COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Docket No. SJC-13109

THE MASONIC TEMPLE ASSOCIATION OF QUINCY, INC.

Plaintiff/Appellant

v.

JAY PATEL and DIPIKA, INC.
Defendants/Appellants

v.

LEO MARTIN, SEYMOUR H. MARCUS a/k/a SY H. MARCUS, ROBLIN INSURANCE AGENCY INC., TREACE LTD, QUINCY ADAMSBUILDING CORPORATION, SHEA STREET REALTY TRUST, ELLEN REA MARCUS, AS TRUSTEE OF THE GROSSMAN MONROE TRUST, and UNION INSURANCE COMPANY
Third-Party

Defendants/Appellees

DIPIKA, INC.

Plaintiff/Appellant

v.

ACADIA INSURANCE COMPANY

Defendant/Appellee

THE MASONIC TEMPLE ASSOCIATION OF QUINCY, INC.

Plaintiff/Appellant

v.

ACADIA INSURANCE COMPANY
Defendant/Appellee

ON APPEAL FROM JUDGMENTS OF THE
NORFOLK SUPERIOR COURT

UNITED POLICYHOLDERS' BRIEF OF AMICUS CURIAE

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CORPORATE DISCLOSURE STATEMENT

United Policyholders ("UP") is a federal 501(c) (3) tax-exempt non-profit organization founded in 1991. UP is not publicly held and does not have any public company affiliates.

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STATEMENT OF INTEREST OF THE AMICUS BRIEF

The Massachusetts Supreme Court has solicited amicus curiae briefs to address:

> Where the named insured in a general liability insurance policy includes a "doing business as" designation, whether policy coverage is limited to liabilities arising out of the "doing business as" entity's business or whether it applies to the named insured when it operates in other capacities; e.g., where, as here, the named insured is "Dipika Inc. dba Super 8," whether policy coverage is limited to liabilities arising out of Dipika's operation of the Super 8 Motel or whether the policy also provides coverage more broadly to other Dipika, Inc., operations.

Dkt. No. 2. (entered April 27, 2021).

United Policyholders ("UP") therefore respectfully seeks to assist this Court in addressing how a "'doing business as' designation" should be interpreted in the context of a general liability insurance policy. [1]

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[1] United Policyholders has submitted amicus briefs in numerous matters before this Court as well as before federal courts sitting in Massachusetts. *See, e.g., Mount Vernon Fire Ins. Co. v. Visionaid, Inc.*, 477 Mass. 343 (2017); *Auto Flat Car Crushers, Inc. v. Hanover Ins. Co.*, 469 Mass. 813 (2014); *Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, London,* 449 Mass. 621 (2007); *John Hancock Mut. Life Ins. Co. v. Banerji,* 447 Mass. 875 (2006); *W. All. Ins. Co. v. Gill,* 426 Mass. 115 (1997); *Clark Equip. Co. v. Mass. Insurers Insolvency Fund*, 423 Mass. 165 (1996); *see also Legal Sea Foods, LLC v. Strathmore Ins. Co.*, No. 21-1202 (1st Cir. Mar. 19, 2021); *Doe v. Harvard Pilgrim Health Care, Inc.*, 974 F.3d 69 (1st Cir. 2020); *Boston Gas Co. v. Century Indem. Co.*, 588 F.3d 20 (1st Cir. 2009); *Denmark v. Liberty Life Assur. Co. of Boston*, 566 F.3d 1 (1st Cir. 2009); *Foreign Car Ctr., Inc. v. Salem Suede, Inc.,* Civ.A. No. 97-12587-REK, *sub nom. In re Salem Suede, Inc.*, 221 B.R. 586 (D. Mass. 1998).

UP is a unique non-profit, tax-exempt, charitable organization founded in 1991 that provides valuable information and assistance to the public concerning insurers' duties and policyholders' rights. UP monitors legal developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps preserve the integrity of the insurance system by educating consumers and advocating for fairness in policy sales and claim handling. Grants, donations and volunteers support the organization's work. UP does not accept funding from insurance companies.

UP assists Massachusetts businesses and residents through three programs: Roadmap to Recovery (disaster recovery and claim help); Roadmap to Preparedness (preparedness through insurance education); and Advocacy and Action (judicial, regulatory and legislative engagements to uphold the reasonable expectations of policyholders). UP hosts a library of informational publications and videos related to personal and commercial insurance products, coverage and the claims process at www.uphelp.org.

In the state of Massachusetts, UP has assisted coastal property owners and purchasers of disability insurance and worked with the Division of Insurance on various matters.

In furtherance of its mission, UP cautiously chooses cases and regularly appears as amicus curiae in courts nationwide to advance the policyholder's

perspective on insurance cases likely to have widespread impact. UP has been advocating for policyholder's rights in the courts for decades. For instance, UP's amicus brief was cited in the U.S. Supreme Court's opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999).

UP seeks to fulfill the classic role of amicus curiae by supplementing the efforts of counsel and drawing the court's attention to law that may have escaped consideration.

STATEMENT OF THE CASE AND FACTS

UP hereby adopts the "Statement of the Case" and "Statement of the Facts" set forth in the Opening Brief of Appellants Jay Patel and Dipika, Inc., filed on May 6, 2021, and refers the Court thereto for a detailed recitation of the factual history of this case.

SUMMARY OF THE ARGUMENT

On April 27, 2021, this Court requested input from amicus curiae regarding the insurance coverage implications of the named insured in a general liability insurance policy having a "'doing business as' designation." Dkt. No. 2.

In response to the Court's query, UP submits that under bedrock principles of insurance, Massachusetts insurance law, and the plain language of the operative insurance policy, a policy sold to a Named Insured that includes its "doing business as" ("dba") designee provides insurance coverage to the operations of the

Named Insured as well as those of its dba designee. Here, for example, where the Named Insured was identified in the Declarations page of the policy as "Dipika Inc. dba Super 8," a general liability insurance policy must provide insurance coverage to the operations of Dipika, Inc. ("Dipika").

As detailed in the Appellants' Brief, the parties' dispute concerns insurance coverage for a lawsuit against Dipika, under a general liability insurance policy that Union Insurance Company ("Union") sold to Dipika (the "Policy"), in connection with the construction of a Super 8 hotel.

Established principles of insurance law, the nature and purpose of liability insurance policies, and the designation of a Named Insured, dictate a result in favor of coverage. Liability policies differ from property insurance policies insofar as coverage for the latter is tethered to specific physical locations, while coverage for the former protects the Named Insured irrespective of location. And the designation of a Named Insured is of critical importance as it identifies the corporate entity to be insured.

In accordance with, and under well-established tenets of Massachusetts insurance law, the plain language of the Policy—such as the Named Insured provision—should govern questions of policy interpretation. Here, the plain language of the Policy unambiguously confirms that the Policy provides coverage to Dipika. For example, in addition to the identification of Dipika as the Named

Insured on the Declarations page of the Policy, the Policy includes endorsements that require Union to insure all "Designated Construction Project(s)" at "ALL LOCATIONS." RAI_208, 210.

Even if the Court were to find that the Named Insured provision is susceptible to multiple reasonable interpretations and thus ambiguous, Massachusetts law mandates that the Policy be construed in favor of coverage. And there's a simple reason for this—as here, the Policy was drafted by Union without negotiation of its terms with its policyholder Dipika.

Moreover, to the extent Union is seeking to turn the Named Insured provision into a limitation on coverage, such limitation must be narrowly construed against Union. Though it could have done so, Union did not include any policy provision or exclusion clearly limiting coverage to the activities of the dba designee. Thus, just as in the case of ambiguities, Massachusetts law dictates the policy should be read broadly in favor of coverage.

Finally, Appellants' interpretation comports with the legal significance ascribed to dba designees. Under Massachusetts law, and as other state high courts have found, dba designees are not separate legal entities, meaning the obligations borne in the name of dba designee flow to the legal entity. In this regard, Dipika is legally responsible to pay the insurance premiums, not the dba designee, which has no independent legal standing. It offends common notions of equity to hold Dipika

responsible for Super 8's premium and other legal obligations, and then deny it the benefits of the insurance that it purchased.

ARGUMENT

I. BEDROCK PRINCIPLES OF INSURANCE, MASSACHUSETTS INSURANCE LAW PRINCIPLES, AND THE PLAIN LANGUAGE OF THE POLICY REQUIRE UNION TO INSURE DIPIKA

UP has a particular interest in promoting the rights of policyholders and seeing that policyholders obtain the full measure of the insurance they purchase. The questions presented in this case are of importance to policyholders across Massachusetts, as companies large and small often operate their businesses under a dba.

Here, Dipika purchased insurance to provide coverage for its commercial activities, including operating and construction activities at its motels. Indeed, "Dipika Inc. dba Super 8" purchased insurance that provided two separate and distinct coverage parts: commercial property insurance *and* commercial general liability insurance. Though Union opted to package these insurance products together when it sold the Policy to "Dipika Inc. dba Super 8," bedrock principles of insurance law require that the unique purpose and functioning of liability insurance, as well as the significance of a Named Insured provision on a Declarations Page, be given due consideration.

a. <u>The Bedrock Promise of Liability Insurance</u>

In the most basic sense, "the essence of insurance is risk transfer and risk distribution. The policyholder incurs a small but certain loss (premium payment) in return for a promise of protection should it experience a larger—but contingent—loss. . . The policyholder is effectively 'off-loading' the risk to the insurer—and paying for the privilege." Richard P. Lewis & Nicholas M. Insua, *Business Income Insurance Disputes* § 2.02 (2d ed., 2021-1 Supp. 2012); *see also SCA Servs., Inc. v. Transp. Ins. Co.,* 419 Mass. 528, 532 (1995) (noting that "[b]y its very nature insurance is based on contingent risks which may or may not occur. Stated differently, the basic purpose of insurance is to protect against fortuitous events and not against known certainties. Parties wager against the occurrence or nonoccurrence of a specified event; the carrier insures against a risk, not a certainty." (citation omitted)).

For property insurance, "the risk off-loaded is that of direct physical injury to the policyholder's ***covered property*** . . ." Lewis, *Business Income Insurance Disputes* § 2.02 (emphasis added). For general liability insurance, by contrast, "the risk off-loaded is that of liability of the policyholder for bodily injury or property damage caused by the ***policyholder***." *Id.* (emphasis added). At its core, a critical distinction in these products is that property insurance runs with specifically

identified property and liability insurance runs with the specifically identified insured.

i. *Property Insurance: Protection against First-Party Losses*

Property insurance long predates liability insurance:

> Historically, property insurance grew out of the insurance against the risk of fire which became available for ships, buildings, and some commercial property at a time when most of the structures in use were made wholly or primarily of wood. . . The concept of "property insurance" now includes a broad spectrum of policies and coverages applicable to just about any type of property that exists in the modern world.

Steven Plitt et al, 10A *Couch on Insurance* § 148:1 (3d ed. June 2021). As Massachusetts courts have long recognized, "[i]n its most basic form, a commercial property casualty policy insures against the risk of damage or loss of a business's real and personal property." *Verrill Farms, LLC v. Farm Fam. Cas. Ins. Co.*, 86 Mass. App. Ct. 577, 580 (2014). "The property to be covered under a policy of property insurance is, of course, the property as described in all the writings constituting the 'policy.'" Plitt, *supra*, at § 148:11. In this regard, property policies extend coverage only to the property identified in the schedules attached to the policy.

Property insurance is a classic example of a "first-party" insurance. First-party insurance "is coverage for the policyholder from the insurer (who is the "second party") in the event the policyholder itself suffers a loss. . . . If [for

example] the policyholder's home is destroyed by fire, the policyholder obtains payment from the insurer to compensate for the loss of the home." Erik S. Knutsen and Jeffrey W. Stempel, *Stempel and Knutsen on Insurance Coverage* § 2.06(F) (4th ed., 2021-1 Supp.). Said another way, first-party insurance obligates the insurance company to pay benefits directly to the insured for losses suffered to the insured's property.

ii. *Liability Insurance: Protection against Third-Party Claims.*

Liability insurance, by contrast, is considered "third-party" insurance. Liability insurance obligates the "insurance company to respond to claims against and liabilities sought to be imposed upon the policyholder for injuries suffered, or alleged to be suffered, by third parties." Lewis, *supra*, § 2.02; see also *Kief Farmers Co-op. Elevator Co. v. Farmland Mut. Ins. Co.*, 534 N.W.2d 28, 32 n.3 (N.D. 1995) ("A third-party liability insurance policy provides coverage for the insured's liability to another in which the insurer generally assumes a contractual duty to pay judgments recovered against the insured arising from the insured's negligence.")

Third-party liability insurers are "generally seen as having a greater responsibility to protect their policyholders from the consequences of adverse claims, particularly if the claim may result in liability in excess of the policy limits." Stempel, *supra,* § 2.06(F). Moreover, the "third-party liability carrier

normally has control of the defense and settlement of an action, effectively precluding the policyholder from being in the best position to protect its own interests." *Id.*

General commercial liability insurance is a subset of liability insurance. "General" liability is distinguished from more specific risks covered by other insurance liability products, such as environmental impairment liability, directors & officers' liability, and professional liability. As the name suggests, "general commercial liability insurance is designed to protect a commercial policyholder from litigation risks." Stempel, *supra*, § 14.01(C). Notwithstanding some common limitations of scope, commercial general liability insurance underwrites a broad assortment of risks, including the expansion of a policyholder's business:

> Unless the policy contains a specific exclusion limiting coverage**, the CGL insurer accepts the risk that the policyholder's operations will expand or diversify along with the risk that these expanded or diversified activities will result in lawsuits, settlements, and adverse judgments. . . .**

Id. (emphasis added). Indeed, underwriters must anticipate that the policyholder's activities may, and likely will, grow over time.

> Policyholders are not covered solely for their activities in progress at the time a CGL was purchased. . . .
> **Unless otherwise stated, the policyholder may ramp-up or expand its activity without losing coverage because of any insurer "surprise" and claim that it never anticipated insuring such an active policyholder. Too bad. The insurer accepted this risk—and was paid for**

> **it—as part of the risk transfer that animated the CGL transaction.**

Id. (emphasis added).

In this regard, unlike property policies that insure against risks relating only to scheduled property, liability policies provide coverage against liability asserted against the insured, irrespective of location and even if the insured operation expands. Moreover, these policies are deemed to cover all general commercial risks that are not otherwise excluded, including risks arising out of operations that the insured was not engaged in at the time the policy was issued. *See Quincy Mut. Fire Ins. Co. v. Quisset Props., Inc.*, 69 Mass. App. Ct. 147, 153–54 (2007).

iii. ***Identifying the Scope of Coverage***

1. *The Declarations Page*

Because most policies are issued on preprinted forms, the declarations page of the policy is usually the only portion of the policy that contains typed entries specific to the particular policy and the insured. Stempel, *supra*, at § 2-107. As a matter of fact, most insureds do not draft, negotiate, or assent to specific policy provisions in standard-form insurance policies. Lorelie S. Masters, et al., *Insurance Coverage Litigation* § 2.05 (2d. Ed., 2021 Supp.). Insureds generally cannot negotiate matters outside of the amount of coverage purchased (such as key terms) and most insureds do not see their insurance policies until after coverage has already been bound. *Id.*

The declarations sheet or page is the "title page" of the insurance policy. The "declarations are contained in a cover sheet and constitute a series of statements including the identity of the named insured, the effective dates of the insurance policy, the business description of the policyholder, the coverage parts purchased, and the premiums charged." *Id*. The declarations may also denote the type of insurance purchased, any endorsements attached to the insurance policy, and various factual recitals. *Id.*

The declarations page generally includes the following information:

1) Identity of the Insurer;
2) Identity of the First Named Insured;
3) First Named Insured's Mailing Address;
4) Policy Period;
5) Policy Limits;
6) Deductible;
7) Schedule of Forms; and
8) Hazard Schedule.

Scott C. Turner, *Insurance Coverage of Construction Disputes*, (2d. ed.) August 2021 Update, § 1:10.

Contrary to Union's contention, the terms and descriptors used in the declarations page are generally the starting point for coverage. Policy provisions

that merely describe an insured's activities, potential hazards, or premises, however, without explicitly limiting coverage to those activities, hazards, or premises, are not limited by the description. *GRE Ins. Grp. v. Metro. Boston Hous. P'ship, Inc.,* 61 F.3d 79, 81-82 (1st Cir. 1995) (general liability policy was not limited to only activities only at the insured's offices, but rather extended to wherever the insured was conducting business); *see also Trustees of Tufts Univ. v. Com. Union Ins. Co.,* 415 Mass. 844, 856 (1993) (coverage not limited to scheduled hazards because "[n]owhere does the policy unambiguously provide that coverage is limited to the specific hazards listed in the schedule."). If an "insurer wants to strictly limit coverage to activities within [a business] description, it should explicitly say so." *Old Republic Ins. Co. v. Stratford Ins. Co*., 777 F.3d 74, 88-89 (1st Cir. 2015) ("[T]he general rule . . . is that 'business descriptions' do not limit coverage to the precise type of business described.").

2. *The "Named Insured"*

In the simplest terms, "[t]he 'insured' under a contract of insurance is the person or entity that will receive a certain sum upon the happening of a specified contingency or event." *See* Plitt, 3 *Couch on Insurance,* § 40:1. Special significance is given to the Named Insured.

Within an insurance contract, the "'Named Insured' has a clear and explicit meaning. It is the individual or entity who is listed on the declarations page."

Jacobs v. U.S. Fid. & Guar. Co., 417 Mass. 75, 78 (1993). Other insureds may be covered in the context of the policy without necessarily being named in the policy declarations; "these individuals and organizations may be included for coverage as 'insureds' or 'additional insureds' by other provisions (e.g., definitions) of the policy." Peter J. Kalis, Thomas M. Reiter, James R. Segerdahl & Lucas J. Tanglen, *Policyholder's Guide to the Law of Insurance Coverage* § 19.07 (1st Edition, 2021-1 Supp. 2012); *see also Glossary of Insurance Terms* 172 (5th ed. 1994) ("Any person, firm, or corporation, or any member thereof, specifically designated by name as the insured(s) in a policy. Others may be protected as insureds even though their names do not appear on the policy.").

Insurance policies often extend coverage to others as well, generally referred to as "additional insureds." "The naming of additional insureds . . . gives to other persons the same protection afforded to the principal insured." *Mass. Tpk. Auth. v. Perini Corp.*, 349 Mass. 448, 457 (1965).

Irrespective of the existence or number of additional insureds, only the first named insured is legally responsible to pay the policy's premium. *Am. Mut. Liab. Ins. Co. v. Condon*, 280 Mass. 517, 523 (1932). The first named insured is also the person or entity the insurer deals with in matters such as cancellation, notification and policy changes. Turner, *supra*, § 1:10. Absent fraud or misrepresentation, "[a]n insured may use any name when contracting with an insurer . . . Since the

purpose of a name is to designate a person, an insured may contract using an adopted name by which he or she is known and called." Plitt, 3 *Couch on Insurance*, at § 40:4.

iv. *Underwriting an Insurance Policy*

As a final foundational consideration, it should be noted that the sale of insurance policies to a Named Insured occurs through a process known as underwriting. After a prospective insured submits an application for insurance, the insurer will evaluate the risk internally and decide what coverage to offer and set a premium.

The "insurer sets the parameters of the negotiation, deciding those risks that it wishes to insure and those that it does not." *Quincy,* 69 Mass. App. Ct. at 154. During underwriting, the insurer may seek the information and ask the applicant questions to assess the nature of the risk it is considering taking on. *Id*.

The onus is squarely on the insurer to solicit the information it deems relevant to its analysis of risk:

> Insureds are not in a position to recognize risk-enhancing circumstances as readily as the insurer, who can more easily identify and evaluate circumstances that are material to the decision to underwrite and insure the risk. Information not asked for is presumably deemed immaterial. [citation omitted]. Moreover, imposing the burden of inquiry on the insurer poses no undue burden and reduces, if not eliminates, the difficult determination of what is, or is not, material to the risk of loss from the perspective of an insurer.

Id. at 156.

As famously stated nearly 250 years ago by Lord Mansfield, "[e]very underwriter is pre[s]umed to be **acquainted with the practice of the trade he in[s]ures."** *Noble v. Kennoway*, 2 Doug. 510, 513 (K.B. 1780) (emphasis added). A more recent statement of this rule appears in *Ritchie v. Anchor Casualty Co*., 135 Cal. App. 2d 245, 257 (1955) ("The insurer is presumed to have known of the nature of [the] applicant's business.…"). Thus, a number of courts—including those in Massachusetts— have observed that an insurance company is estopped from later claiming that the policy it sold conflicts with the policyholder's business activities, as the underwriters are presumed to know the policyholder's business. *See, e.g., Parsons v. Mass. Fire & Marine Ins. Co.,* 6 Mass. 197, 204 (1810) ("Every underwriter is presumed to be acquainted with the practice of the trade he insures; and it must be supposed to be the intention of the contract to conform the indemnity to the known practice."); *see also United Pac. Ins. Co. v. Meyer,* 305 F.2d 107 (9th Cir. 1962) ("where. . .the insurer makes a promise to write a certain specific coverage, the insured is entitled to rely thereon and the insurer is estopped from taking a different position."); *All-State Investigation & Sec. Agency, Inc. v. Turner Constr. Co*., 301 A.2d 273, 276 (Del. 1972) ("All-State's Insurer, Harleysville Mutual Insurance Company, issued a certificate of insurance to Turner which reflected coverage of All-State for the 'Contractual Liability covering

Agreement between the two Parties'. Accordingly, it is estopped to deny coverage of the occurrence as set forth in the agreement between Turner and All-State.")

The underwriting process gives the insurer the opportunity to evaluate the applicant's risks and determine which perils it does not wish to take on, including risks that may arise in the future. In this regard, the insurer may introduce any exclusions to coverage it so desires. The prospective policyholder's only option is generally to accept the scope of coverage offered by the insurer.

b. <u>"Doing Business As" in Massachusetts.</u>

Given Union's knowledge of the business that it underwrote, it must be presumed to understand what it means to be a dba designee in Massachusetts.

As this Court has long held, for reasons of convenience, marketing, name recognition, or for no reason at all, "[a] corporation may assume a trade name and conduct a business under a name other than the one designated in its charter." *Blanchard v. Stone's, Inc.,* 304 Mass. 634, 638 (1939). "It is generally accepted that use of the designation 'doing business as' does not create a separate legal entity." *Fried v. Wellesley Mazda*, 2010 Mass. App. Div. 36, at *1 (Dist. Ct. 2010); *accord Santo Domingo Motors, Inc. v. Shamrock Fin., LLC*, 35 Mass.L.Rptr. 553, 555 (Mass. Super. Ct. Apr. 17, 2019) (the "use of an alias business name does not establish a separate legal entity because the 'd/b/a' designation merely describes ... effort[s] to conduct business under some other name.");

Rogers v. Kolman, 2001 WL 1525531, at *4-5 (Mass. Super. Ct. Aug. 21, 2001) ("use of an alias business name does not establish a separate legal entity because the 'd/b/a' designation merely describes ... effort[s] to conduct business under some other name.").

Moreover, a dba entity does not have an independent tax ID number and is not required to file tax returns, underscoring that it is not an independent legal identity. *See Santo Domingo Motors*, 2019 WL 3976051, at *2 (Mass. Super. Apr. 17, 2019). "'[T]he significance [of the term 'doing business as'] is ... much like that given to other phrases in common use in the law for slightly different purposes, 'alias' . . . 'a/k/a' or 'also known as.'" *Rogers,*2001 WL 1525531, at *4.

Because a dba designation does not create a new separate entity, any obligation of the dba designee becomes an obligation of the main entity:

> The [dba] designation does not create an entity distinct from the person operating the business because the person who does business as a sole proprietor under one or several names remains one person, personally liable for all his obligations.
>
> The ordinary sense of the words 'X, d/b/a Y, Inc.' **should convey the message that X remains personally liable for this entity's obligations** . . . .
>
> Flueckiger's use of the d/b/a designation, "A & A Home Construction Co." does not create a distinct new entity because it merely serves as another name for Alfred Flueckiger. **Alfred Flueckiger is the legal entity and remains personally liable for the obligations of A & A Home Construction Co**.

Id. at *4-*5. (cleaned up) (emphasis added).

Thus, the ultimate legal entity—and not the dba designee—is responsible to pay the premium on an insurance policy. In *American Mutual Liability Insurance Co. v. Condon*, for example, a premium was not paid on a policy issued to an insured with a dba designation. 280 Mass. 517, 523 (1932). This Court held that the defendant, an individual, was obligated to pay the policy's unpaid premiums: "the parties were not mistaken as to the identity and character of the insured, and that the defendant as an individual doing business under that name was in fact the party making the contract of insurance and intended by both parties to be insured under the policy." *Id*.

It therefore follows that because a dba designee cannot legally enter into a contract in its own right, an insurance policy cannot be issued to a dba designee exclusively. Rather, the policy must be issued to the true and singular legal entity.

c. **Insurance Policy Interpretation Under Massachusetts Law**

The "rules which govern the interpretation of language in an insurance policy are the same rules which govern the interpretation of language in written contracts generally. In either case we must ascertain 'the fair meaning of the language used, as applied to the subject matter.'" *Save-Mor Supermarkets, Inc. v. Skelly Detective Serv., Inc.*, 359 Mass. 221, 226 (1971). Interpretation of an insurance contract presents a question of law. *Id.* The terms of an insurance policy

will be interpreted according to their ordinary meaning. *Davis v. Allstate Ins. Co.*, 434 Mass. 174, 179 (2001). Massachusetts courts are charged with reading insurance policies as a whole and "giving meaning to each provision in context." *Performance Transp., Inc. v. Gen. Star Indem. Co*., 983 F.3d 20, 26 (1st Cir. 2020). In addition, "'[a]n interpretation which gives a reasonable meaning to all of the provisions of a contract is to be preferred to one which leaves a part useless or inexplicable.'" *First Specialty Ins. Corp. v. Pilgrim Ins. Co.*, 83 Mass. App. Ct. 812, 819 (2013).

As a general matter, grants of coverage are construed broadly in favor of coverage. *Quincy Mut. Fire Ins. Co. v. Abernathy,* 393 Mass. 81, 83 (1984). Exclusionary clauses, conversely, "must be strictly construed against the insurer so as not to defeat any intended coverage or diminish the protection purchased by the insured." *Camp Dresser & McKee, Inc. v. Home Ins. Co.,* 30 Mass. App. Ct. 318, 324 (1991).

Relatedly, Massachusetts courts have long recognized that "ambiguities in an insurance policy are resolved against the insurer, in favor of the insured." *USF Ins. Co. v. Langlois*, 86 Mass. App. Ct. 44, 46 (2014); *see also Chow v. Merrimack Mut. Fire Ins. Co*., 83 Mass. App. Ct. 622, 625 (2013). In this vein, "[w]here ... there is more than one rational interpretation of policy language, 'the insured is

entitled to the benefit of the one that is more favorable to it.'" *Hakim v. Mass. Insurers' Insolvency Fund,* 424 Mass. 275, 281 (1997).

The rationale behind this rule is to encourage insurers, who typically draft the policy and are in the best position to avoid future misunderstandings, to be as clear and explicit as possible. *See* Plitt, 2 *Couch on Insurance* § 22:14 (3d ed. 2005) ("doubtful language is to be interpreted most strongly against the party who used it in drafting the contract"). This same rationale extends to insurance questionnaires and applications. *Hingham Mut. Fire Ins. Co. v. Mercurio*, 71 Mass. App. Ct. 21, 24 (2008).

Said simply, the insurer has complete control to decide to offer insurance coverage, what information to request in underwriting, to determine the price and terms, and to add exclusions before the policy is bound; in exchange, case law is clear that policies are to be construed broadly in the insured's benefit with ambiguities resolved in favor of coverage wherever possible. Thus, absent explicit and unmistakable intent to limit coverage to a "dba" designee, Massachusetts law demands that insurance policies provide coverage to both the legal entity and the dba designee.

i. *The Policy Plainly Provides Coverage to Dipika*

Here, the plain language of the policy should control. UP respectfully submits that removing Dipika from the ambit of coverage when coverage was

expressly provided to "Dipika Inc." violates the tenets of Massachusetts insurance law, ignores the legal significance of "doing business as" designations, and deprives Dipika of the benefit of the insurance it purchased. Union argues that appellants wish for "the Court to improperly erase the phrase 'dba Super 8' from the Named Insured designation." Union Opening Brief ("Union Op. Br.") at 28. Not so. Adopting Union's narrow reading, conversely, would effectively erase "Dipika, Inc." from the Named Insured designation. Adopting Union's reason erases the actual Named Insured from the Policy. Nothing in the policy or common law supports such an approach. Though Union could have included an exclusion or endorsement limiting coverage, it chose not to do so. The Policy cannot be read to include what Union omitted.

Specifically, if a dba designation does not create a distinct legal entity, how can insurance be said to be issued exclusively with respect to dba operations? Analyzed from every angle, Massachusetts law supports a finding that coverage should be provided to Dipika generally, and not artificially limited to Super 8 operations.

Massachusetts law requires that where "the language in the policy is unambiguous, its terms will be construed according to their plain meaning." *USF Ins. Co.,* 86 Mass. App. Ct. at 46. Here, the policy was issued to "Dipika Inc. dba Super 8," with "form of business: corporation." RAI_81-82. As discussed above, a

dba is not a distinct legal entity; therefore, the typed-out reference to a business that is a "corporation" on the declarations page must refer to "Dipika Inc." No other plain meaning can be reasonably construed from this information.

The reasonableness of this interpretation is further bolstered by considering the Policy as a whole.

1. *Policy Endorsements Support A Broad Reading of Coverage*

The Policy also includes two endorsements that demonstrate that the Policy was intended to cover construction activities at locations besides the Super 8, which undercuts Union's proffered interpretation. Specifically, the Policy contains "Designated Construction Project[s]" and "Designated Location[s]" endorsements. RAI_208, 210. As argued by Dipika (Appellant Jay Patel and Dipika, Inc.'s Opening Brief at 26) and the Masonic Temple Association (Appellant The Masonic Temple Association's Opening Brief at 33) alike, these endorsements confirm that Union sold Dipika a policy with liability coverage that extended beyond the motel's operations in Weymouth.

The former endorsement provides, the "Designated Construction Project(s)" "modifies insurance provided under the . . . COMMERCIAL GENERAL LIABILITY COVERAGE PART." *Id*. Specifically, under this endorsement, Union promises to pay "all sums for which the insured becomes legally obligated

to pay . . .which can be attributed only to . . . a single designated construction project shown in the Schedule above." *Id*. The schedule, in turn, extends coverage to "ALL PROJECTS." Thus, Union sold a policy under which it promised to pay for liabilities arising out of all construction projects undertaken by the insured. The work performed at the temple of the Masonic Temple Association of Quincy, Inc. ("Temple") was a construction project to convert the temple into a Super 8 motel. Thus, as argued by Appellants Dipika and the Masonic Temple, the work at the Temple plainly is of the sort contemplated by Union when it included the "Designated Construction Project(s)" endorsement.

Similarly, the "Designated Location(s)" Endorsement modifies the CGL coverage part. This endorsement defines the locations covered by the Policy. The Schedule in the Endorsement extends coverage to "ALL LOCATIONS." RAI_210. There is no effort in the endorsement or elsewhere to limit the endorsement to a particular location.

Union asks the Court to disregard these endorsements. Union Op. Br. at 37. But the Court should not heed this self-serving advice. Union—not Dipika—added these endorsements to the Policy. These endorsements must have *some* meaning; otherwise, why would they be included? Massachusetts law abhors a construction that would render certain policy language surplusage: "It is a canon of construction that every word and phrase of an instrument is if possible to be given

meaning, and none is to be rejected as surplusage if any other course is rationally possible." *Nat'l Shawmut Bank of Boston v. Joy*, 315 Mass. 457, 466 (1944).

Indeed, considering these two endorsements in the context of the policy as a whole—as Massachusetts law requires—the only reasonable inference is that the policy provides coverage for construction activities at all locations. *See Performance Transp.*, 983 F.3d at 26. This is the only reasonable interpretation of these endorsements.

2. *Construction Activities Were Reasonably Foreseeable Conduct of the Named Insured*

Motel construction was a reasonably foreseeable activity of a motel. Massachusetts insurance principles mandate that coverage should not be denied under a liability policy unless such activities were not even remotely foreseeable conduct. The risk accepted by the CGL insurer "is quite broad, including not only liability . . . from the policyholder's current operations **but also liability from expanded or revised operations."** Stempel, *supra*, § 14.01(C) (emphasis added).

Unless "the policy contains a specific exclusion limiting coverage, the CGL insurer accepts the risk that the policyholders operations will expand or diversify along with the risk that these expanded or diversified activities will result in lawsuits." *Id*. "A baseline understanding of the contracting parties **is that a policyholder may—and probably will—grow and expand its activities**.

Policyholders are not covered solely for their activities in progress at the time a CGL was purchased. . . ." *Id*. (emphasis added).

In this regard, a well-regarded insurance treatise notes, "Consequently, our empathy is limited for insurers that **fail to exclude risks associated with expanded, acquired, or diversified policyholder operations.** Although there may be some extreme cases that would justify a 'we didn't anticipate this policyholder activity' defense to coverage, they logically are few and far between." *Id*. (emphasis added).

Here, it is certainly foreseeable that a motel owner may be involved in motel construction activities. The policy drafted and issued by Union contains no exclusions prohibiting coverage for such operations. As noted above, liability policies—such as the policy Union sold here—run with the insured. Massachusetts law holds that the Policy should be interpreted to afford coverage to the construction activities, and thus, it is reasonable to assume that coverage was intended for the entity involved in construction, here, Dipika.

3. *Dipika's Interpretation is Consistent with Massachusetts Law Regarding the Significance of dba Designations*

Consistent with the plain language of the Policy, considerations surrounding the use of dba designations generally also support a finding of broad coverage. *See* Part I.v, *supra*. In this regard, it is important to consider what a dba is—and what

it is not. As discussed above, a dba designee is not a distinct legal entity; it has no rights, no tax ID, and no legal standing. *Id.* Obligations borne by the dba designee flow back to the corporate entity. Here, for example, had the premium on the policy not been paid, Union had the right to pursue Dipika for full satisfaction of the debt. *Condon,* 280 Mass. at 523.

Massachusetts policyholders, like Dipika, would not expect to be held responsible for the financial obligations of their dba designees yet deprived of the resulting benefits. Thus, as any insurer would not agree to relieve a corporate entity of the payment of premium undertaken in the name of a dba designee, Union should not be permitted to limit coverage only to the dba designee.

ii. *If the Named Insured Provision is Ambiguous, It Must Be Construed in Favor of Coverage.*

Policies must be construed in favor of coverage, with ambiguities resolved against the insurer. *USF Ins. Co.,* 86 Mass. App. Ct. at 46. Though UP believes this language is clear on its face in favor of coverage, the existence of multiple reasonable interpretations of the Named Insured provisions would render the language ambiguous. Because ambiguities are interpreted against the insurer, the insured's reasonable interpretation controls. Thus, even if the use of a dba designation renders the Named Insured provision ambiguous, Massachusetts law nevertheless finds in favor of affording coverage for liabilities arising out of both

"Dipika Inc. dba Super 8" and "Dipika Inc."

iii. *Limitations on Coverage Must Also Be Construed Narrowly and in Favor of Coverage*

Relatedly, to the extent that Union is arguing that the dba designation should serve as a limitation on coverage, such limitation must also be construed "in favor of the insured and against the drafter." *Metro. Prop. & Cas. Ins. Co. v. Morrison,* 460 Mass. 352, 363 (2011). Here, to the extent that Union is seeking to impose a limitation on coverage, not only does Union have the burden of showing the limitation applies but it must also overcome the narrow construction of the limitation. A narrow construction of the "'Named Insured'" does not warrant limiting coverage to only the dba designee. Nothing in the Policy suggests that Union, when drafting the policy, intended to extend coverage *only* to the dba designee. In this regard, Union—as the policy's drafter—had ample opportunity to include an exclusion so limiting coverage. Yet, it chose not to do so. This Court cannot insert what Union has omitted. *See e.g., Safeco Ins. Co. of Am. v. Robert S.,* 26 Cal. 4th 758, 764 (2001) ("[W]e cannot read into the policy what [the insurer] has omitted. To do so would violate the fundamental principle that in interpreting . . . insurance contracts, courts are not to insert what has been omitted.").

Though Union disregards the significance of this omission (Union Op. Br. at 42), it cannot dispute that it freely selected the exclusionary language that it

wanted in its standard-form policy and that the burden is on Union to offer clear and unmistakable exclusionary language. *See, e.g., Camp Dresser,* 30 Mass. App. Ct. at 325 ("The burden of the failure clearly to exclude [coverage] must fall on the insurer."); *Vigilant Ins. Co. v. V.I. Techs., Inc.,* 253 A.D.2d 401, 403 (N.Y. App. Div. 1998) (taking note of the insurer's failure to use "common language that could have been used to draft an unambiguous exclusion"); *Fireman's Fund Ins. Cos. v. Atl. Richfield Co.,* 94 Cal. App. 4th 842, 852 (2001) ("an insurance company's failure to use available language to exclude certain types of liability gives rise to the inference that the parties intended not to so limit coverage.").

Rather, because Union failed to add limiting language, and because both "Dipika Inc." and "Super 8" appear in the "Named Insured" on the declarations page, a reasonable interpretation of this clause favors a finding of full liability coverage for Dipika, including its motel construction operations. *See, e.g., MacArthur v. Mass. Hosp. Serv., Inc.,* 343 Mass. 670, 672 (1962) ("If an insurer chooses to use language in a policy which permits two rational interpretations, we choose the one more favorable to the insured.").

II. THE CASES CITED BY UNION FROM OTHER JURISDICTIONS DO NOT WARRANT A DIFFERENT RESULT.

Union concedes, as it must, that no Massachusetts court has ruled on the dba question presently before this court. Union Op. Br. at 29. Instead, Union points to

cases in other jurisdictions with significantly different fact patterns. *Id.* Those cases are not relevant to this Court's consideration and provide no guidance. *Fid. & Deposit Co. v. Charter Oak Fire Ins. Co.,* 66 Cal. App. 4th 1080 (1998) (development activities of bank in a state across the country from the insured risk were not reasonably foreseeable for a restaurant); *Carpenter v. Fed. Ins. Co.,* 637 A.2d 1008 (Pa. Super. Ct. 1994) (not a dba case; rather here, the court held there was no coverage because the officer/director of the insured corporation was not acting on behalf of the corporation at the time of the accident); *Budget Rent-A-Car Sys., Inc. v. Shelby Ins. Grp.,* 541 N.W.2d 178 (Wis. Ct. App. 1995) (no coverage found because not reasonably foreseeable that insured video business would engage in unrelated construction activities); *Charter Oak Fire Ins. Co. v. Coleman*, 273 F. Supp. 2d 903 (W.D. Ky. 2003) (no coverage found because policy did not name or reference second business); *Consol. Am. Ins. Co. v. Landry*, 525 So. 2d 567 (La. Ct. App. 1988) (no coverage found because not reasonably foreseeable that the insured apartment business would engage, own and operate an undisclosed lumber yard business); *Musselwhite v. Florida Farm Gen. Ins. Co*., 273 So. 3d 251 (Fla. Dist. Ct. App. 2019) (after feed store policyholder was informed that his policy did not cover well-drilling and declining to purchase additional insurance, court held that initial policies did not cover well drilling operations unrelated to the feed store premises).

Unlike the case at bar, none of the cases cited by Union include liability for operations that relate to reasonably foreseeable activities of the dba designee. Nor did those cases include endorsements clearly stating that construction activities were covered. Indeed, it is nonsensical to compare the construction of a Super 8 motel under a policy covering such activities with a feed store's expansion into oil drilling operations or a real estate management company getting into the lumber business. Thus, Union's out-of-state authorities should be disregarded.

III. CASES FROM OTHER STATE HIGH COURTS MAY OFFER GUIDANCE TO THIS COURT

At least four state High Courts, confronting similar issues, have determined that coverage should be provided to the corporate entity, regardless of the corporate entity's "dba." *See, e.g., Carlson v. Doekson Gross, Inc*., 372 N.W.2d 902, 906 (N.D. 1985) (holding that liability policy provided coverage for all operations of the legal entity because "[a] sole proprietorship which is conducted under a trade name is *not* a separate legal entity"); *Auto-Owners Ins. Co. v. Rhodes,* 405 S.C. 584, 600 (2013) (finding coverage extended to activities of legal entity, not merely the dba, because the "fact that Eadon operated his business under another name did not create a separate legal entity for insurance purposes"); *Recalde v. ITT Hartford*, 254 Va. 501, 506 (1997) (rejecting *Consol. Am. Ins. Co. v. Landry*, 525 So. 2d 567 (La. Ct. App. 1988) relied upon by Union and finding

coverage for the legal entity because "a sole proprietor doing business under a trade name was not a juridical person separate and apart from the natural person"); *Hall v. Auto-Owners Ins. Co.* 265 Neb. 716, 720 (2003) ("doing business under another name or several names does not create an entity separate and distinct from the person operating the business"); *see also, O'Hanlon v. Hartford Accident & Indem. Co.,* 639 F.2d 1019 (3d Cir.1981) (holding that where insured purchases policy in trade name, policy will be viewed as if issued in his given name).

As the North Dakota Supreme Court explained in *Carlson*:

> The designation 'd/b/a' means 'doing business as' but is merely descriptive of the person or corporation who does business under some other name.

Carlson, 372 N.W.2d at 905. The North Dakota Supreme Court, accordingly, held that:

> [The dbas involved] are not separate legal entities: they cannot own property, are not subject to liability in any suit, and cannot enter into a contract. The "party" who contracted for the insurance in this case was Edwin Carlson—there was no other legal entity which was capable of entering into the contract.

Id. at 906.

Although these rulings are not binding on this Court, they do provide some guidance on the point that because dbas are not separate legal entities, those state

High Courts have looked to the real party-in-interest–set forth in the operative policy–in analyzing insurance coverage. UP urges this Court to do the same.

CONCLUSION

Accordingly, UP respectfully requests that this Court reverse the lower court holding and find that, where the named insured in a general liability insurance policy includes a "doing business as" designation, liability coverage applies to the corporate entities set forth in the Named Insured provision.

Dated: September 14, 2021

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CERTIFICATE OF SERVICE

I certify that I served a copy of the UNITED POLICYHOLDERS' BRIEF OF AMICUS CURIAE on all counsel of record via the Massachusetts electronic filing system on this 14th day of September 2021.

Dated: September 14, 2021 PASICH LLP

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing document complies with the rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 16(a)(13), 16(e), 18, 20, and 21. This brief complies with the length limit of Rule 20(a)(2)(A) in that it is written in Times New Roman 14-point font and not more than 7,500 words.

Dated: September 14, 2021

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