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*Special Counsel to Howard M. Ehrenberg, as
 liquidating Trustee of the jointly administered
 bankruptcy estates of Orion HealthCorp., Inc.
 and Constellation Healthcare Technologies, Inc.*

UNITED STATES BANKRUPTCY COURT
 EASTERN DISTRICT OF NEW YORK

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In re:	Chapter 11
ORION HEALTHCORP, INC. ¹	Case No. 18-71748 (AST)
Debtors.	(Jointly Administered)

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HOWARD M. EHRENBURG, as liquidating Trustee of the jointly administered bankruptcy estates of Orion HealthCorp., Inc. and Constellation Healthcare Technologies, Inc.,	Adv. Pro. No. _____
Plaintiff,	

- v. -

ALLIED WORLD NATIONAL ASSURANCE CO.,
 Defendant.

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¹ The debtors in these chapter 11 cases, along with the last four digits of each debtor's federal tax identification number, are: Orion Healthcorp, Inc. (7246); Constellation Healthcare Technologies, Inc. (0135); NEMS Acquisition, LLC (7378); Northeast Medical Solutions, LLC (2703); NEMS West Virginia, LLC (unknown); Physicians Practice Plus Holdings, LLC (6100); Physicians Practice Plus, LLC (4122); Medical Billing Services, Inc. (2971); Rand Medical Billing, Inc. (7887); RMI Physician Services Corporation (7239); Western Skies Practice Management, Inc. (1904); Integrated Physician Solutions, Inc. (0543); NYNM Acquisition, LLC (unknown) Northstar FHA, LLC (unknown); Northstar First Health, LLC (unknown); Vachette Business Services, Ltd. (4672); Phoenix Health, LLC (0856); MDRX Medical Billing, LLC (5410); VEGA Medical Professionals, LLC (1055); Allegiance Consulting Associates, LLC (7291); Allegiance Billing & Consulting, LLC (7141); New York Network Management, LLC (7168). The corporate headquarters and the mailing address for the debtors listed above is 1715 Route 35 North, Suite 303, Middletown, NJ 07748.

ADVERSARY PROCEEDING COMPLAINT

Plaintiff, Howard M. Ehrenberg, liquidating trustee (“Plaintiff” or “Trustee”) of the jointly administered bankruptcy estates of Orion HealthCorp, Inc. (“Orion”) and Constellation Healthcare Technologies, Inc. (“CHT,” and, together with Orion, the “Debtors”), by and through his attorneys, alleges as follows:

NATURE OF THE ACTION

1. This is an insurance coverage dispute in which the insurer, Allied World National Assurance Co. (“Allied World” or “Defendant”), refused to participate in the defense and settlement of claims against Debtors’ former Directors and Officers² in breach of both the terms of the insurance policy Allied World issued and the covenant of good faith and fair dealing every insurer owes its insured.

2. The Directors and Officers were insured under two insurance policies issued to CHT. The first is a primary level “D&O Policy,” insuring the Directors and Officers against claims alleging wrongful acts conducted within the scope of their roles.

3. Allied World issued the second policy, an excess insurance policy that generally follows form to the primary level insurance policy. As a “follow form” excess policy, Allied World agreed to insure against losses for claims covered under the primary policy where the losses exceeded the primary policy’s limits.

4. In March 2020, the Trustee commenced an adversary proceeding in the United States Bankruptcy Court for the Eastern District of New York, alleging that Debtors had been the victims of negligent mismanagement and gross lack of oversight by the Directors and Officers.

² Specifically John Johnston, David Andrew Clark, Moshe “Mark” Menachem Feuer, Sir Rodney Malcolm Aldridge, Shawn H. Zimberg, Joseph A. Seale, Truc To, John Esposito, Mark Bellissimo, Cliona Sotiropoulos, Arvind Walia, Dale Brinkman, Melodie Kraljev, and Alon P. Baram (collectively “Directors and Officers”).

See Ehrenberg v. Johnston, et al., Adv. Pro. No. 8-20-08046 (Main Case No. 18-71748) (“Underlying D&O Action”). The Trustee sought to recover damages caused by the Directors and Officers breach of their legal obligations to Debtors, including their fiduciary duties of care, loyalty and candor.

5. The Directors and Officers tendered the complaint in the Underlying D&O Action both to their primary insurer and Allied World and for coverage. The primary insurer accepted the defense, participated in settlement discussions, and agreed to the settlement of the Trustee’s claims against the Directors and Officers. In contrast, Allied World denied coverage on the eve of mediation.

6. Throughout the ongoing mediation of the Trustee’s claims and the settlement of the Underlying D&O Action, Allied World never changed its coverage position, refusing to accept that there was a potential for coverage, and refusing to meaningfully participate in the settlement discussions.

7. The Trustee and the Directors and Officers believe that Allied World’s conduct breached its obligations under the Allied World policy. Thus, in consideration for settling the Trustee’s claims, the Directors and Officers assigned their claims against Allied World to the Trustee to pursue through this action. The Trustee, therefore, brings this action as the assignee of the Directors’ and Officers’ claims against Allied World for breach of its duties arising under the Allied World policy.

THE PARTIES

8. Plaintiff Howard M. Ehrenberg is the duly appointed liquidating Trustee for the Debtors’ bankruptcy estates. The Trustee received the claims pursued here via assignment by the Directors and Officers and stands in their shoes as assignee.

9. On March 16, 2018, the Debtors each filed a voluntary petition under Chapter 11 of Title 11 of the United States Code (“Bankruptcy Code”). On May 15, 2018, the Debtors filed their Schedules and Statement of Financial Affairs. *See* Case No. 8-18-71748 (Dkt. Nos. 203, 204); Case No. 8-18-71749 (Dkt. Nos. 12, 13).

10. Upon information and belief, Allied World is an insurance company duly organized and existing under the laws of the State of New Hampshire with its principal places of business located at 10 Ferry Street, Suite 313, Concord, New Hampshire 03301 and 199 Water Street, 24th and 29th Floors, New York, NY 10038.

JURISDICTION AND VENUE

11. This action is a civil proceeding related to a case under Title 11 of the United States Code and pursuant to Federal Rule of Bankruptcy Procedure 7001. This Court has subject matter jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 151, 157, and 1334(b). This is a core proceeding under 28 U.S.C. § 157(b)(2).

12. Venue is proper in this Court, including venue pursuant to 28 U.S.C. § 1409, because, among other things, this is the district in which the Debtors’ bankruptcy action is pending. Pursuant to 28 U.S.C. § 1391, venue is also appropriate as the acts and conduct complained of herein took place within this district and because this Court also has personal jurisdiction over the Defendant.

13. In the event that this Bankruptcy Court or any other court of competent jurisdiction determines any part of this adversary proceeding to be “non-core,” Plaintiff consents to the entry of final orders and judgments by the Bankruptcy Court, pursuant to Federal Rule of Bankruptcy Procedure 7008. Plaintiff also consents to the entry of final orders or judgments by the Bankruptcy

Court if it is determined that the Bankruptcy Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

STATEMENT OF FACTS COMMON TO ALL CLAIMS FOR RELIEF

A. The Underlying D&O Action Against the Directors and Officers

14. In 1984, Orion was incorporated in Delaware under the name Technical Coatings Incorporated. In 2004, after undergoing a series of name changes, this company changed its name to Orion HealthCorp, Inc. Orion thereafter acquired multiple operating subsidiaries.

15. On September 3, 2014, CHT was formed to become the holding company for Orion and its subsidiaries. Parmjit “Paul” Parmar (“Parmar”) was the Chief Executive Officer of CHT, Sotiros “Sam” Zaharis (“Zaharis”) was the Chief Financial Officer, and Ravi Chivukula (“Chivukula”) was the controller of CHT and served on its board of directors. For the purposes of this complaint, Parmar, Zaharis, and Chivukula are collectively referred to as the “Parmar Conspirators.” CHT was formed to create a public traded entity on London Stock Exchange’s Alternative Investments Market (“AIM”). According to the AIM Offering Memorandum, CHT was to acquire all of the issued share capital of Orion immediately prior to CHT’s admission to trading on AIM. CHT went public on December 8, 2014.

16. Over the course of several years, the Parmar Conspirators cooperated and conspired to fabricate the acquisition of multiple fictitious companies, from which the Parmar Conspirators would obtain the majority of the sales proceeds. The Parmar Conspirators represented that these fictitious companies were operating businesses with bona fide customers and revenue when, in fact, they had no business operations, employees, customers, or revenue, and that they would personally receive the value that CHT paid to acquire these fictitious companies (the “Parmar Conspiracy”).

17. The acquisitions made as part of the Parmar Conspiracy shared common characteristics: (1) money was raised through secondary public offerings on the AIM; (2) the acquisition target was formed shortly before the date of acquisition; and (3) the proceeds of the public offerings were used for other purposes, including but not limited to, the creation of fictitious customer receipts and as revenue for other CHT business units.

18. The Parmar Conspirators also diverted CHT shares, and other interests representing the CHT shares, to Parmar and other members actively involved in the Parmar Conspiracy, through a series of corporate transactions by and among a complex labyrinth of Delaware limited liability companies that Parmar caused to be formed and/or controlled.

19. The Parmar Conspirators caused CHT's revenue and earnings to be overstated in its financial statements filed with the AIM in 2015 and 2016. CHT's stock price then increased based on these inaccurate financial statements.

20. The Directors and Officers served as directors and officers of CHT while Parmar was its CEO and the Parmar Conspirators engaged in wrongful behavior.

B. The January 30, 2017 Merger & Resignation of Parmar

21. Effective as of January 30, 2017, CHT entered into a go-private merger transaction with CC Capital Management LLC ("CC Capital"). This transaction is generally referred to herein as the "Merger."

22. As inducement to enter into the Merger, Parmar represented and warranted that CHT's financial statements were truthful and accurate, that there were no false entries on any of CHT's books and records, that CHT's accounts receivable were the result of bona fide transactions, and that its material contracts were valid and enforceable. Upon information and belief, these representations and warranties were known by Parmar to be false when made.

23. To meet its obligations under the Merger, Orion obtained Merger financing to fund shareholder redemption payments. To fund the shareholder redemption payments: (i) CC Capital conveyed a capital contribution to CHT HoldCo; (ii) Debtors and non-party debtors incurred liens on all their assets to secure the Merger financing; and (iii) CHT issued unsecured promissory notes to its shareholders in the amount of approximately \$39.6 million. As to the collateral security for their guarantees, Debtors and non-party debtors granted first priority liens on all of their property, including 100% of the equity interests in each of their subsidiaries, to the financial institution providing the Merger financing. The Merger financing also was jointly and severally guaranteed by Debtors and non-party debtors.

24. The remainder of the acquisition price was financed by CHT's issuance of unsecured promissory notes to its shareholders in the amount of approximately \$39.6 million.

25. On January 18, 2017, CHT submitted the Merger for approval to its shareholders, which was granted shortly thereafter.

26. On January 26, 2017, CHT requested that trading of its shares on the AIM be suspended.

27. The Merger closed on or about January 30, 2017.

28. In or about April 2017, one of the Directors and Officers, Truc To, was hired as Chief Financial Officer of CHT. Upon information and belief, Director To was part of an effort by the newly constituted Board to improve CHT's financial and accounting processes and reporting and to exercise increased oversight over the processes.

29. On September 14, 2017, Parmar resigned as CEO of CHT and its subsidiaries.

30. Upon information and belief, on or about September 29, 2017, a specially called meeting of CHT's board of directors occurred resulting from the questions and concerns regarding

the state of CHT's business operations. In such meeting, Parmar disclosed that CHT's consolidated revenue and earnings before interest, tax, depreciation and amortization (or "EBITDA") for 2017 were \$70 million less and \$50 million less, respectively, than the amounts indicated during the Merger negotiations.

31. On September 29, 2017, Parmar resigned from the board of directors of CHT effective immediately.

32. By March 2018, the Debtors each filed a voluntary petition under Chapter 11 of Title 11 of the United States Code.

C. The Underlying Claims Against the Directors and Officers

The Underlying Shareholder Action

33. On March 29, 2018, CHT as Debtor in Possession commenced an adversary proceeding seeking to recover actual and constructive fraudulent transfers, as defined by the Bankruptcy Code, of proceeds that had distributed to a number of entities. After the appointment of a liquidating Trustee, a Second Amended Complaint was ultimately filed on March 12, 2020, naming several of the non-executive Directors and Officers as defendants. *See Ehrenberg v. Griffiths*, Adv. Pro. No. 8-18-08048-ast, Dkt. 295 (Bank. E.D.N.Y. March 12, 2020) (Main Case No. 18-71748) ("Underlying Shareholder Action" and together with the Underlying D&O Action, "Underlying Actions"). A copy of the Second Amended Complaint filed in the Underlying Shareholder Action is attached hereto as Exhibit A ("Underlying Shareholder Complaint").

34. The Underlying Shareholder Complaint alleged that the certain defendant Directors and Officers had improperly received payments and financial benefits made in connection with the Merger, and asserted claims including constructive, intentional, and actual fraudulent transfer and payment of illegal dividends, *inter alia*. (Underlying Shareholder Complaint, Exhibit A, pp. 44-54, ¶¶ 175-245.)

35. Specifically, the Underlying Shareholder Complaint alleged that certain “Shareholder Redemption Payments” and “IRS Funds” had been paid by the Debtor within two years of the petition date and that the Debtor had not received reasonably equivalent value, and contended that these should be recovered from the named Directors and Officers under the Bankruptcy Code and the Delaware Uniform Fraudulent Transfer Act. *Id.*

36. The Underlying Shareholder Complaint also alleged that certain defendant Directors and Officers were personally liable for the amount of dividends paid out by CHT due to their willful or negligent approval of the transfer of such dividends while Debtors lacked sufficient surplus or net profits or was otherwise insolvent in violation of Delaware’s General Corporation Law.

The Underlying D&O Action

37. On March 13, 2020, the Trustee commenced the Underlying D&O Action against CHT’s Directors and Officers – a group of former CHT directors and officers that did not include the Parmar Conspirators. *See Ehrenberg v. Johnston, et al.*, Adv. Pro. No. 8-20-08046 (Bankr. E.D.N.Y. March 13, 2020) (Main Case No. 18-71748). A copy of the Complaint filed in the Underlying D&O Action is attached hereto as Exhibit B (“Underlying D&O Complaint” and with the Underlying Shareholder Complaint, the “Underlying Complaints”).

38. The Underlying D&O Complaint asserted the following causes of action against the Directors and Officers: (1) breach of fiduciary duties arising out of the Parmar Conspiracy; (2) breach of fiduciary duties arising out of the go-private merger; and (3) negligence. (Underlying D&O Complaint, Exhibit B, pp. 14-17, ¶¶ 70-92.)

39. The Underlying D&O Complaint alleged that the Directors and Officers breached their legal obligations and fiduciary duties of care, loyalty and candor to Debtors, their shareholders, and their creditors by failing to take the reasonable care that a reasonable director or

officer would be expected to take to protect the assets of the Debtors, to prevent harm to the Debtors, and to avoid incurring unreasonable liabilities for which Debtors' former directors and officers knew, or should have known, the Debtors would be unable to pay. (Exhibit B, p. 2, ¶¶ 1-2.)

40. As set forth in the Underlying D&O Complaint, the Directors and Officers broadly breached their fiduciary duties relating to: (1) the sham acquisitions and transactions; and (2) the Merger transaction. (Exhibit B, pp. 14-17, ¶¶ 70-86.)

41. Specifically, as to the sham acquisitions and transactions, the Underlying D&O Complaint alleged:

- a. The Directors and Officers knew or should have known that the Parmar Conspirators conducted a number of transactions that removed substantial assets from the Debtors for their own personal profit and to the detriment of Debtors. (Exhibit B, p. 2, ¶ 3.)
- b. By allowing Parmar to enter into the sham acquisitions and transactions without conducting due and reasonable diligence into the nature and value of the fictitious entities, the Directors and Officers abandoned their fiduciary duties. (Exhibit B, pp. 11-12, ¶¶ 43, 46-69.)
- c. The Directors and Officers failed to initiate or implement any diligence or audits of these transactions, or implement any fraud protections practice, which would have uncovered Parmar's looting of the Debtor's assets, despite these transactions raising a number of red flags that a reasonable director or officer would have seen and/or investigated. (Exhibit B, pp. 2, 11, ¶¶ 3, 44.)

- d. Any reasonable investigation of the sham acquisitions and transactions by the Directors and Officers would have revealed that the fictitious entities acquired by CHT had no value or were acquired for an amount that far exceeded their value and that the information about these fictitious companies provided by the Parmar Conspirators was false and/or misrepresentative. (Exhibit B, p. 8, ¶¶ 38-39.)

42. As to the Merger transaction, the Underlying D&O Complaint alleged:

- a. The Debtors would not have entered into the Merger had the Directors and Officers undertaken adequate due diligence at any point prior to the Merger. (Exhibit B, p. 13, ¶ 61.)
- b. The Debtors were under no obligation to enter into the Merger or incur the obligations under the Merger financing that resulted in a massive payout to its Shareholders. (Exhibit B, p. 13, ¶ 61.)
- c. The Directors and Officers allowed the Merger transaction to become effective on January 30, 2017, which had the reasonable and foreseeable effect that the Debtors would incur liability for which they could not pay, despite Directors and Officers having access to financial information showing that the Debtors would not be able to pay the liabilities incurred as part of the Merger transaction. (Exhibit B, p. 3, ¶ 4.)
- d. The Directors and Officers knew, or should have known, that the Merger would result in the insolvency of the Debtors but failed to object, investigate, or otherwise take reasonable care to prioritize the interests of

the Debtors, their shareholders, and their creditors. (Exhibit B, pp. 2-3, ¶¶ 1, 4.)

D. Allied World's Excess Insurance Policy Covering the Underlying Actions

43. Allied World sold to Debtor CHT an "Excess Directors & Officers Liability Insurance Following Form Policy" with a policy number 0310-5162. A true and correct copy of the Policy is attached hereto as Exhibit C ("Policy").

44. The Policy contains the following insurance coverage grant:

The Insurer shall pay the individuals and entities insured under the Primary Policy (also referred to herein as the "Insured") for Loss after exhaustion by payments of all applicable underlying limits by either the Underlying Insurers as specified in Item 4 of the Declarations, the Insureds and/or any insurer under a difference-in-conditions policy written as specifically excess over the Limit of Liability provided by this Policy, subject to:

- A. the terms and conditions of the Primary Policy as in effect the first day of the Policy Period;
- B. the Limit of Liability as stated in Item 3 of the Declarations; and
- C. the terms and conditions of, and the endorsements attached to, this Policy.

(Policy, Exhibit C, p. 8, § I, as amended by Endorsement 4.)

45. The Policy provides the same terms and conditions as the "Primary Policy" subject to any additional terms and conditions in the Policy:

This Policy, except as herein stated, is subject to all terms, conditions, agreements and limitations of the Primary Policy in all respects as in effect on the date hereof.

(Exhibit C, p. 12, § II.F.1, as amended by Endorsement 7.)

46. The "Primary Policy" is defined as a Hiscox policy form underwritten by Lloyd's Syndicate 2623/623 Beazley ("Hiscox") with a Policy Number B0723EI00943A17 and limits of \$5,000,000. (Exhibit C, p. 1, Declarations.)

47. A true and correct copy of the “Primary Policy” is attached hereto as Exhibit D (“Primary Policy”).

48. Under the Primary Policy, Hiscox agreed to pay the loss on behalf of an “insured person” due to any “wrongful act” for which “claims” were made and reported during the Primary Policy period. (Primary Policy, Exhibit D, p. 10, § 1.)

49. The Directors and Officers were “insured persons” under the Primary Policy. (Exhibit D, p. 15, § 3.18(i).) Thus, the Directors and Officers were “insured persons” under the Allied World Policy.

50. The Underlying Complaints together and each separately were a “claim” for a “wrongful act” under the terms of the Primary Policy. (Exhibit D, pp. 13, 18, 18, §§ 3.4, 3.43.) Thus, the Underlying Complaints were a claim for a wrongful act under the terms of the Allied World Policy.

51. Hiscox and Allied World (collectively, “Insurers”) were provided notice of the circumstances that would reasonably give rise to the Underlying Complaints by letter dated January 4, 2018 (“January 4, 2018 Notice”). The January 4, 2018 Notice advised Insurers of potential claims against the Directors and Officers for: (1) failure to adequately supervise management in connection with various transactions and decisions; (2) failure to fulfill the duty of loyalty by both management and the members of the board of directors by engaging in self-interested transactions; (3) failure to fulfill the duty of care by being reasonably informed of transactions contemplated and consummated by CHT; (4) failure to make due inquiry into transactions contemplated and consummated by CHT; and (5) failure to adequately consider the impact of transactions on CHT’s stakeholders.

52. The January 4, 2018 Notice to Insurers was a timely notice of claim under the terms of the Primary Policy. (*See* Primary Policy, Exhibit D, pp. 20-21, §§ 5.6-5.9.) The January 4, 2018 Notice to Insurers was also a timely notice of claim under the terms of the Allied World Policy.

53. One or more of the Directors and Officers timely tendered the Underlying Complaints to Insurers on or before April 23, 2020. Upon information and belief, other Directors and Officers also timely tendered the Underlying Complaints to Insurers.

54. Hiscox accepted coverage under the Primary Policy, and agreed to pay all covered losses under its terms.

E. Mediation and Allied World's Denial of Coverage

55. The Court ordered the parties in the Underlying D&O Action to mediation. The parties held their first mediation on March 3, 2021.

56. Allied World did not respond to the April 23, 2020 tender until March 2, 2021, the day before the mediation in the Underlying D&O Action.

57. In its March 2, 2021 response, Allied World denied coverage, citing to Endorsement No. 2 of the Policy, which states:

This Policy shall not cover any Loss in connection with any claim alleging, arising out of, based upon, or attributable to any wrongful act(s) committed, attempted, or allegedly committed or attempted prior to January 7, 2017. This Policy shall provide coverage only with respect to wrongful acts occurring on or after January 7, 2017 and prior to the end of the Policy Period and otherwise covered under the terms and conditions of this Policy.

(Policy, Exhibit C, p. 6, § 2 as amended by Endorsement No. 2.) (“Prior Acts Exclusion”).

58. A second mediation was scheduled for and occurred on April 21, 2021, which Allied World did not attend.

59. A third mediation was scheduled for and occurred on June 11, 2021.

60. On or about June 24, 2021, the Trustee's counsel sent a letter to Allied World providing a policy limits demand, which offered to settle the claims against the Directors and Officers in consideration of a settlement contribution by Allied World of the remaining value in the Policy, which the Trustee understood to be \$5 million. This letter confirmed and renewed the Trustee's offer to settle the claims against the Directors and Officers in exchange for Allied World's payment of its remaining policy limits insofar as Hiscox would agree to exhaust the Primary Policy by payment.

61. Directors and Officers asked and demanded that Allied World accept this settlement demand as a reasonable settlement of the claims in the Underlying D&O Complaint, taking into account all facts and circumstances.

62. On or about July 2, 2021, Allied World responded by letter rejecting the Trustee's demand and declining to participate in the settlement or reverse its coverage denial for the Underlying D&O Action.

63. At no point in settlement discussions between the Trustee and the Directors and Officers did Allied World agree to contribute to any proposed settlement, reimburse any defense costs, or accept the possibility of coverage.

F. The Trustee, Hiscox, and Directors and Officers Enter Into A Settlement Agreement, in which Directors and Officers Assign their Claims Against Allied World to the Trustee

64. Despite Allied World's continued refusal to contribute to or participate in settling the Trustee's claims, the Trustee, the Directors and Officers, and Hiscox were able to agree on the terms of a Settlement Agreement following a good-faith and arm's length negotiations as overseen

by a third-party neutral mediator. A copy of the Settlement Agreement is attached hereto as Exhibit E (“Settlement Agreement”).

65. In pertinent part, the Settlement Agreement fixed the liability of the Directors and Officers at \$18,500,000 for the claims asserted in the Underlying D&O Complaint, which the parties to the Underlying D&O Action agreed to be a reasonable settlement amount considering all facts, circumstances, and the parties’ interests. (Settlement Agreement, Exhibit E, p. 8, ¶ 2.) The Settlement Agreement also contained a provision where the Trustee agreed not to attempt to enforce the Settlement Agreement against the assets of the Directors and Officers in consideration for an assignment of any claims the Directors and Officers held against Allied World, as their insurer. (Exhibit E, p. 11, ¶ 3.iii.)

66. Specifically, the Settlement Agreement included the following language:

As consideration for the promises made herein, Defendants hereby assign to Trustee any and all rights, title and interest in claims arising under, from and based upon the Allied Policy [...]

The Defendants and Trustee agree that that the Assignment is intended by Defendants and Trustee to be, and is, an assignment in the title and ownership in Defendants’ claims against Allied [World] and is considered to be a contemporaneous exchange for new value given by the Trustee to Defendants [...]

(Exhibit E, p. 10, ¶ 3.ii.)

67. On or about October 18, 2021, the Trustee filed a motion for entry of an order approving settlement agreement between the Trustee, the Directors and Officers, and Hiscox (the “Motion to Approve Settlement”). (See Exhibit E, pp. 1-2.)

68. On or about December 16, 2021, the Court granted the Motion to Approve Settlement, authorizing the Trustee to execute the Settlement Agreement and finding that the Settlement Agreement was “reasonable and entered into in good faith and at arm’s length.” (Exhibit E, p. 2.)

69. As such, any and all rights and claims held by the Directors and Officers arising from the Policy, including those claims against Allied World relating to its conduct and its decision to deny coverage for the Underlying D&O Action have been effectively assigned to the Trustee.

FIRST CLAIM FOR RELIEF

BREACH OF INSURANCE CONTRACT

70. The Trustee repeats and re-alleges each and every allegation contained in paragraphs 1 through 69 above as if fully stated herein.

71. The Policy is a valid contract.

72. All conditions and covenants required by the Policy have been performed and satisfied by Debtors and/or Directors and Officers.

73. All insurance premiums required by the Policy have been paid.

74. Under the terms of the Policy, Allied World owed a duties to the Directors and Officers, including the duty to advance defense costs for covered claims.

75. Under the terms of the Policy, Allied World owed a duty to the Directors and officers to pay the loss on behalf of each Director and Officer due to the Underlying Actions, to the extent the Primary Policy is exhausted by payment. (*See supra* ¶¶ 43-54.)

76. Allied World breached the Policy in a number of ways, including, without limitation, the following:

- a. Denying Directors' and Officers' claim for coverage under the Policy for the Underlying Actions;
- b. Failing and refusing to meaningfully participate in the mediation in the Underlying Actions;
- c. Failing to accept a reasonable settlement demand within the Policy limits;

- d. Failing and refusing to make available for the Settlement the full policy limits of the Policy;
- e. Failing and refusing to pay benefits due and owing under the Policy for the covered loss without conducting a full, fair, competent, objective, and unbiased investigation based on all available facts and circumstances;
- f. Failing to properly and timely investigate the Directors and Officers tender of claim; and/or
- g. Failing to comply with its duty of good faith and fair dealing.

77. Directors and Officers were damaged as a direct and proximate result of the above listed contract breaches (and others not specifically listed) committed by Allied World.

78. Directors and Officers claims against Allied World for breach of contract have been duly assigned to the Trustee.

79. In his own capacity and in his capacity as assignee of the Directors and Officers claims, and as a direct and proximate result of Allied World's breaches of its contractual obligations, the Trustee has suffered and continues to suffer substantial direct monetary damages, pre-judgment and post-judgment interest, and costs incurred in bringing this action against Allied World, all in an amount to be established at trial.

80. As a direct and proximate result of Allied World's breach of its contractual obligations, the Trustee (in his own capacity and as assignee of the Directors' and Officers' claims) has also incurred substantial consequential damages that exceed the Policy limits, including, but not limited to, the full amount of the Settlement Agreement less any amounts paid to the Trustee under the Settlement Agreement by Hiscox, as well as attorneys' fees associated with prosecuting

the present action, pre-judgment and post-judgment interest on the above damages, all in an amount to be proven at trial.

81. These damages, as a result of Allied World's breaches of its obligations under the Policy, are and were foreseeable at the time the Policy was issued, and at the time Allied World denied coverage for the Underlying Actions, and should be awarded to as adequate compensation for Allied World's conduct.

SECOND CLAIM FOR RELIEF

BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

82. The Trustee repeats and re-alleges each and every allegation contained in paragraphs 1 through 81 above as if fully stated herein.

83. Implied in the Policy is a covenant that Allied World will act in good faith and deal fairly with respect to its insureds, which here include the assignor Directors and Officers. That obligation includes, among other things,

- a. an obligation that Allied World would not do anything to interfere with Debtors' rights to receive the benefits due and owing under the Policy;
- b. that Allied World would honestly, promptly, and fairly investigate the facts of coverage, evaluate damages, adjust the loss, communicate and cooperate with the insured, and promptly pay the full amount of the covered loss and damage; and/or
- c. that Allied World would give as much, if not more, consideration to the insured's interest as Allied World gave to its own interests in responding to this loss.

84. Allied World has breached its duty of good faith and fair dealing by:

- a. Withholding its coverage position until the day before mediation in the Underlying Actions despite having had knowledge of the facts and circumstances giving rise to the Underlying Actions since the notice of circumstances was provided on January 4, 2018;
- b. Failing to conduct a good faith, thorough, or timely investigation concerning the Underlying Actions;
- c. Viewing the information, records and documents provided by Debtors and Directors and Officers through the lens of creating an artifice for denying coverage rather than supporting coverage;
- d. Refusing to meaningfully participate in the settlement discussions or otherwise agree to contribute toward the settlement of the Underlying Actions despite requests from the Directors and Officers to do so;
- e. Unreasonably interpreting the terms of the Policy in a way that increased litigation costs to its insureds;
- f. Compelling its insureds to institute suit to recover amounts due under the Policy; and/or
- g. Otherwise acting contrary to the obligations imposed by the implied covenant of good faith and fair dealing in the Policy.

85. Allied World did these things and committed the acts alleged above for the purpose of consciously withholding from the Directors and Officers the rights and benefits to which they were entitled under the Policy.

86. The acts described above are (a) inconsistent with insureds' reasonable expectations; (b) contrary to established claims practices and legal requirements; (c) contrary to insurance industry custom and practice; and (d) contrary to the express terms of the Policy.

87. Directors' and Officers' claims against Allied World for breach of the implied covenant of good faith and fair dealing have been duly assigned to the Trustee.

88. As a direct and proximate result of Allied World's breach of its duty of good faith and fair dealing, the Trustee (in his own capacity and as assignee of the Directors' and Officers' claims) has incurred substantial consequential damages that exceed the Policy limits, including, but not limited to, the full amount of the Settlement Agreement less any amounts paid to the Trustee under the Settlement Agreement by Hiscox, as well as attorneys' fees associated with prosecuting the present action, pre-judgment and post-judgment interest on the above damages, all in an amount to be proven at trial.

89. These damages are and were a foreseeable consequence of Allied World's conduct.

THIRD CLAIM FOR RELIEF

DECLARATORY RELIEF

90. The Trustee repeats and re-alleges each and every allegation contained in paragraphs 1 through 89 above as if fully stated herein.

91. An actual controversy has arisen, and now exists, between the Trustee (as assignee of Directors' and Officers' claims against Allied World) on the one hand and Allied World on the other, with respect to whether the Policy covers the claims alleged in the Underlying Actions.

92. As assignee to the Directors' and Officers' rights under the Policy, Trustee is currently being injured by Allied World's continued refusal to provide insurance coverage under the Policy.

93. A decision by this Court regarding the availability of coverage under the Policy would resolve the parties' rights at issue in this case and would prevent unnecessary injury.

94. As to this controversy, the Trustee requests that the Court make and enter a binding judicial declaration that:

- a. The Policy provides coverage for the claims alleged in the Underlying Actions;
- b. The obligations in Allied World's Policy have been triggered by the exhaustion of the Primary Policy through Hiscox's payment;
- c. No exclusions in the Policy apply to bar coverage;
- d. The Prior Acts Exclusion does not justify Allied World's denial of the Directors' and Officers' claims for coverage for the Underlying Actions;
- e. The Prior Acts Exclusion does not exclude coverage for the claims asserted in the Underlying Complaints as to any or all of the Directors and Officers;
- f. Directors and Officers have fully complied with all requirements under the Policy;
- g. Allied World owed a duty of good faith and fair dealing to Directors and Officers;
- h. The assignment of claims in the Settlement Agreement against Allied World from the Directors and Officers to the Trustee is an effective assignment;
- i. The Settlement Agreement was reasonable, and entered into in good faith and at arms-length; and
- j. The Directors and Officers incurred an insured loss of \$18,500,000 as "loss" is defined in the Primary Policy and the Allied World Policy.

- k. The \$18,500,000 liability set forth in the Settlement Agreement is a covered “loss” as that term is defined in the Primary Policy and the Allied World Policy.

95. The requested declarations are both necessary and proper at this time under the circumstances in that the interest of judicial economy and substantial justice will be served thereby.

96. The Trustee is informed and believes, and upon that basis alleges, that Allied World disputes all or part of the contentions set forth in the preceding paragraphs.

97. The Trustee seeks the judicial declarations set forth above.

PRAYER FOR RELIEF

WHEREFORE, the Trustee respectfully seeks the following relief:

1. With respect to the First Claim for Relief, the Trustee requests that the Court enter judgment against Defendant for damages in an amount to be proven at trial, including compensatory damages, consequential damages, interest, punitive damages, and other such relief the Court deems just and proper.
2. With respect to the Second Claim for Relief, the Trustee requests that the Court enter judgment against Defendant for damages in an amount to be proven at trial, including compensatory damages, consequential damages, interest, punitive damages, and other such relief the Court deems just and proper.
3. With respect to the Third Claim for Relief, the Trustee requests that the Court make the judicial declarations set forth above in favor of Trustee and in favor of coverage for Trustee’s claim.

Dated: December 20, 2021

Respectfully submitted,

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