



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

AR CAPITAL, LLC,)
)
Plaintiff,)
)
v.)
)
XL SPECIALTY INSURANCE)
COMPANY, BEAZLEY INSURANCE)
COMPANY, EVEREST NATIONAL)
INSURANCE COMPANY, ILLINOIS)
NATIONAL INSURANCE COMPANY,)
ALTERRA AMERICA INSURANCE)
COMPANY, ARGONAUT INSURANCE)
COMPANY, QBE INSURANCE)
COMPANY, and CATLIN INSURANCE)
COMPANY,)

C.A. No. N16C-04-154 WCC [CCLD]



PUBLIC VERSION

Defendants.

**FIRST AMENDED COMPLAINT FOR DECLARATORY RELIEF,
BREACH OF CONTRACT, AND DAMAGES**

AR Capital, LLC (“AR Capital”), for its First Amended Complaint against Defendants, alleges as follows:

INTRODUCTION

1. This action seeks declaratory relief and damages arising out of Defendants’ failure to treat AR Capital fairly and equitably under separate insurance programs (the “VEREIT Policies” and the “AR Capital Policies” as hereinafter defined) under which AR Capital, and certain of its directors and officers, have sought coverage for a series of investigations and lawsuits arising, in part, out of management and advisory services AR Capital provided to VEREIT,



Inc. (“VEREIT”), f/k/a American Realty Capital Properties, Inc. (the “Underlying Matters”).

2. The VEREIT Policies provide coverage for AR Capital with respect to its own costs of defense, judgment and/or settlement of the Underlying Matters, as well as for amounts it pays to defend and indemnify its directors and officers with respect to those Underlying Matters. Accordingly, by letter dated April 7, 2015, AR Capital, through its counsel, gave notice to the Defendants of certain of the Underlying Matters, and demanded that they pay for the costs of defense and indemnity with respect to those Matters.

3. This matter is particularly urgent because the finite insurance assets presented by the VEREIT Policies have been expended to pay for claims by VEREIT to the exclusion of AR Capital. VEREIT previously told at least two of the Defendants that it represented the interests of all insureds on claims for coverage under the VEREIT Policies for the Underlying Matters, even though VEREIT knew that AR Capital is separately represented by counsel.

4. Furthermore, at least one of the Defendants, Beazley Insurance Company (“Beazley”), responded to VEREIT’s representation by tendering its full policy limit to VEREIT. Beazley gave no notice to AR Capital of that tender or the resulting exhaustion of the Beazley policy limits, despite the fact that Beazley has been on notice of AR Capital’s separate claims for coverage with respect to the

Underlying Matters since at least April 2015. AR Capital repeatedly sought clarification on these issues from VEREIT, Beazley, and Everest National Insurance Company (“Everest”), but received none, necessitating this action.

5. AR Capital and the individuals represented by Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C. (“Kellogg Huber”) have incurred over \$6 million in unpaid defense costs in connection with the Underlying Matters. As a result, to provide for its own defense as well as that of the individuals, AR Capital has been forced to pay Kellogg Huber’s fees directly – even though AR Capital is fully covered under the VEREIT Policies and entitled to have Defendants pay those amounts on its behalf. Absent the immediate intervention of the Court to ensure that the Defendants treat AR Capital’s claims for access to the finite insurance assets applicable to the Underlying Matters equally with those made by VEREIT, AR Capital’s ability to defend against the Underlying Matters could be seriously and irreparably compromised.

6. Accordingly, AR Capital seeks a declaratory judgment that: (1) the AR Capital claims fall within the coverage of the VEREIT Policies; (2) Defendants must treat AR Capital’s claims under the VEREIT Policies fairly and equally with claims by any other insured, including VEREIT; (3) to ensure such fair and equal treatment, Defendants must notify AR Capital before making any payment that would erode the limits of the VEREIT Policies; and (4) Defendants must disclose

any payments already made to VEREIT or at its direction against the policy limits.

AR Capital also seeks damages caused by certain Defendants' breach of their payment obligations and their breach of the duty of good faith and fair dealing under the VEREIT Policies with respect to AR Capital's coverage claims for defense and indemnity in connection with the Underlying Matters.

7. AR Capital also seeks a declaratory judgment and damages from Defendant XL Specialty Insurance Company ("XL") in connection with the AR Capital Policies.

THE PARTIES

8. Plaintiff AR Capital is a Delaware corporation, with its principal place of business in New York, New York. AR Capital's corporate affiliates provided management and advisory services to VEREIT during the relevant period.

9. Upon information and belief, Defendant XL is a corporation organized under the laws of Delaware, maintains its principle place of business in Connecticut, and is an insurance company that is licensed to do business in the State of Delaware, among other places. Upon information and belief, XL has written insurance policies covering risks for Delaware citizens and/or is otherwise transacting business in the State of Delaware.

10. Upon information and belief, Defendant Beazley is a corporation organized under the laws of Connecticut, maintains its principal place of business

in Connecticut, and is an insurance company that is licensed to do business in the State of Delaware, among other places. Upon information and belief, Beazley has written insurance policies covering risks for Delaware citizens and/or is otherwise transacting business in the State of Delaware.

11. Upon information and belief, Defendant Everest is a corporation organized under the laws of Delaware, maintains its principal place of business in New Jersey, and is an insurance company that is licensed to do business in the State of Delaware, among other places. Upon information and belief, Everest has written insurance policies covering risks for Delaware citizens and/or is otherwise transacting business in the State of Delaware.

12. Upon information and belief, Defendant Illinois National Insurance Company (“Illinois National”) is a corporation organized under the laws of Illinois, maintains its principal place of business in New York, and is an insurance company that is licensed to do business in the State of Delaware, among other places. Upon information and belief, Illinois National has written insurance policies covering risks for Delaware citizens and/or is otherwise transacting business in the State of Delaware.

13. Upon information and belief, Defendant Alterra America Insurance Company (“Alterra”) is a corporation organized under the laws of Delaware, maintains its principal place of business in Virginia, and is an insurance company

that is licensed to do business in the State of Delaware, among other places. Upon information and belief, Alterra has written insurance policies covering risks for Delaware citizens and/or is otherwise transacting business in the State of Delaware.

14. Upon information and belief, Defendant Argonaut Insurance Company (“Argonaut”) is a corporation organized under the laws of Illinois, maintains its principal place of business in Texas, and is an insurance company that is licensed to do business in the State of Delaware, among other places. Upon information and belief, Argonaut has written insurance policies covering risks for Delaware citizens and/or is otherwise transacting business in the State of Delaware.

15. Upon information and belief, Defendant QBE Insurance Corporation (“QBE”) is a corporation organized under the laws of Pennsylvania, maintains its principal place of business in New York, and is an insurance company that is licensed to do business in the State of Delaware, among other places. Upon information and belief, QBE has written insurance policies covering risks for Delaware citizens and/or is otherwise transacting business in the State of Delaware.

16. Upon information and belief, Defendant Catlin Insurance Company (“Catlin”) is a corporation organized under the laws of Texas, maintains its

principal place of business in Georgia, and is an insurance company that is licensed to do business in the State of Delaware, among other places. Upon information and belief, Catlin has written insurance policies covering risks for Delaware citizens and/or is otherwise transacting business in the State of Delaware.

17. Defendants Everest, Illinois National, Alterra, Argonaut, QBE, and Catlin are collectively referred to herein as the “VEREIT Excess Insurers.”

FACTS GIVING RISE TO THIS SUIT

The VEREIT Policies

18. The VEREIT Policies cover the period from February 7, 2014, to February 7, 2015, as follows:

- a. XL issued a primary policy no. ELU133180, a copy of which is attached as Exhibit A, subject to an aggregate limit of \$10 million, including defense costs (“VEREIT Primary Policy”);
- b. Beazley issued excess insurance policy no. V14E1E140101, a copy of which is attached as Exhibit B, with aggregate policy limits, including defense costs, of \$10 million excess of \$10 million;
- c. Everest issued excess insurance policy no. FL5DO00101-141, a copy of which is attached as Exhibit C, with aggregate policy limits, including defense costs, of \$10 million excess of \$20 million;

d. Illinois National issued excess insurance policy no. 02-138-43-39, a copy of which is attached as Exhibit D, with aggregate policy limits, including defense costs, of \$10 million excess of \$30 million;

e. Alterra issued excess insurance policy no. MAXA6EL0001623, a copy of which is attached as Exhibit E, with aggregate policy limits, including defense costs, of \$10 million excess of \$40 million;

f. Argonaut issued excess insurance policy no. MLX 7600822-00, a copy of which is attached as Exhibit F, with aggregate policy limits, including defense costs, of \$10 million excess of \$50 million;

g. QBE issued excess insurance policy no. QPL0040843, a copy of which is attached as Exhibit G, with aggregate policy limits, including defense costs, of \$10 million excess of \$60 million; and

h. Catlin issued excess insurance policy no. XSP-683883-0214, a copy of which is attached as Exhibit H, with aggregate policy limits, including defense costs, of \$10 million excess of \$70 million.

19. The policies issued as excess to the VEREIT Primary Policy are collectively referred to as the “VEREIT Excess Policies” and, together with the VEREIT Primary Policy, the “VEREIT Policies.”

20. Except as otherwise expressly provided in the VEREIT Excess Policies, those policies “follow form” to the terms and conditions of the VEREIT

Primary Policy, meaning that they adopt those terms and conditions as if fully set forth in their policy language.

21. Pursuant to the Insuring Agreement of the VEREIT Primary Policy, the insurer agrees to pay on behalf of “the Company”: (1) Loss which the Company is required or permitted to pay as indemnification to any Insured Person resulting from a Claim made during the policy period for a Wrongful Act (“Coverage B”) and (2) Loss resulting from a Securities Claim first made against the Company during the policy period for a Company Wrongful Act (“Coverage C”).

22. Pursuant to Endorsement 52 of the VEREIT Primary Policy, AR Capital is also included along with VEREIT in the definition of “Company” and is an insured under the VEREIT Primary Policy and the VEREIT Excess Policies with respect to Wrongful Acts that occur or allegedly occur during the time that VEREIT and/or its Subsidiaries are externally managed.

23. Upon information and belief, VEREIT and/or its Subsidiaries were externally managed within the meaning of the VEREIT Primary Policy during the period from September 7, 2011 through January 8, 2014.

24. “Insured Person” is defined under the VEREIT Primary Policy to include, inter alia, “any past, present or future director or officer, or member of the Board of Managers of the Company[.]”

25. Pursuant to the “Amend Insured Person” Endorsement No. 39 to the VEREIT Primary Policy, past, present or future employees of AR Capital are also made “Insured Persons” under the VEREIT Primary Policy with respect to Securities Claims.

26. “Wrongful Act” is defined under the VEREIT Primary Policy to include, inter alia, “any actual or alleged act, error, omission, misstatement, misleading statement, neglect, or breach of duty by any Insured Person” while acting in his or her capacity as an “Insured Person of the Company.”

27. “Company Wrongful Act” is defined under the VEREIT Primary Policy to mean “any actual or alleged act, error, omission, misstatement, misleading statement or breach of duty by the Company in connection with a Securities Claim.”

28. “Securities Claim” is defined by Endorsement No. 54 of the VEREIT Primary Policy to include, inter alia, “a claim other than an administrative or regulatory investigation of a Company” for “any actual or alleged violation of any federal, state, local regulation, statute or rule (whether statutory or common law), including but not limited to actual or alleged violations of the foregoing in connection with the purchase or sale of, or offer to purchase or sell, securities[.]”

29. “Securities Claim” is also defined by Endorsement 54 to include “administrative or regulatory investigations of, a Company, but only if and only

during the time that such investigation is also commenced and continuously maintained against an Insured Person.”

30. Pursuant to Endorsement No. 50 of the VEREIT Primary Policy, the insurer agrees that “[u]pon the written request of an Insured, the Insurer will advance Defense Expenses on a current basis in excess of the applicable retention, if any, before the disposition of the Claim for which this policy provides coverage” subject to repayment “if it is finally determined by a final, non-appealable adjudication” that the Loss, including Defense Expenses, is not covered under the policy.

31. Section V of the VEREIT Primary Policy is titled “Defense, Settlement and Allocation of Loss.” Subsection (D) of that Section provides that “[i]f both Loss covered by this Policy and Loss not covered by this Policy are incurred,” either because a claim includes both covered and uncovered matters, or a claim is made against both an Insured and a non-Insured, the Insured and the Insurer will use “their best efforts to determine a fair and appropriate allocation of Loss[.]”

The AR Capital Policies

32. The AR Capital Policies consist of a primary policy, no. ELU136570-14, issued by XL to AR Capital which covers the period from October 23, 2014, to

October 23, 2016 (the “AR Capital Primary Policy”), and certain follow-form excess insurance policies not at issue in this action.

33. The AR Capital Primary Policy is subject to an aggregate limit of \$10 million, including defense costs. A copy of the AR Capital Primary Policy is attached hereto as Exhibit I.

34. Pursuant to the Insuring Agreement of the AR Capital Primary Policy, the insurer agrees to pay on behalf of “the Company” Loss which the Company is required or permitted to pay as indemnification to any Insured Person resulting from a Claim made during the policy period for a Wrongful Act (“Coverage B”).

35. AR Capital is the Parent Company named in the AR Capital Primary Policy. “Company” is defined in the policy to mean the Parent Company.

36. “Insured Person” is defined under the AR Capital Primary Policy to include, inter alia, “any past, present or future director or officer, or member of the Board of Managers, of the Company[.]”

37. Endorsement No. 12 of the AR Capital Primary Policy defines “Securities Claim” to include “administrative or regulatory investigations of, a Company, but only if and only during the time that such investigation is also commenced and continuously maintained against an Insured Person.”

38. Endorsement No. 34 of the AR Capital Primary Policy amends the definition of “Claim” to include “an investigation of an Insured Person if

commenced by a subpoena, target letter, or other order of investigation, whether or not they have been identified as a person against whom an otherwise covered Claim would be made.”

39. “Wrongful Act” is defined under the AR Capital Primary Policy to include, inter alia, “any actual or alleged act, error, omission, misstatement, misleading statement, neglect, or breach of duty by any Insured Person” while acting in his or her capacity as an “Insured Person of the Company.”

40. A retention of \$1.5 million applies to Coverage B of the AR Capital Primary Policy. Section IV(A) of the AR Capital Primary Policy provides that “[t]he Insurer shall pay the amount of Loss in excess of the applicable Retention(s) set forth in ITEM 4 of the Declarations up to the Limit of Liability set forth in ITEM 3 of the Declarations.”

41. Pursuant to Endorsement No. 47 of the AR Capital Primary Policy, the insurer agrees that “[u]pon the written request of an Insured, the Insurer will advance Defense Expenses on a current basis in excess of the applicable retention, if any, before the disposition of the Claim for which this policy provides coverage” subject to repayment “if it is finally determined by a final, non-appealable adjudication” that the Loss, including Defense Expenses, is not covered under the policy.

42. Section V of the AR Capital Primary Policy is titled “Defense, Settlement and Allocation of Loss.” Subsection (D) of that Section provides that “[i]f both Loss covered by this Policy and Loss not covered by this Policy are incurred,” either because a claim includes both covered and uncovered matters, or a claim is made against both an Insured and a non-Insured, the Insured and the Insurer will use “their best efforts to determine a fair and appropriate allocation of Loss[.]”

The VEREIT Agreements

43. VEREIT and American Realty Capital II, LLC (an affiliate of AR Capital) entered into an “Acquisition and Capital Services Agreement” on September 6, 2011. VEREIT and ARC Properties Advisors, LLC (also an affiliate of AR Capital) also entered into a “Management Agreement” on that same day, and later an “Amended and Restated Management Agreement” on February 28, 2013. Collectively, these two agreements are referred to as the “VEREIT Agreements,” and the term “AR Capital” as used herein includes the AR Capital-related entities that were named parties to the VEREIT Agreements.

44. Among other duties, under the VEREIT Agreements AR Capital performed various services and activities relating to the investments and financial operations of VEREIT.

45. Under Section 8 of the VEREIT Agreements, VEREIT is required to indemnify AR Capital and advance defense costs in connection with claims arising out of AR Capital's work on behalf of VEREIT.

46. The two VEREIT Agreements were terminated on February 28, 2013, and January 8, 2014, respectively, by mutual agreement of the parties.

The Underlying Matters

47. On September 7, 2014, the Audit Committee of VEREIT's Board of Directors began an investigation with the assistance of its advisors Weil, Gotshal & Manges LLP and Ernst & Young LLP into certain alleged reporting irregularities (the "Audit Committee Investigation"). The Audit Committee Investigation was disclosed on October 29, 2014, when VEREIT announced certain restated financial results for the first and second quarters of 2014. Then, in March 2015, VEREIT announced additional financial restatements for certain years, including 2013, during which AR Capital had served under the VEREIT Agreements as VEREIT's manager.

48. In the wake of a drop in the stock price following the October 29, 2014, disclosure, a number of lawsuits were filed between October 30, 2014, and the present. VEREIT, AR Capital, and numerous individuals affiliated with both entities were named as defendants in various securities class actions consolidated under the name *In re American Capital Realty Properties, Inc. Litigation*, No. 15-

mc-00040-AKH (S.D.N.Y.) (the “Securities Class Action Litigation”), as well as a number of opt-out actions, at least seven of which are currently pending in jurisdictions around the country (collectively, with the Securities Class Action Litigation, the “Civil Litigations”). Attached as Exhibit J is a chart identifying all of the Civil Litigations for which AR Capital seeks coverage under the VEREIT Policies and which attaches thereto a copy of each of the referenced complaints.

49. [REDACTED]

50. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

51. [REDACTED]

[REDACTED]

52. The Audit Committee Investigation, the Civil Litigations and the Government Investigations are collectively referred to herein as the “Underlying Matters.”

53. In November 2014, Kellogg Huber was retained by AR Capital, and subsequently retained by Peter Budko (“Budko”), William Kahane (“Kahane”), Nicholas Radesca (“Radesca”), and Edward Weil (“Weil”), all of whom are AR Capital directors or officers (collectively, the “Individuals”). To date, Kellogg Huber has incurred approximately \$6 million in defense of the Underlying Matters.

54. Also in or about November 2014, Nicholas Schorsch (“Schorsch”), also an AR Capital director and officer, retained Paul, Weiss, Rifkind, Wharton & Garrison LLP (“Paul Weiss”). To date, Paul Weiss has incurred approximately [REDACTED] in defense of the Underlying Matters. For purposes of this First

[REDACTED]

Amended Complaint, Budko, Kahane, Radesca, Schorsch, and Weil are referred to collectively as the “AR Capital Directors.”

55. AR Capital’s Operating Agreement, attached as Exhibit L, require it to indemnify the AR Capital Directors and advance their defense costs with respect to the Underlying Matters.

AR Capital Seeks Recovery Under the VEREIT Policies

56. The Audit Committee Investigation constitutes a “Claim” for a “Wrongful Act” under the VEREIT Policies.

57. The Government Investigations constitute “Claims” for a “Wrongful Act” and “Securities Claims” under the VEREIT Policies.

58. The Civil Litigations constitute “Claims” for a “Wrongful Act” and “Securities Claims” under the VEREIT Policies.

59. By letter dated May 19, 2015, from Kellogg Huber to VEREIT, AR Capital demanded that VEREIT agree to indemnify it and the Individuals, and advance its costs of defense in connection with the Underlying Matters in accordance with Section 8 of the VEREIT Agreements.

60. In response, by letter dated June 22, 2015, a copy of which is annexed hereto as Exhibit M (the “June 22 Letter”), VEREIT objected to AR Capital having any direct contact with the Defendants with respect to coverage under the VEREIT

Policies, despite AR Capital's and the Individuals' status as additional Insureds under those Policies. VEREIT stated as follows:

[VEREIT] recently learned that, on April 7, 2015, AR Capital made a written demand for coverage under [VEREIT]'s insurance policies in connection with the accounting-related investigations and lawsuits, and sent this written demand directly to [VEREIT]'s carriers without copying any [VEREIT] representative or otherwise providing [VEREIT] knowledge of it. This direct communication with [VEREIT]'s carriers is inappropriate and unacceptable, and it is all the more troubling that [VEREIT] was not included on or informed of it. [VEREIT] demands that AR Capital cease and desist from any further contact or communications with [VEREIT]'s carriers; all contact and communications with those carriers must – and will – come from [VEREIT] or its designated representatives.

61. On behalf of AR Capital and the Individuals, Kellogg Huber responded by letter dated July 7, 2015, stating that, as a separate insured under the VEREIT Policies, AR Capital was fully entitled to contact the Defendants directly and demand coverage with respect to the Underlying Matters.

62. After receipt of the June 22 Letter, AR Capital, through both Kellogg Huber and AR Capital's coverage counsel, continued negotiations with VEREIT with respect to AR Capital's and the Individuals' right to indemnity and advancement under the VEREIT Agreements. After originally admitting that it was obligated to provide such indemnity and advancement, and making an initial payment of \$300,000 toward the amounts incurred by AR Capital and the Individuals, VEREIT reneged on those admissions in March 2016 and denied that it owed any further payment to AR Capital or the Individuals.

63. Upon information and belief, at all times based on those negotiations and discussions, VEREIT was aware that AR Capital was separately represented by coverage counsel, and that VEREIT's counsel was not retained or authorized to speak on behalf of AR Capital or the Individuals with respect to their rights to coverage under the VEREIT Policies.

64. Yet despite that awareness, upon information and belief, as early as December 2015, VEREIT and its counsel represented to one or more of the Defendants, including XL and Beazley, that VEREIT represented the interests of all insureds in connection with the VEREIT Policies and was authorized to seek coverage on their behalf.

65. However, AR Capital had informed the Defendants on April 7, 2015, that the undersigned counsel represented AR Capital, and demanded coverage for defense and indemnity under the VEREIT Policies. A copy of that letter is attached as Exhibit N.

66. Upon information and belief, despite receiving the April 7, 2015, letter to Defendants from AR Capital's counsel, and based on VEREIT's representation that it spoke on behalf of all Insureds, neither XL nor Beazley ever provided AR Capital with any of the coverage positions that they issued, including those coverage positions that referenced AR Capital and the Individuals' rights to coverage under the VEREIT Policies, or any notification of payments made to

VEREIT which eroded the policy limits and did not include payments of Kellogg Huber invoices. In fact, as a result of VEREIT's representation, Beazley tendered its entire policy limit to VEREIT, purporting to exhaust that policy in payment of the Underlying Matters.

67. Upon learning of the exhaustion of the first two layers of the VEREIT Policies and the alleged representations that VEREIT made to secure direct payment to itself of those limits, on April 15, 2016, AR Capital, through its counsel, wrote to VEREIT's counsel and demanded that counsel desist from any representation that counsel and/or VEREIT represent the interests of, or are entitled to seek coverage on behalf of, AR Capital or the Individuals.

68. On that same date, AR Capital notified the Defendants that neither VEREIT nor its counsel were authorized to speak on behalf of and did not represent AR Capital or the Individuals with respect to the coverage owed to AR Capital and the Individuals under the VEREIT Policies. AR Capital demanded that Defendants copy AR Capital on all prior and future correspondence with VEREIT or its counsel with respect to coverage for the Underlying Matters.

69. By email dated April 18, 2016, Everest replied to AR Capital's April 15 letter, stating that it had made no payment under its policies with respect to those Matters. However, it refused to provide AR Capital with any of the previous coverage positions that Everest had issued to VEREIT, including those positions

that concerned AR Capital, and refused to acknowledge AR Capital's rights to coverage and fair and equal treatment under the VEREIT Policies.

70. No Defendant has made any payment under its policies to AR Capital in connection with the Underlying Matters, with the exception of a partial payment of \$650,000 that Everest made on September 27, 2016, after AR Capital commenced this litigation and filed a partial motion for summary judgment, and had appeared before the Court twice during the summer in an effort to, among other things, secure a coverage position and payment from Everest.

AR Capital Seeks Recovery Under the AR Capital Policies

71. In November 2014, XL received notice under the AR Capital Policy that the AR Capital Directors had been sued in a lawsuit that became the Securities Class Action Litigation, and thereafter received notice of all of the Underlying Matters listed in Exhibit J.

72. On April 15, 2015, XL acknowledged that the defense costs incurred by the AR Capital Directors in connection with the Securities Class Action Litigation were covered under the AR Capital Primary Policy. XL later acknowledged on September 6, 2016, that defense costs incurred by the AR Capital Directors in connection with the Civil Litigations were covered under the AR Capital Primary Policy.

73. On November 3, 2015, XL informed AR Capital that XL would pay an allocated portion of [REDACTED] defense costs in the Securities Class Action Litigation under the AR Capital Primary Policy. AR Capital did not agree to this proposed allocation.

74. Over the course of the next several months, AR Capital engaged in discussions with XL and its counsel regarding the percentage allocated to the AR Capital Primary Policy. Despite requests by AR Capital that it do so, XL made no payment with respect to the Underlying Matters under the AR Capital Primary Policy, including but not limited to the undisputed amounts.

75. On July 21, 2016, AR Capital provided additional notice to XL under the AR Capital Policies of the SEC Subpoenas.

76. On August 4, 2016, counsel for AR Capital wrote to XL's counsel requesting payment for the undisputed amounts incurred by AR Capital's Directors in the Underlying Matters.

77. Throughout September 2016, XL's counsel confirmed in writing and during phone calls that XL would make payment based upon the undisputed allocation amount of defense costs for the Underlying Matters for the AR Capital Directors "as promptly as possible," within a few weeks, while XL and AR Capital continued their negotiations regarding allocating a greater percentage of costs to the AR Capital Primary Policy.

78. Based on the representations that its defense expenditures would be reimbursed by XL, AR Capital advanced defense costs on behalf of the AR Capital Directors on or about October 3, 2016.

79. After three weeks went by without any payment or further response from XL, counsel for AR Capital scheduled a call for October 10, 2016. That day, and for the first time, XL took the position that AR Capital was not entitled to any monies under the AR Capital Primary Policy.

80. The defenses to coverage raised by XL on October 10, 2016, which had never previously been raised, included but were not limited to XL's assertion that only an allocated portion of the costs incurred could be counted toward the AR Capital Primary Policy's \$1.5 million retention, and that, as a result, the retention had not yet been satisfied and no payment was currently due under the AR Capital Primary Policy.

FIRST CAUSE OF ACTION

(Declaratory Judgment Against All Defendants – Duty to Pay Defense Costs Pursuant to 10 Del. C. § 6501 *et seq.* and Indemnify Plaintiff Under the VEREIT Policies)

81. AR Capital repeats and realleges the allegations contained in the paragraphs above as if fully set forth herein.

82. The Underlying Matters constitute covered Claims and Securities Claims under the VEREIT Policies, entitling AR Capital to contemporaneous

payment of its own costs of defense, and payment of amounts it has expended or will expend for the defense of the Individuals, subject to the limits and layers of the respective VEREIT Policies.

83. Insurers such as Defendants have a duty to treat co-insureds that have claims or shared limits fairly and equitably, particularly where, as here, the insurer knows of the competing claims of the co-insureds.

84. AR Capital has satisfied all of the requirements necessary for it to receive indemnification and payment of its defense costs under the VEREIT Policies.

85. AR Capital has not received any payment for its defense costs by any Defendant, with the exception of one partial payment by Everest on September 27, 2016, towards defense costs related to the Civil Litigations.

86. The VEREIT Excess Insurer Defendants dispute the scope of their coverage obligation to AR Capital.

87. An actual and justiciable controversy presently exists between the parties concerning the parties' rights, duties, obligations and liabilities under the VEREIT Policies.

88. The issuance of prompt declaratory relief by this Court is desirable and necessary to resolve the existing controversy between the parties.

SECOND CAUSE OF ACTION

(Breach of Contract Against XL, Beazley and Everest – VEREIT Policies)

89. AR Capital repeats and realleges the allegations contained in the paragraphs above as if fully set forth herein.

90. The costs incurred by AR Capital to date in connection with its own defense of the Underlying Matters were reasonable and proper.

91. The costs incurred by the Individuals to date in connection with the defense of the Underlying Matters were reasonable and proper.

92. Subject to their limits and triggering layers, Defendants are obligated under the VEREIT Policies to pay those costs.

93. To the extent that the XL and Beazley policy limits have not been properly exhausted under the VEREIT Policies, XL and Beazley owe a current obligation to AR Capital to pay on its behalf: (1) amounts incurred in AR Capital's defense of the Underlying Matters; and (2) amounts incurred in the defense of the Individuals in connection with the Underlying Matters for which AR Capital is permitted and required to indemnify.

94. To the extent that the XL and Beazley policy limits have been properly exhausted under the VEREIT Policies, Everest owes a current obligation to AR Capital to pay on its behalf: (1) amounts incurred in AR Capital's defense of the Underlying Matters; and (2) amounts incurred in the defense of the

Individuals in connection with the Underlying Matters for which AR Capital is permitted and required to indemnify those individuals.

95. Neither XL nor Beazley has ever made any payment under the VEREIT Policies toward AR Capital's or the Individuals' defense costs.

96. On September 27, 2016, Everest made a partial payment of \$650,000 toward AR Capital and the Individuals' defense costs in connection with the Civil Litigations, but only as a result of this litigation and several conferences with the Court, but has not made any payments toward the millions of dollars of other outstanding Kellogg Huber invoices.

97. AR Capital has complied with all conditions necessary to trigger the obligations of XL, Beazley, and Everest to pay already-incurred defense costs pursuant to the VEREIT Policies.

98. As a result of the breaches of XL, Beazley, and Everest, AR Capital has been injured, and is entitled to judgment awarding it actual and consequential damages in an amount to be determined at trial, but in no event less than \$6 million, plus pre-judgment interest, its attorneys' fees, and consequential damages arising from their failure to pay for the costs incurred by AR Capital, or which AR Capital is permitted and required to pay on behalf of the Individuals under the terms of the VEREIT Policies.

THIRD CAUSE OF ACTION

(Breach of Obligation of Good Faith and Fair Dealing Against Beazley and Everest – VEREIT Policies)

99. AR Capital repeats and realleges the allegations contained in the paragraphs above as if fully set forth herein.

100. Because AR Capital is an Insured under the VEREIT Policies, Defendants have a duty to act reasonably and in good faith and to deal fairly with AR Capital.

101. By not acting in a manner that would preserve the shared insurance assets for the benefit of all insureds, including AR Capital, Beazley has breached its duty of good faith and fair dealing in the manner in which it has purported to erode or exhaust the limits of its policies.

102. Upon information and belief, Beazley has made payments to VEREIT while failing to make any payment to AR Capital with respect to the same Underlying Matters, in the process eliminating the limits of its policy to the damage and detriment of AR Capital.

103. In addition, Everest has breached its obligations of good faith and fair dealing by, among other things: (1) refusing to notify AR Capital of any demands for payment by, or payments made to, other policyholders, including VEREIT, under the Everest policy; and (2) failing to provide a timely coverage determination with respect to the Underlying Matters.

104. As a direct result of these breaches, AR Capital has lost a significant portion of its coverage under the VEREIT Excess Policies for the Underlying Matters and is entitled to judgment awarding it actual and consequential damages in an amount to be determined at trial, but in no event less than \$6 million, plus pre-judgment interest, its attorneys' fees, and consequential damages arising from their failure to pay for the costs incurred by AR Capital, for which AR Capital is obligated to pay on behalf of the Individuals under the terms of the VEREIT Excess Policies.

FOURTH CAUSE OF ACTION

(Declaratory Judgment Against XL – Duty to Pay Defense Costs Pursuant to 10 Del. C. § 6501 *et seq.* and Indemnify Plaintiff With Respect to the Underlying Matters Under the AR Capital Primary Policy)

105. AR Capital repeats and realleges the allegations contained in the paragraphs above as if fully set forth herein.

106. The Underlying Matters constitute covered Claims and Securities Claims under the AR Capital Primary Policy, entitling AR Capital to contemporaneous payment of amounts it has expended or will expend in indemnifying the AR Capital Directors for their defense costs, subject to the retention and limits of the AR Capital Primary Policy.

107. AR Capital has satisfied all of the requirements necessary for it to receive indemnification and payment of its defense costs pursuant to the AR Capital Primary Policy.

108. As a result of XL's change of position on October 10, 2016 that AR Capital is currently not entitled to any monies under the AR Capital Primary Policy, an actual and justiciable controversy presently exists between the parties concerning the parties' rights, duties, obligations and liabilities under the AR Capital Primary Policy.

109. The issuance of prompt declaratory relief by this Court is desirable and necessary to resolve the existing controversy between the parties.

FIFTH CAUSE OF ACTION

(Breach of Contract Against XL - AR Capital Primary Policy)

110. AR Capital repeats and realleges the allegations contained in the paragraphs above as if fully set forth herein.

111. The costs incurred to date by the AR Capital Directors in connection with the defense of the Underlying Matters were reasonable and proper.

112. Subject to the retention and limits of the policy, XL is obligated under the AR Capital Primary Policy to pay these costs.

113. XL has a current obligation to AR Capital to pay amounts incurred in the defense of the AR Capital Directors in connection with the Underlying Matters,

but has not yet made any payment toward those amounts, which continue to accrue.

114. AR Capital has complied with all conditions necessary to trigger XL's obligation to pay under the AR Capital Primary Policy.

115. As a result of XL's breach, AR Capital has been injured, and is entitled to judgment awarding it actual damages in an amount to be determined at trial, plus pre-judgment interest, and its attorneys' fees, arising from XL's failure to advance the defense costs for which AR Capital is permitted and required to indemnify the AR Capital Directors.

SIXTH CAUSE OF ACTION
(Equitable Estoppel Against XL)

116. AR Capital repeats and realleges the allegations contained in the paragraphs above as if fully set forth herein.

117. Based on XL's representations and course of conduct, AR Capital reasonably understood that XL intended to provide coverage for the Underlying Matters under the AR Capital Primary Policy and would begin promptly advancing at least [REDACTED] defense costs under the AR Capital Primary Policy while AR Capital and XL continued their discussions regarding the allocation share.

118. Based upon XL's promise that it was going to "promptly" begin making payments, AR Capital paid the defense costs of the AR Capital Directors. AR Capital has thus suffered a prejudicial change of position as a result of this reliance.

119. As a result of this equitable estoppel, AR Capital is entitled to a judgment ordering XL to immediately begin advancement of at least the previously undisputed amounts of defense costs until a final reasonable allocation amount is determined.

SEVENTH CAUSE OF ACTION

(Promissory Estoppel Against XL)

120. AR Capital repeats and realleges the allegations contained in the paragraphs above as if fully set forth herein.

121. XL promised, both in correspondence and oral communications, that it would begin promptly advancing a portion of the defense costs under the AR Capital Primary Policy.

122. XL knew from AR Capital that timely advancement of these defense costs was critical and that AR Capital would make payments of the AR Capital Directors' defense costs based on that promise.

123. AR Capital reasonably relied on XL's promises to promptly advance defense costs and accordingly made payment on those invoices.

124. As a result of this promissory estoppel, AR Capital is entitled to a judgment ordering XL to immediately begin advancement of the previously undisputed amounts of defense costs in connection with the Underlying Matters. In the alternative, AR Capital is entitled to damages in an amount no less than the amount of defense costs paid by AR Capital in anticipation of XL's payment.

WHEREFORE, plaintiff AR Capital requests that the Court enter an order and judgment herein:

- i. On the First Cause of Action, declaring the rights and other legal relations of the parties with respect of the matters set forth herein and further declaring that: (1) the Underlying Matters fall within the coverage of the VEREIT Policies subject to the limits and layers of those Policies; (2) AR Capital is entitled to contemporaneous and prompt payment of amounts spent in its own defense and amounts it advances on behalf of the Individuals' defense of the Underlying Matters; (3) Defendants are obligated to treat the interests of AR Capital equally with those of any other insured, including VEREIT; and (4) VEREIT and its counsel do not represent the interests of AR Capital with respect to the coverage, and Defendants must take steps to ensure that its communications regarding AR Capital's claim for

coverage are limited to authorized representatives of AR Capital, including counsel herein;

- ii. On its Second Cause of Action, awarding AR Capital: (1) its actual damages in an amount not less than \$6 million plus pre-judgment interest; (2) its attorneys' fees; and (3) consequential damages.
- iii. On its Third Cause of Action, awarding AR Capital: (1) its actual damages in an amount not less than \$6 million plus pre-judgment interest; (2) its attorneys' fees; and (3) consequential damages.
- iv. On its Fourth Cause of Action, declaring the rights and other legal relations of AR Capital and XL with respect to the matters set forth herein and further declaring that: (1) the Underlying Matters, including the Government Investigations, fall within the coverage of the AR Capital Primary Policy, subject to the limits and layers of the Policy; (2) the retention of the AR Capital Primary Policy has been satisfied by AR Capital's payment of \$1.5 million in defense costs for Underlying Matters; and (3) AR Capital is entitled to contemporaneous and prompt payment of no less than [REDACTED]
[REDACTED]
defense costs in the Underlying Matters.

- v. On its Fifth Cause of Action, awarding AR Capital: (1) its actual damages plus pre-judgment interest; and (2) its attorneys' fees.
- vi. On its Sixth Cause of Action, declaring that AR Capital is entitled to contemporaneous and prompt payment of no less than [REDACTED]
[REDACTED]
defense costs in the Underlying Matters.
- vii. On its Seventh Cause of Action, declaring that AR Capital is entitled to contemporaneous and prompt payment of no less than [REDACTED]
[REDACTED]
defense costs in the Underlying Matters.
- viii. Awarding AR Capital such other and further relief as the Court deems just, proper, and equitable.

POTTER ANDERSON & CORROON LLP

OF COUNSEL:

Robin L. Cohen
Natasha Romagnoli
McKOOL SMITH, PC
One Bryant Park, 47th Fl.
New York, NY 10036
Telephone: (212) 402-9400
rcohen@mckoolsmith.com
nromagnoli@mckoolsmith.com

By: /s/ Jennifer C. Wasson
Jennifer C. Wasson (No. 4933)
Carla M. Jones (No. 6046)
Hercules Plaza, Sixth Floor
1313 North Market Street
Wilmington, Delaware 19801
(302) 984-6000 – Telephone
(302) 658-1192 – Facsimile
jwasson@potteranderson.com
cjones@potteranderson.com

Public Version: October 18, 2016
Dated: October 17, 2016
[1236176 / 43278]

Attorneys for Plaintiff AR Capital, LLC