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2 **UNITED STATES DISTRICT COURT**
3 **EASTERN DISTRICT OF LOUISIANA**

4 LOUISIANA WORSHIP HOSPITALITY,
5 LLC.,

6 Plaintiff,

7 vs.

8
9 LEXINGTON INSURANCE COMPANY,

10 Defendant

) Case No.: 08-3740

) PRELIMINARY EXPERT REPORT OF
) CHARLES M. MILLER

11 **I. INTRODUCTION**

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13 1. I have been retained by Louisiana Worship Hospitality, LLC (“Louisiana
14 Worship”) to provide my expert opinion on whether Lexington Insurance Company
15 (“Lexington”) complied with the practices and standards in the insurance industry for
16 claims handling in its handling of the Louisiana Worship claims, which are the subject
17 of this litigation.
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20 2. A copy of my CV is attached hereto as Exhibit A.

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22 3. My hourly rate is \$350.

23 **II. BASIS FOR OPINIONS**

24 4. I have been retained as an expert on insurance practices and standards
25 in over 100 cases, in both federal and state court, including Arizona, California,
26 Idaho, Nevada, New Mexico, South Carolina, Pennsylvania, Florida, the Virgin
27 Islands, Washington, Oregon, Utah, Arkansas, Texas, Missouri, Mississippi,
28

1 Louisiana, West Virginia, and Toronto, Ontario, Canada. I have been qualified as an
2 expert on insurance industry claims handling standards and practices and testified in
3 trial in Arizona, Nevada, Arkansas, Idaho, and California. Attached hereto as exhibit
4 B is a list of the cases in which I have been deposed and/or testified at trial in the
5 past five years.
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7 5. My opinions are based on my experience and training as an insurance
8 adjuster and manager at Fireman's Fund Insurance Company from 1972 to 1990, my
9 experience and training as a lawyer practicing insurance law, and my experience in
10 reviewing and analyzing the claims handling of other insurance companies. My
11 opinions are also based upon, among other sources, my review and knowledge of
12 insurance industry texts and articles concerning the handling of insurance claims,
13 and the statutory and regulatory standards for the handling of insurance claims, such
14 as National Association of Insurance Commissioner's Model Unfair Claim Settlement
15 Practices Act (hereinafter the "Act"), which has been adopted in Louisiana (LSA R.S.
16 22:1214(14)), and the National Association of Insurance Commissioner's Model
17 Unfair Claims Settlement Practices Regulations (hereinafter the "Regulations").
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21 6. The Act and the Regulations are one of many important sources of
22 information for insurance industry standards for the proper handling of claims.
23 Indeed, the Act and Regulations are often articulations of the general insurance
24 industry standards for claims handling.¹ As one well known author on insurance
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26
27 ¹ The Act and the Regulations are based upon the National Association of Insurance
28 Commissioner's Model Unfair Claims Practices Act and Model Unfair Claims Practices
Regulations. Over 45 states have adopted the Model Unfair Claims Practices Act either
in its original form or in a modified form. Likewise, many state insurance commissioners

1 claims handling has pointed out, insureds are frequently permitted to introduce
2 evidence of violations of the Model Unfair Claims Settlement Practices Act and Model
3 Unfair Claims Settlement Practices Regulations “because the model act is a
4 nationally recommended standard of care. It was developed [by the National
5 Association of Insurance Commissioners] as a guide for insurance regulators in every
6 state to establish reasonable claim practices. Since the NAIC [National Association
7 of Insurance Commissioners] is made up of insurance “experts,” juries should
8 consider their opinion of what constitutes unfair claim practices when evaluating the
9 behavior of an insurer in a bad faith case. Thus, although the model [Unfair Claims
10 Settlement Practices] act may not allow insureds or claimants who have been treated
11 unfairly by an insurer to file a private action, it has been used indirectly for the benefit
12 of many plaintiffs.” (Markham, James J. et al, ed., The Claims Environment (1st ed.
13 1993) Insurance Institute of America) Because the Act and Regulations constitute
14 accepted insurance industry practices and standards for claims handling, where
15 appropriate, sections of the Act and Regulations are referred to herein.
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19 7. In preparing my opinions I was provided with the following documents:

- 20 • The Petition for Damages;

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23 have adopted the Model Unfair Claims Settlement Practices Regulations. The Model
24 Unfair Claims Practices Act and Model Unfair Claims Practices Regulations are used by
25 insurance commissioners nationwide to conduct market conduct examinations of
26 insurance claims operations. Such examinations involve the review of hundreds of
27 claims files to determine if the insurer is complying with the standards set forth in the
28 Unfair Claims Settlement Practices Act and Unfair Claims Settlement Practices
Regulations. Further, many insurers have inserted either the Model Unfair Claims
Practices Act and/or Unfair Claims Settlement Practices Regulations, or versions
thereof, in their claims manuals and required their claims personnel to comply with
them.

- 1 • Defendant's Responses to Plaintiff's First Set of Requests for
Production of Documents;
- 2 • Defendant's Answer and Affirmative Defenses;
- 3 • Lexington policy 1115726 issued to Louisiana Hospitality, LLC for
4 the period of December 29, 2006 to December 29, 2007
(hereinafter, the "Policy");
- 5 • The depositions of Edward A. Mossien, Assistant Vice President
6 for AIG Commercial Insurance, Roger Sawyer of the General
Adjustment Bureau ("GAB"), Brent Barton of AIG, Jake Mello, and
7 Eddie Bhatt.
- 8 • The Examinations Under Oath ("EUO") of Ashok (Eddie) Bhatt,
and Daniel Adame;
- 9 • Plaintiff's Second Supplemental Response to Defendant's
10 Requests For Production of Documents;
- 11 • Documents produced by GAB;
- 12 • Documents produced by J.S. Held, and
- 13 • Lexington Documents produced, bates number 001-613.

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15 8. During my employment at Fireman's Fund I was responsible for the
16 handling of thousands of claims, either as an adjuster or supervisor, including claims
17 such as the one involved in this case. In many other similar claims it was necessary,
18 upon notice of an accident or occurrence, for me to thoroughly investigate the claim,
19 determine the scope and extent of damages as well as determine what coverages
20 applied to the loss. During my employment in the insurance industry, I not only had
21 the opportunity to learn about proper claims handling standards from my own
22 employer, but was also able to observe the claims handling procedures and
23 standards of well over one hundred other insurers. In addition, I attended numerous
24 classes, workshops, seminars or similar programs regarding the handling of
25 insurance claims.
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1 9. My experience with insurance industry claims handling standards
2 continued with my legal practice, which began in 1990. My legal practice, particularly
3 since 1992, has been substantially devoted to insurance matters. As a result, I have
4 been able to review claims files and manuals of many insurers as well as observe
5 their claims handling procedures and methods. I have also testified as an expert in
6 insurance matters since 1997. As a result I again have had the opportunity to review
7 numerous claims files, claims manuals, and other documents regarding insurance
8 company claims handling procedures.
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11 10. Insurance company claims representatives are routinely trained in the
12 standards of insurance claims handling. Claims personnel are expected to know
13 these standards and apply them in their work on a daily basis. This requirement is
14 underscored in a text on insurance claims, which is used nationwide to train
15 insurance claims personnel. In the book, The Claims Environment by Markham, et
16 al, the authors, all of whom are or were employed in the insurance industry, point out
17 that "claims representatives should have expert knowledge of insurance policy
18 coverages, the law, and determination of damages." (Markham, p. 12) Insurance
19 claims handling standards are national in scope, and do not differ substantially from
20 one state to another. These standards include the accepted standards for the
21 interpretation and application of insurance policies. Insurance claim professionals
22 are trained in the interpretation and application of insurance policies. Indeed, these
23 professionals, on nearly a daily basis, interpret and apply insurance policies sold by
24 their respective companies. In order to interpret and apply insurance policies fairly,
25 insurance claims professionals use insurance industry standards for the interpretation
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1 of insurance policies (see below) as well as many insurance industry resources which
2 provide guidance to insurance claims professionals on the interpretation and
3 application of insurance policies, some of which are referenced in this report.

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5 11. Because insurance industry claims handling standards are national in
6 scope they apply in all states. Although there may be some slight variations from
7 state to state, generally insurance claims handling standards do not differ from state
8 to state. Accordingly, a claims professional in Louisiana or one who handles claims
9 in Louisiana should be trained and knowledgeable in the standards of insurance
10 claims handling.

12 12. Insurance is defined as the "pooling of fortuitous losses by transfer of
13 such risk to insurers, who agree to indemnify insureds for such losses, to provide
14 other pecuniary benefits on their occurrence, or to render services connected with the
15 risk." (Principles of Risk Management and Insurance, Rejda, George E., (Addison
16 Wesley, 8th ed., 2003) p. 18, quoting from the Commission on Insurance Terminology
17 of the American Risk and Insurance Association) As the definition reflects, a critical
18 component of the definition of insurance is the transfer of risk from the insured to the
19 insurer. If this transfer is interfered with so that the insured does not timely receive
20 the full benefits owed under the insurance policy then the purpose of insurance is
21 defeated. In order to avoid this outcome, the insurance industry has adopted various
22 standards and practices for the handling of insurance claims. The aim of these
23 standards and practices is to assure that the purpose of insurance and the insurance
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1 contract are fulfilled when the insured submits a claim. Among the standards for
2 claims handling are the following:²

- 3 a. The insurance company must treat its policyholder's interests with
4 equal regard as it does its own interests;
- 5 b. The insurance company must conduct a full, fair and prompt
6 investigation of the claim at its own expense;
- 7 c. The insurance company must fully, fairly and promptly evaluate
8 and adjust the claim;
- 9 d. The insurer should resolve any doubts regarding coverage in
10 favor of the policyholder;
- 11 e. The insurance company may not misrepresent facts or policy
12 provisions;
- 13 f. The insurance company must timely advise its insured of all policy
14 limitations or exclusions which may apply to a claim;
- 15 J. An insurance company must not assert coverage positions which
16 it knows are without merit;
- 17 k. An insurance company must look for coverage and not just ways
18 to deny a claim, and
- 19 l. An insurance company must interpret its policies reasonably,
20 pursuant to the well recognized insurance industry rules for
21 insurance policy construction.
- 22 m. An insurance company must interpret its policies reasonably,
23 pursuant to the well recognized insurance industry rules for
24 insurance policy construction, which include the following:

- exclusions are to be interpreted narrowly,³
- insuring agreements are to be interpreted broadly,⁴

25 ² Federated has also adopted these standards. (Sutton deposition, pp. 190-197)

26 ³ How to Draft and Interpret Insurance Policies, Wollner, Kenneth S. (Cas. Risk Pub, LLC 1999), p. 19 (hereinafter "Wollner") ("Exclusions and other limitations are strictly construed against the party seeking to impose the limitation.") All the insurance texts referenced in this declaration are either used in training insurance claims professionals or as reference materials for claims professionals.

27 ⁴ Insurance Contract Analysis, Wiening, Eric A., and Malecki, Donald S., (Am. Inst. for
28 CPCU, 1st Ed 1992) p. 76 ("[I]nsurance agreement provides a broad statement of coverage.") (hereinafter "Wiening")

- the insurance company must resolve doubts concerning coverage in favor of the policyholder,⁵
- policy language should be given its plain, ordinary and popular meaning;⁶
- ambiguous policy provisions should be interpreted against the insurer and in favor of coverage,⁷ and
- the insurance company has the burden of proving the application of an excluded peril.⁸

14. In arriving at my opinions in this case I have applied the standards for insurance claims handling.

III. OPINIONS

15. Based on my review of the available documents Lexington failed to comply with insurance industry claims handlings standards and practices in its handling of the Louisiana Hospitality claim by, among other things, the following:

- Failing to timely and thoroughly investigate the full scope of the loss;
- Failing to advise Louisiana Hospitality of all available coverages under the Policy;
- Improperly took depreciation;

⁵ Property Loss Adjusting, Popow, Donna J. (Am Inst. of CPCU, 3rd ed., 2004) § 5.34 (hereinafter "Popow")

⁶ Adjustment of Property Losses, Thomas, Paul & Reed, Prentiss, (McGraw Hill, 4th ed., 1977) p. 48 (hereinafter "Reed & Thomas")

⁷ *Id.*, p. 50.

⁸ Insurance claims handlers have testified that these standards are used in the insurance industry to interpret and apply insurance policies. For example, Stephan Hinkle, a State Farm Home Office Claim Consultant, was deposed in the matter of *Illing v. State Farm, So. Dist. Ms.*, Case No.: 1:06cv513-LG-RHW, and testified that it is a basic tenet of insurance claims handling that the insurer must prove the application of the exclusion. (See Hinkle Deposition, p. 166, and see Wollner, p. 46).

- Unreasonably denied coverage;
- Failed to adopt written standards for the handling of claims;
- Failure to pay all amounts due under the Policy, and
- Failed to pay timely all amounts due under the Policy.

By conducting itself in the foregoing manner Lexington demonstrated an intent to serve its own interests to the detriment of its policyholder. Indeed, Lexington's failure to investigate facts which supported coverage and advise its insured of potentially available coverages evidences Lexington's attempt to avoid payment of amounts due under the Policy.

A. Lexington Failed To Conduct A Timely and Thorough Investigation Of Louisiana Hospitality's Claims.

16. An insurer is obligated to thoroughly and timely investigate a loss, as well as accurately measure the amount of the loss and make timely payment. Investigation of a water loss, such as that sustained by Louisiana Hospitality at the Grand Hotel, involves not only an inspection of visible surfaces, but also of hidden surfaces which are likely to have been damaged by water. As Popow has pointed out: "Many times the problem is worse than it appears because mold can migrate through materials and affect both sides. The unexposed side of the material often reveals extensive mold growth and damage. Removal of a portion of the material for a visual inspection of the back might be appropriate. A boroscope can be used to view spaces in ductwork and behind walls to check for mold growth. The meter can help identify hidden mold growth, and aid in assessing the extent of water damage. Property loss adjusters should continue inspection, even after a source of the water has been found. More often than not, multiple sources will be found." (Popow, §6.15) Similarly, Popow

1 notes that tear out is often required in investigating the scope of a water loss. (Popow,
2 §6.11) Lexington, however, did not conduct inspection of water damage conditions
3 behind the walls.⁹ (Jake Mello deposition, pp. 88-89 (did not use moisture meters,
4 drills to look behind walls or conduct any destructive testing)

5 17. An insurer, during its investigation of the claim, must also look for
6 coverage for the policyholder. This often involves looking for other potential damages
7 that may be covered under the insurance policy that the insured may not have
8 included in its original claim assessment. The insurer has this obligation regardless of
9 the insurer's beliefs concerning the possible sophistication of the policyholder when it
10 comes to insurance claims. The insurance claims professional, not the insured, is
11 trained to evaluate and determine the scope and amount of a loss. Despite these well
12 recognized standards Lexington did not investigate and evaluate the acts of vandalism
13 that occurred after the February 10, 2007 incident despite the fact that Sawyer, who
14 represented Lexington, was aware of such damage. (Sawyer deposition, p. 92)
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19 ⁹ It is significant to note that Mello, who was in charge of the inspection of the hotel for
20 Lexington, was not aware of any standards that pertain to the inspection of a water loss.
21 (Mello deposition, p. 99) The leading standard for the inspection and remediation of
22 water damage is published by the Institute of Inspection Cleaning and Restoration, and
23 is Standard IICRC S500, "Standard and Reference Guide for Professional Water
24 Damage Restoration." This standard is recognized and used in the insurance industry
25 as well as with water remediation companies nation wide. The Standard provides that in
26 determining the extent of water damage the equipment to be used may include
27 "thermohygrometers and moisture meters." (S500, p. 34) Further, the Standard
28 provides that technicians "must use appropriate moisture detection equipment to
evaluate and record moisture intrusion in specific structural materials," which will include
"subfloor and underlays; above floor structural materials (e.g., walls, frames, ceilings,
fixtures, insulation...basements, crawlspaces and attics." (Id) It appears that Lexington
and its consultant did not comply with this standard. Accordingly, it would have been
improper for Lexington to rely upon the results of Mello's inspection to determine the
amount owed under the Policy.

