and the Unemployment Compensation Law or similar law in any State in respect to the employees of Subcontractor in the performance of the Work herein provided for, and agrees to furnish Contractor with suitable written evidence that he has been authorized to accept such liability. The Subcontractor agrees to protect the Contractor against all liability in respect to said employees under said Act or Law.

(d) The Subcontractor accepts exclusive liability for any and all sales tax which may be assessed against materials, equipment or labor used in the Subcontractor's part of the Work.

ARTICLE X - Payment due hereunder shall be payable as the Work progresses, in accordance with payment schedule attached as Exhibit “B” hereto. Contractor may at his option, retain ten (10%) percent of each estimate until final settlement, and may withhold payment of all or part of any estimate until Subcontractor has furnished Contractor with suitable evidence that he has paid in full for all labor, materials and supplies used in the Work through the date of the estimate. Final payment shall be made within thirty (30) days after the completion of the Work and acceptance by Owner, Contractor, and all inspection agencies. Estimates are to be submitted in accordance with the payment schedule, which is attached as Exhibit “B”.

ARTICLE XI – Subcontractor agrees that the construction referenced herein involves and substantially impacts interstate commerce. All claims, disputes, and other matters in question arising out of, or relating to, this Contract or the breach thereof, except for claims which have been waived by the making or acceptance of final payment and which cannot be settled by negotiation between the Contractor and the Subcontractor, shall be decided in Mobile, Alabama, in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. The award rendered by the arbitration shall be final, and judgment may be entered upon it in accordance with applicable laws in any court having jurisdiction thereof.

Notice of the demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association. The demand for arbitration shall be made within a reasonable time after the dispute arises and in no event shall it be made after institution of legal or equitable proceedings based on the original claim, dispute, or other matter in question would be barred by the applicable statute of limitations.

The Subcontractor shall carry on the Work and maintain the progress schedule during any arbitration proceedings, unless otherwise agreed by him and the Contractor in writing.

ARTICLE XII - Not applicable

ARTICLE XIII - (a) Should Subcontractor at any time breach this agreement or fail to prosecute the said Work with promptness, diligence and efficiency, or fail to perform any of the requirements hereof, Contractor may without notice (or, if notice be required by law, then after twenty-four hours written notice either by registered mail addressed to Subcontractor at 5821 Rangeline Road, Building 202, Theodore, AL 36582; phone: 251-443-7837, fax: 251-443-5979 or by posting in some conspicuous place on the job) proceed as follows:

1. Provide such materials, supplies, equipment, and labor as may be necessary to complete said Work, pay for same and deduct the amount so paid from any money then or thereafter due Subcontractor and
2. Terminate the employment of Subcontractor, enter upon the premises and take possession of all the materials, supplies, tools, equipment and appliances of the Subcontractor, thereon and complete the Work, or have same completed by others, and be liable to Subcontractor for no further payment under the Contract until final payment is due and then only if and to the extent that the unpaid balance of the amount to be paid under this subcontract exceeds the expense of the Contractor in finishing the Work.

(b) If the amount expended by Contractor under Article XIII (a)(1) above or the cost completing the Work under Article XIII (a)(2) above exceeds the unpaid balance of Contract price herein stated, Subcontractor shall pay Contractor such excess.

(c) Should Subcontractor at any time fail to pay for all labor, materials or supplies used by Subcontractor in said Work when due, Contractor may, at his option, pay for same and charge to Subcontractor; or may, at his discretion, and with the consent of Subcontractor, pay at any time claims for labor, materials, and supplies used in the Work.

(d) Should Subcontractor default in any of the provisions of this Contract and should Contractor employ an attorney to enforce any provision hereof or to collect damages for breach of the Contract or to recover on the bond mentioned in Article XII above, Subcontractor and his surety agree to pay Contractor such reasonable attorney's fees as he may expend therein. As against the obligations herein contained, Subcontractor and his surety waive all rights of exemption.

ARTICLE XIV - The Subcontractor warrants to the Contractor that all materials and equipment furnished under this Contract will be new unless otherwise specified, and that all Work will be of good quality, free from faults and defects and in conformance with the Contract Documents. All Work not so conforming to these standards may be considered defective. If required by the Contractor, the Subcontractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

The warranty provided in this paragraph shall be in addition to and not in limitation of any other warranty or remedy required by law or by the contract. All warranties which would be afforded by law unless modified, disclaimed or otherwise affected contractually shall be afforded in the manner they would have been afforded by law without modification, disclaimer or being otherwise affected contractually.

The Subcontractor warrants that the Work shall be free from defects in material and workmanship for a period expiring one year following the issuance of the last Certificate of Occupancy or the lender's final inspection, whichever is later. The Subcontractor shall promptly repair all such defects at his expense. The term "defects" shall not be construed as embracing damage arising from the Contractor's misuse or negligence, Acts of God, (normal wear and tear), or failure to follow operating instructions.

The warranties made herein by the Subcontractor to the Contractor shall apply to all of the Work, and any fault, defect, inadequacy or lack of quality in the Work appearing within one (1) year. All of the warranties made in this Contract by the Subcontractor to the Contractor shall run in favor of any person or entity to which any warranty may be assigned; and any warranty or any claim under any warranty may be assigned, in whole or in part, before or after any claim respecting a warranty arises.

If the Subcontractor fails or refuses to correct any defect or perform any work required by this warranty, the Contractor may, after fifteen (15) days written notice to the Subcontractor and without prejudice to any other rights or remedies of the Contractor, cause the defect to be corrected and/or the work to be performed, holding the Subcontractor fully responsible therefor.

ARTICLE XV - The Subcontractor shall diligently pursue the Work and, the Subcontractor shall man the job with sufficient types of equipment and sufficient employees. It is understood and agreed that if the Subcontractor has equipment of similar type working on any other job than this

project, then he shall have similar equipment working on this project.

It shall be a cause for default for the Subcontractor to move equipment or personnel from this project to another job if there is work at this project that could be done with the equipment or personnel so moved.

It is understood and agreed that the Subcontractor shall diligently do the Work regardless of any type labor problem, direct or indirect, or strike, and in the event of such occurrence it shall not be a cause for delay of the Work.

ARTICLE XVI - (a) Subcontractor shall not sublet, assign or transfer this Contract, or any part thereof, without the written consent of the Contractor. If consent is received, Subcontractor shall remain liable to Contractor for all duties and responsibilities outlined herein.

(b) This Contract contains the entire agreement between the parties, and all additions thereto or changes therein shall be in writing and shall not be binding unless same are in writing.

ARTICLE XVII - Subcontractor hereby represents and warrants that, during the term of this Agreement, it will not hire or continue the employment of an 'unauthorized alien' as defined by the Immigration Reform and Control Act of 1986 (IRCA) in 8 U.S.C. Section 1324A.

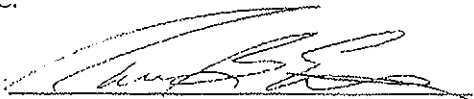
Subcontractor further hereby agrees to indemnify and hold Owner harmless from any loss, claim, liability and expense arising out of the hiring or continued employment of an 'unauthorized alien', as defined by the IRCA in 8 U.S.C. Section 1324A, by the contractor during the term of this Agreement, including expenses associated with governmental reporting and penalties.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day of year first above written:

SUBCONTRACTOR:

ESTES HEATING & AIR CONDITIONING, INC.

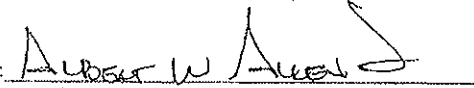
BY:



CONTRACTOR:

THE MITCHELL COMPANY, INC.

By:



Albert W. Allen, Jr.
Its Vice President

Subcontractor Federal I.D. No. 63-0894928
(Or Social Security No.)

Exhibit "A"

SCOPE OF WORK
Bessemer Family Sales
Estes Heating and Air Conditioning, Inc.
HVAC
15-120

Furnish all labor, material, equipment and supplies to install a complete, fully functioning heating and cooling system as described in project specifications and indicated on project plans by Creative Designs sheets A1-A21 and M1-M10. The equipment shall consist of 36 condensing units, and 36 air handlers (3 ton units) as shown on the attached Payment Schedule and Equipment Specifications.

The Mitchell Company reserves the right to contract any or all of this contract to another contractor if the quality and performance of work does not meet the standards of construction set forth by The Mitchell Company.

Any omissions due to code requirements are the responsibility of this subcontractor and in no way will The Mitchell Company bear the cost of such omissions.

The heating, venting, air conditioning subcontractor (hereinafter called HVAC sub) will vent bath fans and vent all clothes dryers, and HVAC units as shown in the plans and as required by the City of Prichard, AL.

Aluminum grills and registers will be as manufactured by Drye Manufacturing Company, high sidewall model No. A-160 or ceiling model No. A-503M, with multi-shutter damper. Return air grill equal to Drye Model No. A-170. Steel registers and grills shall be prefinished white.

All equipment, material, supplies and workmanship shall be first class and fully guaranteed for a period of one year from date of acceptance by Owner. Items found defective shall be replaced or repaired, at General Contractor's option, by HVAC sub at no additional cost to General Contractor. The standard five-year compressor warranty will also be applicable. All suction lines will be insulated from air handler to condensing unit.

Changes in duct layout are subject to General Contractor approval prior to fabrication and installation.

Upon signing of this contract, subcontractor shall submit to The Mitchell Company four (4) copies of submittals for approval by The Mitchell Company.

This HVAC sub will provide a 4" PVC pipe for each house to be used as a "chase" for his underground lines from air handler to condensing unit. This "chase pipe" will be installed by others.

This HVAC sub will clean up his debris and place in dumpster daily. Additional cleanup, if required by General Contractor, will be back charged to the HVAC sub.

Upon acceptance of a system by the Prichard Housing Authority, (i.e. final turnover) new filters will be installed by this HVAC sub.

Service calls on heating and air conditioning equipment installed by HVAC sub will be on a no charge basis (day, night, holidays or weekend) for a period of one year from the date of the Final Inspection by the US Department of Housing and Urban Development (HUD), the City of Prichard, The Mitchell Company and The Prichard Housing Authority.

The HVAC sub will furnish a complete list of all condensing unit and fan coil unit serial numbers by lot numbers to the General Contractor upon completion of installation of said unit.

Differences observed between specifications and plans shall be construed to be in favor of Owner at no additional cost.

Rough-in and trim-out four (4) houses per week

HVAC sub will supply all licenses and permits for the above-mentioned work including but not limited to the HVAC permit, City of Prichard Business License, and State Subcontractor License.

General Notes:

Additional work: This subcontractor agrees to furnish and/or install any additional items of work not included in this contract for the same unit price as similar items of work that are included in this contract payable upon completion with 10% retainage withheld as per the contract.

Dress: In addition to adherence to 'Personal Protective Equipment' guidelines set forth by OSHA, it is extremely important that your workforce dress appropriately. Acceptable length of short pants is to the knee. No open-toed foot attire of any kind will be tolerated; sneakers and work boots/shoes only will be considered acceptable (preferably work boots/shoes). The only acceptable T-Shirts to be worn on-site are 'plain' (no writing) &/or those bearing company logos &/or names.

Supervision: It is mutually understood that you are responsible for having a 'competent' supervisor on-site at all times, in order to direct & manage the workforce for your particular 'Scope of Work'. It is also required that the supervisor, whom you appoint, be equipped with the appropriate mobile communication device, and that he/she be accessible at all times during the construction cycle.

Progress Meetings: Progress Meetings will be held on-site on a weekly basis. The Project Management Team will coordinate dates and times. The attendance by your primary on site representative is mandatory.

Safety Meetings: Safety Meetings will be held on-site on a weekly basis. The Project Management Team will coordinate dates and times. All subcontractors are responsible for conducting their own safety meetings in accordance with OSHA guidelines.

Site Trash Removal: It is a requirement of this contract that the site be cleaned and free of all debris, and that all construction related debris, be removed from the project in a timely manner, such timely manner to be determined by the Contractor. This includes, but is not limited to, lunch trash and other food items.

It is mutually understood that any Trade Contractor found with any food and/or food by-products in the units, after drywall has been installed, will be fined \$50.00 per occurrence. In addition, any Trade Contractor found in the units with their shoes on, after carpet has been installed, will be fined \$100.00 per occurrence.

It is mutually understood that failure to have your workforce clean up in a timely manner, such timely manner to be determined by the Contractor will result in the Contractor undertaking that effort on your behalf, without notification, and the associated costs assessed against your contract as Damages.

Change Orders: No unauthorized work may be processed for payment unless a pre-approved Change Order, signed by the Project Manager and/or the Vice President of Construction, accompanies the request for payment.

HUD Payroll: Subcontractor agrees to submit weekly payroll forms (WH347) and pay all workers at least the rate required on the general decision statement by Mobile County.

Partial Lien Release: A lien release must be submitted with each invoice for payment.

Invoicing: All invoices must be turned in to the job superintendent or mailed to the office. Faxed invoices will not be accepted.

Plan/Spec Variance: Differences observed between specifications and plans shall be construed to be in favor of Owner and General Contractor at no additional cost.

Warranty Information: Subcontractor is required to furnish two (2) copies of all warranty information to the Contractor. This includes Manufacture product and warranty information, and written warranty on labor.

Work Time Frames: It is clearly understood that the project is not limited to a 40-hour week and the subcontractor agrees to work whatever hours that are directed by the Mitchell Company in order to meet the job schedule.

Exhibit "B"
 Payment Schedule
 Bessemer Family Sales
 Estes Heating & Air Conditioning, Inc.
 HVAC 15-120

Lot Number	House Type	Rough-In	Trim Out	Retainage 10%	Total
1	G1-R	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
2	O-R	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
3	M	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
4	N-R	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
5	J2	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
6	B2	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
7	M	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
8	N	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
9	H2	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
10	B1-R	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
11	K1-R	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
12	M-R-H/C	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
13	B2	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
14	J1	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
15	K2	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
16	H1-R	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
17	J1	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
18	N	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
19	M-H/C	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
20	G1	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
21	K2-R	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
22	O	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
23	H1-R	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
24	N	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
25	J2	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
26	B1	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
27	O	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
28	K1	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
29	H2	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
30	L1	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
31	G2-R	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
32	O-R	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
33	L2	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
34	G1	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
35	O	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
36	G2-R	\$1,632.38	\$1,632.38	\$362.75	\$3,627.50
Total		\$58,765.50	\$58,765.50	\$13,059.00	\$130,590.00

All invoices will be submitted to Job Superintendent for processing on or before the 25th day of each month. Payments will be made on or before the 10th day of the following month. A 10% retainage will be held on each payment request until final inspection by The Mitchell Company and local inspector. Each time The Mitchell Company is invoiced, the invoice must be accompanied by a copy of this payment schedule with the amounts "highlighted" for your payment request. Do not alter this payment schedule. Certified payroll forms must accompany each payment request for consideration of payment.

EXHIBIT D

[Investigation Report, Estes108-109]

COOK CLAIMS SERVICES, INC.



Mobile Office P.O. Box 160461 Mobile, AL 36616 Tel: (251) 470-0774 Fax: (251) 470-0776	Birmingham Office P.O. Box 58 Mt. Olive, AL 35117 Tel: (205) 631-9190 Fax: (205) 631-2630	Florence Office 215-A Ana Drive Florence, AL 35630 Tel: (256) 766-7891 Fax: (256) 776-0084	Huntsville Office P.O. Box 6113 Huntsville, AL 35813 Tel: (256) 464-3177 Fax: (256) 464-3179	Montgomery Office P.O. Box 186 Dadeville, AL 36853 Tel: (256) 825-1295 Fax: (256) 825-1296
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Privileged & Confidential

September 16, 2009

via email only elm@vickersiis.com

Mr. Billy Barrett
Anchor Managing General Agency, Inc.
C/o Mr. Mac McCafferty, III
Vickers, Riis, Murray, & Curran, LLC
Eleventh Floor
Regions Bank Building
56 Saint Joseph Street
Mobile, Alabama 36602-3489

RE: INSURED : **Estes Heating & Air Conditioning, Inc.**
 CLAIMANT : **Robert W. Henderson, Et Al**
 DOL : **05/31/09**
 OUR FILE NO. : **5579L DC**
 POLICY NO. : **ANM199036**
 CIVIL ACTION : **02-CV-2009-901381.00 Civil Circuit of Mobile, AL**

Dear Mr. Barrett:

This shall acknowledge and thank you for the above referenced matter received in our office on August 3, 2009. Subsequently, contact was made with the Insured and our investigation was undertaken at that time.

In accordance with your initial investigative instructions, we met with the Assured and obtained the details behind this alleged loss following the review and signing of a Non-Waiver Agreement. In addition, at our meeting with Mr. Estes, we obtained statements from the Insured's employees and air conditioning distributor, Mr. Robert Taylor of *Gemaire Distributors, LLC*, Mobile, AL. A summary of the information obtained during our investigation is outlined herein.

ENCLOSURES:

1. Copy of Non-Waiver Agreement;
2. Civil Summons & Complaint;
3. Assured's Bessemer Rental Expenses;
4. St. Louis Testing Laboratories Report;
5. E-mail from Gemaire to Assured – Copy of article relating to coil corrosion;
6. Make & Model Product Identification;

Page 2 of 5- Robert Henderson, et al v. Estes Heating & Air Conditioning

Privileged & Confidential

7. Quote, Contract & Scope of Work;
8. Reservation of Rights Letters;
9. Mitchell Company Legal Answers to Complaints;
10. Mitchell Company Legal Motion to Dismiss;
11. Mitchell Company Legal Motion to Consolidate Cases.

ASSIGNMENT:

The undersigned received this assignment on August 3, 2009 and as instructed, the Assured was contacted, interviewed and supporting documents obtained following the Assured's review and signed acknowledgment of a Non-Waiver Agreement (**Enclosure 1**).

DESCRIPTION OF LOSS:

On or about July 23, 2009, the Assured received a civil summons of complaint filed on or about the same date, under case number, 02-CV-2009-901381.00, where they were named as defendants in this matter by plaintiff(s) Robert W. Henderson Et Al. In the complaint, the plaintiffs allege that the Assured installed an inadequate, defective and miss-sized HVAC system which exacerbated the "Chinese drywall" condition found some of the "Bessemer Subdivision" homes the plaintiffs leased or lived in (**Enclosure 2**).

INSURED REPRESENTATIVE'S STATEMENTS:

Mr. Rick Estes, President
Mr. Ricky Estes, Technician Manager
Ms. Debbie Crain, Dispatcher
Mr. Robert Taylor, Territory Manager for *Gemaire Distributors, LLC*, 4720 Rangeline
Estes Heating and Air Conditioning Inc.
5715 Rabbit Creek Drive
Theodore, Alabama 36582
(251) 443-7837

On August 8, 2009, Misters Rick Estes, Ricky Estes, Robert Taylor and Ms. Debbie Crain provided voluntary statements with regards to the history of this project immediately following the reading and signing of a non-waiver agreement by Mr. Estes. Mr. Estes advised that they were contracted by Mitchell Homes to install approximately 35 individual systems in the neighborhood described as Bessemer Subdivision, explaining that he believed that all those units were all either 3 ton units or 3 and a half ton units, depending on the size and build of the single-family home.

Mr. Estes stated that they did not compute the HVAC system load calculations himself, explaining that Mitchell Homes had all the load calculations, duct work layout and design completed by a mechanical engineer and they simply installed the HVAC system and duct work in accordance with the engineer's plans and specifications. Mr. Estes said that in his expert opinion, even without computing a block load, the units were of appropriate size and design to perform the task they were intended, explaining that the mechanical engineers specifications

Page 3 of 5- Robert Henderson, et al. v. Estes Heating & Air Conditioning

Privileged & Confidential

concurrent with what he would have installed in the homes. He said that every one of his system installations were inspected and approved during the rough in phase as well as the finish phase by city officials.

Both Mr. Rick Estes and Ricky Estes explained that after a period of six months to a year of occupancy of each home, they would respond to service calls involving problems associated with the coils, in fact, they noticed an unusual amount of Freon leaks, coil replacement and compressor failures due to a breakdown of metal (copper) in the coil system. He said that the many of the coils had been replaced under warranty by the Manufacturer (Nordyne) through his distributor, Gemaire. Mr. Estes said that many of the service calls to charge system and replace coils came out of his company's pocket as well, explaining that current figures are estimated over \$28,000.00 (Enclosure 3).

Rick said that during one of many service calls, one of his technicians reported a black soot-like substance throughout the corroded copper coils, which had never been seen by the Assured or his employees. He said that he turned over the coil containing the soot-like residue to Robert Taylor of Gemaire and asked him if he knew what it was, which Robert said that he had never seen anything like that and forwarded the coil to Nordyne whom had the substance tested at an independent laboratory in St. Louis, MO. Robert said that the lab results indicated that the lab identified sulfur and phosphorus along with other elements in the black material, which had likely contributed to the corrosion of the copper tubing (Enclosure 4).

Rick said that the results told them little as to where the sulfur was originating from and first speculated that the subdivision may have been built a top an old sulfur mine or disposal site. He said that they made inquiries of this nature with the local housing board and Mitchell Homes' employees. Rick said that once Mr. Burt Allen of Mitchell Homes was advised of Nordyne's sulfur finding, Mitchell Homes brought in an environmental engineer firm and conducted testing in and around the homes, starting with the carpet. He said that he really felt like it was the location of the homes, explaining that just 100 yards away were 120 residences that had similar systems that never had any problems. He said that the problems they had incurred were not due to being of appropriate design or defect, explaining that all or most of the problems they had incurred where the result of the failure of the metal (copper) in the coils.

Mr. Robert Taylor said that there were no recalls or industry-wide problems or defects associated with the HVAC systems provided by them and installed by the Assured. Mr. Rick Estes said that he believed that it took about four weeks or so after the labs analysis and Mitchell Homes environmental engineers to figure out that it was the sheetrock causing the problems. He did not recall who figured it out first, Nordyne or Mitchell Homes, because the news was reporting similar problems arising out of Florida, specifically the influx of sulfur-containing drywall that was manufactured overseas (China). Mr. Taylor heard claims of similar nature coming out of Florida in the tens of thousands. In fact, he said that Nordyne's Regional Sales Manager forwarded him with an article relating to the problems with the coils, which he relayed to the Assured sometime in June of 2009 (Enclosure 5).

Page 4 of 5- Robert Henderson, et al. v. Estes Heating & Air Conditioning

Privileged & Confidential

Mr. Rick Estes said that the owner of Mitchell Homes, Stephen Mitchell took this matter very seriously and went to Washington D.C. to meet with EPA and other environmental and commerce authorities to address the problems and remedies in this matter.

Mr. Estes said that the HVAC systems had nothing to do with the installation of drywall, although the reason they had experienced as many failures as they did, was because of the drywall. Rick said that they were financial victims in this matter, explaining that they spent over \$28,000.00 in correcting problems that were caused by the sulfur containing drywall. He said that everyone of the HVAC systems they installed were of appropriate design, construction and installed professionally and performed exactly as they were supposed to perform. He said that serviced these units in and out of warranty and expended not only the documented labor and materials, but countless others, explaining that if they were out on a call and were notified by the local housing manager that another home needed their Freon recharged, they would do it.

Mr. Estes said that he is sympathetic with the owners, tenants and other people adversely affected by the installation of the Chinese drywall, but pointed out that he initiated the investigation that identified the affects of the sulfur containing drywall in the first place. If not for his company's professional and attentiveness, this condition may have gone on for several months or years without identifying the source. He said that he could not understand why his company was listed in the summons and complaint filed by the Plaintiff's.

HVAC SYSTEM IDENTIFICATION:

On September 16, 2009, the Assured provided HVAC units purchased and later installed for Bessemer project (**Enclosure 6**).

Adjuster's Note: An Internet search of recalled HVAC units and furnaces did not include any of the unit models provided.

CONTRACT & SPECIFICATIONS:

On September 16, 2009, the Assured provided the undersigned with their quote, contract and scope of work with regard to their HVAC installations at Bessemer Family Sales (**Enclosure 7**).

Adjuster's Note: The Assured has requested the original design and specification requirements from Mitchell Company, Inc.; they could not locate a copy of these original specifications.

RESERVATION OF RIGHTS:

On September 16, 2009, the Assured provided the undersigned with the Reservation of Rights letter from Haskell & Slaughter (**Enclosure 8**).

MITCHELL COMPANY, INC. LEGAL DOCUMENTS:

On September 16, 2009, the Assured provided the undersigned with Mitchell Company, Inc.'s Answers to Complaint in both lawsuits filed against them and Assured (**Enclosure 9**).

Page 5 of 5- Robert Henderson, et al v. Estes Heating & Air Conditioning

Privileged & Confidential

On September 16, 2009, the Assured provided the undersigned with Mitchell Company, Inc.'s Motion to Dismiss in both lawsuits filed against them and Assured (**Enclosure 10**).

On September 16, 2009, the Assured provided the undersigned with Mitchell Company, Inc.'s Motion for Consolidation in both lawsuits filed against them and Assured (**Enclosure 11**).

FURTHER HANDLING:

We will continue our attempts to obtain the original specifications from Mitchell Company, Inc. and evaluate those specifications with the rated performance of units identified as being installed in Claimant's home.

As it appears that there are now three lawsuits filed in this matter, we will obtain copies of the remaining two and include them in our supplemental report.

We await your further handling instructions from you at your earliest possible convenience. Please allow us to take this opportunity to provide you with our invoice for professional services rendered. We would like to thank you for allowing Cook Claims Services, Inc. to have been of service to you.

Sincerely,



Rick Norman
Claims Adjuster

EXHIBIT E

[Deposition of Gary Estes, pp. 13-15;45-46;66-67;94]

Gary Estes, Sr.

Page 1

IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

* * * * *

HOUSING AUTHORITY OF THE CITY *
OF PRICHARD, ALABAMA, *

VS. * CV-2009-901118.00 *

THE MITCHELL COMPANY, INC., *
et al. *

* * * * *

DIGES E. LITTLE, et al. *

VS. * CV-2009-901153 *

* Consolidated with *

THE MITCHELL COMPANY, INC., * CV-09-901118-MAY *

et al. *

* * * * *

ROBERT W. HENDERSON, et al. *

VS. * CV-2009-901381 *

* Consolidated with *

THE MITCHELL COMPANY, INC., * CV-09-901118-MAY *

et al. *

* * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

* * * * *

IN RE: CHINESE-MANUFACTURED *CASE 2:09-MD-2047 *

DRYWALL PRODUCTS LIABILITY * *

LITIGATION *SECTION "L" *

*JUDGE FALLON *

(ALL CASES) *MAGISTRATE WILKINSON *

* * * * *

The deposition of GARY ESTES, SR.,
taken at the law offices of Vickers,
Riis, Murray & Curran, 56 St. Joseph
Street, Mobile, Alabama, on the 19th
day of April 2011, commencing at
approximately 9:15 a.m.

Gary Estes, Sr.

Page 2

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A P P E A R A N C E S

FOR THE PLAINTIFFS: HOLSTON, VAUGHAN, ANDRESS, LLC
ATTORNEYS AT LAW
211 S. CEDAR STREET
MOBILE, ALABAMA

BY: JOHN TEAGUE, ESQUIRE
(VIA PHONE) RICHARD H.
HOLSTON, ESQUIRE

FOR PRICHARD HOUSING AUTHORITY:
WRIGHT, GREEN, P.C.
ATTORNEYS AT LAW
POST OFFICE BOX 16818
MOBILE, ALABAMA

BY: WILLIAM A. DONALDSON,
ESQUIRE

FOR THE MITCHELL COMPANY, INC. :
CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL
ATTORNEYS AT LAW
63 SOUTH ROYAL STREET
SUITE 700
MOBILE, ALABAMA

BY: IAN ROSENTHAL,
ESQUIRE

FOR CREOLA ACE HARDWARE, INC. :
PRINCE, McKEAN, McKENNA &
BROUGHTON
ATTORNEYS AT LAW
POST OFFICE BOX 1347
MOBILE, ALABAMA

BY: J. RITCHIE M. PRINCE,
ESQUIRE

Gary Estes, Sr.

Page 3

1 A P P E A R A N C E S - Continued

2 FOR ESTES HEATING & AIR, INC.:
 VICKERS, RIIS, MURRAY & CURRAN
3 ATTORNEYS AT LAW
 POST OFFICE DRAWER 2568
4 MOBILE, ALABAMA

5 BY: E. L. McCAFFERTY, III,
 ESQUIRE

6
7 FOR INTERIOR & EXTERIOR BUILDING SUPPLY:
 CARR ALLISON, P.C.
8 ATTORNEYS AT LAW
 6251 MONROE STREET, SUITE 200
9 DAPHNE, ALABAMA

10 BY: JONATHAN MAPLES,
 ESQUIRE

11
12 FOR KNAUF USA INSULATION GMBH:
 HAND ARENDALL, LLC
13 POST OFFICE BOX 123
 MOBILE, ALABAMA
14 BY: DOUG McCOY, ESQUIRE

15

16

17

18

19

20 LOIS ANNE ROBINSON, RDR
 COURT REPORTER

21

22

23

Gary Estes, Sr.

Page 13

1 residential.

2 Q All right. Do you know if Rick, Sr., or
3 Rick, Jr., performed the cost estimate for the
4 Bessemer Subdivision?

5 A From what I'm told, the calculations were
6 already performed and given to us ahead of time.

7 Q What calculations are you referring to?

8 A If I read it right, they came out with a
9 three-ton system or two-and-a-half. Is that right,
10 Mack?

11 MR. McCAFFERTY:

12 Initially.

13 THE WITNESS:

14 Yeah. I was trying to remember.

15 MR. TEAGUE:

16 Q All right. So you're saying that someone
17 did some calculations and determined that a
18 two-and-a-half-ton system should be installed out
19 there?

20 A Well, we went by what was on the plans,
21 according to Rick.

22 Q Okay. Do you know the specific
23 calculations that are performed to determine the

Gary Estes, Sr.

Page 14

1 size --

2 A No.

3 Q -- unit?

4 Okay. You don't know how that process is
5 done or anything like that?

6 A (Nods negatively.)

7 MR. McCAFFERTY:

8 You've got to say no. You can't shake
9 your head. Say no.

10 THE WITNESS:

11 Oh, okay.

12 MR. PRINCE:

13 Or yes.

14 MR. TEAGUE:

15 Q Is there anybody at Estes that would know
16 how you go about determining the size HVAC system
17 that needs to go into a particular structure?

18 A Yes.

19 MR. McCAFFERTY:

20 Well, he just said that they didn't do
21 that. Okay? Somebody else did it.

22 MR. TEAGUE:

23 Q Yeah. But, I mean, is that -- Is

Gary Estes, Sr.

Page 15

1 determining the size of an HVAC system that goes
2 into a structure, is that something that Estes
3 Heating and Air does? Is that part of their
4 business?

5 A We can do it. We don't -- We do what's
6 on the plans.

7 Q All right. So it's Estes' business
8 practice to rely on the plans that are prepared by
9 someone else to determine the size unit that needs
10 to go into a house?

11 A That's right.

12 Q All right. During your employment with
13 Estes, have you ever researched and obtained prices
14 for HVAC systems and components?

15 A Have I ever researched?

16 Q Uh-huh.

17 A No.

18 Q Okay. Are you familiar with the
19 different types of entities that manufacture HVAC
20 systems and components?

21 A I am.

22 Q All right. What are some of the entities
23 that manufacture the HVAC systems that Estes

Gary Estes, Sr.

Page 45

1 Q Okay. Do you know what size HVAC systems
2 were initially installed in the homes in the
3 Bessemer Subdivision?

4 A Three-tons.

5 Q Okay. And who was the manufacturer of
6 the systems?

7 A Nordyne.

8 Q Do you know if the plans and
9 specifications for the Bessemer Subdivision
10 referenced a size different than three tons?

11 A I think we just went by the plans,
12 according to my -- from what I know.

13 Q Uh-huh.

14 Do you know if the size of the units were
15 changed from two-and-a-half to three tons?

16 A I don't know that, now. I just -- The
17 only thing I know is we were supposed to have went
18 by what the plans said, and if there was anything
19 else -- Three-ton units. We went by equipment
20 specifications. That's all I can tell you.

21 Q Okay. Do you know the size of the HVAC
22 system for the Bessemer Subdivision that was
23 required by the plans and specifications?

Gary Estes, Sr.

Page 46

1 A What was required was -- is whatever was
2 on the specs is what we used.

3 Q Uh-huh.

4 A Whatever -- Which I have right here. It
5 says three tons.

6 Q Uh-huh. So you know that there were
7 three-ton units installed in Bessemer; right?

8 A To my knowledge, yeah.

9 Q Okay. Who selected that size HVAC system
10 for the Bessemer Subdivision?

11 A Which what, now?

12 Q Who selected a three-ton system to be
13 installed in the homes in the Bessemer Subdivision?

14 A Whoever drew the plans up.

15 Q Okay. Do you know if the size of the
16 HVAC systems for the Bessemer Subdivision was ever
17 changed at any time before the installation
18 actually occurred?

19 A I don't -- Not to my knowledge.

20 Q Okay. If the size of the units was
21 changed prior to installation, who would know about
22 that?

23 A Well, I'm guessing Rick, Sr., and Jr.

Gary Estes, Sr.

Page 66

1 Q Is Freon a flammable substance?

2 A No.

3 Q Okay. Why is it a problem if Freon is
4 leaking out of the system?

5 A Where is -- Where is there a problem?

6 Q Why is it a problem if Freon is leaking
7 out of the system?

8 A Why is it a problem? Well, if it's
9 leaking, then it's not gonna cool unless it's
10 addressed.

11 MR. TEAGUE:

12 I think it's a good time for a break.
13 We'll take a break.

14 (BRIEF RECESS.)

15 MR. TEAGUE:

16 Q Mr. Estes, you testified earlier that
17 Estes Heating and Air Conditioning relied on the
18 size HVAC system that was referenced on the plans
19 for the Bessemer project; correct?

20 MR. McCAFFERTY:

21 He didn't say he relied on them. That's
22 what they --

23 A Well, that's just what was submitted to

Gary Estes, Sr.

Page 67

1 us, what to use, by Creative Designs. They sized
2 the units out. They do their own testing.

3 So -- They do their own testing. You know, we
4 don't.

5 MR. TEAGUE:

6 Q So, to your knowledge, nobody from Estes
7 did any independent evaluation or analysis to --

8 A Absolutely not.

9 Q Okay. How do you know that the people of
10 Creative Designs sized the units right?

11 A How do we know?

12 Q Uh-huh.

13 A Well, we don't know. I mean, they're
14 supposed to be engineers or architects, whatever.
15 So we trust their design.

16 Q Is this the first time that Estes had
17 been involved on a project where Creative Designs
18 had sized the HVAC systems?

19 A I think we've done more projects with
20 Creative Designs being the architect.

21 Q Okay.

22 A Engineer.

23 Q On any of the projects other than

Gary Estes, Sr.

Page 94

1 calculations?

2 A That determines the size of the unit --

3 Q Okay.

4 A -- as far as BTU's.

5 Q Okay. And by the size, are you referring
6 to the tonnage?

7 A Is that the size what, now?

8 Q By the size of the unit, you mean the
9 tonnage?

10 A Tonnage. That's right.

11 Q Okay. So you didn't perform any cooling
12 load calculation for the Bessemer project?

13 A No.

14 Q Okay. Do you know if anyone at Estes
15 performed cooling load calculations for the
16 Bessemer project?

17 A No.

18 Q No, they didn't, or you don't know?

19 A To my knowledge, there was no -- We done
20 no calculations for Bessemer. It was done by
21 Creative Designs.

22 Q Okay. Do you know what ARI ratings are?

23 A Know what what is?

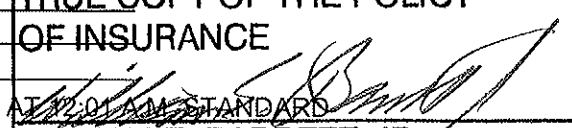
EXHIBIT F

[QBE's Commercial General Liability Policy ANM10661-6]

COMMON POLICY DECLARATIONS

IL DS 00 07 02

Policy Number. ANM19903-6

QBE INSURANCE CORPORATION 88 PINE ST NEW YORK, NY 10005 HOME: 1515 MARKET STREET OFFICE: PHILADELPHIA, PA 19102	INTERNATIONAL ASSURANCE P.O. BOX 9635 G367 960 DOWNTOWNER BLVD. MOBILE AL 36691
NAMED INSURED: ESTES HEATING & AIR CONDITIONING, INC. MAILING ADDRESS: P.O. BOX 5548 MOBILE AL 36605 POLICY PERIOD: FROM: 11/29/2008 TO: 11/29/2009 TIME AT YOUR MAILING ADDRESS SHOWN	I CERTIFY THAT THIS IS A TRUE COPY OF THE POLICY OF INSURANCE  AT 12:01 AM STANDARD TIME WILLIAM E. BARRETT, JR. CLAIMS MANAGER
BUSINESS DESCRIPTION: HVAC CONTRACTOR	

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

THIS POLICY CONSISTS OF THE FOLLOWING COVERAGE PARTS FOR WHICH A PREMIUM IS INDICATED. THIS PREMIUM MAY BE SUBJECT TO ADJUSTMENT.

	PREMIUM
BOILER AND MACHINERY COVERAGE PART	\$ NOT COVERED
CAPITAL ASSETS PROGRAM (OUTPUT POLICY) COVERAGE PART	\$
COMMERCIAL AUTOMOBILE COVERAGE PART	\$ NOT COVERED
COMMERCIAL GENERAL LIABILITY COVERAGE PART	\$ 29,463.00
COMMERCIAL INLAND MARINE COVERAGE PART	\$ 2,064.00
COMMERCIAL PROPERTY COVERAGE PART	\$ 12.00
CRIME AND FIDELITY COVERAGE PART	\$ NOT COVERED
EMPLOYMENT-RELATED PRACTICES LIABILITY COVERAGE PART	\$
FARM COVERAGE PART	\$
LIQUOR LIABILITY COVERAGE PART	\$
POLLUTION LIABILITY COVERAGE PART	\$
PROFESSIONAL LIABILITY COVERAGE PART	\$
TOTAL:	\$ 31,539.00

Premium shown is payable: **\$ 31,539.00** at inception
 \$ 12/22/08 ADW

Forms applicable to all Coverage Parts:

IL 00 17 11 98	IL 00 21 07 02	IL 01 90 07 02	IL 09 35 07 02
IL 09 53 01 08	QBIL-0121 01 08	QBIL-0124 09 04	CP DS 00 10 00
CG DS 01 10 01	QBCM 0102		

Countersigned:	By:
(Date)	(Authorized Representative)



Notice to Policyholders U.S. TREASURY DEPARTMENT'S OFFICE OF FOREIGN ASSETS CONTROL ("OFAC")

NO COVERAGE IS PROVIDED BY THIS POLICYHOLDER NOTICE NOR CAN IT BE CONSTRUED TO REPLACE ANY PROVISIONS OF YOUR POLICY. YOU SHOULD READ YOUR POLICY AND REVIEW YOUR DECLARATIONS PAGE FOR COMPLETE INFORMATION ON THE COVERAGES YOU ARE PROVIDED.

THIS NOTICE PROVIDES INFORMATION CONCERNING POSSIBLE IMPACT ON YOUR INSURANCE COVERAGE DUE TO DIRECTIVES ISSUED BY OFAC.

PLEASE READ THIS NOTICE CAREFULLY

The Office of Foreign Assets Control (OFAC) administers and enforces sanctions policy, based on Presidential declarations of "national emergency". OFAC has identified and listed numerous:

- Foreign agents;
- Front organizations;
- Terrorists;
- Terrorist organizations; and
- Narcotics traffickers;

As "Specially Designated Nationals and Blocked Persons". This list can be located on the United States Treasury's web site - <http://www.treas.gov/ofac>.

In accordance with OFAC regulations, if it is determined that you or any other insured, or any person or entity claiming the benefits of this insurance has violated U.S. sanctions law or is a Specially Designated National and Blocked Person, as identified by OFAC, this insurance will be considered a blocked or frozen contract and all provisions of this insurance are immediately subject to OFAC. When an insurance policy is considered to be such a blocked or frozen contract, no payments nor premium refunds may be made without authorization from OFAC. Other limitations on the premiums and payments also apply.

POLICY NUMBER: ANM19903-6



Notice to Policyholders **General Liability** **Broadenings and Restrictions Of Terrorism Coverage**

This Notice has been prepared in conjunction with the implementation of changes related to coverage of terrorism under your policy. It contains a brief synopsis of significant exclusionary provisions and limitations.

This Notice does **not** form a part of your insurance contract. The Notice is designed to alert you to coverage restrictions and to other provisions in the terrorism endorsement in this policy. If there is any conflict between this Notice and the policy (including its endorsements), the provisions of the policy (including its endorsements) apply.

Carefully read your policy, including the endorsements attached to your policy.

CHANGE IN THE DEFINITION OF CERTIFIED ACTS OF TERRORISM

Under the federal Terrorism Risk Insurance Program Reauthorization Act of 2007, the definition of "certified acts of terrorism" no longer requires that the act of terrorism be committed by or on behalf of a foreign interest. Therefore, coverage for, or an exclusion for, "certified acts of terrorism" is no longer limited to an act of terrorism committed by or on behalf of a foreign interest. For example, the definition of "certified acts of terrorism" now includes an act committed against the United States government by a United States citizen, when the act is determined by the federal government to be a "certified act of terrorism" under the terms of the federal Terrorism Risk Insurance Program.

Due to the change in the definition of "certified acts of terrorism", when your renewal policy includes **CG 26 86 01 08** or **CG 21 76 01 08** – **Exclusion of Punitive Damages Related To A Certified Act Of Terrorism**, the punitive damages exclusion related to "certified acts of terrorism" is no longer limited to an act of terrorism committed by or on behalf of a foreign interest.

YOUR PREVIOUS POLICY

When your previous policy includes CG 21 70 11 02 - Cap On Losses From Certified Acts Of Terrorism:

This policy does not contain a terrorism exclusion. However, the policy contains an endorsement under which coverage for "certified acts of terrorism" (which is more fully defined in the endorsement but involves acts of terrorism by or on behalf of a foreign interest) is subject to a limit on our liability pursuant to the federal Terrorism Risk Insurance Act. Further, the absence of a terrorism exclusion does not create coverage for any loss that would otherwise be excluded under the policy, such as losses excluded by the war liability exclusion.

When your previous policy includes CG 21 71 12 02 - Limited Terrorism Exclusion (Other Than Certified Acts Of Terrorism); Cap On Losses From Certified Acts Of Terrorism:

This policy contains an endorsement that makes a distinction between "certified acts of terrorism" and "other acts of terrorism". Coverage is provided for "certified acts of terrorism" (which is more fully defined in the endorsement but involves acts of terrorism by or on behalf of a foreign interest). This coverage is subject to a limit on our liability pursuant to the federal Terrorism Risk Insurance Act. The endorsement excludes coverage for "other acts of terrorism" (terrorist acts other than certified acts) but such exclusion applies only if:

- 1) Aggregate losses from the event exceed \$25 million; or
- 2) Fifty or more persons sustain death or physical injury; or
- 3) If the event qualified as a nuclear event; or
- 4) If the event qualified under certain circumstances as a biological or chemical event.

With respect to "certified acts of terrorism" and "other acts of terrorism", policy exclusions (for example, the war liability exclusion) and other policy provisions continue to apply.

When your previous policy includes CG 21 73 (11 02 or 12 02) - Exclusion Of Certified Acts Of Terrorism:

This policy contains an endorsement excluding coverage for "certified acts of terrorism", which is more fully defined in the endorsement but involves acts of terrorism by or on behalf of a foreign interest.

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When your previous policy includes CG 21 75 12 02 - Exclusion Of Certified Acts Of Terrorism And Other Acts Of Terrorism:

The terrorism endorsement in this policy makes a distinction between "certified acts of terrorism" (which is more fully defined in the endorsement but involves acts of terrorism that are committed by or on behalf of a foreign interest) and "other acts of terrorism". Both types of terrorism are excluded from coverage but the exclusions are subject to different terms and conditions. The exclusion of "certified acts of terrorism" relates to criteria in the federal Terrorism Risk Insurance Act. The exclusion of coverage for "other acts of terrorism" (terrorist acts other than certified acts) applies only if:

- 1) Aggregate losses from the event exceed \$25 million; or
- 2) Fifty or more persons sustain death or physical injury; or
- 3) If the event qualified as a nuclear event; or
- 4) If the event qualified under certain circumstances as a biological or chemical event.

With respect to "certified acts of terrorism" and "other acts of terrorism", policy exclusions (for example, the war liability exclusion) and other policy provisions continue to apply.

When your previous policy includes CG 21 70 01 08 – Cap On Losses From Certified Acts Of Terrorism:

For applicable information, please refer to the paragraphs below for "When your renewal policy includes CG 21 70 01 08 – Cap On Losses From Certified Acts Of Terrorism".

When your previous policy includes CG 21 73 01 08 – Exclusion Of Certified Acts Of Terrorism:

For applicable information, please refer to the paragraphs below for "When your renewal policy includes CG 21 73 01 08 – Exclusion Of Certified Acts Of Terrorism".

YOUR RENEWAL POLICY

When your renewal policy includes CG 21 70 01 08 – Cap On Losses From Certified Acts Of Terrorism:

- This policy does not contain a terrorism exclusion. However, the policy contains an endorsement under which coverage for "certified acts of terrorism" (which is more fully defined in the endorsement but involves acts of terrorism certified as such under the federal Terrorism Risk Insurance Program) is subject to a limit on our liability and the liability of the federal government pursuant to the federal Terrorism Risk Insurance Act, as outlined below. Further, the absence of a terrorism exclusion does not create coverage for any loss that would otherwise be excluded under the policy, such as losses excluded by the war liability exclusion. Refer to the terrorism endorsement for the definition of "certified acts of terrorism". Refer to the endorsement, and to the rest of the insurance contract, for provisions that govern coverage for, or that exclude coverage for, losses arising from terrorism.
- Information On Limitations On Federal And Insurer Liability: The federal government may participate in paying for some of the losses from a "certified act of terrorism". However, if aggregate insured losses attributable to terrorist acts certified under the Terrorism Risk Insurance Act exceed \$100 billion in a Program Year (January 1 through December 31), the Treasury shall not make any payment for any portion of the amount of such losses that exceeds \$100 billion. Further, this coverage is subject to a limit on our liability pursuant to the federal law, that is, if aggregate insured losses attributable to terrorist acts certified under the Terrorism Risk Insurance Act exceed \$100 billion in a Program Year (January 1 through December 31) and we have met our insurer deductible under the Terrorism Risk Insurance Act, we shall not be liable for the payment of any portion of the amount of such losses that exceeds \$100 billion. In such case insured losses up to that amount are subject to pro rata allocation in accordance with procedures established by the Secretary of the Treasury.

When your renewal policy includes CG 21 73 01 08 – Exclusion Of Certified Acts Of Terrorism:

This policy contains an endorsement excluding coverage for "certified acts of terrorism", which is more fully defined in the endorsement but involves acts of terrorism certified as such under the federal Terrorism Risk Insurance Program. Refer to the terrorism endorsement for the definition of "certified acts of terrorism." Refer to the endorsement, and to the rest of the insurance contract, for provisions that govern coverage for, or that exclude coverage for, losses arising from terrorism.

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When your renewal policy includes CG 21 71 06 08 - Exclusion Of Other Acts Of Terrorism Committed Outside The United States; Cap On Losses From Certified Acts Of Terrorism:

- This policy contains an exclusion of acts of terrorism committed outside the United States (including its territories and possessions and Puerto Rico) that are not certified as acts of terrorism under the federal Terrorism Risk Insurance Program. There is no exclusion applicable to "certified acts of terrorism". However, coverage for "certified acts of terrorism" (which is more fully defined in the endorsement but involves acts of terrorism certified as such under the federal Terrorism Risk Insurance Program) is subject to a limit on our liability and the liability of the federal government pursuant to the federal Terrorism Risk Insurance Act, as outlined below (note that "certified acts" are defined in the same manner as they were previously, except that they are no longer limited to acts of terrorism committed by or on behalf of a foreign person or entity). Further, the absence of a "certified acts of terrorism" exclusion does not create coverage for any loss that would otherwise be excluded under the policy, such as losses excluded by the war liability exclusion. Refer to the terrorism endorsement for the definitions of "certified act of terrorism" and "other act of terrorism". Refer to the endorsement, and to the rest of the insurance contract, for provisions that govern coverage for, or that exclude coverage for, losses arising from terrorism.
- Information On Limitations On Federal And Insurer Liability: The federal government may participate in paying for some of the losses from a "certified act of terrorism". However, if aggregate insured losses attributable to terrorist acts certified under the Terrorism Risk Insurance Act exceed \$100 billion in a Program Year (January 1 through December 31), the Treasury shall not make any payment for any portion of the amount of such losses that exceeds \$100 billion. Further, this coverage is subject to a limit on our liability pursuant to the federal law, that is, if aggregate insured losses attributable to terrorist acts certified under the Terrorism Risk Insurance Act exceed \$100 billion in a Program Year (January 1 through December 31) and we have met our insurer deductible under the Terrorism Risk Insurance Act, we shall not be liable for the payment of any portion of the amount of such losses that exceeds \$100 billion. In such case insured losses up to that amount are subject to pro rata allocation in accordance with procedures established by the Secretary of the Treasury.

When your renewal policy includes CG 21 75 06 08 - Exclusion Of Certified Acts Of Terrorism And Exclusion Of Other Acts Of Terrorism Committed Outside The United States:

This policy contains an endorsement excluding coverage for:

- "Certified acts of terrorism", which is more fully defined in the endorsement but involves acts of terrorism certified as such under the federal Terrorism Risk Insurance Program; and
- "Other acts of terrorism" that are committed outside the United States (including its territories and possessions and Puerto Rico).

Refer to the terrorism endorsement for the definitions of "certified act of terrorism" and "other acts of terrorism". Refer to the endorsement, and to the rest of the insurance contract, for provisions that govern coverage for, or that exclude coverage for, losses arising from terrorism.

POLICY NUMBER: ANM19903-6



Notice to Policyholders

Commercial Property, Commercial Inland Marine, Crime Broadenings and Restrictions Of Terrorism Coverage

This Notice has been prepared in conjunction with the implementation of changes related to coverage of terrorism under your policy. It contains a brief synopsis of significant exclusionary provisions and limitations.

This Notice does **not** form a part of your insurance contract. The Notice is designed to alert you to coverage restrictions and to other provisions in the terrorism endorsement in this policy. If there is any conflict between this Notice and the policy (including its endorsements), the provisions of the policy (including its endorsements) apply.

Carefully read your policy, including the endorsements attached to your policy.

CHANGE IN THE DEFINITION OF CERTIFIED ACTS OF TERRORISM

Under the federal Terrorism Risk Insurance Program Reauthorization Act of 2007, the definition of "certified acts of terrorism" no longer requires that the act of terrorism be committed by or on behalf of a foreign interest. Therefore, coverage for, or an exclusion for, "certified acts of terrorism" is no longer limited to an act of terrorism committed by or on behalf of a foreign interest. For example, the definition of "certified acts of terrorism" now includes an act committed against the United States government by a United States citizen, when the act is determined by the federal government to be a "certified act of terrorism" under the terms of the federal Terrorism Risk Insurance Program.

YOUR PREVIOUS POLICY

When your previous policy includes IL 09 52 11 02 - Cap On Losses From Certified Acts Of Terrorism or CL 0600 Certified Terrorism Loss:

This policy does not contain a terrorism exclusion. However, the policy contains an endorsement under which coverage for "certified acts of terrorism" (which is more fully defined in the endorsement but involves acts of terrorism by or on behalf of a foreign interest) is subject to a limit on our liability pursuant to the federal Terrorism Risk Insurance Act. Further, the absence of a terrorism exclusion does not create coverage for any loss that would otherwise be excluded under the policy, such as losses excluded by the nuclear hazard and war exclusions.

When your previous policy includes

- ***IL 09 59 11 02 or IL 09 74 11 02 - Limited Exclusion Of Acts Of Terrorism (Other Than Certified Acts Of Terrorism); Cap On Losses From Certified Acts Of Terrorism, or***
- ***IL 09 54 11 02 or IL 09 69 11 02 - Limited Exclusion Of Acts Of Terrorism (Other Than Certified Acts Of Terrorism); Cap On Losses From Certified Acts Of Terrorism; Coverage For Certain Fire Losses:***

This policy contains an endorsement that makes a distinction between "certified acts of terrorism" and "other acts of terrorism". Coverage is provided for "certified acts of terrorism" (which is more fully defined in the endorsement but involves acts of terrorism by or on behalf of a foreign interest). This coverage is subject to a limit on our liability pursuant to the federal Terrorism Risk Insurance Act. The endorsement excludes coverage for "other acts of terrorism" (terrorist acts other than certified acts) but such exclusion applies only if aggregate losses from the event exceed \$25 million, or if the event involves biological or chemical materials under certain circumstances. With respect to "certified acts of terrorism" and "other acts of terrorism", policy exclusions (for example, the nuclear hazard and war exclusions) and other policy provisions continue to apply.

When your previous policy includes IL 09 68 11 02 - Exclusion Of Certified Acts Of Terrorism; Coverage For Certain Fire Losses or IL 09 58 11 02 - Exclusion Of Certified Acts Of Terrorism or IL 09 73 11 02 - Exclusion Of Certified Acts Of Terrorism or CL 0620 - Certified Act Of Terrorism Exclusion (with Limited Exception) or CL 0610 - Certified Act Of Terrorism Exclusion:

This policy contains an endorsement excluding coverage for "certified acts of terrorism", which is more fully defined in the endorsement but involves acts of terrorism by or on behalf of a foreign interest.

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POLICY NUMBER:

When your previous policy includes CL 0640 – Non-Certified Act Of Terrorism Exclusion (with Limited Exception) and War And Military Action Exclusion or CL 0630 – Non-Certified Act Of Terrorism Exclusion and War And Military Action Exclusion:

This policy contains an endorsement excludes coverage for "non-certified acts of terrorism" (terrorist acts other than certified acts) but such exclusion applies only if aggregate losses from the event exceed \$25 million, or if the event involves biological or chemical materials under certain circumstances. With respect to "non-certified acts of terrorism", policy exclusions (for example, the nuclear hazard and war exclusions) and other policy provisions continue to apply.

When your previous policy includes

- **IL 09 61 11 02 or IL 09 76 11 02 - Exclusion Of Certified Acts And Other Acts Of Terrorism, or**
- **IL 09 56 11 02 or IL 09 71 11 02 - Exclusion Of Certified Acts And Other Acts Of Terrorism; Coverage For Certain Fire Losses, or**
- **IL 09 88 04 03 or IL 00 41 09 04 - Exclusion Of Certified Acts And Other Acts Of Terrorism; Coverage For Certain Fire Losses Resulting From Other Acts Of Terrorism:**

The terrorism endorsement in this policy makes a distinction between "certified acts of terrorism" (which is more fully defined in the endorsement, but involves acts of terrorism that are committed by or on behalf of a foreign interest) and "other acts of terrorism". Both types of terrorism are excluded from coverage but the exclusions are subject to different terms and conditions. The exclusion of "certified acts of terrorism" relates to criteria in the federal Terrorism Risk Insurance Act. The exclusion of coverage for "other acts of terrorism" (terrorist acts other than certified acts) applies only if aggregate insured losses from the event exceed \$25 million, or if the event involves biological or chemical materials under certain circumstances. With respect to "certified acts of terrorism" and "other acts of terrorism", policy exclusions (for example, the nuclear hazard and war exclusions) and other policy provisions continue to apply.

When your previous policy includes IL 09 54 or IL 09 56 or CL 0620 or CL 0640 and covers property located in one of the states shown in the Schedule below, the following also applies: The terrorism exclusion does not restrict fire coverage under Commercial Property or Commercial Inland Marine insurance due to a statutory requirement in this state. Therefore, losses attributable to fire following an act of terrorism, if otherwise covered, remain covered under such insurance.

When your previous policy includes IL 09 68, IL 09 69 or IL 09 71 and covers property located in one of the states shown in the Schedule below, the following also applies: The terrorism exclusion does not restrict fire coverage under Commercial Property insurance due to a statutory requirement in this state. Therefore, losses attributable to fire following an act of terrorism, if otherwise covered, remain covered under such insurance.

When your previous policy includes IL 00 41 or IL 09 88 and covers property located in Connecticut or Virginia, the following also applies: The terrorism exclusion for "other acts of terrorism" does not restrict fire coverage under Commercial Property insurance due to a statutory requirement in this state. Therefore, losses attributable to fire following an "other act of terrorism", if otherwise covered, remain covered under such insurance.

Schedule	
Line of Insurance	State
Commercial Property	Arizona (residential risks only), California, Connecticut, Georgia, Hawaii, Iowa, Illinois, Maine, Massachusetts, Missouri, North Carolina, New Jersey, New York, Oregon, Rhode Island, Virginia, Washington, West Virginia, Wisconsin
Commercial Inland Marine	California, Maine, Missouri, Oregon, Wisconsin

YOUR RENEWAL POLICY

When your renewal policy includes IL 09 52 01 08 – Cap On Losses From Certified Acts Of Terrorism or CL 0600 – Certified Terrorism Loss:

- This policy does not contain a terrorism exclusion. However, the policy contains an endorsement under which coverage for "certified acts of terrorism" (which is more fully defined in the endorsement but involves acts of terrorism certified as such under the federal Terrorism Risk Insurance Program) is subject to a limit on our liability and the liability of the federal government pursuant to the federal Terrorism Risk Insurance Act, as outlined below. Further, the absence of a terrorism exclusion does not create coverage for any loss that would otherwise be excluded under the policy, such as losses excluded by the nuclear hazard and war exclusions. Refer to the terrorism endorsement for the definition of "certified acts of terrorism". Refer to the endorsement, and to the rest of the insurance contract, for provisions that govern coverage for, or that exclude coverage for, losses arising from terrorism.
- Information On Limitations On Federal And Insurer Liability: The federal government may participate in paying for some of the losses from a "certified act of terrorism". However, if aggregate insured losses attributable to terrorist acts certified under the Terrorism Risk Insurance Act exceed \$100 billion in a Program Year (January 1 through December 31), the Treasury shall not make any payment for any portion of the amount of such losses that exceeds \$100 billion. Further, this coverage is subject to a limit on our liability pursuant to the federal law, that is, if aggregate insured losses attributable to terrorist acts certified under the Terrorism Risk Insurance Act exceed \$100 billion in a Program Year (January 1 through December 31) and we have met our insurer deductible under the Terrorism Risk Insurance Act, we shall not be liable for the payment of any portion of the amount of such losses that exceeds \$100 billion. In such case insured losses up to that amount are subject to pro rata allocation in accordance with procedures established by the Secretary of the Treasury.

When your renewal policy includes IL 09 53 01 08 – Exclusion Of Certified Acts Of Terrorism or CL 0610 – Certified Act Of Terrorism Exclusion or CL 0620 – Certified Act Of Terrorism Exclusion (With Limited Exception):

This policy contains an endorsement excluding coverage for "certified acts of terrorism", which is more fully defined in the endorsement but involves acts of terrorism certified as such under the federal Terrorism Risk Insurance Program. Refer to the terrorism endorsement for the definition of "certified acts of terrorism." Refer to the endorsement, and to the rest of the insurance contract, for provisions that govern coverage for, or that exclude coverage for, losses arising from terrorism.

When your renewal policy includes IL 09 53 or CL 0620 and covers property located in one of the states shown in the Schedule below, the following also applies:

Information On Coverage For Fire Following An Act Of Terrorism In Certain States: The terrorism exclusion does not restrict fire coverage under Commercial Property and/or Inland Marine insurance due to a statutory requirement in the states shown in the Schedule on Page 2 of this notice with regard to CL 0620 or, with regard to IL 09 53, in the Schedule shown on Page 1 of IL 09 53. Therefore, losses attributable to fire following an act of terrorism, if otherwise covered, remain covered under your insurance for the aforementioned line(s) of insurance as per the Schedule on Page 2 of this notice with regard to CL 0620 or, with regard to IL 09 53, in the Schedule shown on Page 1 of IL 09 53. Such coverage is subject to all policy exclusions (for example, the nuclear hazard and war exclusions) and other policy provisions. The federal government may participate in paying for some of the losses for fire following a "certified act of terrorism". However, if aggregate insured losses attributable to terrorist acts certified under the Terrorism Risk Insurance Act exceed \$100 billion in a Program Year (January 1 through December 31), the Treasury shall not make any payment for any portion of the amount of such losses that exceeds \$100 billion. Further, this coverage is subject to a limit on our liability pursuant to the federal law, that is, if aggregate insured losses attributable to terrorist acts certified under the Terrorism Risk Insurance Act exceed \$100 billion in a Program Year (January 1 through December 31) and we have met our insurer deductible under the Terrorism Risk Insurance Act, we shall not be liable for the payment of any portion of the amount of such losses that exceeds \$100 billion. In such case insured losses up to that amount are subject to pro rata allocation in accordance with procedures established by the Secretary of the Treasury.

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COMMON POLICY CONDITIONS

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

A. Cancellation

1. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.
2. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:
 - a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
 - b. 30 days before the effective date of cancellation if we cancel for any other reason.
3. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.
4. Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.
5. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.
6. If notice is mailed, proof of mailing will be sufficient proof of notice.

B. Changes

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

C. Examination Of Your Books And Records

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

D. Inspections And Surveys

1. We have the right to:
 - a. Make inspections and surveys at any time;

- b. Give you reports on the conditions we find; and
 - c. Recommend changes.
2. We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:
 - a. Are safe or healthful; or
 - b. Comply with laws, regulations, codes or standards.
3. Paragraphs 1. and 2. of this condition apply not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.
4. Paragraph 2. of this condition does not apply to any inspections, surveys, reports or recommendations we may make relative to certification, under state or municipal statutes, ordinances or regulations, of boilers, pressure vessels or elevators.

E. Premiums

The first Named Insured shown in the Declarations:

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

F. Transfer Of Your Rights And Duties Under This Policy

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured. If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

ESTES000814

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NUCLEAR ENERGY LIABILITY EXCLUSION ENDORSEMENT

(Broad Form)

This endorsement modifies insurance provided under the following:

COMMERCIAL AUTOMOBILE COVERAGE PART
COMMERCIAL GENERAL LIABILITY COVERAGE PART
FARM COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
PROFESSIONAL LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART
UNDERGROUND STORAGE TANK POLICY

1. The insurance does not apply:
 - A. Under any Liability Coverage, to "bodily injury" or "property damage":
 - (1) With respect to which an "insured" under the policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada or any of their successors, or would be an insured under any such policy but for its termination upon exhaustion of its limits of liability; or
 - (2) Resulting from the "hazardous properties" of "nuclear material" and with respect to which (a) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (b) the "insured" is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.
 - B. Under any Medical Payments coverage, to expenses incurred with respect to "bodily injury" resulting from the "hazardous properties" of "nuclear material" and arising out of the operation of a "nuclear facility" by any person or organization.
 - C. Under any Liability Coverage, to "bodily injury" or "property damage" resulting from "hazardous properties" of "nuclear material", if:
 - (1) The "nuclear material" (a) is at any "nuclear facility" owned by, or operated by or on behalf of, an "insured" or (b) has been discharged or dispersed therefrom;
 - (2) The "nuclear material" is contained in "spent fuel" or "waste" at any time possessed, handled, used, processed, stored, transported or disposed of by, or on behalf of an "insured"; or
 - (3) The "bodily injury" or "property damage" arises out of the furnishing by an "insured" of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any "nuclear facility", but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (3) applies only to "property damage" to such "nuclear facility" and any property thereat.

ESTES000815

2. As used in this endorsement:

"Hazardous properties" include radioactive, toxic or explosive properties.

"Nuclear material" means "source material", "Special nuclear material" or "by-product material".

"Source material", "special nuclear material", and "by-product material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof;

"Spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a "nuclear reactor".

"Waste" means any waste material **(a)** containing "by-product material" other than the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its "source material" content, and **(b)** resulting from the operation by any person or organization of any "nuclear facility" included under the first two paragraphs of the definition of "nuclear facility."

"Nuclear facility" means:

(a) Any "nuclear reactor;"

(b) Any equipment or device designed or used for **(1)** separating the isotopes of uranium or plutonium, **(2)** processing or utilizing "spent fuel", or **(3)** handling, processing or packaging "waste";

(c) Any equipment or device used for the processing, fabricating or alloying of "special nuclear material" if at any time the total amount of such material in the custody of the "insured" at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235;

(d) Any structure, basin, excavation, premises or place prepared or used for the storage or disposal of "waste";

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations.

"Nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material;

"Property damage" includes all forms of radioactive contamination of property.

ESTES000816

IL 01 90 07 02

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ALABAMA CHANGES – ACTUAL CASH VALUE

This endorsement modifies insurance provided under the following:

BOILER AND MACHINERY COVERAGE PART
CAPITAL ASSETS PROGRAM (OUTPUT POLICY) COVERAGE PART
COMMERCIAL INLAND MARINE COVERAGE PART
COMMERCIAL PROPERTY COVERAGE PART
CRIME AND FIDELITY COVERAGE PART
FARM COVERAGE PART

The following is added to any provision which uses the term actual cash value:

Actual cash value is calculated as the amount it would cost to repair or replace Covered Property, at the time of loss or damage, with material of like kind and quality, subject to a deduction for deterioration, depreciation and obsolescence. Actual cash value applies to valuation of Covered Property regardless of whether that property has sustained partial or total loss or damage.

The actual cash value of the lost or damaged property may be significantly less than its replacement cost.

ESTES000817

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF CERTAIN COMPUTER-RELATED LOSSES

This endorsement modifies insurance provided under the following:

COMMERCIAL INLAND MARINE COVERAGE PART
COMMERCIAL PROPERTY COVERAGE PART
CRIME AND FIDELITY COVERAGE PART
STANDARD PROPERTY POLICY

- A.** We will not pay for loss ("loss") or damage caused directly or indirectly by the following. Such loss ("loss") or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss ("loss") or damage.
1. The failure, malfunction or inadequacy of:
 - a. Any of the following, whether belonging to any insured or to others:
 - (1) Computer hardware, including micro-processors;
 - (2) Computer application software;
 - (3) Computer operating systems and related software;
 - (4) Computer networks;
 - (5) Microprocessors (computer chips) not part of any computer system; or
 - (6) Any other computerized or electronic equipment or components; or
 - b. Any other products, and any services, data or functions that directly or indirectly use or rely upon, in any manner, any of the items listed in Paragraph **A.1.a.** of this endorsement;

due to the inability to correctly recognize, process, distinguish, interpret or accept one or more dates or times. An example is the inability of computer software to recognize the year 2000.
 2. Any advice, consultation, design, evaluation, inspection, installation, maintenance, repair, replacement or supervision provided or done by you or for you to determine, rectify or test for, any potential or actual problems described in Paragraph **A.1.** of this endorsement.
- B.** If an excluded Cause of Loss as described in Paragraph **A.** of this endorsement results:
1. In a Covered Cause of Loss under the Crime and Fidelity Coverage Part, the Commercial Inland Marine Coverage Part or the Standard Property Policy; or
 2. Under the Commercial Property Coverage Part:
 - a. In a "Specified Cause of Loss", or in elevator collision resulting from mechanical breakdown, under the Causes of Loss - Special Form; or
 - b. In a Covered Cause of Loss under the Causes Of Loss - Basic Form or the Causes Of Loss - Broad Form;

we will pay only for the loss ("loss") or damage caused by such "Specified Cause of Loss", elevator collision, or Covered Cause of Loss.
- C.** We will not pay for repair, replacement or modification of any items in Paragraphs **A.1.a.** and **A.1.b.** of this endorsement to correct any deficiencies or change any features.

ESTES000818

POLICY NUMBER: ANM19903-6

IL 09 53 01 08

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF CERTIFIED ACTS OF TERRORISM

This endorsement modifies insurance provided under the following:

- BOILER AND MACHINERY COVERAGE PART
- COMMERCIAL INLAND MARINE COVERAGE PART
- COMMERCIAL PROPERTY COVERAGE PART
- CRIME AND FIDELITY COVERAGE PART
- EQUIPMENT BREAKDOWN COVERAGE PART
- FARM COVERAGE PART
- STANDARD PROPERTY POLICY

SCHEDULE

The **Exception Covering Certain Fire Losses** (Paragraph C) applies to property located in the following state(s), if covered under the indicated Coverage Form, Coverage Part or Policy:

State(s)	Coverage Form, Coverage Part Or Policy
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. The following definition is added with respect to the provisions of this endorsement:

"Certified act of terrorism" means an act that is certified by the Secretary of the Treasury, in concurrence with the Secretary of State and the Attorney General of the United States, to be an act of terrorism pursuant to the federal Terrorism Risk Insurance Act. The criteria contained in the Terrorism Risk Insurance Act for a "certified act of terrorism" include the following:

1. The act resulted in insured losses in excess of \$5 million in the aggregate, attributable to all types of insurance subject to the Terrorism Risk Insurance Act; and
2. The act is a violent act or an act that is dangerous to human life, property or infrastructure and is committed by an individual or individuals as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.

B. The following exclusion is added:

CERTIFIED ACT OF TERRORISM EXCLUSION

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

C. Exception Covering Certain Fire Losses

The following exception to the exclusion in Paragraph B. applies only if indicated and as indicated in the Schedule of this endorsement.

If a "certified act of terrorism" results in fire, we will pay for the loss or damage caused by that fire. Such coverage for fire applies only to direct loss or damage by fire to Covered Property. Therefore, for example, the coverage does not apply to insurance provided under Business Income and/or Extra Expense coverage forms or endorsements which apply to those forms, or to the Legal Liability Coverage Form or the Leasehold Interest Coverage Form.

If aggregate insured losses attributable to terrorist acts certified under the Terrorism Risk Insurance Act exceed \$100 billion in a Program Year (January 1 through December 31) and we have met our insurer deductible under the Terrorism Risk Insurance Act, we shall not be liable for the payment of any portion of the amount of such losses that exceeds \$100 billion, and in such case insured losses up to that amount are subject to pro rata allocation in accordance with procedures established by the Secretary of the Treasury.

D. Application Of Other Exclusions

The terms and limitations of any terrorism exclusion, or the inapplicability or omission of a terrorism exclusion, do not serve to create coverage for any loss which would otherwise be excluded under this Coverage Part or Policy, such as losses excluded by the Nuclear Hazard Exclusion or the War And Military Action Exclusion.

POLICY NUMBER: ANM19903-6

INTERLINE
QBIL-0121 (01-08)



THIS ENDORSEMENT IS ATTACHED TO AND MADE PART OF YOUR POLICY IN RESPONSE TO THE DISCLOSURE REQUIREMENTS OF THE TERRORISM RISK INSURANCE ACT. THIS ENDORSEMENT DOES NOT GRANT ANY COVERAGE OR CHANGE THE TERMS AND CONDITIONS OF ANY COVERAGE UNDER THE POLICY.

DISCLOSURE PURSUANT TO TERRORISM RISK INSURANCE ACT

- This policy **includes** coverage for Certified Acts of Terrorism. Please refer to the applicable charge(s) below.
- This policy **excludes** coverage for Certified Acts of Terrorism.

Note: Applicable to Commercial Property and Commercial Inland Marine

Standard fire policy states mandate coverage for ensuing fire losses. If this policy is issued in a standard fire policy state, coverage for fire losses resulting from an act of terrorism is provided for Commercial Property and in some states for Commercial Inland Marine. The additional premium for such fire coverage is mandatory in these states and is shown below.

SCHEDULE

THIS POLICY CONSISTS OF THE FOLLOWING CHARGES FOR CERTIFIED ACTS OF TERRORISM	PREMIUM
Terrorism (Fire Following) – Commercial Property	
Terrorism (Fire Following) – Commercial Inland Marine	
Terrorism (Other than Fire Following)	
TOTAL TERRORISM PREMIUM (CERTIFIED ACTS):	
<p>This premium is the total Certified Acts premium attributable to the following Coverage Part(s), Coverage Form(s) and/or Policy(s):</p> <p>Additional information, if any, concerning the terrorism premium:</p>	

NOTE: The premium above is for certain losses resulting from certified acts of terrorism as covered pursuant to coverage provisions, limitations and exclusions in this policy. You should read the definition in your policy carefully, but generally speaking, "certified" acts of terrorism are acts that exceed \$5 million in aggregate losses to the insurance industry and which are subsequently declared by the U.S. Secretary of the Treasury as a certified terrorist act under the Terrorism Risk Insurance Act. Some losses resulting from certified acts of terrorism are not covered. Read your policy and endorsements carefully.

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A. Disclosure Of Premium

In accordance with the federal Terrorism Risk Insurance Act, we are required to provide you with a notice disclosing the portion of your premium, if any, attributable to coverage for terrorist acts certified under the Terrorism Risk Insurance Act. The portion of your premium attributable to such coverage is shown in the Schedule of this endorsement or in the policy Declarations.

B. Disclosure Of Federal Participation In Payment Of Terrorism Losses

The United States Government, Department of the Treasury, will pay a share of terrorism losses insured under the federal program. The federal share equals 85% of that portion of the amount of such insured losses that exceeds the applicable insurer retention. However, if aggregate insured losses attributable to terrorist acts certified under the Terrorism Risk Insurance Act exceed \$100 billion in a Program Year (January 1 through December 31), the Treasury shall not make any payment for any portion of the amount of such losses that exceeds \$100 billion.

C. Cap On Insurer Participation In Payment Of Terrorism Losses

If aggregate insured losses attributable to terrorist acts certified under the Terrorism Risk Insurance Act exceed \$100 billion in a Program Year (January 1 through December 31) and we have met our insurer deductible under the Terrorism Risk Insurance Act, we shall not be liable for the payment of any portions of the amount of such losses that exceeds \$100 billion, and in such case insured losses up to that amount are subject to pro rata allocation in accordance with procedures established by the Secretary of the Treasury.

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INTERLINE
QBIL-0124 (09-04)



THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

POLLUTANTS DEFINITION AMENDMENT

All Coverage Parts or Coverage Forms included in this policy are subject to the following:

The definition of "pollutants" is replaced in its entirety by the following:

"Pollutants" mean any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor soot, fumes, acids, alkalis, radiation or radioactive contamination, dioxins, polychlorinated biphenols, pathogenic or poisonous biological or chemical materials and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

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QBIL-0124 (09-04)

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COMMERCIAL PROPERTY COVERAGE PART DECLARATIONS PAGE

POLICY NO: ANM19903-6

EFFECTIVE DATE:

11/29/2008

NAMED INSURED

ESTES HEATING & AIR
CONDITIONING, INC.

"X" If Supplemental
Declarations Is Attached

DESCRIPTION OF PREMISES

Prem. No.	Bldg. No.	Location, Construction And Occupancy
1	1	5715 RABBIT CREEK DR., THEODORE, AL, 36582- FRM ACCOUNTING SERVICES

COVERAGES PROVIDED

Insurance At The Described Premises Applies Only For Coverages For Which
A Limit Of Insurance Is Shown

Prem. No.	Bldg. No.	Coverage	Limit Of Insurance	Covered Causes Of Loss	Coinsurance*	Rates
1	1	PERSONAL PROPERTY OF THE INSURED	1,000	BASIC	80	

OPTIONAL COVERAGES

*If Extra Expense Coverage, Limits On Loss Payment
Applicable Only When Entries Are Made In The Schedule Below

Prem. No.	Bldg. No.	Expiration Date	Agreed Value		Replacement Cost (X)		
			Cov.	Amount	Building	Pers. Prop.	Including "Stock"
1	1		PERSONAL PROPERTY OF THE INSURED				

Inflation Guard (%)
Bldg. Pers. Prop.

*Monthly Limit Of
Indemnity (Fraction)

Maximum Period
Of Indemnity (Y/N)

*Extended Period
Of Indemnity (Days)

*Applies to Business Income Only.

MORTGAGEHOLDERS

Prem. No.	Bldg. No.	Mortgageholder Name And Mailing Address

DEDUCTIBLE

\$500. Exceptions:
\$250.00

FORMS APPLICABLE

To All Coverages:			
CP 00 10 04 02	CP 00 90 07 88	CP 01 40 07 06	CP 01 45 05 08
CP 10 10 04 02			

To Specific Premises/Coverages:			Form Number
Prem. No.	Bldg. No.	Coverages	

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BUILDING AND PERSONAL PROPERTY COVERAGE FORM

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

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

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

A. Coverage

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

1. Covered Property

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

- a. Building**, meaning the building or structure described in the Declarations, including:
- (1) Completed additions;
 - (2) Fixtures, including outdoor fixtures;
 - (3) Permanently installed:
 - (a) Machinery and
 - (b) Equipment;
 - (4) Personal property owned by you that is used to maintain or service the building or structure or its premises, including:
 - (a) Fire extinguishing equipment;
 - (b) Outdoor furniture;
 - (c) Floor coverings; and
 - (d) Appliances used for refrigerating, ventilating, cooking, dishwashing or laundering;
 - (5) If not covered by other insurance:
 - (a) Additions under construction, alterations and repairs to the building or structure;

- (b) Materials, equipment, supplies and temporary structures, on or within 100 feet of the described premises, used for making additions, alterations or repairs to the building or structure.

- b. Your Business Personal Property** located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises, consisting of the following unless otherwise specified in the Declarations or on the Your Business Personal Property - Separation of Coverage form:
- (1) Furniture and fixtures;
 - (2) Machinery and equipment;
 - (3) "Stock";
 - (4) All other personal property owned by you and used in your business;
 - (5) Labor, materials or services furnished or arranged by you on personal property of others;
 - (6) Your use interest as tenant in improvements and betterments. Improvements and betterments are fixtures, alterations, installations or additions:
 - (a) Made a part of the building or structure you occupy but do not own; and
 - (b) You acquired or made at your expense but cannot legally remove;
 - (7) Leased personal property for which you have a contractual responsibility to insure, unless otherwise provided for under Personal Property of Others.

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- c. Personal Property Of Others** that is:
- (1) In your care, custody or control; and
 - (2) Located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises.

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

2. Property Not Covered

Covered Property does not include:

- a. Accounts, bills, currency, food stamps or other evidences of debt, money, notes or securities. Lottery tickets held for sale are not securities;
- b. Animals, unless owned by others and boarded by you, or if owned by you, only as "stock" while inside of buildings;
- c. Automobiles held for sale;
- d. Bridges, roadways, walks, patios or other paved surfaces;
- e. Contraband, or property in the course of illegal transportation or trade;
- f. The cost of excavations, grading, backfilling or filling;
- g. Foundations of buildings, structures, machinery or boilers if their foundations are below:
 - (1) The lowest basement floor; or
 - (2) The surface of the ground, if there is no basement;
- h. Land (including land on which the property is located), water, growing crops or lawns;
- i. Personal property while airborne or waterborne;
- j. Bulkheads, pilings, piers, wharves or docks;
- k. Property that is covered under another coverage form of this or any other policy in which it is more specifically described, except for the excess of the amount due (whether you can collect on it or not) from that other insurance;
- l. Retaining walls that are not part of a building;
- m. Underground pipes, flues or drains;
- n. Electronic data, except as provided under Additional Coverages - Electronic Data. Electronic data means information, facts or computer programs stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), on hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other repositories of computer software which are used with electronically controlled equipment. The term computer programs, referred to in the foregoing description of electronic data, means a set of related electronic instructions which direct the operations and functions of a computer or device connected to it, which enable the computer or device to receive, process, store, retrieve or send data. This Paragraph n., does not apply to your "stock" of prepackaged software.
- o. The cost of replace or restore the information on valuable papers and records, including those which exist as electronic data. Valuable papers and records include but are not limited to proprietary information, books of account, deeds, manuscripts, abstracts, drawings and card index systems. Refer to the Coverage Extension for Valuable Papers And Records (Other Than Electronic Data) for limited coverage for valuable papers and records other than those which exist as electronic data.
- p. Vehicles or self-propelled machines (including aircraft or watercraft) that:
 - (1) Are licensed for use on public roads; or
 - (2) Are operated principally away from the described premises.

This paragraph does not apply to:

 - (a) Vehicles or self-propelled machines or autos you manufacture, process or warehouse;
 - (b) Vehicles or self-propelled machines, other than autos, you hold for sale;
 - (c) Rowboats or canoes out of water at the described premises; or
 - (d) Trailers, but only to the extent provided for in the Coverage Extension for Non-Owned Detached Trailers.

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- q. The following property while outside of buildings:
 - (1) Grain, hay, straw or other crops;
 - (2) Fences, radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers, signs (other than signs attached to buildings), trees, shrubs or plants (other than "stock" of trees, shrubs or plants), all except as provided in the Coverage Extensions.

3. Covered Causes Of Loss

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

4. Additional Coverages

a. Debris Removal

(1) Subject to Paragraphs (3) and (4), we will pay your expense to remove debris of Covered Property caused by or resulting from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date of direct physical loss or damage.

(2) Debris Removal does not apply to costs to:

- (a) Extract "pollutants" from land or water; or
- (b) Remove, restore or replace polluted land or water.

(3) Subject to the exceptions in Paragraph (4), the following provisions apply:

- (a) The most we will pay for the total of direct physical loss or damage plus debris removal expense is the Limit of Insurance applicable to the Covered Property that has sustained loss or damage.
- (b) Subject to (a) above, the amount we will pay for debris removal expense is limited to 25% of the sum of the deductible plus the amount that we pay for direct physical loss or damage to the Covered Property that has sustained loss or damage.

(4) We will pay up to an additional \$10,000 for debris removal expense, for each location, in any one occurrence of physical loss or damage to Covered Property, if one or both of the following circumstances apply:

(a) The total of the actual debris removal expense plus the amount we pay for direct physical loss or damage exceeds the Limit of Insurance on the Covered Property that has sustained loss or damage.

(b) The actual debris removal expense exceeds 25% of the sum of the deductible plus the amount that we pay for direct physical loss or damage to the Covered Property that has sustained loss or damage.

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

(5) Examples

The following examples assume that there is no coinsurance penalty.

Example #1

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

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

Example #2

Limit of Insurance	\$	90,000
Amount of Deductible	\$	500
Amount of Loss	\$	80,000
Amount of Loss Payable	\$	79,500
		(\$80,000 - \$500)
Debris Removal Expense	\$	30,000
Debris Removal Expense Payable		
	Basic Amount	\$ 10,500
	Additional Amount	\$ 10,000

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

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

b. Preservation of Property

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

- (1) While it is being moved or while temporarily stored at another location; and
- (2) Only if the loss or damage occurs within 30 days after the property is first moved.

c. Fire Department Service Charge

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

- (1) Assumed by contract or agreement prior to loss; or
 - (2) Required by local ordinance.
- No Deductible applies to this Additional Coverage.

d. Pollutant Clean Up and Removal

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

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

The most we will pay under this Additional Coverage for each described premises is \$10,000 for the sum of all covered expenses arising out of Covered Causes of Loss occurring during each separate 12 month period of this policy.

e. Increased Cost Of Construction

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

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- (3) The ordinance or law referred to in e.(2) of this Additional Coverage is an ordinance or law that regulates the construction or repair of buildings or establishes zoning or land use requirements at the described premises, and is in force at the time of loss.
- (4) Under this Additional Coverage, we will not pay any costs due to an ordinance or law that:
- (a) You were required to comply with before the loss, even when the building was undamaged; and
 - (b) You failed to comply with.
- (5) Under this Additional Coverage, we will not pay for:
- (a) The enforcement of any ordinance or law which requires demolition, repair, replacement, reconstruction, remodeling or remediation of property due to contamination by "pollutants" or due to the presence, growth, proliferation, spread or any activity of "fungus", wet or dry rot or bacteria; or
 - (b) Any costs associated with the enforcement of an ordinance or law which requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants", "fungus", wet or dry rot or bacteria.
- (6) The most we will pay under this Additional Coverage, for each described building insured under this Coverage Form, is \$10,000 or 5% of the Limit of Insurance applicable to that building, whichever is less. If a damaged building is covered under a blanket Limit of Insurance which applies to more than one building or item of property, then the most we will pay under this Additional Coverage, for that damaged building, is the lesser of: \$10,000 or 5% times the value of the damaged building as of the time of loss times the applicable coinsurance percentage.
The amount payable under this Additional Coverage is additional insurance.
- (7) With respect to this Additional Coverage:
- (a) We will not pay for the Increased Cost of Construction:
 - (i) Until the property is actually repaired or replaced, at the same or another premises; and
 - (ii) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage, not to exceed two years. We may extend this period in writing during the two years.
 - (b) If the building is repaired or replaced at the same premises, or if you elect to rebuild at another premises, the most we will pay for the Increased Cost of Construction, subject to the provisions of e.(6) of this Additional Coverage, is the increased cost of construction at the same premises.
 - (c) If the ordinance or law requires relocation to another premises, the most we will pay for the Increased Cost of Construction, subject to the provisions of e.(6) of this Additional Coverage, is the increased cost of construction at the new premises.
- (8) This Additional Coverage is not subject to the terms of the Ordinance or Law Exclusion, to the extent that such Exclusion would conflict with the provisions of this Additional Coverage.
- (9) The costs addressed in the Loss Payment and Valuation Conditions, and the Replacement Cost Optional Coverage, in this Coverage Form, do not include the increase cost attributable to enforcement of an ordinance or law. The amount payable under this Additional Coverage, as stated in e.(6) of this Additional Coverage, is not subject to such limitation.
- f. Electronic Data**
- (1) Under this Additional Coverage, electronic data has the meaning described under Property Not Covered - Electronic Data.
 - (2) Subject to the provisions of this Additional Coverage, we will pay for the cost to replace or restore electronic data which has been destroyed or corrupted by a Covered Cause of Loss. To the extent that electronic data is not replaced or restored, the loss will be valued at the cost of replacement of the media on which the electronic data was stored, with blank media of substantially identical type.
 - (3) The Covered Causes of Loss applicable to Your Business Personal Property apply to this Additional Coverage - Electronic Data, subject to the following:

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- (a) If the Causes Of Loss - Special Form applies, coverage under this Additional Coverage - Electronic Data is limited to the "specified causes of loss" as defined in that form, and Collapse as set forth in that form.
 - (b) If the Causes Of Loss - Broad form applies, coverage under this Additional Coverage - Electronic Data includes collapse as set forth in that form.
 - (c) If the Causes Of Loss Form is endorsed to add a Covered Cause of Loss, the additional Covered Cause of Loss does not apply to the coverage provided under this Additional Coverage - Electronic Data.
 - (d) The Covered Causes of Loss include a virus, harmful code or similar instruction introduced into or enacted on a computer system (including electronic data) or a network to which it is connected, designed to damage or destroy any part of the system or disrupt its normal operation. But there is no coverage for loss or damage caused by or resulting from manipulation of a computer system (including electronic data) by any employee, including a temporary or leased employee, or by an entity retained by you or for you to inspect, design, install, modify, maintain, repair or replace that system.
- (4) The most we will pay under this Additional Coverage - Electronic Data is \$2,500 for all loss or damage sustained in any one policy year, regardless of the number of occurrences of loss or damage or the number of premises, locations or computer systems involved. If loss payment on the first occurrence does not exhaust this amount, then the balance is available for subsequent loss or damage sustained in but not after that policy year. With respect to an occurrence which begins in one policy year and continues or results in additional loss or damage in a subsequent policy year(s), all loss or damage is deemed to be sustained in the policy year in which the occurrence began.
- 5. Coverage Extensions**
- Except as otherwise provided, the following Extensions apply to property located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises.
- If a Coinsurance percentage of 80% or more or, a Value Reporting period symbol, is shown in the Declarations, you may extend the insurance provided by this Coverage Part as follows:
- a. Newly Acquired Or Constructed Property**
- (1) Buildings**
- If this policy covers Building, you may extend that insurance to apply to:
- (a) Your new buildings while being built on the described premises; and
 - (b) Buildings you acquire at locations, other than the described premises, intended for:
 - (i) Similar use as the building described in the Declarations; or
 - (ii) Use as a warehouse.
- The most we will pay for loss or damage under this Extension is \$250,000 at each building.
- (2) Your Business Personal Property**
- (a) If this policy covers Your Business Personal Property, you may extend that insurance to apply to:
 - (i) Business personal property, including such property that you newly acquire, at any location you acquire other than at fairs, trade shows or exhibitions;
 - (ii) Business personal property, including such property that you newly acquire, located at your newly constructed or acquired buildings at the location described in the Declarations; or
 - (iii) Business personal property that you newly acquire, located at the described premises.
- The most we will pay for loss or damage under this Extension is \$100,000 at each building.
- (b) This Extension does not apply to:
 - (i) Personal property of others that is temporarily in your possession in the course of installing or performing work on such property; or

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- (ii) Personal property of others that is temporarily in your possession in the course of your manufacturing or wholesaling activities.

(3) Period Of Coverage

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

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

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

b. Personal Effects And Property Of Others

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

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

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

c. Valuable Papers And Records (Other Than Electronic Data)

- (1) You may extend the insurance that applies to Your Business Personal Property to apply to the cost to replace or restore the lost information on valuable papers and records for which duplicates do not exist. But this Extension does not apply to valuable papers and records which exist as electronic data. Electronic data has the meaning described under Property Not Covered-Electronic Data.
- (2) If the Causes Of Loss - Special Form applies, coverage under this Extension is limited to the "specified causes of loss" as defined in that form, and Collapse as set forth in that form.
- (3) If the Cause Of Loss - Broad Form applies, coverage under this Extension includes Collapse as set forth in that form.
- (4) Under this Extension, the most we will pay to replace or restore the lost information is \$2,500 at each described premises, unless a higher limit is shown in the Declarations. Such amount is additional insurance. We will also pay for the cost of blank material for reproducing the records (whether or not duplicates exist), and (when there is a duplicate) for the cost of labor to transcribe or copy the records. The costs of blank material and labor are subject to the applicable Limit of Insurance on Your Business Personal Property and therefore coverage of such costs is not additional insurance.

d. Property Off-Premises

- (1) You may extend the insurance provided by this Coverage Form to apply to your Covered Property while it is away from the described premises, if it is:
 - (a) Temporarily at a location you do not own, lease or operate;
 - (b) In storage at a location you lease, provided the lease was executed after the beginning of the current policy term; or
 - (c) At any fair, trade show or exhibition.
- (2) This Extension does not apply to Property:
 - (a) In or on a vehicle;

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

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

e. Outdoor Property

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

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

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

f. Non-Owned Detached Trailers

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

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

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

- (a) While the trailer is attached to any motor vehicle or motorized conveyance, whether or not the motor vehicle or motorized conveyance is in motion;

(b) During hitching or unhitching operations, or when a trailer becomes accidentally unhitched from a motor vehicle or motorized conveyance.

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

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

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

B. Exclusions And Limitations

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

C. Limits Of Insurance

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

The most we will pay for loss or damage to outdoor signs attached to buildings is \$1,000 per sign in any one occurrence.

The limits applicable to the Fire Department Service Charge and Pollutant Clean Up and Removal Additional Coverages are in addition to the Limits of Insurance.

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

D. Deductible

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

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

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Example No. 1:

(This example assumes there is no coinsurance penalty.)

Deductible:	\$ 250
Limit of Insurance - Bldg. 1:	\$ 60,000
Limit of Insurance - Bldg. 2:	\$ 80,000
Loss to Bldg. 1:	\$ 60,100
Loss to Bldg. 2:	\$ 90,000

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

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

\$60,100
- 250
\$59,850 Loss Payable - Bldg. 1

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

Total amount of loss payable: \$59,850 + 80,000 = \$139,850

Example No. 2:

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

The Deductible and Limits of Insurance are the same as those in Example No. 1.

Loss to Bldg. 1:	\$ 70,000
(exceeds Limit of Insurance plus Deductible)	
Loss to Bldg. 2:	\$ 90,000
(exceeds Limit of Insurance plus Deductible)	
Loss Payable - Bldg. 1:	\$ 60,000
(Limit of Insurance)	
Loss Payable - Bldg. 2:	\$ 80,000
(Limit of Insurance)	
Total amount of loss payable:	\$ 140,000

E. Loss Conditions

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

1. Abandonment

There can be no abandonment of any property to us.

2. Appraisal

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

The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

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

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

3. Duties In The Event Of Loss Or Damage

- a. You must see that the following are done in the event of loss or damage to Covered Property:
 - (1) Notify the police if a law may have been broken.
 - (2) Give us prompt notice of the loss or damage. Include a description of the property involved.
 - (3) As soon as possible, give us a description of how, when and where the loss or damage occurred.
 - (4) Take all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim. This will not increase the Limit of Insurance. However, we will not pay for any subsequent loss or damage resulting from a cause of loss that is not a Covered Cause of Loss. Also, if feasible, set the damaged property aside and in the best possible order for examination.
 - (5) At our request, give us complete inventories of the damaged and undamaged property. Include quantities, costs, values and amount of loss claimed.
 - (6) As often as may be reasonably required, permit us to inspect the property proving the loss or damage and examine your books and records.

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

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

(8) Cooperate with us in the investigation or settlement of the claim.

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

4. Loss Payment

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

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

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

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

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

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

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

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

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

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

5. Recovered Property

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

6. Vacancy

a. Description Of Terms

(1) As used in this Vacancy Condition, the term building and the term vacant have the meanings set forth in (1)(a) and (1)(b) below:

(a) When this policy is issued to a tenant, and with respect to that tenant's interest in Covered Property, building means the unit or suite rented or leased to the tenant. Such building is vacant when it does not contain enough business personal property to conduct customary operations.

(b) When this policy is issued to the owner or general lessee of a building, building means the entire building. Such building is vacant unless at least 31% of its total square footage is:

- (i) Rented to a lessee or sub-lessee and used by the lessee or sub-lessee to conduct its customary operations; and/or
- (ii) Used by the building owner to conduct customary operations.

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

b. Vacancy Provisions

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

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

7. Valuation

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

- a. At actual cash value as of the time of loss or damage, except as provided in **b.**, **c.**, **d.** and **e.** below.
- b. If the Limit of Insurance for Building satisfies the Additional Condition, Coinsurance, and the cost to repair or replace the damaged building property is \$2,500 or less, we will pay the cost of building repairs or replacement.
The cost of building repairs or replacement does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property. However, the following property will be valued at the actual cash value even when attached to the building:
 - (1) Awnings or floor coverings;
 - (2) Appliances for refrigerating, ventilating, cooking, dishwashing or laundering; or
 - (3) Outdoor equipment or furniture.
- c. "Stock" you have sold but not delivered at the selling price less discounts and expenses you otherwise would have had.

- d. Glass at the cost of replacement with safety glazing material if required by law.
- e. Tenant's Improvements and Betterments at:
 - (1) Actual cash value of the lost or damaged property if you make repairs promptly.
 - (2) A proportion of your original cost if you do not make repairs promptly. We will determine the proportionate value as follows:
 - (a) Multiply the original cost by the number of days from the loss or damage to the expiration of the lease; and
 - (b) Divide the amount determined in (a) above by the number of days from the installation of improvements to the expiration of the lease.
 If your lease contains a renewal option, the expiration of the renewal option period will replace the expiration of the lease in this procedure.
 - (3) Nothing if others pay for repairs or replacement.

F. Additional Conditions

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

1. Coinsurance

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

- a. We will not pay the full amount of any loss if the value of Covered Property at the time of loss times the Coinsurance percentage shown for it in the Declarations is greater than the Limit of Insurance for the property. Instead, we will determine the most we will pay using the following steps:
 - (1) Multiply the value of Covered Property at the time of loss by the Coinsurance percentage;
 - (2) Divide the Limit of Insurance of the property by the figure determined in step (1);

- (3) Multiply the total amount of loss, before the application of any deductible, by the figure determined in Step (2); and
- (4) Subtract the deductible from the figure determined in Step (3).

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

Example No. 1 (Underinsurance):

When: The value of the property is \$ 250,000
 The Coinsurance percentage for it is 80%
 The Limit of Insurance for it is \$ 100,000
 The Deductible is \$ 250
 The amount of loss is \$ 40,000

Step (1): $\$250,000 \times 80\% = \$200,000$
 (the minimum amount of insurance to meet your Coinsurance requirements)

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

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

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

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

Example No. 2 (Adequate Insurance):

When: The value of the property is: \$ 250,000
 The Coinsurance percentage for it is 80%
 The Limit of Insurance for it is \$ 200,000
 The Deductible is \$ 250
 The amount of loss is \$ 40,000

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

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

Example No. 3:

When: The value of property is:
 Bldg. at Location No.1 \$ 75,000
 Bldg. at Location No. 2 \$ 100,000
 Personal Property at Location No. 2 \$ 75,000
 \$ 250,000

The Coinsurance percentage for it is 90%

The Limit of Insurance for Buildings and Personal Property at Location Nos. 1 and 2 is \$ 180,000
 The Deductible is \$ 1,000

The amount of loss is:
 Bldg. at Location No. 2 \$ 30,000
 Personal Property at Location No. 2. \$ 20,000
 \$ 50,000

Step (1): $\$250,000 \times 90\% = \$225,000$
 (the minimum amount of insurance to meet your Coinsurance requirements and to avoid the penalty shown below)

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

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

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

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

2. Mortgageholders

- a. The term mortgageholder includes trustee.
- b. We will pay for covered loss of or damage to buildings or structures to each mortgageholder shown in the Declarations in their order of precedence, as interests may appear.
- c. The mortgageholder has the right to receive loss payment even if the mortgageholder has started foreclosure or similar action on the building or structure.
- d. If we deny your claim because of your acts or because you have failed to comply with the terms of this Coverage Part, the mortgageholder will still have the right to receive

loss payment if the mortgageholder:

- (1) Pays any premium due under this Coverage Part at our request if you have failed to do so;
- (2) Submits a signed, sworn proof of loss within 60 days after receiving notice from us of your failure to do so; and

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- (3) Has notified us of any change in ownership, occupancy or substantial change in risk known to the mortgageholder.

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

- e. If we pay the mortgageholder for any loss or damage and deny payment to you because of your acts or because you have failed to comply with the terms of this Coverage Part:

- (1) The mortgageholder's rights under the mortgage will be transferred to us to the extent of the amount we pay; and
- (2) The mortgageholder's right to recover the full amount of the mortgageholder's claim will not be impaired.

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

- f. If we cancel this policy, we will give written notice to the mortgage holder at least:

- (1) 10 days before the effective date of cancellation if we cancel for your non-payment of premium; or
- (2) 30 days before the effective date of cancellation if we cancel for any other reason.

- g. If we elect not to renew this policy, we will give written notice to the mortgageholder at least 10 days before the expiration date of this policy.

G. Optional Coverages

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

1. Agreed Value

- a. The Additional Condition, Coinsurance, does not apply to Covered Property to which this Optional Coverage applies. We will pay no more for loss of or damage to that property than the proportion that the Limit of Insurance under this Coverage Part for the property bears to the Agreed Value shown for it in the Declarations.
- b. If the expiration date for this Optional Coverage shown in the Declarations is not extended, the Additional Condition, Coinsurance, is reinstated and this Optional Coverage expires.

- c. The terms of this Optional Coverage apply only to loss or damage that occurs:

- (1) On or after the effective date of this Optional Coverage; and
- (2) Before the Agreed Value expiration date shown in the Declarations or the policy expiration date, whichever occurs first.

2. Inflation Guard

- a. The Limit of Insurance for property to which this Optional Coverage applied will automatically increase by the annual percentage shown in the Declarations.
- b. The amount of increase will be:
 - (1) The Limit of Insurance that applied on the most recent of the policy inception date, the policy anniversary date, or any other policy change amending the Limit of Insurance, times
 - (2) The percentage of annual increase shown in the Declarations, expressed as a decimal (example: 8% is .08), times
 - (3) The number of days since the beginning of the current policy year or the effective date of the most recent policy change amending the Limit of Insurance, divided by 365.

Example:

If:	The applicable Limit of Insurance is	\$ 100,000
	The annual percentage increase is	8%
	The number of days since the beginning of the policy year (or last policy change) is	146
	The amount of increase is \$100,000 x .08 x 146	
	÷ 365 =	\$ 3,200

3. Replacement Cost

- a. Replacement Cost (without deduction for depreciation) replaces Actual Cash Value in the Loss Condition, Valuation, of this Coverage Form.
- b. This Optional Coverage does not apply to:
 - (1) Personal property of others;
 - (2) Contents of a residence;

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- (3) Works of art, antiques or rare articles, including etchings, pictures, statuary, marbles, bronzes, porcelains and bric-a-brac; or
 - (4) "Stock", unless the Including "Stock" option is shown in the Declarations.
- Under the terms of this Replacement Cost Optional Coverage, tenants' improvements and betterments are not considered to be the personal property of others.
- c. You may make a claim for loss or damage covered by this insurance on an actual cash value basis instead of on a replacement cost basis. In the event you elect to have loss or damage settled on an actual cash value basis, you may still make a claim for the additional coverage this Optional Coverage provides if you notify us of your intent to do so within 180 days after the loss or damage.
 - d. We will not pay on a replacement cost basis for any loss or damage:
 - (1) Until the lost or damaged property is actually repaired or replaced; and
 - (2) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.

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

 - (3) If the conditions in **d.(1)** and **d.(2)** above are not met, the value of tenants' improvements and betterments will be determined as a proportion of your original cost, as set forth in the Valuation Condition of this Coverage Form; and
 - (4) We will not pay for loss or damage to tenants' improvements and betterments if others pay for repairs or replacement.
 - e. We will not pay more for loss or damage on a replacement cost basis than the least of **(1)**, **(2)** or **(3)**, subject to **f.** below:
 - (1) The Limit of Insurance applicable to the lost or damaged property;
 - (2) The cost to replace the lost or damaged property with other property:
 - (a) Of comparable material and quality; and
 - (b) Used for the same purpose; or
 - (3) The amount actually spend that is necessary to repair or replace the lost or damaged property.

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

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

4. Extension Of Replacement Cost To Personal Property Of Others

- a. If the Replacement Cost Optional Coverage is shown as applicable in the Declarations, then this Extension may also be shown as applicable. If the Declarations show this Extension as applicable, then Paragraph **3.b.(1)** of the Replacement Cost Optional Coverage is deleted and all other provisions of the Replacement Cost Optional Coverage apply to replacement cost on personal property of others.
- b. With respect to replacement cost on the personal property of others, the following limitation applies:

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

H. Definitions

1. "Fungus" means any type or form of fungus, including mold or mildew, and any mycotoxins, spores, scents or by-products produced or released by fungi.
2. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
3. "Stock" means merchandise held in storage or for sale, raw materials and in-process or finished goods, including supplies used in their packing or shipping.

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COMMERCIAL PROPERTY CONDITIONS

This Coverage Part is subject to the following conditions, the Common Policy Conditions and applicable Loss Conditions and Additional Conditions in Commercial Property Coverage Forms.

A. CONCEALMENT, MISREPRESENTATION OR FRAUD

This Coverage Part is void in any case of fraud by you as it relates to this Coverage Part at any time. It is also void if you or any other insured, at any time, intentionally conceal or misrepresent a material fact concerning:

1. This Coverage Part;
2. The Covered Property;
3. Your interest in the Covered Property; or
4. A claim under this Coverage Part.

B. CONTROL OF PROPERTY

Any act or neglect of any person other than you beyond your direction or control will not affect this insurance.

The breach of any condition of this Coverage Part at any one or more locations will not affect coverage at any location where, at the time of loss or damage, the breach of condition does not exist.

C. INSURANCE UNDER TWO OR MORE COVERAGES

If two or more of this policy's coverages apply to the same loss or damage, we will not pay more than the actual amount of the loss or damage.

D. LEGAL ACTION AGAINST US

No one may bring a legal action against us under this Coverage Part unless:

1. There has been full compliance with all of the terms of this Coverage Part; and
2. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

E. LIBERALIZATION

If we adopt any revision that would broaden the coverage under this Coverage Part without additional premium within 45 days prior to or during the policy period, the broadened coverage will immediately apply to this Coverage Part.

F. NO BENEFIT TO BAILEE

No person or organization, other than you, having custody of Covered Property will benefit from this insurance.

G. OTHER INSURANCE

1. You may have other insurance subject to the same plan, terms, conditions and provisions as the insurance under this Coverage Part. If you do, we will pay our share of the covered loss or damage. Our share is the proportion that the applicable Limit of Insurance under this Coverage Part bears to the Limits of Insurance of all insurance covering on the same basis.
2. If there is other insurance covering the same loss or damage, other than that described in 1. above, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not. But we will not pay more than the applicable Limit of Insurance.

H. POLICY PERIOD, COVERAGE TERRITORY

Under this Coverage Part:

1. We cover loss or damage commencing:
 - a. During the policy period shown in the Declarations; and
 - b. Within the coverage territory.
2. The coverage territory is:
 - a. The United States of America (including its territories and possessions);
 - b. Puerto Rico; and
 - c. Canada.

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I. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment.

That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing:

1. Prior to a loss to your Covered Property or Covered Income.
2. After a loss to your Covered Property or Covered Income only if, at time of loss, that party is one of the following:
 - a. Someone insured by this insurance;
 - b. A business firm:
 - (1) Owned or controlled by you; or
 - (2) That owns or controls you; or
 - c. Your tenant.

This will not restrict your insurance.

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COMMERCIAL PROPERTY
CP 01 40 07 06

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART STANDARD PROPERTY POLICY

- A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
- B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.
However, this exclusion does not apply to loss or damage caused by or resulting from "fungus", wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.
- C. With respect to any loss or damage subject to the exclusion in Paragraph B., such exclusion supersedes any exclusion relating to "pollutants".
- D. The following provisions in this Coverage Part or Policy are hereby amended to remove reference to bacteria:
 - 1. Exclusion of "Fungus", Wet Rot, Dry Rot And Bacteria; and
 - 2. Additional Coverage – Limited Coverage for "Fungus", Wet Rot, Dry Rot And Bacteria, including any endorsement increasing the scope or amount of coverage.
- E. The terms of the exclusion in Paragraph B., or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy.

COMMERCIAL PROPERTY
CP 01 45 05 08

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ALABAMA CHANGES

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART

- A.** When this endorsement is attached to the Standard Property Policy **CP 00 99**, the term Coverage Part in this endorsement is replaced by the term Policy.
- B.** The following exclusion and related provisions are added to Paragraph **B.2. Exclusions** in the Causes Of Loss Forms and to any Coverage Form or policy to which a Causes Of Loss Form is not attached:
1. We will not pay for loss or damage arising out of any act committed:
 - a. By or at the direction of any insured; and
 - b. With the intent to cause a loss.
 2. However, this exclusion will not apply to deny coverage to an innocent coinsured when the loss or damage is otherwise covered under this policy and is proximately related to and in furtherance of an abusive act by an insured who is a family or household member. Such coverage will be provided only if the innocent co-insured:
 - a. Provides evidence of the abuse to us, to demonstrate that the loss is abuse-related; and
 - b. For the act causing the loss, either:
 - (1) Files a complaint under the Protection From Abuse Act against the abuser, and does not voluntarily dismiss the complaint; or
 - (2) Seeks a warrant for the abuser's arrest and cooperates in the prosecution of the abuser.
 3. If we pay a claim pursuant to Paragraph **B.2.**, our payment to the innocent coinsured is limited to that insured's legal interest in the property less any payments we first made to a mortgagee or other party with a legal secured interest in the property. In no event will we pay more than the Limit of Insurance.
- C.** The following is added to the **Transfer Of Rights Of Recovery Against Others To Us** Condition:
- If we pay an innocent coinsured for loss arising out of an act of abuse by another insured, the rights of the innocent coinsured to recover damages from the abuser are transferred to us to the extent of our payment. Following the loss, the innocent co-insured may not waive such rights to recover against the abuser.
- D. Legal Action Against Us**
1. The **Legal Action Against Us** Commercial Property Condition is replaced by the following except as provided in Paragraphs **D.2.** and **D.3.** below:

No one may bring a legal action against us under this Coverage Part unless:

 - a. There has been full compliance with all of the terms of this Coverage Part; and
 - b. The action is brought within the time limitations prescribed by Alabama law.
 2. Paragraph **D.1.** above does not apply to the Legal Action Against Us Condition in Legal Liability Coverage Form **CP 00 40**.
 3. Paragraph **a.** of the **Legal Action Against Us** Condition in the Mortgageholders Errors And Omissions Coverage Form is replaced by the following:
 - a. No one may bring a legal action against us under Coverages **A** and **B** unless:
 - (1) There has been full compliance with all of the terms of Coverages **A** and **B**; and
 - (2) The action is brought within the time limitations prescribed by Alabama law.

CAUSES OF LOSS - BASIC FORM

A. Covered Causes Of Loss

When Basic is shown in the Declarations, Covered Causes of Loss means the following:

1. Fire.
2. Lightning.
3. Explosion, including the explosion of gases or fuel within the furnace of any fired vessel or within the flues or passages through which the gases of combustion pass. This cause of loss does not include loss or damage by:
 - a. Rupture, bursting or operation of pressure relief devices; or
 - b. Rupture or bursting due to expansion or swelling of the contents of any building or structure, caused by or resulting from water.
4. Windstorm or Hail, but not including:
 - a. Frost or cold weather;
 - b. Ice (other than hail), snow or sleet, whether driven by wind or not; or
 - c. Loss or damage to the interior of any building or structure, or the property inside the building or structure, caused by rain, snow, sand or dust, whether driven by wind or not, unless the building or structure first sustains wind or hail damage to its roof or walls through which the rain, snow, sand or dust enters.
5. Smoke causing sudden and accidental loss or damage. This cause of loss does not include smoke from agricultural smudging or industrial operations.
6. Aircraft or Vehicles, meaning only physical contact of an aircraft, a spacecraft, a self-propelled missile, a vehicle or an object thrown up by a vehicle with the described property or with the building or structure containing the described property. This cause of loss includes loss or damage by objects falling from aircraft. We will not pay for loss or damage caused by or resulting from vehicles you own or which are operated in the course of your business.
7. Riot or Civil Commotion, including:
 - a. Acts of striking employees while occupying the described premises; and
 - b. Looting occurring at the time and place of a riot or civil commotion.
8. Vandalism, meaning willful and malicious damage to, or destruction of, the described property. We will not pay for loss or damage caused by or resulting from theft, except for building damage caused by the breaking in or exiting of burglars.
9. Sprinkler Leakage, meaning leakage or discharge of any substance from an Automatic Sprinkler System, including collapse of a tank that is part of the system. If the building or structure containing the Automatic Sprinkler System is Covered Property, we will also pay the cost to:
 - a. Repair or replace damaged parts of the Automatic Sprinkler System if the damage:
 - (1) Results in sprinkler leakage; or
 - (2) Is directly caused by freezing.
 - b. Tear out and replace any part of the building or structure to repair damage to the Automatic Sprinkler System that has resulted in sprinkler leakage. Automatic Sprinkler System means:
 - (1) Any automatic fire protective or extinguishing system, including connected:
 - (a) Sprinklers and discharge nozzles;
 - (b) Ducts, pipes, valves and fittings;
 - (c) Tanks, their component parts and supports; and
 - (d) Pumps and private fire protection mains.
 - (2) When supplied from an automatic fire protective system:
 - (a) Non-automatic fire protective systems; and
 - (b) Hydrants, standpipes and outlets.

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10. Sinkhole Collapse, meaning loss or damage caused by the sudden sinking or collapse of land into underground empty spaces created by the action of water on limestone or dolomite.

This cause of loss does not include:

- a. The cost of filling sinkholes; or
- b. Sinking or collapse of land into man-made underground cavities.

11. Volcanic Action, meaning direct loss or damage resulting from the eruption of a volcano when the loss or damage is caused by:

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

All volcanic eruptions that occur within any 168-hour period will constitute a single occurrence. This cause of loss does not include the cost to remove ash, dust or particulate matter that does not cause direct physical loss or damage to the described property.

B. Exclusions

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

a. Ordinance Or Law

The enforcement of any ordinance or law:

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

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

- (1) An ordinance or law that is enforced even if the property has not been damaged; or
- (2) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property, or removal of its debris, following a physical loss to that property.

b. Earth Movement

- (1) Earthquake, including any earth sinking, rising or shifting related to such event;
- (2) Landslide, including any earth sinking, rising or shifting related to such event;

- (3) Mine subsidence, meaning subsidence of a man-made mine, whether or not mining activity has ceased;
- (4) Earth sinking (other than sinkhole collapse), rising or shifting including soil conditions which cause settling, cracking or other disarrangement of foundations or other parts of realty. Soil conditions include contraction, expansion, freezing, thawing, erosion, improperly compacted soil and the action of water under the ground surface.

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

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

c. Governmental Action

Seizure or destruction of property by order of governmental authority.

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

d. Nuclear Hazard

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

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

e. Utility Services

The failure of power or other utility service supplied to the described premises, however caused, if the failure occurs away from the described premises. Failure includes lack of sufficient capacity and reduction in supply.

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

This exclusion does not apply to the Business Income coverage or to Extra Expense coverage. Instead, the Special Exclusion in Paragraph **B.3.a.(1)** applies to these coverages.

ESTES000844

f. War And Military Action

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

g. Water

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

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

h. "Fungus" Wet Rot, Dry Rot And Bacteria

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

But if "fungus", wet or dry rot or bacteria results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

This exclusion does not apply:

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

Exclusion **B.1.a.** through **B.1.h.** apply whether or not the loss event results in widespread damage or affects a substantial area.

2. We will not pay for loss or damage caused by or resulting from:
 - a. Artificially generated electrical current, including electric arcing, that disturbs electrical devices, appliances or wires.
But if artificially generated electrical current results in fire, we will pay for the loss or damage caused by that fire.
 - b. Rupture or bursting of water pipes (other than Automatic Sprinkler Systems) unless caused by a Covered Cause of Loss.
 - c. Leakage or discharge of water or steam from any part of a system or appliance containing water or steam (other than an Automatic Sprinkler System), unless the leakage or discharge occurs because the system or appliance was damaged by a Covered Cause of Loss. But we will not pay for loss or damage caused by or resulting from continuous or repeated seepage or leakage of water, or the presence or condensation of humidity, moisture or vapor, that occurs over a period of 14 days or more.
 - d. Explosion of steam boilers, steam pipes, steam engines or steam turbines owned or leased by you, or operated under your control.
But if explosion of steam boilers, steam pipes, steam engines or steam turbines results in fire or combustion explosion, we will pay for the loss or damage caused by that fire or combustion explosion.
 - e. Mechanical breakdown, including rupture or bursting caused by centrifugal force.
But if mechanical breakdown results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.
 - f. Neglect of an insured to use all reasonable means to save and preserve property from further damage at and after the time of loss.

3. SPECIAL EXCLUSIONS

The following provisions apply only to the specified Coverage Forms.

ESTES000845

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

We will not pay for:

- (1) Any loss caused directly or indirectly by the failure of power or other utility service supplied to the described premises, however caused, if the failure occurs outside of a covered building. Failure includes lack of sufficient capacity and reduction in supply.
But if the failure of power or other utility service results in a Covered Cause of Loss, we will pay for the loss resulting from that Covered Cause of Loss.
- (2) Any loss caused by or resulting from:
 - (a) Damage or destruction of "finished stock"; or
 - (b) The time required to reproduce "finished stock".

This exclusion does not apply to Extra Expense.
- (3) Any loss caused by or resulting from direct physical loss or damage to radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers.
- (4) Any increase of loss caused by or resulting from:
 - (a) Delay in rebuilding, repairing or replacing the property or resuming "operations", due to interference at the location of the rebuilding, repair or replacement by strikers or other persons; or
 - (b) Suspension, lapse or cancellation of any license, lease or contract. But if the suspension, lapse or cancellation is directly caused by the "suspension" of "operations", we will cover such loss that affects your Business Income during the "period of restoration" and any extension of the "period of restoration" in accordance with the term of the Extended Business Income Additional Coverage and the Extended Period of Indemnity Optional Coverage or any variation of these.
- (5) Any Extra Expense caused by or resulting from suspension, lapse or cancellation of any license, lease or contract beyond the "period of restoration".

(6) Any other consequential loss.

b. Leasehold Interest Coverage Form

- (1) Paragraph **B.1.a.**, Ordinance Or Law; does not apply to insurance under this Coverage Form.
- (2) We will not pay for any loss caused by:
 - (a) Your cancelling the lease;
 - (b) The suspension, lapse or cancellation of any license; or
 - (c) Any other consequential loss.

c. Legal Liability Coverage Form

- (1) The following exclusions do not apply to insurance under this Coverage Form:
 - (a) Paragraph **B.1.a.**, Ordinance Or Law;
 - (b) Paragraph **B.1.c.**, Governmental Action;
 - (c) Paragraph **B.1.d.**, Nuclear Hazard;
 - (d) Paragraph **B.1.e.**, Utility Services; and
 - (e) Paragraph **B.1.f.**, War And Military Action.
- (2) The following additional exclusions apply to insurance under this Coverage Form:
 - (a) **Contractual Liability**
We will not defend any claim or "suit", or pay damages that you are legally liable to pay, solely by reason of your assumption of liability in a contract or agreement. But this exclusion does not apply to a written lease agreement in which you have assumed liability for building damage resulting from an actual or attempted burglary or robbery, provided that:
 - (i) Your assumption of liability was executed prior to the accident; and
 - (ii) The building is Covered Property under this Coverage Form.
 - (b) **Nuclear Hazard**
We will not defend any claim or "suit", or pay any damages, loss, expense or obligation, resulting from nuclear reaction or radiation, or radioactive contamination, however caused.

ESTES000846

C. Additional Coverage - Limited Coverage For "Fungus", Wet Rot, Dry Rot And Bacteria

1. The coverage described in **C.2.** and **C.6.** only applies when the "fungus", wet or dry rot or bacteria is the result of one or more of the following causes that occurs during the policy period and only if all reasonable means were used to save and preserve the property from further damage at the time of and after that occurrence.
 - a. A Covered Cause of Loss other than fire or lightning; or
 - b. Flood, if the Flood Coverage Endorsement applies to the affected premises.
2. We will pay for loss or damage by "fungus", wet or dry rot or bacteria. As used in this Limited Coverage, the term loss or damage means:
 - a. Direct physical loss or damage to Covered Property caused by "fungus", wet or dry rot or bacteria, including the cost of removal of the "fungus", wet or dry rot or bacteria;
 - b. The cost to tear out and replace any part of the building or other property as needed to gain access to the "fungus", wet or dry rot or bacteria; and
 - c. The cost of testing performed after removal, repair, replacement or restoration of the damaged property is completed, provided there is a reason to believe that "fungus", wet or dry rot or bacteria are present.
3. The coverage described under **C.2.** of this Limited Coverage is limited to \$15,000. Regardless of the number of claims, this limit is the most we will pay for the total of all loss or damage arising out of all occurrences of Covered Causes of Loss (other than fire or lightning) and Flood which take place in a 12-month period (starting with the beginning of the present annual policy period). With respect to a particular occurrence of loss which results in "fungus", wet or dry rot or bacteria, we will not pay more than a total of \$15,000 even if the "fungus", wet or dry rot or bacteria continues to be present or active, or recurs, in a later policy period.
4. The coverage provided under this Limited Coverage does not increase the applicable Limit of Insurance on any Covered Property. If a particular occurrence results in loss or damage by "fungus", wet or dry rot or bacteria, and other loss or damage, we will not pay more, for the total of all loss or damage, than the applicable Limit of Insurance on the affected Covered Property.

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

5. The terms of the Limited Coverage do not increase or reduce the coverage provided under Paragraph **b.** of Covered Causes Of Loss **9.**, Sprinkler Leakage.
6. The following, **6.a.** or **6.b.**, applies only if Business Income and/or Extra Expense coverage applies to the described premises and only if the "suspension" of "operations" satisfies all terms and conditions of the applicable Business Income and/or Extra Expense Coverage form.
 - a. If the loss which resulted in "fungus", wet or dry rot or bacteria does not in itself necessitate a "suspension" of "operations", but such "suspension" is necessary due to loss or damage to property caused by "fungus", wet or dry rot or bacteria, then our payment under Business Income and/or Extra Expense is limited to the amount of loss and/or expense sustained in a period of not more than 30 days. The days need not be consecutive.
 - b. If a covered "suspension" of "operations" was caused by loss or damage other than "fungus", wet or dry rot or bacteria but remediation of "fungus", wet or dry rot or bacteria prolongs the "period of restoration", we will pay for loss and/or expense sustained during the delay (regardless of when such a delay occurs during the "period of restoration"), but such coverage is limited to 30 days. The days need not be consecutive.

D. Limitation

We will pay for loss of animals only if they are killed or their destruction is made necessary.

E. Definitions

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

ESTES000847

POLICY NUMBER: ANM19903-6 COMMERCIAL GENERAL LIABILITY
CG DS 01 10 01

COMMERCIAL GENERAL LIABILITY DECLARATIONS

QBE INSURANCE CORPORATION

INTERNATIONAL ASSURANCE

NAMED INSURED: ESTES HEATING & AIR
CONDITIONING, INC.

P.O. BOX 9635 G367
960 DOWNTOWNER BLVD.
MOBILE AL 36691

MAILING ADDRESS: P.O. BOX 5548
MOBILE

AL 36605

POLICY PERIOD: From 11/29/2008 to 11/29/2009

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

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

LIMITS OF INSURANCE

EACH OCCURRENCE LIMIT	\$	1,000,000	
DAMAGE TO PREMISES RENTED TO YOU LIMIT	\$	100,000	Any one premises
MEDICAL EXPENSE LIMIT	\$	5,000	Any one person
PERSONAL & ADVERTISING INJURY LIMIT	\$	1,000,000	Any one person or organization
GENERAL AGGREGATE LIMIT	\$		2,000,000
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT	\$		2,000,000

RETROACTIVE DATE (CG 00 02 ONLY)

THIS INSURANCE DOES NOT APPLY TO "BODILY INJURY", "PROPERTY DAMAGE" OR "PERSONAL AND ADVERTISING INJURY" WHICH OCCURS BEFORE THE RETROACTIVE DATE, IF ANY, SHOWN BELOW.

RETROACTIVE DATE: NONE

(Enter Date or "None" if no Retroactive Date applies)

DESCRIPTION OF BUSINESS

Form Of Business: Individual Partnership Joint Venture Trust Limited Liability Company
 Organization, including a Corporation (but not including a Partnership, Joint Venture or Limited Liability Company) **BUSINESS DESCRIPTION: HVAC CONTRACTOR**

All Premises You Own, Rent Or Occupy:

1 5715 RABBIT CREEK DR. THEODORE AL

CLASSIFICATION AND PREMIUM

CLASSIFICATION	CODE NO	PREMIUM BASIS	RATE		ADVANCE PREMIUM		
			PROD/COMP OPS	PREM/OPS	PROD/COMP OPS	PREM/OPS	
HEATING/COMB/AIR SYS INST...DISTR-NO LPG	95647	1080500	(p)	10.784	16.021	11652	17,311
						\$	
		Add'l To Equal Minimum				\$	29,463
		Total Advance Premium				\$	29,463

ENDORSEMENTS

Endorsements attached to this policy:
See Register QBGL 0140
SY02

** Products-Completed Operations are subject to the General Aggregate Limit

THESE DECLARATIONS, TOGETHER WITH THE COMMON POLICY CONDITIONS AND COVERAGE FORM(S) AND ANY ENDORSEMENT(S), COMPLETE THE ABOVE NUMBERED POLICY.

Countersigned: _____ BY: _____
(Date) (Authorized Representative)

COMMERCIAL GENERAL LIABILITY SCHEDULE OF OPERATIONS

POLICY NO: ANM19903-6

NAMED INSURED: ESTES HEATING & AIR CONDITIONING, INC.

LOCATION OF PREMISES

Location Of All Premises You Own, Rent Or Occupy:

PREMIUM

Classification	Code No.	Premium Basis	Pr/Co	Rate		Advance Premium	
				All Other	Pr/Co	All Other	All Other
ADD'L INSURED					----	500	

Premium Basis Guide

- | | | | |
|----------------------------------|------------------------------|--------------------------------|------------------|
| s - Per \$1000 of Gross Sales | c - Per \$1000 Contract Cost | m - Per 1000 Admissions | o - Other |
| p - Per \$1000 of Payroll | u - Per Unit | x - Per \$1000 of Expenditures | t - See Footnote |
| a - Per 1000 Square Feet of Area | e - Each | | |

** Including Products/Completed Operations

DECLARATIONS (CONTINUED) - FORMS REGISTER

Named Insured	Policy Number
ESTES HEATING & AIR	ANM19903-6
Producer	Effective Date
INTERNATIONAL ASSURANCE	11/29/2008

Line of Business: General Liability

CG 00 01 12 04	CG 00 67 03 05	CG 20 33 07 04	CG 21 47 07 98
CG 21 49 09 99	CG 21 60 09 98	CG 21 67 12 04	CG 21 75 06 08
CG 21 96 03 05	CG 24 26 07 04	QBCG-0100 11 06	QBCG-0101 05 04
QBCG-0251 11 06			

ESTES000850

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

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

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II - Who Is An Insured.

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

SECTION I - COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III - Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages A and B.

- b. This insurance applies to "bodily injury" and "property damage" only if:
- (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";
 - (2) The "bodily injury" or "property damage" occurs during the policy period; and
 - (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II - Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.
- c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II - Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.
- d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II - Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:
- (1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;
 - (2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or
 - (3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

- e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
 - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
 - (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

d. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer's Liability

"Bodily injury" to:

- (1) An "employee" of the insured arising out of and in the course of:
 - (a) Employment by the insured; or
 - (b) Performing duties related to the conduct of the insured's business; or
- (2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

ESTES000852

f. Pollution

- (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":
- (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:
 - (i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;
 - (ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or
 - (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";
 - (b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
 - (c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:
 - (i) Any insured; or
 - (ii) Any person or organization for whom you may be legally responsible; or
 - (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:
 - (i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;
 - (ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or
 - (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".
 - (e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".

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- (2) Any loss, cost or expense arising out of any:
- (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
 - (b) Claim or "suit" by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

g. Aircraft, Auto Or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

- (1) A watercraft while ashore on premises you own or rent;
- (2) A watercraft you do not own that is:
 - (a) Less than 26 feet long; and
 - (b) Not being used to carry persons or property for a charge;
- (3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;
- (4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or

- (5) "Bodily injury" or "property damage" arising out of:
 - (a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged; or
 - (b) the operation of any of the machinery or equipment listed in Paragraph **f.(2)** or **f.(3)** of the definition of "mobile equipment".

h. Mobile Equipment

"Bodily injury" or "property damage" arising out of:

- (1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or
- (2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

i. War

"Bodily injury" or "property damage", however caused, arising, directly or indirectly, out of:

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

j. Damage To Property

"Property damage" to:

- (1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;
- (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody or control of the insured;

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- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III - Limits Of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you. Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a side-track agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

o. Personal And Advertising Injury

"Bodily injury" arising out of "personal and advertising injury".

p. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

Exclusions c. through n. do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section III - Limits Of Insurance.

COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III - Limits Of Insurance; and

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(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C**.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages **A** and **B**.

- b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

2. Exclusions

This insurance does not apply to:

a. **Knowing Violation Of Rights Of Another**

"Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

b. **Material Published With Knowledge Of Falsity**

"Personal and advertising injury" arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity.

c. **Material Published Prior To Policy Period**

"Personal and advertising injury" arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

d. **Criminal Acts**

"Personal and advertising injury" arising out of a criminal act committed by or at the direction of any insured.

e. **Contractual Liability**

"Personal and advertising injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

f. **Breach Of Contract**

"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement".

g. **Quality Or Performance Of Goods - Failure To Conform To Statements**

"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement".

h. **Wrong Description Of Prices**

"Personal and advertising injury" arising out of the wrong description of the price of goods, products or services stated in your "advertisement".

i. **Infringement Of Copyright, Patent, Trademark Or Trade Secret**

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights.

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

j. **Insureds In Media And Internet Type Business**

"Personal and advertising injury" committed by an insured whose business is:

- (1) Advertising, broadcasting, publishing or telecasting;
- (2) Designing or determining content of websites for others; or
- (3) An Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs **14.a.**, **b.** and **c.** of "personal and advertising injury" under the Definitions Section.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

k. **Electronic Chatrooms Or Bulletin Boards**

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

l. **Unauthorized Use Of Another's Name Or Product**

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

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m. Pollution

"Personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

n. Pollution-Related

Any loss, cost or expense arising out of any:

- (1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
- (2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

o. War

"Personal and advertising injury", however caused, arising, directly or indirectly, out of:

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

COVERAGE C MEDICAL PAYMENTS**1. Insuring Agreement**

a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

- (1) On premises you own or rent;
- (2) On ways next to premises you own or rent; or
- (3) Because of your operations; provided that:
 - (1) The accident takes place in the "coverage territory" and during the policy period;
 - (2) The expenses are incurred and reported to us within one year of the date of the accident; and
 - (3) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

- (1) First aid administered at the time of an accident;
- (2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and
- (3) Necessary ambulance, hospital, professional nursing and funeral services.

2. Exclusions

We will not pay expenses for "bodily injury":

- a. **Any Insured**
To any insured, except "volunteer workers".
- b. **Hired Person**
To a person hired to do work for or on behalf of any insured or a tenant of any insured.
- c. **Injury On Normally Occupied Premises**
To a person injured on that part of premises you own or rent that the person normally occupies.
- d. **Workers Compensation And Similar Laws**
To a person, whether or not an "employee" of any insured, if benefits for the "bodily injury" are payable or must be provided under a workers' compensation or disability benefits law or a similar law.
- e. **Athletics Activities**
To a person injured while practicing, instructing or participating in any physical exercises or games, sports, or athletic contents.
- f. **Products-Completed Operations Hazard**
Included within the "products-completed operations hazard".
- g. **Coverage A Exclusions**
Excluded under Coverage A.

SUPPLEMENTARY PAYMENTS - COVERAGES A AND B

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:
 - a. All expenses we incur.
 - b. Up to \$250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.

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- c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
- d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to \$250 a day because of time off from work.
- e. All costs taxed against the insured in the "suit".
- f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
- g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:
 - a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";
 - b. This insurance applies to such liability assumed by the insured;
 - c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";
 - d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;
 - e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and
 - f. The indemnitee:
 - (1) Agrees in writing to:
 - (a) Cooperate with us in the investigation, settlement or defense of the "suit";

- (b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";
 - (c) Notify any other insurer whose coverage is available to the indemnitee; and
 - (d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and
- (2) Provides us with written authorization to:
 - (a) Obtain records and other information related to the "suit"; and
 - (b) Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph 2.b.(2) of Section I - Coverage A - Bodily Injury And Property Damage Liability, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when:

- a. We have used up the applicable limit of insurance in the payment of judgments or settlements; or
- b. The conditions set forth above, or the terms of the agreement described in Paragraph f. above, are no longer met.

SECTION II - WHO IS AN INSURED

1. If you are designated in the Declarations as:
 - a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
 - b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
 - c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

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- d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
 - e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.
2. Each of the following is also an insured:
- a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:
 - (1) "Bodily injury" or "personal and advertising injury":
 - (a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), or to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;
 - (b) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph (1)(a) above;
 - (c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs (1)(a) or (b) above; or
 - (d) Arising out of his or her providing or failing to provide professional health care services.
 - (2) "Property damage" to property:
 - (a) Owned, occupied or used by,
 - (b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by you, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).
 - b. Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.
 - c. Any person or organization having proper temporary custody of your property if you die, but only:
 - (1) With respect to liability arising out of the maintenance or use of that property; and
 - (2) Until your legal representative has been appointed.
 - d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.
3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:
- a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;
 - b. Coverage **A** does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and
 - c. Coverage **B** does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.
- No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

SECTION III - LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
- a. Insureds;
 - b. Claims made or "suits" brought; or
 - c. Persons or organizations making claims or bringing "suits".

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2. The General Aggregate Limit is the most we will pay for the sum of:
 - a. Medical expenses under Coverage C;
 - b. Damages under Coverage A, except damages because of "bodily injury" or "property damage" included in the "product-completed operations hazard"; and
 - c. Damages under Coverage B.
3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard".
4. Subject to 2. above, the Personal and Advertising Injury Limit is the most we will pay under Coverage B for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.
5. Subject to 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:
 - a. Damages under Coverage A; and
 - b. Medical expenses under Coverage C because of all "bodily injury" and "property damage" arising out of any one "occurrence".
6. Subject to 5. above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage A for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.
7. Subject to 5. above, the Medical Expense Limit is the most we will pay under Coverage C for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS

1. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

- a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
 - (1) How, when and where the "occurrence" or offense took place;
 - (2) The names and addresses of any injured persons and witnesses; and
 - (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
- b. If a claim is made or "suit" is brought against any insured, you must:
 - (1) Immediately record the specifics of the claim or "suit" and the date received; and
 - (2) Notify us as soon as practicable. You must see to it that we receive written notice of the claim or "suit" as soon as practicable.
- c. You and any other involved insured must:
 - (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
 - (2) Authorize us to obtain records and other information;
 - (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
 - (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.
- d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or

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- b.** To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in **c.** below.

b. Excess Insurance

This insurance is excess over:

- (1) Any of the other insurance, whether primary, excess, contingent or on any other basis:
 - (a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
 - (b) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;
 - (c) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or
 - (d) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion **g.** of Section I - Coverage **A** - Bodily Injury And Property Damage Liability.
- (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.

When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

- (1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
- (2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

5. Premium Audit

- a.** We will compute all premiums for this Coverage Part in accordance with our rules and rates.
- b.** Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.
- c.** The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

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6. Representations

By accepting this policy, you agree:

- a. The statements in the Declarations are accurate and complete;
- b. Those statements are based upon representations you made to us; and
- c. We have issued this policy in reliance upon your representations.

7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or "suit" is brought.

8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

9. When We Do Not Renew

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

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

SECTION V - DEFINITIONS

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:
 - a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
 - b. Regarding web-sites, only that part of a website that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.
2. "Auto" means:
 - a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or
 - b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. However, "auto" does not include "mobile equipment".
3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
4. "Coverage territory" means:
 - a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
 - b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in a. above; or
 - c. All other parts of the world if the injury or damage arises out of:
 - (1) Goods or products made or sold by you in the territory described in a. above;
 - (2) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business; or
 - (3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in a. above or in a settlement we agree to.
5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.
7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.
8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:
 - a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
 - b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by:

 - a. The repair, replacement, adjustment or removal of "your product" or "your work"; or

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- b. Your fulfilling the terms of the contract or agreement.
9. "Insured contract" means:
- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
 - b. A sidetrack agreement;
 - c. An easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
 - d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
 - e. An elevator maintenance agreement;
 - f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement. Paragraph f. does not include that part of any contract or agreement:
 - (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, roadbeds, tunnel, underpass or crossing;
 - (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; or
 - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
 - (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.
10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".
11. "Loading or unloading" means the handling of property:
- a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";
 - b. While it is in or on an aircraft, watercraft or "auto"; or
 - c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;
- but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".
12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:
- a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
 - b. Vehicles maintained for use solely on or next to premises you own or rent;
 - c. Vehicles that travel on crawler treads;
 - d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
 - (1) Power cranes, shovels, loaders, diggers or drills; or
 - (2) Road construction or resurfacing equipment such as graders, scrapers or rollers;
 - e. Vehicles not described in a., b., c. or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:
 - (1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or
 - (2) Cherry pickers and similar devices used to raise or lower workers;
 - f. Vehicles not described in a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo. However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

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- (1) Equipment designed primarily for:
 - (a) Snow removal;
 - (b) Road maintenance, but not construction or resurfacing; or
 - (c) Street cleaning;
- (2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and
- (3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

- 13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
- 14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:
 - a. False arrest, detention or imprisonment;
 - b. Malicious prosecution;
 - c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
 - d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
 - e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
 - f. The use of another's advertising idea in your "advertisement"; or
 - g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".
- 15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

- 16. "Products-completed operations hazard":
 - a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
 - (1) Products that are still in your physical possession; or
 - (2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
 - (a) When all of the work called for in your contract has been completed.
 - (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
 - (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.
 - b. Does not include "bodily injury" or "property damage" arising out of:
 - (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;
 - (2) The existence of tools, uninstalled equipment or abandoned or unused materials; or
 - (3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.
- 17. "Property damage" means:
 - a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

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- b. Loss of use of tangible property that is not physically injured. All such loss of us shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:
- a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
 - b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.
19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.
20. "Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

21. "Your product":

a. Means:

- (1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
 - (a) You;
 - (b) Others trading under your name; or
 - (c) A person or organization whose business or assets you have acquired; and
- (2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and
- (2) The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

22. "Your work":

a. Means:

- (1) Work or operations performed by you or on your behalf; and
- (2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and
- (2) The providing of or failure to provide warnings or instructions.

COMMERCIAL GENERAL LIABILITY
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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – VIOLATION OF STATUTES THAT GOVERN E-MAILS, FAX, PHONE CALLS OR OTHER METHODS OF SENDING MATERIAL OR INFORMATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A. The following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability:

2. Exclusions

This insurance does not apply to:

**DISTRIBUTION OF MATERIAL IN
VIOLATION OF STATUTES**

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- a. The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or
- b. The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
- c. Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

- B. The following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability:

2. Exclusions

This insurance does not apply to:

**DISTRIBUTION OF MATERIAL IN
VIOLATION OF STATUTES**

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- a. The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or
- b. The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
- c. Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A. Section II - Who Is An Insured** is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:
1. Your acts or omissions; or
 2. The acts or omissions of those acting on your behalf;
- in the performance of your ongoing operations for the additional insured.
- A person's or organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed.
- B.** With respect to the insurance afforded to these additional insureds, the following additional exclusion applies:
- This insurance does not apply to:
1. "Bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of, or the failure to render, any professional architectural, engineering or surveying services, including:
 - a. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
 - b. Supervisory, inspection, architectural or engineering activities.
 2. "Bodily injury" or "property damage" occurring after:
 - a. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
 - b. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EMPLOYMENT-RELATED PRACTICES EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. The following exclusion is added to paragraph 2., Exclusions of Section I - Coverage A - Bodily Injury And Property damage Liability:

This insurance does not apply to:

"Bodily injury" to:

- (1) A person arising out of any:
 - (a) Refusal to employ that person;
 - (b) Termination of that person's employment; or
 - (c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed at that person; or
- (2) The spouse, child, parent, brother or sister of that person as a consequence of "bodily injury" to that person at whom any of the employment-related practices described in paragraphs (a), (b), or (c) above is directed.

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

B. The following exclusion is added to paragraph 2., Exclusions of Section I - Coverage B - Personal And Advertising Injury Liability:

This insurance does not apply to:

"Personal and advertising injury" to:

- (1) A person arising out of any:
 - (a) Refusal to employ that person;
 - (b) Termination of that person's employment; or
 - (c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed at that person; or
- (2) The spouse, child, parent, brother or sister of that person as a consequence of "personal and advertising injury" to that person at whom any of the employment-related practices described in paragraphs (a), (b), or (c) above is directed.

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

TOTAL POLLUTION EXCLUSION ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Exclusion **f.** under Paragraph **2.**, **Exclusions of Section I - Coverage A - Bodily Injury And Property Damage Liability** is replaced by the following:
This insurance does not apply to:

f. Pollution

- (1) "Bodily injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

- (2) Any loss, cost or expense arising out of any:
- (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants"; or
 - (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION - YEAR 2000 COMPUTER-RELATED AND OTHER ELECTRONIC PROBLEMS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2., Exclusions of Section I - Coverage A - Bodily Injury And Property Damage Liability and Paragraph 2, Exclusions of Section I - Coverage B - Personal And Advertising Injury Liability:

2. Exclusions

This insurance does not apply to "bodily injury", "property damage", "personal injury" or "advertising injury" (or "personal and advertising injury" if defined as such in your policy) arising directly or indirectly out of:

- a.** Any actual or alleged failure, malfunction or inadequacy of:
 - (1)** Any of the following, whether belonging to any insured or to others:
 - (a)** Computer hardware, including microprocessors;
 - (b)** Computer application software;
 - (c)** Computer operating systems and related software;
 - (d)** Computer networks;
 - (e)** Microprocessors (computer chips) not part of any computer system; or
 - (f)** Any other computerized or electronic equipment or components; or
 - (2)** Any other products, and any services, data or functions that directly or indirectly use or rely upon, in any manner, any of the items listed in Paragraph **2.a.(1)** of this endorsement due to the inability to correctly recognize, process, distinguish, interpret or accept the year 2000 and beyond.
- b.** Any advice, consultation, design, evaluation, inspection, installation, maintenance, repair, replacement, or supervision provided or done by you or for you to determine, rectify or test for, any potential or actual problems described in Paragraph **2.a.** of this endorsement.

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

FUNGI OR BACTERIA EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A.** The following exclusion is added to Paragraph 2. **Exclusions of Section I - Coverage A - Bodily Injury And Property Damage Liability:**
- 2. Exclusions**
This insurance does not apply to:
Fungi Or Bacteria
- a.** "Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.
 - b.** Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.
- This exclusion does not apply to any "fungi" or bacteria that are, are on, or are contained in, a good or product intended for bodily consumption.
- B.** The following exclusion is added to Paragraph 2. **Exclusions of Section I - Coverage B - Personal And Advertising Injury Liability:**
- 2. Exclusions**
This insurance does not apply to:
Fungi Or Bacteria
- a.** "Personal and advertising injury" which would not have taken place, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury.
 - b.** Any loss, cost or expense arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.
- C.** The following definition is added to the **Definitions** Section:
"Fungi" means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or byproducts produced or released by fungi.

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF CERTIFIED ACTS OF TERRORISM AND EXCLUSION OF OTHER ACTS OF TERRORISM COMMITTED OUTSIDE THE UNITED STATES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART
UNDERGROUND STORAGE TANK POLICY

A. The following exclusion is added:

This insurance does not apply to:

TERRORISM

"Any injury or damage" arising, directly or indirectly, out of a "certified act of terrorism", or out of an "other act of terrorism" that is committed outside of the United States (including its territories and possessions and Puerto Rico), but within the "coverage territory". However, with respect to an "other act of terrorism", this exclusion applies only when one or more of the following are attributed to such act:

1. The total of insured damage to all types of property exceeds \$25,000,000 (valued in US dollars). In determining whether the \$25,000,000 threshold is exceeded, we will include all insured damage sustained by property of all persons and entities affected by the terrorism and business interruption losses sustained by owners or occupants of the damaged property. For the purpose of this provision, insured damage means damage that is covered by any insurance plus damage that would be covered by any insurance but for the application of any terrorism exclusions; or
2. Fifty or more persons sustain death or serious physical injury. For the purposes of this provision, serious physical injury means:
 - a. Physical injury that involves a substantial risk of death; or

b. Protracted and obvious physical disfigurement; or

c. Protracted loss of or impairment of the function of a bodily member or organ; or

3. The terrorism involves the use, release or escape of nuclear materials, or directly or indirectly results in nuclear reaction or radiation or radioactive contamination; or
4. The terrorism is carried out by means of the dispersal or application of pathogenic or poisonous biological or chemical materials; or
5. Pathogenic or poisonous biological or chemical materials are released, and it appears that one purpose of the terrorism was to release such materials.

With respect to this exclusion, Paragraphs 1. and 2. describe the thresholds used to measure the magnitude of an incident of an "other act of terrorism" and the circumstances in which the threshold will apply for the purpose of determining whether this exclusion will apply to that incident.

B. The following definitions are added:

1. For the purposes of this endorsement, "any injury or damage" means any injury or damage covered under any Coverage Part to which this endorsement is applicable, and includes but is not limited to "bodily injury", "property damage", "personal and advertising injury", "injury" or "environmental damage" as may be defined in any applicable Coverage Part.

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2. "Certified act of terrorism" means an act that is certified by the Secretary of the Treasury, in concurrence with the Secretary of State and the Attorney General of the United States, to be an act of terrorism pursuant to the federal Terrorism Risk Insurance Act. The criteria contained in the Terrorism Risk Insurance Act for a "certified act of terrorism" include the following:
 - a. The act resulted in insured losses in excess of \$5 million in the aggregate, attributable to all types of insurance subject to the Terrorism Risk Insurance Act;
 - b. The act resulted in damage:
 - (1) Within the United States (including its territories and possessions and Puerto Rico); or
 - (2) Outside of the United States in the case of:
 - (a) An air carrier (as defined in Section 40102 of title 49, United States Code) or United States flag vessel (or a vessel based principally in the United States, on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), regardless of where the loss occurs; or
 - (b) The premises of any United States mission; and
 - c. The act is a violent act or an act that is dangerous to human life, property or infrastructure and is committed by an individual or individuals as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.
3. "Other act of terrorism" means a violent act or an act that is dangerous to human life, property or infrastructure that is committed by an individual or individuals and that appears to be part of an effort to coerce a civilian population or to influence the policy or affect the conduct of any government by coercion, and the act is not a "certified act of terrorism".

Multiple incidents of an "other act of terrorism" which occur within a seventy-two hour period and appear to be carried out in concert or to have a related purpose or common leadership shall be considered to be one incident.
- C. In the event of any incident of a "certified act of terrorism" or an "other act of terrorism" that is not subject to this exclusion, coverage does not apply to any loss or damage that is otherwise excluded under this Coverage Part.

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SILICA OR SILICA-RELATED DUST EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. The following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability:

2. Exclusions

This insurance does not apply to:

Silica Or Silica-Related Dust

- a. "Bodily injury" arising, in whole or in part, out of the actual, alleged, threatened or suspected inhalation of, or ingestion of, "silica" or "silica-related dust".
- b. "Property damage" arising, in whole or in part, out of the actual, alleged, threatened or suspected contact with, exposure to, existence of, or presence of, "silica" or "silica-related dust".
- c. Any loss, cost or expense arising, in whole or in part, out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to or assessing the effects of, "silica" or "silica-related dust", by any insured or by any other person or entity.

B. The following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability:

2. Exclusions

This insurance does not apply to:

Silica Or Silica-Related Dust

- a. "Personal and advertising injury" arising, in whole or in part, out of the actual, alleged, threatened or suspected inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, "silica" or "silica-related dust".
- b. Any loss, cost or expense arising, in whole or in part, out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to or assessing the effects of, "silica" or "silica-related dust", by any insured or by any other person or entity.

C. The following definitions are added to the Definitions Section:

1. "Silica" means silicon dioxide (occurring in crystalline, amorphous and impure forms), silica particles, silica dust or silica compounds.
2. "Silica-related dust" means a mixture or combination of silica and other dust or particles.

ESTES000874

COMMERCIAL GENERAL LIABILITY
CG 24 26 07 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

AMENDMENT OF INSURED CONTRACT DEFINITION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Paragraph 9. of the **Definitions** Section is replaced by the following:

9. "Insured contract" means:

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
- b. A sidetrack agreement;
- c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, provided the "bodily injury" or "property damage" is caused, in whole or in part, by you or by those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
 - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

ESTES000875

COMMERCIAL GENERAL LIABILITY
QBCG-0100 (11-06)



THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

EXCLUSION - ASBESTOS LIABILITY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART

A. The following exclusion is added to the Commercial General Liability Coverage Part under Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury and Property Damage Liability

The following exclusion is added to the Products/Completed Operations Liability Coverage Form and the Owners and Contractors Protective Liability Coverage Part under Paragraph 2., **Exclusions of Section I – Bodily Injury and Property Damage Liability**

The following exclusion is added to the Railroad Protective Liability Coverage Part under Paragraph 2. **Exclusions of Section I – Coverage A – Bodily Injury and Property Damage Liability** and Paragraph 2., **Exclusions of Section I – Coverage B – Physical Damage to Property**

2. Exclusions

This insurance does not apply to:

- a. "Bodily injury" arising, in whole or in part, out of the actual, alleged, threatened or suspected inhalation of, or ingestion of, asbestos fibers or dust.
- b. "Property damage" arising, in whole or in part, out of the actual, alleged, threatened or suspected contact with, exposure to, existence of, or presence of, asbestos in any form.
- c. Any loss, cost or expense arising, in whole or in part, out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to or assessing the effects of asbestos in any form, by any insured or by any other person or entity.

B. The following exclusion is added to the Commercial General Liability Coverage Part under Paragraph 2., Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability:

2. Exclusions

This insurance does not apply to:

- a. "Personal and advertising injury" arising, in whole or in part, out of the actual, alleged, threatened or suspected inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, asbestos fibers or dust.
- b. Any loss, cost or expense arising, in whole or in part, out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to or assessing the effects of, asbestos in any form, by any insured or by any other person or entity.

All other terms and conditions remain unchanged.

ESTES000876

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POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
QBCG-0101 (05-04)



THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION - LEAD LIABILITY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE FORM
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE FORM
RAILROAD PROTECTIVE LIABILITY COVERAGE FORM

The following exclusion is added to the Commercial General Liability Coverage Form under Paragraph 2., **Exclusions of Section I – Coverage A – Bodily Injury and Property Damage Liability** and Paragraph 2., **Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability** and Paragraph 2., **Exclusions of Section I – Coverage C – Medical Payments**

The following exclusion is added to the Products/Completed Operations Liability Coverage Form and the Owners and Contractors Protective Liability Coverage Form under Paragraph 2., **Exclusions of Section I – Bodily Injury and Property Damage Liability**

The following exclusion is added to the Railroad Protective Liability Coverage Form under Paragraph 2. **Exclusions of Section I – Coverage A – Bodily Injury and Property Damage Liability** and Paragraph 2., **Exclusions of Section I – Coverage B – Physical Damage to Property**

This insurance does not apply to any of the following:

- (1) "Bodily Injury", "property damage", "personal and advertising injury" or any other loss, cost or expense arising out of the presence, ingestion, inhalation,

absorption, manufacture of, use of, sale of, installation of, removal of, distribution of or exposure to lead in any form or any product containing lead;

- (2) Any obligation of the Insured to indemnify any party because of damages arising out of such "bodily injury", "property damage", "personal and advertising injury" or any other loss, cost or expense arising out of the presence, ingestion, inhalation, absorption, manufacture of, use of, sale of, installation of, removal of, distribution of or exposure to lead in any form or any product containing lead; or
- (3) Any obligation to defend any suit or claim against the Insured alleging "bodily injury", "property damage", "personal and advertising injury" or any other loss, cost or expense arising out of the presence, ingestion, inhalation, absorption, manufacture of, use of, sale of, installation of, removal of, distribution of or exposure to lead in any form or any product containing lead.

All other terms and conditions remain unchanged.

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – LIQUOR LIABILITY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

- A. The last paragraph of Exclusion c. **Liquor Liability** of **SECTION 1 – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions** is deleted and replaced by the following:

2. Exclusions

c. Liquor Liability

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages, including all beers, ales, porter, wines and other similar malt or fermented beverages, whether or not defined by statute as nonalcoholic and nonintoxicating beverages.

All other terms and conditions remain unchanged.

COMMERCIAL INLAND MARINE DECLARATIONS

POLICY NO. ANM19903-6

	INTERNATIONAL ASSURANCE P.O. BOX 9635 G367 960 DOWNTOWNER BLVD. MOBILE AL 36691
--	--

NAMED INSURED: ESTES HEATING & AIR
CONDITIONING, INC.

MAILING ADDRESS: P.O. BOX 5548
MOBILE AL 36605

POLICY PERIOD: From 11/29/2008 To 11/29/2009 at
12:01 A.M. standard time at your mailing address shown above.

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS

Business HVAC CONTRACTOR

Premium For This Coverage Part: 2,064

Forms applicable to the Commercial Inland Marine Coverage Part:

CM 00 01 09 00	CM 01 44 05 08	IM 1271 Ed 1.0	IM 1668 Ed 1.0
IM 7001 Ed 1.0	IM 7006 Ed 1.0	IM 7100 Ed 1.0	IM 7105 Ed 1.0
IM 7200 Ed 1.0	IM 7205 Ed 1.0		

COUNTERSIGNED _____ BY: _____
(Date) (Authorized Representative)

COMMERCIAL INLAND MARINE CONDITIONS

The following conditions apply in addition to the Common Policy Conditions and applicable Additional Conditions in Commercial Inland Marine Coverage Forms:

LOSS CONDITIONS

A. Abandonment

There can be no abandonment of any property to us.

B. Appraisal

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

1. Pay its chosen appraiser; and
2. Bear the other expenses of the appraisal and umpire equally.

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

C. Duties In The Event Of Loss

You must see that the following are done in the event of loss or damage to Covered Property:

1. Notify the police if a law may have been broken.
2. Give us prompt notice of the loss or damage. Include a description of the property involved.
3. As soon as possible, give us a description of how, when and where the loss or damage occurred.
4. Take all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim. This will not increase the Limit of Insurance. However, we will not pay for any subsequent loss or damage resulting from a cause of loss that is not a Covered Cause of Loss. Also, if feasible, set the damaged property aside and in the best possible order for examination.
5. You will not, except at your own cost, voluntarily make a payment, assume any obligation, or incur any expense without our consent.

6. As often as may be reasonably required, permit us to inspect the property proving the loss or damage and examine your books and records. Also permit us to take samples of damaged and undamaged property for inspection, testing and analysis, and permit us to make copies from your books and records.

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

8. Send us a signed, sworn proof of loss containing the information we request to settle the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.

9. Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or suit.

10. Cooperate with us in the investigation or settlement of the claim.

D. Insurance Under Two Or More Coverages

If two or more of this policy's coverages apply to the same loss or damage, we will not pay more than the actual amount of the loss or damage.

E. Loss Payment

1. We will give notice of our intentions within 30 days after we receive the sworn proof of loss.
2. We will not pay you more than your financial interest in the Covered Property.
3. We may adjust losses with the owners of lost or damaged property if other than you. If we pay the owners, such payments will satisfy your claim against us for the owners' property. We will not pay the owners more than their financial interest in the Covered Property.
4. We may elect to defend you against suits arising from claims of owners of property. We will do this at our expense.

ESTES000880

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

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

6. We will not be liable for any part of a loss that has been paid or made good by others.

F. Other Insurance

1. You may have other insurance subject to the same plan, terms, conditions and provisions as the insurance under this Coverage Part. If you do, we will pay our share of the covered loss or damage. Our share is the proportion that the applicable Limit of Insurance under this Coverage Part bears to the Limits of Insurance of all insurance covering on the same basis.
2. If there is other insurance covering the same loss or damage, other than that described in 1. above, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not. But we will not pay more than the applicable Limit of Insurance.

G. Pair, Sets Or Parts

1. Pair Or Set

In case of loss or damage to any part of a pair or set we may:

- a. Repair or replace any part to restore the pair or set to its value before the loss or damage; or
- b. Pay the difference between the value of the pair or set before and after the loss or damage.

2. Parts

In case of loss or damage to any part of Covered Property consisting of several parts when complete, we will only pay for the value of the lost or damaged part.

H. Recovered Property

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

I. Reinstatement Of Limit After Loss

The Limit Of Insurance will not be reduced by the payment of any claim, except for total loss or damage of a scheduled item, in which event we will refund the unearned premium on that item.

J. Transfer Of Rights Of Recovery Against Others To Us

If any person or organization to or from whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing:

1. Prior to a loss to your Covered Property.
2. After a loss to your Covered Property only if, at time of loss, that party is one of the following:
 - a. Someone insured by this insurance; or
 - b. A business firm:
 - (1) Owned or controlled by you; or
 - (2) That owns or controls you.

This will not restrict your insurance.

GENERAL CONDITIONS

A. Concealment, Misrepresentation Or Fraud

This Coverage Part is void in any case of fraud, intentional concealment or misrepresentation of a material fact, by you or any other insured, at any time, concerning:

1. This Coverage Part;
2. The Covered Property;
3. Your interest in the Covered Property; or
4. A claim under this Coverage Part.

B. Control Of Property

Any act or neglect of any person other than you beyond your direction or control will not affect this insurance.

The breach of any condition of this Coverage Part at any one or more locations will not affect coverage at any location where, at the time of loss or damage, the breach of condition does not exist.

C. Legal Action Against Us

No one may bring a legal action against us under this Coverage Part unless:

1. There has been full compliance with all the terms of this Coverage Part; and
2. The action is brought within 2 years after you first have knowledge of the direct loss or damage.

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D. No Benefit To Bailee

No person or organization, other than you, having custody of Covered Property will benefit from this insurance.

E. Policy Period

We cover loss or damage commencing:

1. During the policy period shown in the Declarations; and
2. Within the coverage territory.

F. Valuation

The value of property will be the least of the following amounts:

1. The actual cash value of that property;

2. The cost of reasonably restoring that property to its condition immediately before loss or damage; or
3. The cost of replacing that property with substantially identical property.

In the event of loss or damage, the value of property will be determined as of the time of loss or damage.

COMMERCIAL INLAND MARINE
CM 01 44 05 08

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ALABAMA CHANGES

This endorsement modifies insurance provided under the following:

COMMERCIAL INLAND MARINE COVERAGE PART

A. The following exclusion is added:

1. We will not pay for loss or damage arising out of any act committed:
 - a. By or at the direction of any insured; and
 - b. With the intent to cause a loss.
2. However, this exclusion will not apply to deny coverage to an innocent coinsured when the loss or damage is otherwise covered under this policy and is proximately related to and in furtherance of an abusive act by an insured who is a family or household member. Such coverage will be provided only if the innocent coinsured:
 - a. Provides evidence of the abuse to us, to demonstrate that the loss is abuse-related; and
 - b. For the act causing the loss, either:
 - (1) Files a complaint under the Protection From Abuse Act against the abuser, and does not voluntarily dismiss the complaint; or
 - (2) Seeks a warrant for the abuser's arrest and cooperates in the prosecution of the abuser.
3. If we pay a claim pursuant to Paragraph **A.2.**, our payment to the innocent coinsured is limited to that insured's legal interest in the property less any payments we first made to a mortgagee or other party with a legal secured interest in the property. In no event will we pay more than the Limit of Insurance.

B. The following is added to the **Transfer Of Rights Of Recovery Against Others To Us Loss Condition** in the Commercial Inland Marine Conditions:

If we pay an innocent coinsured for loss arising out of an act of abuse by another insured, the rights of the innocent coinsured to recover damages from the abuser are transferred to us to the extent of our payment. Following the loss, the innocent coinsured may not waive such rights to recover against the abuser.

C. The **Legal Action Against Us General Condition** in the Commercial Inland Marine Conditions is replaced by the following:

Legal Action Against Us

No one may bring a legal action against us under this Coverage Part unless:

1. There has been full compliance with all of the terms of this Coverage Part; and
2. The action is brought within the time limitations prescribed by Alabama law.

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IM-1271 Ed 1.0
Page 1 of 1

LOSS PAYABLE SCHEDULE

(The entries required to complete this endorsement will be shown below, or on the "declarations".)

Loss Payable Provision (check one)

- Loss Payable
- Lender's Loss Payable
- Contract of Sale

LOSS PAYABLE SCHEDULE

Loc. No.	Described Premises	Covered Property	Name and Address of Loss Payee
		EDP	US BANCORP MANIFEST SVC 1450 CHANNEL PKY MARSHALL, MN 56258

IM-1271 Ed 1.0

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AAIS
IM-1668 Ed 1.0
Page 1 of 1

This endorsement changes the
Inland Marine Coverage
-- PLEASE READ THIS CAREFULLY --

LOSS PAYABLE ENDORSEMENT

In addition to the policy "terms" contained within the Inland Marine Coverage(s), the following conditions apply to described property as indicated on the "declarations".

LOSS PAYABLE

Any loss shall be adjusted with "you" and shall be payable to "you" and the loss payee described on the "declarations" as "your" and their interests appear.

LENDER'S LOSS PAYABLE

Any loss shall be payable to "you" and the loss payee described on the "declarations" as interests appear. If more than one loss payee is named, they shall be paid in order of precedence.

The insurance for the loss payee continues in effect even when "your" insurance may be void because of "your" acts, neglect, or failure to comply with the coverage "terms". The insurance for the loss payee does not continue in effect if the loss payee is aware of changes in ownership or substantial increase in risk and does not notify "us".

If "we" cancel this policy, "we" notify the loss payee at least ten days before the effective date of cancellation if "we" cancel for "your" nonpayment of premium, or 30 days before the effective date of cancellation if "we" cancel for any other reason.

"We" may request payment of the premium from the loss payee, if "you" fail to pay the premium.

If "we" pay the loss payee for a loss where "your" insurance may be void, the loss payee's right to collect that portion of the debt from "you" then belongs to "us". This does not affect the loss payee's right to collect the remainder of the debt from "you". As an alternative, "we" may pay the loss payee the remaining principal and accrued interest in return for a full assignment of the loss payee's interest and any instruments given as security for the debt.

If "we" choose not to renew this policy, "we" give written notice to the loss payee at least ten days before the expiration date of this policy.

CONTRACT OF SALE

Any loss shall be adjusted with "you" and shall be payable to "you" and the loss payee described on the "declarations" as "your" and their interests appear.

The loss payee described above is a person or organization "you" have entered into a contract with for the sale of covered property.

When covered property is the subject of a contract of sale, the word "you" also means

IM-1668 Ed 1.0

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CONTRACTORS' EQUIPMENT COVERAGE

AGREEMENT

In return for "your" payment of the required premium, "we" provide the coverage described herein subject to all the "terms" of the Contractors' Equipment Coverage. This coverage is also subject to the "declarations" and additional policy conditions relating to assignment or transfer of rights or duties, cancellation, changes or modifications, inspections, and examination of books and records.

Endorsements and schedules may also apply. They are identified on the "declarations".

Refer to Definitions for words and phrases that have special meaning. These words and phrases are shown in quotation marks or bold type.

DEFINITIONS

1. The words "you" and "your" mean the persons or organizations named as the insured on the "declarations".
2. The words "we", "us", and "our" mean the company providing this coverage.
3. "Declarations" means all pages labeled Declarations, Supplemental Declarations, or Schedules, which pertain to this coverage.
4. "Limit" means the amount of coverage that applies.
5. "Pollutant" means:
 - a. any solid, liquid, gaseous, or thermal irritant or contaminant;

- b. electromagnetic (visible or invisible) or sound emission; or

- c. waste, including materials to be disposed of as well as recycled, reclaimed, or reconditioned.

6. "Sinkhole collapse" means the sudden settlement or collapse of earth supporting the covered property into subterranean voids created by the action of water on a limestone or similar rock formation. It does not include the value of the land or the cost of filling sinkholes.

7. "Specified perils" means aircraft; civil commotion; explosion; falling objects; fire; hail; leakage from fire extinguishing equipment; lightning; riot; "sinkhole collapse"; smoke; sonic boom; vandalism; vehicles; "volcanic action"; water damage; weight of ice, snow, or sleet; and windstorm.

Falling objects does not include loss to personal property in the open or to the interior of buildings or structures or to personal property inside buildings or structures unless the exterior of the roof or walls are first damaged by a falling object.

Water damage means the sudden or accidental discharge or leakage of water or steam as a direct result of breaking or cracking of a part of the system or appliance containing the water or steam.

8. "Terms" means all provisions, limitations, exclusions, conditions, and definitions that apply.
9. "Volcanic action" means airborne volcanic blast or airborne shock waves; ash; dust; or particulate matter; or lava flow. It does not include the cost to remove ash, dust, or particulate matter that does not cause direct physical loss to the covered property.

PROPERTY COVERED

1. **Scheduled Equipment** -- "We" cover direct physical loss caused by a covered peril to:
 - a. "your" contractors' equipment and
 - b. equipment of others in "your" care, custody, or control described on the "declarations".
-

PROPERTY NOT COVERED

1. **Aircraft or Watercraft** -- "We" do not cover aircraft or water craft.
 2. **Automobiles and Trucks** -- "We" do not cover automobiles, motor trucks, tractors, trailers, and similar conveyances designed for highway use.
 3. **Contraband** -- "We" do not cover contraband or property in the course of illegal transportation or trade.
 4. **Loaned, Leased, or Rented Property** -- "We" do not cover property that "you" loan, lease, or rent to others.
 5. **Underground Mining Operations** -- "We" do not cover property while stored or operated underground in connection with any mining operations.
 6. **Waterborne Property** -- "We" do not cover property while waterborne except while in transit in the custody of a carrier for hire.
-

ADDITIONAL COVERAGES

1. **Newly Purchased Equipment** -- In the event that "you" purchase additional equipment during the policy

period, "we" extend coverage to the additional purchased equipment for up to 30 days.

The most that "we" pay for any one loss under this additional coverage is the lesser of:

- a. the actual cash value of the covered property;
- b. 25% of the Catastrophe Limit indicated on the "declarations; or
- c. "\$100,000.

This additional coverage will end when any of the following first occur:

- a. this policy expires;
- b. 60 days expire after "you" purchase the additional equipment; or
- c. "you" report the additional purchased equipment to "us".

2. **Debris Removal** -- "We" pay the cost to remove the debris of covered property that is caused by a covered peril. This coverage does not include costs to:

- a. extract "pollutants" from land or water; or
- b. remove, restore, or replace polluted land or water.

"We" will not pay any more under this coverage than 25 percent of the amount "we" pay for the direct loss. "We" will not pay more for loss to property and debris removal combined than the "limit" for the damaged property.

However, "we" pay an additional amount of debris removal expense up to \$5,000 when the debris removal expense exceeds 25 percent of the amount "we" pay for direct loss or when the loss to property and debris removal combined exceeds the "limit" for the damaged property.

"We" do not pay any expenses unless they are reported to "us" in writing within 180 days from the date of direct physical loss to covered property.

3. **Pollutant Cleanup and Removal** -- "We" pay "your" expense to extract "pollutants" from land or water if the discharge, dispersal, seepage, migration, release, or escape of the "pollutants" is caused by a covered peril that occurs during the policy period. The expenses are paid only if they are reported to "us" in writing within 180 days from the date the covered peril occurs.

"We" do not pay the cost of testing, evaluating, observing, or resorting the existence, level, or effects of "pollutants". However, "we" pay the cost of testing which is necessary for the extraction of "pollutants" from land or water.

The most "we" pay for each site or location is \$10,000 for the sum of all such expenses arising out of a covered peril occurring during each separate 12 month period of this policy.

PERILS COVERED

"We" cover external risks of direct physical loss unless the loss is limited or caused by a peril that is excluded.

PERILS EXCLUDED

1. "We" do not pay for loss if one or more of the following exclusions apply to the loss, regardless of other causes or events that contribute to or aggravate the loss, whether such causes or events as to produce the loss before, at the same time as, or after the excluded causes or events.

- a. **Civil Authority** -- "We" do not pay for loss caused by order of any civil authority, including seizure, confiscation, destruction, or quarantine of property.

"We" do pay for loss resulting from acts of destruction by the civil authority to prevent the spread of fire, unless the fire is caused by a peril excluded under this coverage.

- b. **Nuclear Hazard** -- "We" do not pay for loss caused by or resulting from a nuclear reaction, nuclear radiation, or radioactive contamination (whether controlled or uncontrolled; whether caused by natural, accidental, or artificial means). Loss caused by nuclear hazard is not considered loss caused by fire, explosion, or smoke. "We" do pay for direct loss by fire resulting from the nuclear hazard.

- c. **War** -- "We" do not pay for loss caused by war. This means:

- 1) declared war, undeclared war, civil war, insurrection, rebellion, or revolution;
- 2) a warlike act by a military force or by military personnel;
- 3) the destruction, seizure, or use of the property for a military purpose; or
- 4) the discharge of a nuclear weapon even if it is accidental.

2. "We" do not pay for loss or damage if one or more of the following exclusions apply to the loss.
- a. **Criminal, Fraudulent, or Dishonest Acts** -- "We" do not pay for loss caused by or resulting from criminal, fraudulent, dishonest, or illegal acts alone or in collusion with another by:
- 1) "you";
 - 2) others who have an interest in the property;

- 3) others to whom "you" entrust the property;
- 4) "your" partners, officers, directors, trustees, or joint adventurers; or
- 5) the employees or agents of 1), 2), 3), or 4) above, whether or not they are at work.

This exclusion does not apply to acts of destruction by "your" employees, but "we" do not pay for theft by employees.

This exclusion does not apply to covered property in the custody of a carrier for hire.

- b. **Contamination or Deterioration** -- "we" do not pay for loss caused by contamination or deterioration including corrosion, decay, fungus, mildew, mold, rot, rust, or any quality, fault, or weakness in the covered property that causes it to damage or destroy itself.
- c. **Loss of Use** -- "We" do not pay for loss caused by or resulting from loss of use, business interruption, decay, or loss of market.
- d. **Missing Property** -- "We" do not pay for missing property where the only proof of loss is unexplained or mysterious disappearance of covered property, or shortage of property discovered on taking inventory, or any other instance where there is no physical evidence to show what happened to the covered property. This exclusion does not apply to covered property in the custody of a carrier for hire.
- e. **Pollutants** -- "We" do not pay for loss caused by or resulting from release, discharge, seepage, migration, dispersal, or escape of "pollutants" unless the release, discharge, seepage, migration, dispersal, or escape is caused by a "specified peril". "We" do pay for any resulting loss caused by a "specified peril".

- f. **Puncture, Blowout, and Road Damage** -- "We" do not pay for loss caused by puncture, blowout, and road damage to tires and tubes mounted on vehicles. However, "we" do pay for puncture, blowout, or road damage caused by a "specified peril".
 - g. **Temperature/Humidity** -- "We" do not pay for loss caused by humidity, dampness, dryness, or changes in or extremes of temperature.
 - h. **Weight of Load** -- "We" do not pay for loss caused by the weight of a load which, under the operating conditions at the time of a loss, exceeds the registered lifting capacity of any equipment or machine.
 - i. **Voluntary Parting** -- "We" do not pay for loss caused by or resulting from voluntary parting with title to or possession of any property because of any fraudulent scheme, trick, or false pretense.
3. "We" do not pay for loss or damage if one or more of the following exclusions apply to the loss. But if loss by a covered peril results "we" will pay for the resulting loss.
 - a. **Mechanical Breakdown** -- "We" do not pay for loss caused by any:
 - 1) structural, mechanical, or remodeling process; or
 - 2) structural, mechanical, or electrical breakdown or malfunction.
 - d. **Wear and Tear** -- "We" do not pay for loss caused by wear and tear, marring, or scratching.

WHAT MUST BE DONE IN CASE OF LOSS

1. **Notice** -- In case of a loss, your must:

-
- a. give "us" or "our" agent prompt notice including a description of the property involved ("we" may request written notice); and
- b. give notice to the police when the act that causes the loss is a crime.
2. **Protect Property** -- "You" must take all reasonable steps to protect covered property at and after an insured loss to avoid further loss. "We" do pay the reasonable costs incurred by "you" for necessary repairs or emergency measures performed solely to protect covered property from further damage by a peril insured against if a peril insured against has already caused a loss to covered property. You must keep an accurate record of such costs. However, "we" do not pay for such repairs or emergency measures performed on property which has not been damaged by a peril insured against. This does not increase "our" "limit".
3. **Proof of Loss** -- "You" must send "us", within 60 days after "our" request, a signed, sworn proof of loss. This must include the following information:
- a. the time, place, and circumstances of the loss;
- b. other policies of insurance that may cover the loss;
- c. "your" interest and the interests of all others in the property invoked, including all mortgages and liens;
- d. changes in title of the covered property during the policy period; and
- e. estimates, specifications, inventories, and other reasonable information that "we" may require to settle the loss.
4. **Examination** -- "You" must submit to examination under oath in matters connected with the loss as often as "we" reasonably request and give "us" sworn statements of the answers if more than one person is examined, "we" have the right to examine and receive statements separately and not in the presence of others
5. **Records** -- "You" must produce records, including tax returns and bank microfilms of all cancelled checks relating to value, loss, and expense and permit copies and extracts to be made of them as often as "we" reasonably request.
6. **Damaged Property** -- "You" must exhibit the damaged and undamaged property as often as "we" reasonably request and allow "us" to inspect or take samples of the property.
7. **Volunteer Payments** -- "You" must not, except at "your" own expense, voluntarily make any payments, assume any obligations, pay or offer any rewards, or incur any other expenses except as respects protecting property from further damage.
8. **Abandonment** -- "You" may not abandon the property to "us" without "our" written consent.
9. **Cooperation** -- "You" must cooperate with "us" in performing all acts required by this policy.
-
- VALUATION**
-
1. **Actual Cash Value** -- The value of covered property will be based on the actual cash value at the time of the loss (with a deduction for depreciation) except as provided in paragraphs 2. and 3. under Valuation.
2. **Pair or Set** -- The value of a lost or damaged article which is part of a pair or set is based on a reasonable proportion of the value of the entire pair or set. The loss is not considered a total loss at the pair or set.
3. **Loss to Parts** -- The value of a lost or damaged part

of an item that consists of several parts when it is complete is based on the value of only the lost or

HOW MUCH WE PAY

1. **Insurable interest** -- "We" do not cover more than your insurable interest in any property.
2. **Deductible** -- "We" pay only that part of your loss over the deductible amount indicated on the "declarations" in any one occurrence.
3. **Loss Settlement Terms** -- Subject to paragraphs 1., 2., 4., 5., and 6. under How Much We Pay, "we" pay the lesser of:
 - a. the amount determined under Valuation;
 - b. the cost to repair, replace, or rebuild the property with material of like kind and quality to the extent practicable; or
 - c. the "limit" that applies to the covered property. However, the most "we" pay for loss in any one occurrence is the Catastrophe Limit indicated on the "declarations".
4. **Coinsurance** -- "We" only pay a part of the loss if the "limit" is less than 80% of the value of covered property at the time of loss. "Our" part of the loss is determined using the following steps:
 - a. calculate 80% of the value of the covered property at the time of loss;
 - b. divide the "limit" for covered property by the result determined in 4. a. above;
 - c. multiply the total amount of loss, after the application of any deductible, by the result determined in 4. b. above.

The most "we" pay is the amount determined in 4.c. above or the "limit", whichever is less. "We" do not pay any remaining part of the loss.

If there is more than one "limit" indicated on the "declarations" for this coverage part, this procedure applies separately to each limit.

If there is only one "limit" indicated on the "declarations" for this coverage, this procedure applies to the total of all covered property to which the "limit" applies

5. **Insurance Under More Than One Coverage** -- If more than one coverage of this policy insures the same loss, "we" pay no more than the actual claim, loss, or damage sustained.
6. **Insurance Under More Than One Policy** -- "You" may have another policy subject to the same terms as this policy. If "you" do, "we" will pay "our" share of the covered loss. "Our" share is the proportion that the applicable "limit" under this policy bears to the "limit" of all policies covering on the same basis.

If there is another policy covering the same loss, other than that described above, we pay only for the amount of covered loss in excess of the amount due from that

LOSS PAYMENT

1. **Our Options** -- "We" have the following options:
 - a. pay the value of the loss;
 - b. pay the cost of repairing or replacing the loss;

- c. rebuild, repair or replace with property of like kind and quality, to the extent practicable, within a reasonable time;
- d. take all or any part of the damaged property at the agreed or appraised value.

We must give you notice of "our" intent to rebuild, repair, or replace within 30 days after receipt of a duly executed proof of loss.

2. **Your Losses** -- "We" adjust all losses with "you". Payment will be made to you unless another loss payee is named in the policy. An insured loss will be payable 30 days after a satisfactory proof of loss is received, and the amount of the loss has been established either by written agreement with "you" or the filing of an appraisal award with "us".
3. **Property of Others** -- Losses to property of others may be adjusted with and paid to:
 - a. "you" on behalf of the owner; or
 - b. the owner.If "we" pay the owner, we do not have to pay "you". "We" may also choose to defend any suits arising from

OTHER CONDITIONS

1. **Appraisal** -- If "you" and "we" do not agree on the amount of the loss or the actual cash value of covered property, either party may demand that these amounts be determined by appraisal.

If either makes a written demand for appraisal, each will select a competent, independent appraiser and notify the other of the appraisers identity within 20 days of receipt of the written demand. The two appraisers will then select a competent, impartial

umpire. If the two appraisers are unable to agree upon an umpire within 15 days, "you" or "we" can ask a judge of a court of record in the state where the property is located to select an umpire.

The appraisers will then determine and state separately the amount of each loss.

The appraisers will also determine the value of covered property items at the time of the loss, if requested.

If the appraisers submit a written report of any agreement to "us", the amount agreed upon will be the amount of the loss. If the appraisers fail to agree within a reasonable time, they will submit only their differences to the umpire. Written agreement so itemized and signed by any two of these three sets the amount of the loss.

Each appraiser will be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire will be paid equally by "you" and "us".

2. **Benefit to Others** -- Insurance under this coverage shall not directly or indirectly benefit anyone having custody of your property,
3. **Conformity With Statute** -- When a condition of this coverage is in conflict with an applicable law, that condition is amended to conform to that law.
4. **Estates** -- This provision applies only if the insured is an individual.

On "your" death, "we" cover the following as an insured:

- a. the person who has custody of "your" property until a legal representative is qualified and appointed; or
- b. "your" legal representative.

This person or organization is an insured only with respect to property covered by this coverage.

This coverage does not extend past the policy period indicated on the "declarations".

5. **Misrepresentation, Concealment or Fraud** - This coverage is void as to "you" and any other insured if, before or after a loss:
- a. "you" or any other insured have willfully concealed or misrepresented:
 - 1) a material fact or circumstance that relates to this insurance or the subject thereof; or
 - 2) "your" interest herein.
 - b. there has been fraud or false swearing by "you" or any other insured with regard to a matter that relates to this insurance or the subject thereof.
6. **Policy Period** -- "We" pay for a covered loss that occurs during the policy period.
7. **Recoveries** -- If "we" pay "you" for the loss and lost or damaged property is recovered, or payment is made by those responsible for the loss, the following provisions apply:
- a. "you" must notify us promptly if "you" recover property or receive payment;
 - b. "we" must notify "you" promptly if "we" recover property or receive payment;
 - c. any recovery expenses incurred by either are reimbursed first;
 - d. "you" may keep the recovered property but "you" must refund to "us" the amount of the claim paid, or any lesser amount to which "we" agree; and

e. if the claim paid is lesser than the agreed loss due to a deductible or other limiting "terms" of this policy, any recovery will be pre rated between "you" and "us" based on "our" respective interest in the loss.

8. **Restoration of Limit** -- A loss "we" pay under this coverage does not reduce the applicable "limit" unless it is a total loss to a scheduled item. In the event of a total loss to a scheduled item "we" refund the unearned premium on that item.
9. **Subrogation** -- If "we" pay for a loss, "we" may require "you" to assign to "us" "your" right of recovery against others. "You" must do all that is necessary to secure "our" rights. "We" do not pay for a loss if "you" impair this right to recover.

"You" may waive "your" right to recover from others in writing before a loss occurs.

10. **Suit Against Us** -- No one may bring a legal action against "us" under this coverage unless:
- a. all of the "terms" of this coverage have been complied with; and
 - b. the suit has been brought within two years after "you" first have knowledge of the loss.

If any applicable law makes this limitation invalid, then suit must begin within the shortest period permitted by law.

11. **Territorial Limits** -- "We" cover property while it is in the United States of America, its territories and possessions, Canada, and Puerto Rico.

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CONTRACTORS' EQUIPMENT DECLARATIONS

(The information required below may be indicated
on a separate schedule or supplemental "declarations".)

SCHEDULED EQUIPMENT

Item No.	Description of Equipment	Limit
1	MISC EQUIPMENT(\$1,500 MAX PER ITEM)	\$10,000.00

Catastrophe Limit	\$10,000.00
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DEDUCTIBLE

Deductible Amount	\$500.00
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--PLEASE READ THIS CAREFULLY--

INSTALLATION FLOATER COVERAGE

AGREEMENT

In return for "your" payment of the required premium, "we" provide the coverage described herein subject to all the "terms" of the Installation Floater Coverage. This coverage is also subject to the "declarations" and additional policy conditions relating to assignment or transfer of rights or duties, cancellation, changes or modifications, inspections, and examination of books and records.

Endorsements and schedules may also apply. They are identified on the "declarations".

Refer to Definitions for words and phrases that have special meaning. These words and phrases are shown in quotation marks or bold type.

DEFINITIONS

1. The words "you" and "your" mean the persons or organizations named as the insured on the "declarations".
2. The words "we", "us", and "our" mean the company providing this coverage.
3. "Declarations" mean all pages labeled Declarations, Supplemental Declarations, or Schedules, which pertain to this coverage.
4. "Earth movement" means any movement or vibration of the earth's surface (other than "sinkhole collapse") including but not limited to earthquake; landslide; mudflow; mudslide; mine subsidence; or sinking, rising, or shifting, of earth.
5. "Flood" means flood, surface water, waves, tidal water, or the overflow of a body of water whether driven by wind or not. This includes spray that results from these whether driven by wind or not.
6. "Ground water" means:
 - a. water that backs up through a sewer or drain; or
 - b. water below the surface of the ground. This includes water that exerts pressure on or flows, seeps, or leaks through or into a building, sidewalk, driveway, foundation, swimming pool, or other structure.
7. "Limit" means the amount of coverage that applies.
8. "Pollutant" means:
 - a. any solid, liquid, gaseous, or thermal irritant or contaminant;
 - b. electromagnetic (visible or invisible) or sound emission; or
 - c. waste, including materials to be disposed of as well as recycled, reclaimed, or reconditioned.
9. "Sinkhole collapse" means the sudden settlement or collapse of earth supporting the covered property into subterranean voids created by the action of water on a limestone or similar rock formation. It does not include the value of the land or the cost of filling sinkholes.
10. "Specified perils" means aircraft; civil commotion; explosion; falling objects; fire; hail; leakage from fire extinguishing equipment; lightning; riot; "sinkhole collapse"; smoke; sonic boom; vandalism; vehicles; "volcanic action"; water damage; weight of ice, snow, or sleet; and windstorm.

Falling objects does not include loss to personal property in the open or to the interior of buildings or structures or to personal property inside buildings or structures unless the exterior of the roof or walls are first damaged by a falling object.

Water damage means the sudden or accidental discharge or leakage of water or steam as a direct result of breaking or cracking of a part of the system or appliance containing the water or steam.

11. "Terms" means all provisions, limitations, exclusions, conditions, and definitions that apply.
12. "Volcanic action" means airborne volcanic blast or airborne shock waves; ash, dust, or particulate matter; or lava flow. It does not include the cost to remove ash, dust, or particulate matter that does not cause direct physical loss to the covered property.

PROPERTY COVERED

"We" cover direct physical loss to covered property caused by a covered peril while at a site of installation, fabrication, or erection described on the "declarations".

Covered Property consists of:

1. "Your" materials, supplies, machinery, fixtures, and equipment; and
2. similar property of others that is in "your" care, custody, and control

which will become a permanent part of "your" installation, fabrication, or erection project.

PROPERTY NOT COVERED

1. **Airborne** -- "We" do not cover property while airborne except while in transit on a regularly scheduled airline flight.
2. **Buildings, Structures, and Land** -- "We" do not cover buildings, structures, or land. However, "we" do cover property that "you" install, fabricate, or erect in connection with any building or structure.
3. **Contraband** -- "We" do not cover contraband or property in the course of illegal transportation or trade.
4. **Machinery, Tools, Equipment** -- "We" do not cover machinery, tools, equipment, or similar property which will not become a permanent part of "your" installation, fabrication, or erection project.
5. **Money and Securities** -- "We" do not cover accounts, bills, currency, food stamps, or other evidences of debt, lottery tickets not held for sale, money, notes, or securities.
6. **Trees, Shrubs and Plants** -- "We" do not cover trees, shrubs, plants, and lawns.
7. **Waterborne Property** -- "We" do not cover property while waterborne except while in transit in the custody of a carrier for hire.

ADDITIONAL COVERAGES

1. **Transit and Storage Locations** -- "We" cover direct physical loss to covered property caused by a covered peril while:
 - a. in transit; or
 - b. at an unscheduled storage location awaiting installation, fabrication, or erection.

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The most "we" pay under this coverage is \$2,500 plus the "limit" shown on the "declarations".

2. **Debris Removal** -- "We" pay the cost to remove the debris of covered property that is caused by a covered peril. This coverage does not include costs to:

- a. extract "pollutants" from land or water;
or
- b. remove, restore, or replace polluted land or water.

"We" will not pay any more under this coverage than 25% of the amount "we" pay for the direct loss. "We" will not pay more for loss to property and debris removal combined than the "limit" for the damaged property.

However, "we" pay an additional amount of debris removal expense up to \$5,000 when the debris removal expense exceeds 25% of the amount "we" pay for direct loss or when the loss to property and debris removal combined exceeds the "limit" for the damaged property.

"We" do not pay any expenses unless they are reported to "us" in writing within 180 days from the date of direct physical loss to covered property.

3. **Emergency Removal** -- "We" pay for loss to covered property while it is moved or being moved to prevent a loss caused by a covered peril. "We" pay for any direct physical loss caused by a peril that is not excluded. This coverage applies for up to ten days after the property is first moved, but does not extend past the date on which this policy expires.
4. **Pollutant Cleanup and Removal** -- "We" pay "your" expense to extract "pollutants" from land or water if the discharge, dispersal, seepage, migration, release, or escape of the "pollutants" is caused by a covered peril that occurs during the policy period. The expenses are paid only if they

are reported to "us" in writing within 180 days from the date the covered peril occurs.

"We" do not pay the cost of testing, evaluating, observing, or recording the existence, level, or effects of "pollutants". However, "we" pay the cost of testing which is necessary for the extraction of "pollutants" from land or water.

The most "we" pay for each site or location is \$10,000 for the sum of all such expenses arising out of a covered peril occurring during each separate 12 month period of this policy.

This is an additional "limit".

PERILS COVERED

"We" cover external risks of direct physical loss unless the loss is limited or caused by a peril that is excluded.

PERILS EXCLUDED

1. "We" do not pay for loss if one or more of the following exclusions apply to the loss, regardless of other causes or events that contribute to or aggravate the loss, whether such causes or events act to produce the loss before, at the same time as, or after the excluded causes or events.
 - a. **Civil Authority** -- "We" do not pay for loss caused by order of any civil authority, including seizure, confiscation, destruction, or quarantine of property.

"We" do pay for loss resulting from acts of destruction by the civil authority to prevent the spread of fire, unless the fire is caused by a peril excluded under this coverage.

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b. **Earth Movement or Volcanic Eruption**

-- "We" do not pay for loss caused by any "earth movement" (other than "sinkhole collapse") or caused by eruption, explosion, or effusion of a volcano.

"We" do pay for direct loss by fire, explosion, or "volcanic action" resulting from either "earth movement" or eruption, explosion, or effusion of a volcano.

All volcanic eruptions that occur within a 168 hour period shall be considered a single loss.

This exclusion does not apply when a "limit" is indicated for "earth movement" and volcanic eruption on the "declarations".

c. **Flood** -- "We" do not pay for loss caused by "flood" but if fire, explosion, or theft results "we" do cover the loss caused by the fire, explosion, or theft.

This exclusion does not apply to covered property while in transit.

This exclusion does not apply when a "limit" is indicated for "flood" on the "declarations".

d. **Ground Water** -- "We" do not pay for loss caused by "ground water" but if fire, explosion, or theft results "we" do cover the loss caused by the fire, explosion, or theft.

This exclusion does not apply to covered property while in transit.

This exclusion will not apply when a "limit" is indicated for "ground water" on the declarations".

e. **Nuclear Hazard** -- "We" do not pay for loss caused by or resulting from a nuclear reaction, nuclear radiation, or radioactive contamination (whether controlled or uncontrolled; whether caused by natural, accidental, or

artificial means). Loss caused by nuclear hazard is not considered loss caused by fire, explosion, or smoke. "We" do pay for direct loss by fire resulting from the nuclear hazard.

f. **Ordinance or Law** -- "We" do not pay for loss or increased cost caused by enforcement of any code, ordinance, or law regulating the use, construction, or repair of any building or structure; or requiring the demolition of any building or structure including the cost of removing its debris.g. **Penalties** -- "We" do not pay for loss caused by penalties for noncompletion or non-compliance with any contract terms or conditions.h. **War** -- "We" do not pay for loss caused by war. This means:

- 1) declared war, undeclared war, civil war, insurrection, rebellion, or revolution;
- 2) a warlike act by a military force or by military personnel;
- 3) the destruction, seizure, or use of the property for a military purpose; or
- 4) the discharge of a nuclear weapon even if it is accidental.

2. "We" do not pay for loss or damage if one or more of the following exclusions apply to the loss.

a. **Contamination or Deterioration** -- "We" do not pay for loss caused by contamination or deterioration including corrosion, decay, fungus, mildew, mold, rot, rust, or any quality, fault, or weakness in the covered property that causes it to damage or destroy itself.b. **Criminal, Fraudulent, or Dishonest Acts** -- "We" do not pay for loss caused by or resulting from criminal, fraudulent, dishonest, or illegal acts alone or in collusion with another by:

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- 1) "you";
- 2) others who have an interest in the property;
- 3) others to whom "you" entrust the property;
- 4) "your" partners, officers, directors, trustees, or joint adventurers; or
- 5) the employees or agents of 1), 2), 3), or 4) above, whether or not they are at work.

This exclusion does not apply to acts of destruction by "your" employees, but "we" do not pay for theft by employees.

This exclusion does not apply to covered property in the custody of a carrier for hire.

- c. **Explosion, Rupture, or Bursting** -- "We" do not pay for loss caused by explosion, rupture, or bursting of steam boilers, steam or gas turbines, steam pipes, or steam engines.

This exclusion applies only to loss or damage to the steam boilers, steam or gas turbines, steam pipes, or steam engines in which the loss occurred.

- d. **Faults, Inadequacy, and Defects** -- "We" do not pay for loss by faulty, inadequate, or defective:
- 1) planning or development;
 - 2) survey, siting, or zoning; or
 - 3) maintenance.
- e. **Loss of Use** -- "We" do not pay for loss caused by or resulting from loss of use, business interruption, delay, or loss of market.
- f. **Missing Property** -- "We" do not pay for missing property where the only proof of loss is unexplained or mysterious disappearance of covered property, or shortage of property discovered on taking inventory, or any other instance where there is no physical evidence to show what

happened to the covered property. This exclusion does not apply to covered property in the custody of a carrier for hire.

- g. **Pollutants** -- "We" do not pay for loss caused by or resulting from release, discharge, seepage, migration, dispersal, or escape of "pollutants" unless the release, discharge, seepage, migration, dispersal, or escape is caused by a "specified peril". "We" do pay for any resulting loss caused by a "specified peril".
- h. **Rain, Snow, Ice, or Sleet** -- "We" do not pay for loss caused by or resulting from rain, snow, ice, or sleet to property in the open which is not part of the permanent building or structure.
- This exclusion does not apply to property in the custody of carriers for hire.
- i. **Temperature/Humidity** -- "We" do not pay for loss caused by humidity, dampness, dryness, or changes in or extremes of temperature.
- j. **Testing** -- "We" do not pay for loss caused by testing including start-up, performance, stress, pressure, or overload testing of the covered property.
- k. **Voluntary Parting** -- "We" do not pay for loss caused by or resulting from voluntary parting with title to or possession of any property because of any fraudulent scheme, trick, or false pretense.
- l. **Wear and Tear** -- "We" do not pay for loss caused by wear and tear, marring or scratching.
3. "We" do not pay for loss or damage if one or more of the following exclusions apply to the loss. But if loss by a covered peril results "we" will pay for the resulting loss.

- a. **Defects, Errors, and Omissions** -- "We" do not pay for loss caused by an act, defect, error, or omission (negligent or not) relating to:
- 1) design or specifications;
 - 2) workmanship or construction;
 - 3) repair, renovation, or remodeling; or
 - 4) materials.
- b. **Electrical Currents** -- "We" do not pay for loss caused by arcing or by electrical currents other than lightning.
- c. **Mechanical Breakdown** -- "We" do not pay for loss caused by mechanical breakdown including centrifugal force.
- d. **Settling, Cracking, Shrinking, Bulging, or Expanding** -- "We" do not pay for loss caused by settling, cracking, shrinking, bulging, or expanding of pavements, footings, foundations, walls, ceilings, or roofs.
- property. "You" must keep an accurate record of such costs. However, "we" do not pay for such repairs or emergency measures performed on property which has not been damaged by a peril insured against. This does not increase "our" "limit".
3. **Proof of Loss** -- "You" must send "us", within 60 days after "our" request, a signed, sworn proof of loss. This must include the following information:
- a. the time, place, and circumstances of the loss;
 - b. other policies of insurance that may cover the loss;
 - c. "your" interest and the interests of all others in the property involved, including all mortgages and liens;
 - d. changes in title of the covered property during the policy period; and
 - e. estimates, specifications, inventories, and other reasonable information that "we" may require to settle the loss.

WHAT MUST BE DONE IN CASE OF LOSS

1. **Notice** -- In case of a loss, "you" must:
 - a. give "us" or "our" agent prompt notice including a description of the property involved ("we" may request written notice); and
 - b. give notice to the police when the act that causes the loss is a crime.
2. **Protect Property** -- "You" must take all reasonable steps to protect covered property at and after an insured loss to avoid further loss. "We" do pay the reasonable costs incurred by "you" for necessary repairs or emergency measures performed solely to protect covered property from further damage by a peril insured against if a peril insured against has already caused a loss to covered
4. **Examination** -- "You" must submit to examination under oath in matters connected with the loss as often as "we" reasonable request and give "us" sworn statements of the answers. If more than one person is examined, "we" have the right to examine and receive statements separately and not in the presence of others.
5. **Records** -- "You" must produce records, including tax returns and bank microfilms of all cancelled checks relating to value, loss, and expense and permit copies and extracts to be made of them as often as "we" reasonably request.
6. **Damaged Property** -- "You" must exhibit the damaged and undamaged property as often as "we" reasonably request and allow "us" to inspect or take samples of the property.

7. **Volunteer Payments** -- "You" must not, except at "your" own expense, voluntarily make any payments, assume any obligations, pay or offer any rewards, or incur any other expenses except as respects protecting property from further damage.
8. **Abandonment** -- "You" may not abandon the property to "us" without "our" written consent.
9. **Cooperation** -- "You" must cooperate with "us" in performing all acts required by this policy.

VALUATION

1. **Actual Cost To Repair, Replace, or Rebuild** -- The value of covered property will be based on the lesser of the following amounts:
 - a. the actual cost to repair, replace, or rebuild the covered property with materials of like kind and quality. The actual cost may include material, labor, and reasonable overhead expenses.
 - b. the amount "you" actually spend to repair, replace, or rebuild the covered property.

In no event will "we" pay more than the "limit" indicated on the "declarations".

This valuation provision does not apply to paragraphs 2. and 3. under Valuation.

2. **Pair or Set** -- The value of a lost or damaged article which is part of a pair or set is based on a reasonable proportion of the value of the entire pair or set. The loss is not considered a total loss of the pair or set.
3. **Loss to Parts** -- The value of a lost or damaged part of an item that consists of several parts when it is complete is based on the value of only the lost or damaged part or the cost to repair or replace it.

HOW MUCH WE PAY

1. **Insurable Interest** -- "We" do not pay for more than "your" insurable interest in any property.
2. **Deductible** -- "We" pay only that part of "your" loss over the deductible amount indicated on the "declarations" in any one occurrence.
3. **Loss Settlement Terms** -- Subject to paragraphs 1., 2., 4., 5., and 6. under How Much We Pay, "we" pay the lesser of:
 - a. the amount determined under Valuation;
 - b. the cost to repair, replace, or rebuild the property with material of like kind and quality to the extent practicable; or
 - c. the "limit" that applies to the covered property.
4. **Coinsurance** -- When a coinsurance percentage is indicated on the "declarations" the following conditions apply. "We" only pay a part of the loss if the "limit" is less than value of the covered property multiplied by the percentage indicated on the "declarations". "Our" part of the loss is determined using the following steps:
 - a. at the time of the loss, calculate the percentage of the value of the covered property as indicated on the "declarations";
 - b. divide the "limit" for covered property by the result determined in 4.a. above;
 - c. multiply the total amount of loss, after the application of any deductible, by the result determined in 4.b. above.

The most "we" pay is the amount determined in 4.c. above or the "limit", whichever is less. "We" do not pay any remaining part of the loss.

If there is more than one "limit" indicated on the "declarations" for this coverage, this procedure applies separately to each "limit".

If there is only one "limit" indicated on the "declarations" for this coverage, this procedure applies to the total of all covered property to which the "limit" applies.

- 5. **Insurance Under More Than One Coverage** -- If more than one coverage of this policy insures the same loss, "we" pay no more than the actual claim, loss, or damage sustained.
- 6. **Insurance Under More Than One Policy** -- "You" may have another policy subject to the same "terms" as this policy. If "you" do, "we" will pay "our" share of the covered loss. "Our" share is the proportion that the applicable "limit" under this policy bears to the "limit" of all policies covering on the same basis.

If there is another policy covering the same loss, other than that described above, "we" pay only for the amount of covered loss in excess of the amount due from that other policy, whether "you" can collect on it or not. But "we" will not pay more than the applicable "limit".

LOSS PAYMENT

- 1 **Our Options** -- "We" have the following options:
 - a. pay the value of the loss;
 - b. pay the cost of repairing or replacing the loss;
 - c. rebuild, repair, or replace with property of like kind and quality, to the extent practicable, within a reasonable time;

- d. take all or any part of the damaged property at the agreed or appraised value.

"We" must give "you" notice of "our" intent to rebuild, repair, or replace within 30 days after receipt of a duly executed proof of loss.

- 2. **Your Losses** -- "We" will adjust all losses with "you". Payment will be made to "you" unless another loss payee is named in the policy. An insured loss will be payable 30 days after a satisfactory proof of loss is received, and the amount of the loss has been established either by written agreement with "you" or the filing of an appraisal award with "us".
- 3. **Property of Others** -- Losses to property of others may be adjusted with and paid to:
 - a. "you" on behalf of the owner; or
 - b. the owner.

If "we" pay the owner, "we" do not have to pay "you". "We" may also choose to defend any suits arising from the owners at "our" expense.

OTHER CONDITIONS

- 1 **Appraisal** -- If "you" and "we" do not agree on the amount of the loss or the actual cash value of covered property, either party may demand that these amounts be determined by appraisal.

If either makes a written demand for appraisal, each will select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers will then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, "you" or "we" can ask a judge of a court of record in the state where the property is located to select an umpire.

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The appraisers will then determine and state separately the amount of each loss.

The appraisers will also determine the value of covered property items at the time of the loss, if requested.

If the appraisers submit a written report of any agreement to "us", the amount agreed upon will be the amount of the loss. If the appraisers fail to agree within a reasonable time, they will submit only their differences to the umpire. Written agreement so itemized and signed by any two of these three sets the amount of the loss.

Each appraiser will be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire will be paid equally by "you" and "us".

2. **Benefit to Others** -- Insurance under this coverage shall not directly or indirectly benefit anyone having custody of "your" property.
3. **Conformity With Statute** -- When a condition of this coverage is in conflict with an applicable law, that condition is amended to conform to that law.
4. **Estates** -- This provision applies only if the insured is an individual.

On "your" death, "we" cover the following as an insured:

- a. the person who has custody of "your" property until a legal representative is qualified and appointed; or
- b. "your" legal representative.

This person or organization is an insured only with respect to property covered by this coverage.

This coverage does not extend past the policy period indicated on the "declarations".

5. **Misrepresentation, Concealment or Fraud** -- This coverage is void as to "you" and any other insured if, before or after a loss:

- a. "you" or any other insured have willfully concealed or misrepresented:

- 1) a material fact or circumstance that relates to this insurance or the subject thereof; or
- 2) "your" interest herein.

- b. there has been fraud or false swearing by "you" or any other insured with regard to a matter that relates to this insurance or the subject thereof.

6. **Policy Period** -- "We" pay for a covered loss that occurs during the policy period.

7. **Recoveries** -- If "we" pay "you" for the loss and lost or damaged property is recovered, or payment is made by those responsible for the loss, the following provisions apply:

- a. "you" must notify "us" promptly if "you" recover property or receive payment;

- b. "we" must notify "you" promptly if "we" recover property or receive payment;

- c. any recovery expenses incurred by either are reimbursed first;

- d. "you" may keep the recovered property but "you" must refund to "us" the amount of the claim paid, or any lesser amount to which "we" agree; and

- e. if the claim paid is less than the agreed loss due to a deductible or other limiting "terms" of this policy, any recovery will be pro rated between "you" and "us" based on "our" respective interest in the loss.

8. **Restoration of Limits** -- A loss "we" pay under this coverage does not reduce the applicable "limits".

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9. **Subrogation** -- If "we" pay for a loss, "we" may require "you" to assign to "us" "your" right of recovery against others. "You" must do all that is necessary to secure "our" rights. "We" do not pay for a loss if "you" impair this right to recover.

"You" may waive "your" right to recover from others in writing before a loss occurs.

10. **Suit Against Us** -- No one may bring a legal action against "us" under this coverage unless:

- a. all of the "terms" of this coverage have been complied with; and
- b. the suit has been brought within two years after "you" first have knowledge of the loss.

If any applicable law makes this limitation invalid, then suit must begin within the shortest period permitted by law.

11. **Territorial Limits** -- "We" cover property while it is in the United States of America, its territories and possessions, Canada, and Puerto Rico.

12. **Carriers For Hire** -- "You" may accept bills of lading or shipping receipts issued by carriers for hire that limit their liability to less than the actual cash value of the covered property.

13. **When Coverage Ceases** -- Coverage ends when one of the following first occurs:

- a. this policy expires or is cancelled;
- b. the covered property is accepted by the purchaser;
- c. "your" insurable interest in the covered property ceases;
- d. "you" abandon "your" installation, fabrication, or erection project with no intent to complete it;
- e. the installation, fabrication, or erection project has been completed for more than 30 days; or
- f. the covered property has been put to its intended use. However, this does not apply to roofs or walls.

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INSTALLATION FLOATER DECLARATIONS

(The information required below may be indicated
on a separate schedule or supplemental "declarations".)

SCHEDULED LOCATIONS

	Limit
ANY SINGLE LOCATION	\$ <u>50,000</u>
ANY TEMPORARY LOCATION	\$ <u>10,000</u>
ANY DISASTER LOCATION	\$ <u>50,000</u>
Covered property in transit	\$ <u>10,000</u>
Covered property at unscheduled storage locations	\$ <u>10,000</u>
Any one loss caused by "earth movement", and volcanic eruption	\$ _____
Any one loss caused by "flood" and "ground water"	\$ _____

DEDUCTIBLE

	Deductible Amount
For all perils covered unless a different deductible is shown below	\$ <u>1,000</u>
"Earth movement" and volcanic eruption	\$ _____
"Flood" and "ground water"	\$ _____

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COINSURANCE

(check one if applicable) 80% 90% 100%

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ELECTRONIC DATA PROCESSING COVERAGE

AGREEMENT

In return for "your" payment of the required premium, "we" provide the coverage described herein subject to all the "terms" of the Electronic Data Processing Coverage. This coverage is also subject to the "declarations" and additional policy conditions relating to assignment or transfer of rights or duties, cancellation, changes or modifications, inspections, and examination of books and records.

Endorsements and schedules may also apply. They are identified on the "declarations".

Refer to Definitions for words and phrases that have special meaning. These words and phrases are shown in quotation marks or bold type.

DEFINITIONS

1. The words "you" and "your" mean the persons or organizations named as the insured on the "declarations".
2. The words "we", "us", and "our" mean the company providing this coverage.
3. "Declarations" means all pages labeled Declarations, Supplemental Declarations, or Schedules, which pertain to this coverage.
4. "Earth movement" means any movement or vibration of the earth's surface (other than "sinkhole collapse") including but not limited to earthquake; landslide; mudflow; mudslide; mine subsidence; or sinking, rising, or shifting, of earth.
5. "Electrical disturbance" means electrical or magnetic damage, disturbance of electronic recordings, or erasure of electronic recordings
6. "Flood" means flood, surface water, waves, tidal water, or the overflow of a body of water, all whether driven by wind or not. This includes spray that results from these whether driven by wind or not.
7. "Ground water" means:
 - a. water that backs up through a sewer or drain; or
 - b. water below the surface of the ground. This includes water that exerts pressure on or flows, seeps, or leaks through or into a building, sidewalk, driveway, foundation, swimming pool, or other structure.
8. "Hardware" means an assemblage of electronic machine components capable of accepting instructions and information, processing the information according to the instructions, and producing desired results.
9. "Limit" means the amount of coverage that applies.
10. "Mechanical breakdown" means mechanical breakdown or malfunction, component failure, faulty installation, or blowout.
11. "Operations" means "your" normal electronic data processing operations occurring at premises described on the "declarations".
12. "Pollutant" means:
 - a. any solid, liquid, gaseous, or thermal irritant or contaminant.

- c. waste, including materials to be disposed of as well as recycled, reclaimed, or reconditioned.
13. "Power supply disturbance" means interruption of power supply, power surge, blackout, or brownout.
14. "Protection and control systems" means:
- a. air conditioning equipment used exclusively in the operation of the "hardware";
 - b. fire protection equipment used for the protection of the "hardware", including automatic and manual fire suppression equipment, and smoke and heat detectors; and
 - c. uninterruptable power supply system, line conditioner, and voltage regulator.
15. "Restoration period" means the time it should take to resume "your" "operations" starting from the date of loss to covered property caused by a covered peril, and ending on the date the property should be rebuilt, repaired, or replaced. This is not limited by the expiration date of the policy.

This does not include any increase in time due to the enforcement of any ordinance, law, or decree that:

- a. regulates the construction, use, repair, or demolition of any property; or
 - b. requires the testing, evaluating, observing, or recording the existence, level, or effects of "pollutants".
16. "Sinkhole collapse" means the sudden settlement or collapse of earth supporting the covered property into subterranean voids created by the action of water on a limestone or similar rock formation. It does not include the value of the land or the cost of filling sinkholes.

17. "Software" means:

- a. processing, recording, or storage media used for electronic data processing operations. This includes films, tapes, cards, discs, drums, cartridges, or cells and
 - b. data, information, and instructions stored on processing, recording, or storage media used for electronic data processing operations.
18. "Specified perils" means aircraft; civil commotion; explosion; falling objects; fire; hail; leakage from fire extinguishing equipment; lightning; riot; "sinkhole collapse"; smoke sonic boom; vandalism; vehicles; "volcanic action"; water damage; weight of ice, snow, or sleet; and windstorm.

Falling objects does not include loss to:

- a. personal property in the open; or
- b. to the interior of buildings or structures or to personal property inside buildings or structures unless the exterior of the roofs or walls are first damaged by a falling object.

Water damage means the sudden or accidental discharge or leakage of water or steam as a direct result of breaking or cracking of a pan of the system or appliance containing the water or steam.

19. "Terms" means all provisions, limitations, exclusions, conditions, and definitions that apply.
20. "Volcanic action" means airborne volcanic blast or airborne shock waves; ash, dust, or particulate matter; or lava flow. It does not include the cost to remove ash, dust, or particulate matter that does not cause direct physical loss to the covered property.

21. "Volcanic eruption" means eruption, explosion, or effusion of a volcano. All volcanic eruptions that occur within a 168 hour period shall be considered a single loss.

PROPERTY COVERED

"We" cover direct physic loss caused by a covered peril to covered property while at a premises described on the "declarations".

Covered property consists of:

1. "your", "hardware", "protection and control systems", and "software"; and
2. similar property of others that is in "your" care, custody, or control.

PROPERTY NOT COVERED

1. **Accounts, Bills or Documents** -- "We" do not cover accounts, bills, evidences of debt, records, abstracts, deeds, manuscripts, program documentation, or other documents except those that are in "software" form and then only in that form.
2. **Contraband** -- "We" do not cover contraband or property in the course of illegal transportation or trade.
3. **Loaned, Leased, or Rented To Others** -- "We" do not cover property that "you" loan, lease, or rent to others
4. **Money and Securities** -- "We" do not cover currency, food stamps, lottery tickets not held for sale, money, notes, or securities.
5. **Stock in Trade** -- "We" do not cover "your" stock in trade.

PROPERTY SUBJECT TO LIMITATIONS

"We" do not pay more for loss to "software" at a described premises than \$7,500 plus the "limit", if any, indicated for "software" on the "declarations".

ADDITIONAL COVERAGES

1. **Acquired Locations** -- " We" pay up to \$500,000 for covered property at locations that "you" acquire during the policy period. This coverage applies for up to 60 days from the date "you" acquire the location or until "you" report the acquired location to "us" whichever occurs first. This coverage does not go beyond the end of the policy period.

"You" must pay the additional premium due from the date "you" acquire the location.

2. **Debris Removal** -- "We" pay the cost to remove the debris of covered property that is caused by a covered peril. This coverage does not include costs to:
 - a. extract "pollutants" from land or water; or
 - b. remove, restore, or replace polluted land or water.

"We" will not pay any more under this coverage than 25% of the amount "we" pay for the direct loss. "We" will not pay more for loss to property and debris removal combined than the "limit" for the damaged property.

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However, "we" pay an additional amount of debris removal expense up to \$5,000 when the debris removal expense exceeds 25% of the amount "we" pay for direct loss or when the loss to property and debris removal combined exceeds the "limit" for the damaged property.

"We" do not pay any expenses unless they are reported to "us" in writing within 180 days from the date of direct physical loss to covered property.

3. **Disturbance and Mechanical Breakdown**

Coverage -- "We" pay for loss to covered property caused by "mechanical breakdown". "We" also pay for loss to covered property caused by "electrical disturbance" and "power supply disturbance" if the cause of such disturbance took place within 500 feet of the premises where the loss occurred.

4. **Emergency Removal** - "We" pay for loss to covered property while it is moved or being moved to prevent a loss caused by a covered peril. "We" pay for any direct physical loss caused by a peril that is not excluded. This coverage applies for up to ten days after the property is first moved, but does not extend past the date on which this policy expires.

5. **Extra Expense** - "We" pay the necessary extra expenses that "you" incur in order to resume or continue "your" "operations" which are interrupted due to direct physical loss to "your" "hardware" or "software". "We" cover only the extra expenses that "you" incur during the "restoration period" and that are necessary to resume or continue "your" "operations" as nearly as practicable. The loss to "your" "hardware" or "software" must occur at a premises described on the "declarations".

"We" also cover extra expenses that "you" incur as a result of:

- a. damage to a premises described on the "declarations" that prevents "you" from using the covered "hardware" or "software";
- b. damage to the air conditioning or electrical system which is necessary for the operation of the "hardware" and results in a reduction or suspension of "your" "operations". The cause of the damage must occur within 500 feet of a premises described on the "declarations"; or
- c. an order by a civil authority that specifically denies "you" access to a premises described on the "declarations". The order must be as a result of damage caused by a covered peril to the described premises or to adjacent property. This extension is limited to two consecutive weeks from the date of the order. This does not increase the "limit".

The most "we" pay for extra expenses that "you" incur is \$7,500 plus the extra expense "limit", if any, indicated on the "declarations".

6. **Newly Purchased or Leased Hardware** --

In the event that "you" purchase or lease additional "hardware" during the policy period, "we" extend coverage to the additional "hardware" for up to 60 days.

The most that "we" pay for any loss under this additional coverage is the least of:

- a. the actual cash value of the covered property;
- b. 25% of the highest "limit" for any one premises described on the "declaration"; or
- c. \$500,000.

This additional coverage will end when any of the following first occur:

- a. this policy expires;
- b. 60 days after "you" obtain the additional "hardware"; or
- c. "you" report the additional "hardware" to "us".

- 7. Pollutant Cleanup and Removal** -- "We" pay "your" expense to extract "pollutants" from land or water if the discharge, dispersal, seepage, migration, release, or escape of the "pollutants" is caused by a covered peril that occurs during the policy period. The expenses are paid only if they are reported to "us" in writing within 180 days from the date the covered peril occurs.

"We" do not pay the cost of testing, evaluating, observing, or recording the existence, level, or effects of "pollutants". However, "we" pay the cost of testing which is necessary for the extraction of "pollutants" from land or water.

The most "we" pay for each site or location is \$10,000 for the sum of all such expenses arising out of a covered peril occurring during each separate 12-month period of this policy.

- 8. Recharge of Fire Suppression Equipment** -- "We" pay up to \$15,000 to cover "your" incurred expenses to recharge automatic fire suppression equipment when the equipment is discharged:
- a. while fighting a fire;
 - b. as a result of a covered peril; or
 - c. while the equipment is being tested.

- 9. Software Storage** -- "We" cover duplicate and back-up "software" stored at a premises not described on the "declarations" and not covered under any other coverage form. The most "we" pay for loss to "software" at any one storage location is \$50,000. To be eligible for this additional coverage each storage location must be in a separate building which is at least 100 feet away from a premises described on the "declarations".

- 10. Transit and Off-Premises Coverage** -- "We" cover direct physical loss to covered property caused by a covered peril while:
- a. in transit; or
 - b. at a premises that is not described on the "declarations".

The most "we" pay under this coverage is \$7,500 plus the transit and off-premises "limit" indicated on the "declarations".

The off-premises "limit" under this provision cannot be added to the software storage "limit" in paragraph 9. under Additional Coverages.

PERILS COVERED

"We" cover external risks of direct physical loss unless the loss is limited or caused by a peril that is excluded.

PERILS EXCLUDED

1. "We" do not pay for loss if one or more of the following exclusions apply to the loss, regardless of other causes or events that contribute to or aggravate the loss, whether such causes or events act to produce the loss before, at the same time as, or after the excluded causes or events.

- a. **Civil Authority** -- "We" do not pay for loss caused by order of any civil authority, including seizure, confiscation, destruction, or quarantine of property.

"We" do pay for loss resulting from acts of destruction by the civil authority to prevent the spread of fire, unless the fire is caused by a peril excluded under this coverage.

- b. **Nuclear Hazard** -- "We" do not pay for loss caused by or resulting from a nuclear reaction, nuclear radiation, or radioactive contamination (whether controlled or uncontrolled; whether caused by natural, accidental, or artificial means). Loss caused by nuclear hazard is not considered loss caused by fire, explosion, or smoke. "We" do pay for direct loss by fire resulting from the nuclear hazard.

- c. **War** -- "We" do not pay for loss caused by war. This means:

- 1) declared war, undeclared war, civil war, insurrection, rebellion, or revolution;
- 2) a warlike act by a military force or by military personnel;
- 3) the destruction, seizure, or use of the property for a military purpose; or
- 4) the discharge of a nuclear weapon even if it is accidental.

2. "We" do not pay for loss or damage if one or more of the following exclusions apply to the loss.

- a. **Criminal, Fraudulent, or Dishonest Acts** -- "We" do not pay for loss caused by or resulting from criminal, fraudulent, dishonest, or illegal acts alone or in collusion with another by:

- 1) "you"
- 2) others who have an interest in the property;

- 3) others to whom "you" entrust the property;
- 4) "your" partners, officers, directors, trustees, or joint adventurers; or
- 5) the employees or agents of 1), 2), 3), or 4) above, whether or not they are at work.

This exclusion does not apply to acts of destruction by "your" employees, but "we" do not pay for theft by employees.

This exclusion does not apply to covered property in the custody of a carrier for hire.

- b. **Deterioration, Fault or Weakness** -- "We" do not pay for deterioration; decay; or any quality, fault, or weakness in the covered property that causes it to damage or destroy itself. This exclusion does not apply to loss caused by "mechanical breakdown".

- c. **Electrical Disturbance** -- "We" do not pay for loss caused by "electrical disturbance" if the cause of such disturbance took place more than 500 feet from the premises where the loss occurred.

- d. **Lease Terms** -- "We" do not pay for loss caused by a covered peril for which "you" are not responsible under the terms of any lease or rental agreement.

- e. **Loss of Use** -- "We" do not pay for loss caused by or resulting from loss of use, business interruption, delay, or loss of market.

This exclusion does not apply to Extra Expense coverage as provided under Additional Coverages.

- f. **Pollutants** -- "We" do not pay for loss caused by or resulting from release, discharge, seepage, migration, dispersal, or escape of "pollutants" unless the release, discharge,

seepage, migration, dispersal, or escape is caused by a "specified peril". "We" do pay for any resulting loss caused by a "specified peril".

- g. **Power Supply Disturbance** -- "We" do not pay for loss caused by "power supply disturbance" if the cause of such disturbance took place more than 500 feet from the premises where the loss occurred.
- h. **Temperature, Humidity, Corrosion, or Rust** -- "We" do not pay for loss caused by corrosion, rust, humidity, dampness, dryness, or changes in or extremes of temperature.

But "we" do pay for loss to covered property that results from a direct physical loss, caused by a covered peril, to the air conditioning system that services covered "hardware".

- i. **Wear and Tear, or Obsolescence** -- "We" do not pay for loss caused by wear and tear, depreciation, or obsolescence.
3. "We" do not pay for extra expenses that "you" incur if one or more of the following exclusions apply.
- a. **Error or Omission** -- "We" do not pay for extra expense caused by error or omission in programming or incorrect instructions to "hardware".
- b. **Leases, Licenses, Contracts, or Orders** -- "We" do not pay for any increase in extra expenses due to the suspension, lapse, or cancellation of leases, licenses, contracts, or orders. However, "we" do cover loss during the "restoration period" if the suspension, lapse, or cancellation results directly from the interruption of "your" "operations".

"We" do not cover any extra expense beyond the "restoration period" caused

by the suspension, lapse, or cancellation of leases, licenses, contracts, or orders.

- c. **Strikes, Protests, Interference** -- "We" do not pay for any increase in extra expenses due to interference by strikers or other persons at a premises described on the "declarations". This applies to interference with rebuilding, repairing, or replacing covered property or with the resumption of "operations".

WHAT MUST BE DONE IN CASE OF LOSS

1. **Notice** -- In case of a loss, you must:
- a. give "us" or "our" agent prompt notice including a description of the property involved ("we" may request written notice); and
- b. give notice to the police when the act that causes the loss is a crime.
2. **Protect Property** -- "You" must take all reasonable steps to protect covered property at and after an insured loss to avoid further loss. "We" do pay the reasonable costs incurred by "you" for necessary repairs or emergency measures performed solely to protect covered property from further damage by a peril insured against if a peril insured against has already caused a loss to covered property. "You" must keep an accurate record of such costs. However, "we" do not pay for such repairs or emergency measures performed on property which has not been damaged by a peril insured against. This does not increase "our" "limit".
3. **Proof of Loss** -- "You" must send "us", within 60 days after our request, a signed, sworn proof of loss. This must include the following information:

- a. the time, place, and circumstances of the loss;
 - b. other policies of insurance that may cover the loss;
 - c. "your" interest and the interests of all others in the property involved, including all mortgages and liens;
 - d. changes in title of the covered property during the policy period; and
 - e. estimates, specifications, inventories, and other reasonable information that "we" may require to settle the loss.
4. **Examination** -- "You" must submit to examination under oath in matters connected with the loss as often as "we" reasonably request and give "us" sworn statements of the answers. If more than one person is examined, "we" have the right to examine and receive statements separately and not in the presence of others.
 5. **Records** -- "You" must produce records, including tax returns and bank microfilms of all canceled checks relating to value, loss, and expense and permit copies and extracts to be made of them as often as "we" reasonably request.
 6. **Damaged Property** -- "You" must exhibit the damaged and undamaged property as often as "we" reasonably request and allow "us" to inspect or take samples of the property.
 7. **Volunteer Payments** -- "You" must not, except at "your" own expense, voluntarily make any payments, assume any obligations, pay or offer any rewards, or incur any other expenses except as respects protecting property from further damage.
 8. **Abandonment** -- "You" may not abandon the property to "us" without "our" written consent.

9. **Cooperation** -- "You" must cooperate with "us" in performing all acts required by this policy.

VALUATION

1. **Actual Cash Value** -- The value of covered property is based on the actual cash value at the time of loss (with a deduction for depreciation) except as provided in paragraphs 2., 3., and 4. under Valuation.
2. **Replacement Cost** -- When replacement cost is indicated on the "declarations", the value of covered property will be based on the replacement cost without any deduction for depreciation

The replacement cost is limited to the cost of repair or replacement with similar materials on the same site and used for the same purpose. The payment shall not exceed the amount "you" spend to repair or replace the damaged or destroyed property.

Replacement cost valuation does not apply until the damaged or destroyed property is repaired or replaced. "You" may make a claim for actual cash value before repair or replacement takes place, and later for the replacement cost if "you" notify "us" of "your" intent within 180 days after the loss.

3. **Pair or Set** -- The value of a lost or damaged article which is part of a pair or set is based on a reasonable proportion of the value of the entire pair or set. The loss is not considered a total loss of the pair or set.

However, this provision does not apply to "software" that comes in sets. If part of a "software" set cannot be replaced, the loss is considered a total loss of the set.

4. **Loss to Parts** -- The value of a lost or damaged part of an item that consists of several parts when it is complete is based on the value of only the cost or damaged part or the cost to repair or replace it.

The most "we" pay is the amount determined in 4.c. above or the "limit", whichever is less. "We" do not pay any remaining part of the loss.

If there is more than one "limit" indicated on the "declarations" for this coverage part, this procedure applies separately to each "limit".

If there is only one "limit" indicated on the "declarations" for this coverage, this procedure applies to the total of all covered property to which the "limit" applies.

HOW MUCH WE PAY

1. **Insurable Interest** -- "We" do not cover more than "your" insurable interest in any property.
2. **Deductible** -- "We" pay only that part of "your" loss over the deductible amount indicated on the "declarations" in any one occurrence.
3. **Loss Settlement Terms** -- Subject to paragraphs 1., 2., 4., 5., and 6. under How Much We Pay, "we" pay the lesser of:
 - a. the amount determined under Valuation;
 - b. the cost to repair, replace, or rebuild the property with material of like kind and quality to the extent practicable; or
 - c. the "limit" that applies to the covered property.
4. **Coinsurance** -- "We" only pay a part of the loss if the "limit" is less than the percentage of the value of the covered property that is indicated on the "declarations". "Our" part of the loss is determined using the following steps:
 - a. multiply the percent indicated on the "declarations" by the value of the covered property at the time of loss;
 - b. divide the "limit" for covered property by the result determined in 4.a. above;
 - c. multiply the total amount of loss, after the application of any deductible, by the result determined in 4.b. above.

5. **Insurance Under More Than One Coverage** -- If more than one coverage of this policy insures the same loss, "we" pay no more than the actual claim, loss, or damage sustained.
6. **Insurance Under More Than One Policy** -- "You" may have another policy subject to the same "terms" as this policy. If "you" do, "we" will pay "our" share of the covered loss. "Our" share is the proportion that the applicable "limit" under this policy bears to the "limit" of all policies covering on the same basis.

If there is another policy covering the same loss, other than that described above, "we" pay only for the amount of covered loss in excess of the amount due from that other policy, whether "you" can collect on it or not. But "we" do not pay more than the

LOSS PAYMENTS

1. **Our Options** -- "We" have the following options:
 - a. pay the value of the loss;
 - b. pay the cost of repairing or replacing the loss;

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- c. rebuild, repair, or replace with property of like kind and quality, to the extent practicable, within a reasonable time;
- d. take all or any part of the damaged property at the agreed or appraised value.

"We" must give "you" notice of "our" intent to rebuild, repair, or replace within 30 days after receipt of a duly executed proof of loss.

2. **Your Losses** -- "We" adjust all losses with "you". Payment will be made to "you" unless another loss payee is named in the policy. An insured loss will be payable 30 days after a satisfactory proof of loss is received, and the amount of the loss has been established either by written agreement with "you" or the filing of an appraisal award with "us".

3. **Property of Others** -- Losses to property of others may be adjusted with and paid to:

- a. you on behalf of the owner; or
- b. the owner.

If "we" pay the owner, "we" do not have to pay "you". "We" may also choose to defend any suits arising from the owners at "our"

appraisers will then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, "you" or "we" can ask a judge of a court of record in the state where the property is located to select an umpire.

The appraisers will then determine and state separately the amount of each loss.

The appraisers will also determine the value of covered property items at the time of the loss, if requested.

If the appraisers submit a written report of any agreement to "us", the amount agreed upon will be the amount of the loss. If the appraisers fail to agree within a reasonable time, they will submit only their differences to the umpire. Written agreement so itemized and signed by any two of these three sets the amount of the loss.

Each appraiser will be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire will be paid equally by "you" and "us".

2. **Benefit to Others** -- Insurance under this coverage shall not directly or indirectly benefit anyone having custody of "your" property.

3. **Conformity With Statute** -- When a condition of this coverage is in conflict with an applicable law, that condition is amended to conform to that law.

4. **Estates** -- This provision applies only if the insured is an individual.

On "your" death, "we" cover the following as an insured:

- a. the person who has custody of "your" property until a legal representative is qualified and appointed; or
- b. "your" legal representative.

OTHER CONDITIONS

1. **Appraisal** -- If "you" and "we" do not agree on the amount of the loss or the actual cash value of covered property, either party may demand that these amounts be determined by appraisal.

If either makes a written demand for appraisal, each will select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two

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This person or organization is an insured only with respect to property covered by this coverage.

The coverage does not extend past the policy period indicated on the "declarations".

5. **Misrepresentations, Concealment, or Fraud** -- The coverage is void as to "you" and any other insured if, before or after a loss:

- a. "you" or any other insured have willfully concealed or misrepresented:
 - 1) a material fact or circumstance that relates to this insurance or the subject thereof; or
 - 2) "your" interest herein.
- b. there has been fraud or false swearing by "you" or any other insured with regard to a matter that relates to this insurance or the subject thereof.

6. **Policy Period** -- "We" pay for a covered loss that occurs during the policy period.

7. **Recoveries** -- If "we" pay "you" for the loss and lost or damaged property is recovered, or payment is made by those responsible for the loss, the following provisions apply:

- a. "you" must notify "us" promptly if "you" recover property or receive payment;
- b. "we" must notify "you" promptly if "we" recover property or receive payment;
- c. any recovery expenses incurred by either are reimbursed first;
- d. "you" may keep the recovered property but "you" must refund to "us" the amount of the claim paid, or any lesser amount to which "we" agree; and

- e. If the claim paid is less than the agreed loss due to a deductible or other limiting "terms" of this policy, any recovery will be pro rated between "you" and "us" based on "our" respective interest in the loss.

8. **Restoration of Limits** -- A loss "we" pay under this coverage does not reduce the applicable "limits".

9. **Subrogation** -- If "we" pay for a loss, "we" may require "you" to assign to "us" "your" right of recovery against others. "You" must do all that is necessary to secure "our" rights. "We" do not pay for a loss if "you" impair this right to recover.

"You" may waive "your" right to recover from others in writing before a loss occurs.

10. **Suit Against Us** -- No one may bring a legal action against "us" under this coverage unless:

- a. all of the "terms" of this coverage have been complied with; and
- b. the suit has been brought within two years after "you" first have knowledge of the loss.

If any applicable law makes this limitation invalid, then suit must begin within the shortest period permitted by law.

11. **Territorial Limits** -- "We" cover property while it is in the United States of America, its territories and possessions, Canada, and Puerto Rico.

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ESTES000917

ELECTRONIC DATA PROCESSING -- DECLARATIONS

(The information required below may be indicated on a separate schedule or supplemental "declarations".)

SCHEDULED LOCATIONS

Location No.	Described Premises
1	5715 RABBIT CREEK DRIVE; THEODORE, AL 36582

SCHEDULE LIMITS

Location No.	Hardware	Software	Extra Expense	Protection and Control Systems
1	\$30,000.00	\$15,000.00		

Property in transit or

DEDUCTIBLE

	Deductible Amount
For all covered perils unless a different deductible is indicated below	\$500.00
Earth Movement and Volcanic Eruption	
Flood and Ground Water	
Mechanical Breakdown, Electrical Disturbance, and Power Supply Disturbance	\$1,000.00

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Page 2 of 2

COINSURANCE

(check one)

80% 90% 100%

VALUATION

(check one)

Actual Cash Value Replacement Cost

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ESTES000919

EXHIBIT G

[Reservation of Rights Letter]



Haskell Slaughter
attorneys at law

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fal@hsy.com

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305 South Lawrence Street
Montgomery, Alabama 36104
Post Office Box 4660
Montgomery, Alabama 36103-4660
t. 334.265.8573 | f. 334.264.7945

August 21, 2009

VIA FEDERAL EXPRESS & FACSIMILE

Ms. Michelle Estes Rowland
Estes Heating & Air Conditioning, Inc.
5715 Rabbit Creek Drive
Theodore, Alabama 36582

RE: Insured: Estes Heating & Air Conditioning, Inc.
Policy No.: ANM19903-6
DOL: 5/1/09
Policy Period: 11/29/08 to 11/29/09
Litigation: *Diges E. Little, et al. v. The Mitchell Company, Inc., et al.*
In the Circuit Court of Mobile, Alabama (CV-2009-901153)

RESERVATION OF RIGHTS

Dear Ms. Rowland:

Our firm has been retained to provide our opinion concerning coverage for the above-referenced loss under the Commercial General Liability Policy issued by QBE Insurance Corporation ("QBE") to Estes Heating & Air Conditioning, Inc. ("Estes Heating & Air") bearing policy number ANM19903-6 ("Policy"). A demand for defense and indemnification by Estes Heating & Air has been made to QBE.

Our opinion is limited to issues concerning coverage. We express no view as to the viability of the claims asserted against the insured or the nature and extent of any liability on the part of the insured.

I. Policy Provisions

We bring to your attention several aspects of QBE's Policy. By identifying some, not all of the Policy, QBE does not intend to waive its right to rely upon those omitted portions of the Policy. Rather, QBE reserves its right to rely upon any portion of the Policy. The CGL Portion of the Policy provides, in pertinent part, as follows:

SECTION I – COVERAGES

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property

Reservation of Rights
Estes Heating & Air Conditioning, Inc.
August 21, 2009
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damage” to which this insurance applies.

This insurance applies to “bodily injury” and “property damage” only if:

- (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”; and
- (2) The “bodily injury” or “property damage” occurs during the policy period.

Exclusions

This insurance does not apply to:

- a. **Expected or Intended Injury**
“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect persons or property.
- b. **Contractual Liability**
“Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
 - (1) That the insured would have in the absence of the contract or agreement; or
 - (2) Assumed in a contract or agreement that is an “insured contract”, provided the “bodily injury” or “property damage” occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an “insured contract”, reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of “bodily injury” or “property damage”, provided:
 - (a) Liability to such party for, or for the cost of, that party’s defense has also been assumed in the same “insured contract”; and
 - (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance

Reservation of Rights
Estes Heating & Air Conditioning, Inc.
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Page 3

applies are alleged.

...

- f. **Pollution**
"Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants"...

...

- j. **Damage to Property**
"Property damage" to:

- ...
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

... Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement. Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

- k. **Damage To Your Product**
"Property damage" to "your product" arising out of it or any part of it.

- l. **Damage To Your Work**
"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard". This exclusion does not apply if the damaged work or the work out of which the damaged arises was performed on your behalf by a subcontractor.

- m. **Damage To Impaired Property Or Property Not Physically Injured**
"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

- n. **Recall Of Products, Work Or Impaired Property**

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Estes Heating & Air Conditioning, Inc.
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Page 4

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

...

SECTION IV- COMMERCIAL GENERAL LIABILITY CONDITIONS

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit
 - a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
 - (1) How, when and where the "occurrence" or offense took place;
 - (2) The names and addresses of any injured persons and witnesses; and
 - (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
 - b. If a claim is made or "suit" is brought against any insured, you must:
 - (1) Immediately record the specifics of the claim or "suit" and the date received; and
 - (2) Notify us as soon as practicable.You must see to it that we receive written notice of the claim or "suit" as soon as practicable.
 - c. You and any other involved insured must:
 - (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
 - (2) Authorize us to obtain records and other information;
 - (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
 - (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.
 - d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense,

Reservation of Rights
Estes Heating & Air Conditioning, Inc.
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Page 5

other than for first aid, without our consent.

...

4. Other insurance
if other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of the Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

b. Excess Insurance

This insurance is excess over:

(1) Any of the other insurance, whether primary, excess, contingent or on any other basis:

(a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

(b) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;

(c) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or

(d) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I - Coverage A - Bodily Injury And Property Damage Liability.

(2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

...

SECTION V - DEFINITIONS

...

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

...

11. "Loading or unloading" means the handling of property:

a. After it is moved from the place where it is accepted for movement

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Estes Heating & Air Conditioning, Inc.
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- into or onto an aircraft, watercraft or "auto";
 - b. While it is in or on an aircraft, watercraft or "auto"; or
 - c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;
- but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

...

17. "Property damage" means:

- a. Physical injury to tangible property all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

...

20. "Your product" means:

- a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
 - (1) You;
 - (2) Others trading under your name; or
 - (3) A person or organization whose business assets you have acquired; and
- b. Containers (other than vehicles), materials, parts, or equipment furnished in connection with such goods or products.

"Your product" includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and
 - b. The providing of or failure to provide warnings or instructions
- "Your product" does not include vending machines or other property rented to or located for the use of others but not sold.

21. "Your work" means:

- a. Work or operations performed by you or on your behalf; and
- b. Materials, parts or equipment furnished in connection with such work or operations.

"Your work" includes:

- a. Warranties or representations made at any time with respect to the fitness, quality durability, performance or use of "your work"; and
- b. The providing of or failure to provide warnings or instructions.

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Estes Heating & Air Conditioning, Inc.
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AMENDMENT OF INSURING AGREEMENT – KNOWN INJURY OR DAMAGE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART (OCCURRENCE VERSION)

Paragraph 1. Insuring Agreement of Section I – Coverage A – Bodily Injury And Property Damage Liability is replaced by the following:

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any Suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
- (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

b. This insurance applies to “bodily injury” and “property damage” only if:

- (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;
- (2) The “bodily injury” or “property damage” occurs during the policy period; and
- (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no “employee” authorized by you to give or receive notice of an “occurrence” or claim, knew that the “bodily injury” or “property damage” had occurred, in whole or in part. If such a listed insured or authorized “employee” knew, prior to the policy period, that the “bodily injury” or “property damage” occurred, then any continuation, change or resumption of such “bodily injury” or “property damage” during or after the policy period will be deemed to have been known prior to the policy period.

c. “Bodily injury” or “property damage” which occurs during the policy period and was not, prior to the policy period, known to have

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Estes Heating & Air Conditioning, Inc.
August 21, 2009
Page 8

- occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any “employee” authorized by you to give or received notice of an “occurrence” or claim, includes any continuation, change or resumption of that “bodily injury” or “property damage” after the end of the policy period.
- d. “Bodily injury” or “property damage” will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim:
- (1) Reports all, or any part, of the “bodily injury” or “property damage” to us or any other insurer;
 - (2) Receives a written or verbal demand or claim for damages because of the “bodily injury” or “property damage”; or
 - (3) Becomes aware by any other means that “bodily injury” or “property damage” has occurred or has begun to occur.
- e. Damages because of “bodily injury” include damages claimed by any person or organization for care, loss of services or death resulting at any time from the “bodily injury.”

II. Reservation of Rights

We are in receipt of the claim referenced above. QBE is undertaking an investigation of this claim under a full and complete reservation of rights. Further, QBE is defending Estes Heating & Air with regard to the claims that have been asserted by the Plaintiffs against Estes Heating & Air in the above-referenced litigation under a full and complete reservation of rights. The defense of Estes Heating & Air has been assigned to Mac McCafferty, Esq. of the firm Vickers, Riis, Murray and Curran, L.L.C. in Mobile, Alabama.

QBE reserves any and all rights it has under the Policy. Please understand that at this time, QBE is not denying coverage or indemnity to you with regard to this claim; however, QBE is reserving its right to question its duties in the future and/or deny any further duties under the Policy and/or request that a court determine those duties, if any, in an action seeking a declaratory judgment regarding the obligations and rights of the parties under the Policy. By undertaking an investigation and extending a defense to Estes Heating & Air, QBE does not waive any right to assert any provision of the Policy.

This letter does not waive any rights or defenses that QBE may have regarding this matter under any policy of insurance issued by QBE, regardless of whether such claims or defenses are set forth herein. The portions of the Policies that have been referenced in this correspondence are for your reference and convenience only. QBE does not waive any additional terms, conditions or exclusions that might be relevant to this claim. There may be other policy provisions applicable to the facts and allegations of this case, and our failure to set them out in

Reservation of Rights
Estes Heating & Air Conditioning, Inc.
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detail within this correspondence is not intended to suggest that such grounds may not exist or are not applicable. QBE expressly reserves its right to supplement those views expressed above in light of any information that may subsequently become available.

Any action taken by this office or by QBE, its agents, representatives or attorneys investigating this claim does not constitute and is not intended as a waiver of any rights or defenses available to QBE and shall not estop QBE from asserting at a later date, any and all policy defenses that may be available now or in the future. Specifically, all rights and defenses are specifically reserved. QBE reserves its right not only for such rights and defenses that may now exist, but any additional rights and defenses it may discover at a later date which may be applicable to the Policy and the facts of this case.

As we trust you are aware, the liability section and other sections of your policy contain other specific wording and exclusionary provisions that limit coverage. These include but are not limited to notice, cooperation, etc. and other duties that you may have. By calling to your attention certain provisions, we do not intend to de-emphasize or waive any other provisions of your policy, which may be applicable. Given the nature of the policy and the presence of various coverage questions, we will proceed to handle this matter subject to the understanding that you, individually, along with QBE Insurance Corporation, shall each reserve its respective rights and defenses. By denominating particular questions that appear to us at this time, we cannot limit or waive any other rights or defenses QBE Insurance Corporation may have or obtain in the future.

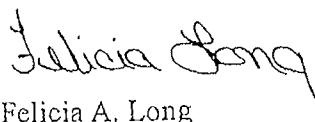
In the event a verdict is rendered against you in excess of the limits of this Policy, and in the event there is a determination that there would be coverage, QBE Insurance Corporation would not respond for the excess amount. If you wish to maintain your personal attorney in this litigation to protect your interests, you have a right to do so, but it would be at your own cost and expense. This is not meant to suggest or imply that you should employ a personal attorney, but merely to inform you of your right to do so.

III. Conclusion

As stated herein, QBE is undertaking an investigation of this claim under a full reservation of rights and defending Estes Heating & Air in this litigation also under a full reservation of rights.

Should you have any information relevant to the above analysis please submit it to my attention and QBE will give it its full consideration.

Sincerely,


Felicia A. Long

Reservation of Rights
Estes Heating & Air Conditioning, Inc.
August 21, 2009
Page 10

cc (via *first class mail*):

Cindy Dunn
Mac McCafferty, Esq.
Constance C. Walker, Esq.

#312018
02391-1123

ESTES 000229

EXHIBIT H

[Order Granting Stay]



ELECTRONICALLY FILED
7/27/2011 9:17 AM
CV-2009-901153.00
CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA
JOJO SCHWARZAUER, CLERK

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

HOUSING AUTHORITY OF THE
CITY OF PRICHARD, ALABAMA,

Plaintiff,

v.

THE MITCHELL COMPANY, INC., et al.,

Defendants.

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CASE NO.: CV-09-901118-MAY

DIGES E. LITTLE, et al.,

Plaintiffs,

v.

THE MITCHELL COMPANY, INC., et al.,

Defendants.

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CASE NO.: CV-09-901153-JCW

CONSOLIDATED WITH
CV-09-901118-MAY

ROBERT W. HENDERSON, et al.

Plaintiffs,

v.

THE MITCHELL COMPANY, INC. et al.,

Defendants.

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CASE NO.: CV-09-901381-JRL

CONSOLIDATED WITH
CV-09-901118-MAY

ORDER


This matter coming to be heard on Interior/Exterior Building Supply, LP's Motion to Stay, the brief in opposition thereto filed by Plaintiffs as well as the supporting brief filed by Creola Ace Hardware, the Court having considered the written motions and responses and the oral argument presented by all the parties present at the hearing does hereby ORDER, DECREE and ADJUDGE as follows:

The Motion to Stay filed by Interior/Exterior Building Supply, LP is GRANTED. It is further

ORDERED, DECREED and ADJUDGED that

The Court finds it is impracticable to stay only claims against Interior/Exterior Building Supply, LP as opposed to staying this entire action. Therefore, this action in its entirety is hereby stayed and placed on the Administrative Docket pending further order of this Court.

Done this 27 date of July, 2011.



CIRCUIT COURT JUDGE

EXHIBIT I

[Complaint for Declaratory Judgment that Insurance Policy does not Afford Coverage]

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA**

**QBE INSURANCE
CORPORATION,**

Petitioner,

v.

**ESTES HEATING & AIR
CONDITIONING, INC.**

Respondent.

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CASE NO.:1:10cv456

**COMPLAINT FOR DECLARATORY JUDGMENT THAT INSURANCE POLICY
DOES NOT AFFORD COVERAGE**

Petitioner QBE Insurance Corporation (“QBE”) files this Complaint for Declaratory Judgment seeking a determination that it owes no coverage to Estes Heating & Air Conditioning, Inc. (“Estes Heating & Air”) under the Commercial General Liability Policy QBE issued to Estes relative to certain claims presented by multiple plaintiffs against Estes in two lawsuits filed in the Circuit Court of Mobile County, Alabama. Those cases are styled *Diges E. Little, et al. v. The Mitchell Company, Inc., et al.* with civil action number CV-09-901118-May and *Robert W. Henderson, et al. v. The Mitchell Company, Inc., et al.* with civil action number CV-2009-901153-May and have been consolidated (hereinafter referred to as the “Underlying Suit”). In support of the relief requested herein, QBE offers the following:

I. PARTIES, VENUE, AND JURISDICTION

1. Petitioner QBE is a Pennsylvania business corporation with its principal place of business located in the State of New York.
2. Respondent Estes Heating & Air Conditioning, Inc. is an Alabama corporation located in Mobile, Alabama with a principal place of business in Mobile County, Alabama.

3. Jurisdiction of this action is proper pursuant to 28 U.S.C. § 1332, as (a) there is complete diversity of citizenship between QBE and the Respondent, and (b) the amount in controversy (exclusive of interest and costs) upon information and belief exceeds \$75,000.00.

4. Venue in this Court is proper pursuant to 28 U.S.C. § 1391.

5. This proceeding is authorized by 28 U.S.C. § 2201.

II. NARRATIVE OF FACTS AND UNDERLYING ALLEGATIONS

1. In 2006 the Mitchell Company, Inc. subcontracted Estes Heating & Air to install approximately 35 individual HVAC systems in a neighborhood described as the Bessemer Subdivision in Pritchard, Alabama.

2. Estes Heating & Air installed these units and each was inspected and approved by city officials.

3. At some point, according to the Plaintiffs in May of 2009, the Plaintiffs became aware of alleged defects in the Chinese Drywall materials that had been used in the homes and also of alleged defects in the HVAC systems installed by Estes Heating & Air. [See *Little* Complaint, attached hereto as Exhibit A, ¶28, and *Henderson* Complaint, attached hereto as Exhibit B, ¶28].

4. These alleged defects allegedly caused the Plaintiffs to suffer damages both to their person and property. [Exhibit A, ¶¶29-30; Ex. B, ¶¶29-30].

5. In general, the Plaintiffs allege that their claims arise out of the construction and lease of their residential homes, and the manufacture, formulation, design, processing, distribution, delivery, importation, supplying, inspection, testing, marketing, sale, warranting, advertising, use, installation, application, servicing and or failure to warn concerning Chinese drywall and/or the HVAC system which the Defendants knew or should have known was

defective or unsuited for its purpose. [Exhibit A, ¶2; Ex. B, ¶2].

6. They allege that due to the Defendants' conduct, the defective Chinese drywall was installed in their homes and has injured them and their property. [Exhibit A, ¶3; Ex. B, ¶3].

7. Further, they allege that the HVAC system was supplied, installed and serviced by Estes and that it was defective and not the proper size, and either caused damage to their property and health, or exacerbated the damage caused by the Chinese drywall. [Exhibit A, ¶¶3,30; Ex. B, ¶¶3,30].

8. According to the Complaint, Chinese drywall materials were made from waste materials collected from scrubbers at coal-fired plants in China or were made from Gypsum, a substance mined in China that contains high levels of sulfur. [Exhibit A, ¶22; Ex. B, ¶22].

9. Allegedly, the drywall materials emit a combination of sulfide gases which produce a chemical odor and can cause corrosion of copper and other metal materials such as those used in HVAC, electrical, and gas fuel systems, and other appliances, electronics and equipment commonly found in residential homes. [Exhibit A, ¶23; Ex. B, ¶23].

10. Plaintiffs allege that one of the gases emitted by the drywall is Hydrogen Sulfide, which is a broad spectrum poison which can cause serious health problems in the human body. Plaintiffs aver that low level exposure to this gas over time can lead to irritated, itchy eyes and skin, difficulty breathing, sore throat, persistent cough, nausea, bloody noses, headaches, fatigue, appetite loss, impaired memory function, sinus infection, allergic reactions and asthma attacks. [Exhibit A, ¶24; Ex. B, ¶24].

11. The Plaintiffs in the underlying actions allege that the Defendants knew or should have known of the defective nature of the Chinese drywall product before putting it in their homes but concealed or suppressed this knowledge from them. [Exhibit A, ¶¶27-28; Ex. B, ¶¶27-

28].

12. Specifically, they allege that as a result of the defective HVAC system, the gas producing properties of the defective Chinese drywall were worsened to their injury. [Exhibit A, ¶26; Ex. B, ¶26].

13. Further, the Plaintiffs state that they could not have discovered the defects in the Chinese drywall until December of 2008 when press reports touting the dangers of the product were first issued and that they did not receive actual notice of the use of Chinese drywall in their homes until May of 2009. Nor could they have discovered the defective nature of the HVAC system supplied and installed by Estes until May of 2009 after investigation of the Chinese drywall. [Exhibit A, ¶28; Ex. B, ¶28].

14. Regarding injuries, the Plaintiffs allege that as a result of the gas emissions and the conduct of the Defendants they have suffered the following damages:

- a) Personal injuries of the kind and form enumerated in the list above associated with the exposure to sulfide gases;
- b) Permanent injuries or the aggravation of pre-existing conditions;
- c) Pain and suffering;
- d) Mental anguish;
- e) Loss of enjoyment of their home;
- f) Increased utility and servicing costs;
- g) Past and future medical expenses;
- h) Past and future lost earnings;
- i) Property damage;
- j) Property damage to the HVAC system, electrical systems, and gas fuel systems in their homes;

- k) Property damage to appliances, electronics, equipment and other items in their homes;
- l) Relocation expenses and costs;
- m) Cleaning expenses and costs;
- n) The loss of financial and time investment in their homes;
- o) The loss of funds paid in the form of rent;
- p) Such severe, regular and systematic failures of the HVAC systems, electrical systems and gas fuel systems and other residential home systems/components so as to render their home unreliable, unsafe, uninhabitable and unfit for human occupation and use.

[Exhibit A, ¶29; Ex. B, ¶29].

15. The damages as enumerated were also allegedly directly and proximately caused, exacerbated and worsened by the HVAC system which was improperly manufactured, formulated, designed, processed, distributed, delivered, imported, supplied, inspected, tested, marketed, sold, warranted, advertised, used, installed, applied and/or serviced, and which was so provided without adequate warnings. [Exhibit A, ¶30; Ex. B, ¶30].

16. The Plaintiffs allege twelve causes of action against Estes Heating & Air in the Underlying Suit:

- a) Count I- Negligence/Wantonness
- b) Count II – Strict Products Liability
- c) Count III – Unjust Enrichment
- d) Count IV – Implied Warranty of Habitability
- e) Count V – Implied Warranty of Fitness for a Particular Purpose
- f) Count VI – Implied Warranty of Merchantability
- g) Count VII – Express Warranty

- h) Count VIII – Violation of Alabama’s Deceptive and Unfair Trade Practices Act
- i) Count IX – Breach of Contract
- j) Count X – Fraudulent Misrepresentation
- k) Count XI – Fraudulent Concealment/Suppression
- l) Count XII - Failure to Secure Performance Bond

[Exhibit A; Ex. B].

III. COMMERCIAL GENERAL LIABILITY POLICY

16. QBE issued to Estes Heating & Air a Commercial General Liability Insurance policy bearing policy numbers ANM19903-6 for the policy period of November 29, 2008 to November 29, 2009. [See QBE’s Commercial General Liability Policy, ANM10661-6, attached hereto as Exhibit “C” hereinafter referred to as the “CGL Policy”].

17. The limit of the liability coverage provided under the CGL Policy is subject to various coverage provisions, endorsements, terms, conditions, limitations, and exclusions. [See Exhibit C].

18. The CGL Policy includes (among other things) the following general provisions regarding coverage:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result. **But:**

(1) The amount we will pay for damages is limited as described in

Section III – Limits Of Insurance; and

- (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

- b. This insurance applies to “bodily injury” and “property damage” only if:
- (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”; and
 - (2) The “bodily injury” or “property damage” occurs during the policy period.

...

2. Exclusions

This insurance does not apply to:

- a. **Expected Or Intended Injury**
“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect persons or property.
- b. **Contractual Liability**
“Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
 - (1) That the insured would have in the absence of the contract or agreement; or
 - (2) Assumed in a contract or agreement that is an “insured contract”, provided the “bodily injury” or “property damage” occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an “insured contract”, reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of “bodily injury” or “property damage”, provided:
 - (a) Liability to such party for, or for the cost of, that party’s defense has also been assumed in the same “insured contract”; and
 - (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

...

- f. **Pollution**

- (1) **“Bodily injury” or “property damage” arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of “pollutants”.**
- (a) **At or from any premises, site or location which is or was at any time owned or occupied by or rented or loaned to, any insured. However, this subparagraph does not apply to:**
- (i) **“Bodily injury” if sustained within a building and caused by smoke, fumes, vapor or soot from equipment used to heat that building.**
- (ii) **“Bodily injury” or “property damage” for which you may be held liable. If you are a contractor and the owner lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or**
- (iii) **“Bodily injury” or “property damage” arising out of heat, smoke or fumes from a “hostile” fire;**
- (b) **At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;**
- (c) **Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any insured or any person or organization for whom you may be legally responsible; or**
- (d) **At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured’s behalf are performing operations if the “pollutants” are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:**
- (i) **“Bodily injury” or “property damage” arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical hydraulic or mechanical functions necessary for the operation of “mobile equipment” or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the “bodily injury” or “property damage” arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the**

premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;

- (ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or
 - (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".
- (e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants".
2. Any loss, cost or expense arising out of any:
- (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
 - (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to or assessing the effects or, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

...

j. **Damage to Property**

"Property damage" to:

- (1) Property you own, rent, or occupy;
- (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody or control of the insured;
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are

performing operations, if the "property damage" arises out of those operations; or

- (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III – Limits of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you. Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement. Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

- k. **Damage to Your Product**
"Property damage" to "your product" arising out of it or any part of it.
- l. **Damage to Your Work**
"Property Damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".
This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.
- m. **Damage to Impaired Property or Property Not Physically Injured**
"Property damage" to "impaired property" or property that has not been physically injured, arising out of:
(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.
This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.
- n. **Recall of Products, Work Or Impaired Property**
Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:
(1) "Your product";
(2) "Your work"; or
(3) "impaired property";
If such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

...

COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
- (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

- b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

2. Exclusions

This insurance does not apply to:

a. "Personal and advertising injury":

- (1) Caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury";
- (2) Arising out of oral or written publication of material, if done by or at the direction of the insured with the knowledge of its falsity;
- (3) Arising out of oral or written publication of Material whose first publication took place before the beginning of the policy period;
- (4) Arising out of a criminal act committed by or at the direction of any insured;
- (5) For which the insured had assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement;
- (6) Arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement";
- (7) Arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement";
- (8) Arising out of the wrong description of the price of goods, products or services stated in your "advertisement";

- (9) Committed by an insured whose business is advertising, broadcasting, publishing or telecasting. However, this exclusion does not apply to Paragraphs 14.a., b. and c. of "personal and advertising injury" under the Definitions Section; or
 - (10) Arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.
- b. Any loss, cost or expense arising out of any:
- (1) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
 - (2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

...

SECTION V- DEFINITIONS

...

3. "Bodily Injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

...

9. "Insured contract" means:
- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
 - b. A sidetrack agreement;
 - c. An easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
 - d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
 - e. An elevator maintenance agreement;
 - f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.
Paragraph f. does not include that part of any contract or agreement:
 - (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
 - (2) That indemnifies an architect, engineer or surveyor for injury or

damage arising out of:

- (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; or
 - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

...

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

...

17. "Property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such losses of use shall be deemed to occur at the time of the "occurrence" that caused it.

...

20. "Your product" means:

- a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
 - (1) You;
 - (2) Others trading under your name; of
 - (3) A person or organization whose business or assets you have acquired; and
- b. Containers (other than vehicles), materials, parts or equipment furnished in connection with such good or products.

"Your product includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and
- b. The providing of or failure to provide warnings or instructions.

"Your product" does not include vending machines or other property rented to or located for the use of others but not sold.

21. "Your work" means:

- a. Work or operations performed by you or on your behalf; and
- b. Materials, parts or equipment furnished in connection with such work or

operations.

"Your work" includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and
- b. The providing of or failure to provide warnings or instructions.

...

POLLUTANTS DEFINITION AMENDMENT

All Coverage Parts or Coverage Forms included in this policy are subject to the following:

The definition of "pollutants" is replaced in its entirety by the following:

"Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, radiation or radioactive contamination, dioxins, polychlorinated biphenols, pathogenic or poisonous biological or chemical materials and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

...

TOTAL POLLUTION EXCLUSION ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Exclusion f. under Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability is replaced by the following:

This insurance does not apply to:

f. **Pollution**

- (1) "Bodily injury" or "property damage" which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.
- (2) Any loss, cost or expense arising out of any:
 - (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants"; or
 - (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

...

AMENDMENT OF INSURED CONTRACT DEFINITION

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART
Paragraph 9. of the Definitions Section is replaced by
the following:

9. "Insured contract" means:

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
- b. A sidetrack agreement;
- c. An easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, provided the "bodily injury" or "property damage" is caused, in whole or in part, by you or those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; or
 - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

IV. COVERAGE ANALYSIS

19. The Underlying Litigation arises directly from allegations of damages including damage to property, damage to the plaintiffs' physical and mental health, and economic losses

caused by the discharge, release, emission, dispersal, seepage, migration, escape or off-gassing of sulfide gases from the Chinese drywall material placed in their homes and from the allegedly undersized and defective HVAC systems supplied and installed by Estes Heating & Air which contributed to the Chinese drywall off-gassing problem to exacerbate or worsen the damages.

20. Estes Heating & Air made a demand on QBE for defense and indemnification under the CGL Policy for the Underlying Suit.

21. The CGL Policy does not cover all risk of liability which may be legally imposed upon Estes Heating & Air.

22. Under Coverage Part A, the CGL Policy only covers acts constituting an "occurrence" causing "bodily injury" or "property damage" as those terms are defined in the Policy.

23. The CGL Policy defines "occurrence" as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions".

24. The CGL Policy defines "property damage" as:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such losses of use shall be deemed to occur at the time of the "occurrence" that caused it.

25. The CGL Policy defines "bodily injury" as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time."

26. An analysis of the claim asserted above, leads to the conclusion that no coverage is afforded to Estes Heating & Air under the CGL Policy.

27. No coverage is afforded to Estes Heating & Air for allegations in the Underlying Suit for damages which are purely economic losses of the plaintiffs because those losses do not

constitute "property damage" or "bodily injury" under the CGL Policy which would trigger coverage under the Policy.

28. No coverage is afforded to Estes Heating & Air for the allegations in the Underlying suit which do constitute "bodily injury" and/or "property damage" as those terms are defined because of the lack of an "occurrence", and/or the applicability of the Total Pollution Exclusion Endorsement, the Expected or Intended Injury Exclusion, the Contractual Liability Exclusion, the Damage to Your Product Exclusion, the Damage to Your Work Exclusion, and the Damage to Impaired Property or Property Not Physically Injured Exclusion.

V. REQUEST FOR DECLARATORY JUDGMENT AND RELIEF

26. QBE believes and avers that no coverage is afforded Estes Heating & Air under the CGL Policy.

27. QBE believes and avers that QBE owes neither a duty to defend nor a duty to indemnify Estes Heating & Air with regard to the allegations in the Underlying Litigation.

28. A justiciable controversy exists.

WHEREFORE, THE ABOVE PREMISES CONSIDERED, QBE prays that this Honorable Court:

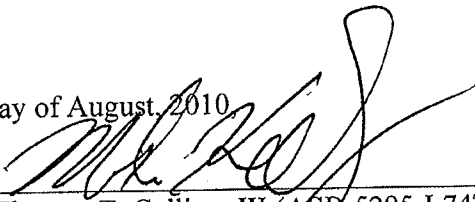
A. Declare and decree that the CGL Policy issued to Estes Heating & Air does not afford coverage to Estes Heating & Air for the Underlying Suit; and

B. Declare and decree that QBE does not have a duty to defend Estes Heating & Air in the Underlying Suit; and

C. Declare and decree that QBE does not have a duty to indemnify Estes Heating & Air in the Underlying Suit; and

D. Afford QBE such other and further relief as the Court may deem proper.

Respectfully submitted this the 20th day of August, 2010.



Thomas T. Gallion, III (ASB-5295-L74T)
Constance C. Walker (ASB-5510-L66C)
Michael W. Kelley, II (ASB-7825-I25K)

OF COUNSEL:

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jj@hsy.com

**RESPONDENT SHALL BE SERVED VIA CERTIFIED MAIL AT THE
FOLLOWING ADDRESS:**

Estes Heating & Air Conditioning, Inc.
P.O. Box 5548
Mobile, AL 36605

336609_1
02391-1123

“Proposed Order Number 1”

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

QBE INSURANCE)	
CORPORATION,)	
)	
Petitioner,)	
)	
v.)	CASE NO.:1:10cv456
)	
ESTES HEATING & AIR)	
CONDITIONING, INC.)	
)	
Respondent.)	

ORDER

In accordance with the Memorandum Opinion this day entered, there being no genuine issues of material fact, QBE Insurance Corporation's ("QBE") Motion for Summary Judgment is **GRANTED**. It is hereby **ORDERED, ADJUDGED AND DECREED** that judgment be, and hereby is, entered in favor of QBE. QBE is not obligated to defend or indemnify Estes Heating & Air Conditioning, Inc. for the underlying consolidated action(s) in the Circuit Court of Mobile County styled *Diges E. Little, et al. v. The Mitchell Company, Inc., et al.* with civil action number CV-09-901153 and *Robert W. Henderson, et al. v. The Mitchell Company, Inc., et al.* with civil action number CV-2009-901381.

Done this _____ day of _____, 2011

UNITED STATES DISTRICT JUDGE

“Proposed Order Number 2”

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

QBE INSURANCE)	
CORPORATION,)	
)	
Petitioner,)	
)	
v.)	CASE NO.:1:10cv456
)	
ESTES HEATING & AIR)	
CONDITIONING, INC.)	
)	
Respondent.)	

ORDER

In accordance with the Memorandum Opinion this day entered, there being no genuine issues of material fact, QBE Insurance Corporation's ("QBE") Motion for Summary Judgment is **GRANTED**. It is hereby **ORDERED, ADJUDGED AND DECREED** that judgment be, and hereby is, entered in favor of QBE. QBE is not obligated to defend Estes Heating & Air Conditioning, Inc. ("Estes") for the underlying consolidated action(s) in the Circuit Court of Mobile County styled *Diges E. Little, et al. v. The Mitchell Company, Inc., et al.* with civil action number CV-09-901153 and *Robert W. Henderson, et al. v. The Mitchell Company, Inc., et al.* with civil action number CV-2009-901381. With regard to QBE's duty to indemnify Estes for the underlying action(s), adjudication of the issue is premature at this time and is not ripe. Therefore, it is hereby **ORDERED, ADJUDGED AND DECREED** that QBE's request for declaration of its duty to indemnify Estes is dismissed without prejudice until such time as an actual controversy exists as to that issue.

Done this _____ day of _____, 2011

UNITED STATES DISTRICT JUDGE