

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

EVEREST INDEMNITY INSURANCE)	
COMPANY)	
)	
Plaintiff,)	
)	
vs.)	Civil Action File No.
)	_____
THE COGAR GROUP, LTD.,)	
ANTHONY McDAVID,)	
FERNANDEZ HAWKINS, and)	
TERRI HAWKINS,)	
)	
Defendants.)	
_____)	

PETITION FOR DECLARATORY JUDGMENT

Plaintiff, Everest Indemnity Insurance Company (“Everest”), files this Petition for Declaratory Judgment to determine the rights and obligations of the parties, alleging and showing as follows:

INTRODUCTION

1. This is an action for Declaratory Judgment pursuant to 28 U.S.C. § 2201 to determine and resolve questions of actual controversy involving commercial general liability and commercial catastrophe liability insurance policies issued by Everest to the named insured, The Cogar Group, LTD (“Cogar”).

2. Everest seeks a declaration that it has no duty to defend, indemnify, or otherwise pay Cogar or Mr. McDavid in any form in connection with:

- (a) a Complaint filed by Fernandez and Terri Hawkins on or about December 14, 2016 in the Superior Court of Richmond County, State of Georgia, Civil Action File No. 2016RCCV561 (the “Negligence Action”). A true and correct copy of the Complaint filed in the Negligence Action is attached hereto and incorporated herein as Exhibit A;
- (b) a Summons of Garnishment on a Financial Institution filed by Fernandez and Terri Hawkins on or about December 1, 2017 in the State Court of Gwinnett County, State of Georgia, Civil Action File No. 17GC041070 (the “Garnishment Action”). A true and correct copy of the Summons of Garnishment filed in the Garnishment Action is attached hereto and incorporated herein as Exhibit “B”; or
- (c) a domestication of judgment action received on or about December 12, 2017 by the Circuit Court of Fairfax County, Virginia, and submitted on behalf of Fernandez and Terri Hawkins (the “Virginia Action”). A true and correct copy of the Virginia Action is attached hereto and incorporated herein as Exhibit “C”.

THE PARTIES

3. Everest Indemnity Insurance Company is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business in the state of New Jersey.

4. The Cogar Group, LTD (“Cogar”) is a corporation organized and existing under the laws of the state of Virginia, with its principal place of business in the state of Virginia.

5. Upon information and belief, Anthony McDavid is a resident of the state of Georgia.

6. Upon information and belief, Fernandez and Terri Hawkins are residents of the state of Georgia.

JURISDICTION AND VENUE

7. The Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332 because there is diversity of citizenship among the parties, and the matter in controversy, exclusive of interest, attorneys’ fees, and costs, exceeds Seventy-Five Thousand Dollars (\$75,000). The Court further has jurisdiction under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*, because Everest is seeking a declaration regarding the parties’ rights and obligations with

respect to the application and performance of commercial general liability and commercial catastrophe liability insurance policies issued to Cogar.

8. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because this action seeks the performance of policies of commercial general liability and commercial catastrophe liability insurance in this District.

9. Cogar may be served at its registered agent, Business Filings Incorporated, 289 S. Culver Street, Lawrenceville, Georgia 30046. The Court has personal jurisdiction over Cogar.

10. Mr. McDavid may be served at his personal residence, and upon information and belief his last known address is 5229 Tilton Drive, Evans, Georgia 30809. The Court has personal jurisdiction over Mr. McDavid.

11. Mr. and Mrs. Hawkins may be served at their personal residence, and upon information and belief their last known address is 4330 White Pine Ct., Augusta, Georgia 30906-9296. The Court has personal jurisdiction over Mr. and Mrs. Hawkins.

The Negligence Action

12. Mr. and Mrs. Hawkins filed the Negligence Action on or about December 14, 2016.

13. The Negligence Action alleged that on April 9, 2015, Mr. Hawkins was performing the duties of his employment with Portable Services, Inc. at Back Hall Campus on Fort Gordon, and that on that date he was operating a 2007 Isuzu company truck and attempting to enter through Gate 4 of Back Hall Campus, with advance permission. It is also alleged that Mr. McDavid was operating the security gate and access control barrier of Gate 4 at the time of the incident. It is further alleged that as Mr. Hawkins' truck properly entered the gate with permission, the access control barrier was in the lowered position to allow entry.

14. The Negligence Action alleged that as Mr. Hawkins' truck drove over the barrier, Mr. McDavid was negligent in raising the access control barrier causing the barrier to collide with Mr. Hawkins' truck.

15. The Negligence Action alleged that Mr. Hawkins acted with reasonable care under the conditions and circumstances then existing, and was completely free of any negligence. It is also alleged that as a direct and proximate result of Cogar and Mr. McDavid's negligence, Mr. Hawkins suffered serious injuries to his neck and spine. It is further alleged that following the collision, Mr. Hawkins sought medical treatment, and that Mr. Hawkins allegedly continues to require ongoing medical treatment for his injuries.

16. The Negligence Action alleged that as a direct and proximate result of Cogar and Mr. McDavid's negligence, Mr. Hawkins incurred and continues to incur reasonable and necessary medical expenses in excess of \$15,000, and that he has been unable to return to work since the incident and continues to suffer lost wages in excess of \$30,000. It is also alleged that as a result of Cogar and Mr. McDavid's negligence, Mr. Hawkins sustained serious personal injuries, including but not limited to past, present, and future pain and suffering, both mental and physical, total and partial disability, and lost wages and medical expenses, for which he is allegedly entitled to be compensated by Cogar and Mr. McDavid, jointly and severally.

17. The Negligence Action alleged that Cogar was negligent in the hiring, supervision, training and retention of its agents and employees, including but not limited to Mr. McDavid. It is also alleged that Cogar was negligent in failing to promulgate and enforce policies, procedures and rules for the operation of the security gate and access control barrier to provide for the safety of entrants, including but not limited to Mr. Hawkins. It is further alleged that each of the foregoing acts and omissions constitute an independent act of negligence on the part of Cogar and Mr. McDavid, and one or more or all of the above stated acts were the proximate cause of the injuries to the plaintiffs. It is also alleged that

Cogar and Mr. McDavid are jointly and severally liable as joint tortfeasors for the plaintiffs' injuries, disability, pain and suffering, medical expenses, lost wages, and all other elements of damages allowed under the laws of the State of Georgia.

18. The Negligence Action alleged that at all times relevant, Mr. McDavid was an employee, servant, and/or agent of Cogar and was acting in the course and scope of such position on behalf of Cogar. It is also alleged that both Cogar and Mr. McDavid are jointly and severally liable, and that Cogar is liable to the plaintiffs for the actions of Mr. McDavid under the doctrine of *respondeat superior* and other laws of principles of agency.

19. The Negligence Action alleged that at the time of the injury complained of, Mr. and Mrs. Hawkins were husband and wife. It is also alleged that on account of the alleged injuries and mental and physical disability, pain and suffering sustained by Mr. Hawkins, Mrs. Hawkins has been deprived of the love, society and companionship of her husband to the extent she previously enjoyed same, and that she is allegedly entitled to recover from Cogar and Mr. McDavid for this loss of consortium.

20. The Negligence Action alleged that Cogar and Mr. McDavid have been stubbornly litigious and caused the plaintiffs unnecessary trouble and expense associated with the litigation, despite the alleged fact that no bona fide controversy

exists as to the defendants' alleged liability for the incident described in the Complaint. It is also alleged that plaintiffs are entitled to recover from defendants all expenses of litigation and attorney fees incurred in the prosecution of the action pursuant to O.C.G.A. § 13-6-11.

21. Upon information and belief, Cogar was served with the Negligence Action on or about December 21, 2016 through its registered agent for service of process, BizFilings. Upon information and belief, on December 22, 2016, BizFilings sent an email notification of the service of process of the Negligence Action to Mr. Scott Larson, Cogar's Corporate Financial Officer, who was authorized to receive notices of all lawsuits.

22. Upon information and belief, the Negligence Action was served on Mr. McDavid in December 2016, and Mr. McDavid used Office Max to send the suit papers to a telephone number Mr. McDavid thought was for the home office of Cogar in Virginia.

23. Cogar did not provide notice to Everest of the April 2015 incident involving Mr. Hawkins that is the subject of the Negligence Action.

24. On December 12, 2017, Everest received the first notice from Cogar of the Default Judgment entered in the Negligence Action, which was attached to the Garnishment Action.

25. Prior to December 12, 2017, Everest had not received notice of the Negligence Action from Cogar, Mr. McDavid, or any other source.

The Default Judgment

26. The Default Judgment attached to the Garnishment Action states that the Negligence Action came before the court for hearing on May 16, 2017 on the plaintiffs' Motion for Entry of Default Judgment, and it appeared to the Court that plaintiffs' Complaint against Cogar and Mr. McDavid was filed on December 14, 2016 and properly served upon Mr. McDavid on December 14, 2016, and upon Cogar on December 21, 2016. The Default Judgment attached to the Garnishment Action also states that it appeared to the court that the action became in default on or before February 13, 2017 by failure of either defendant to answer or otherwise file defensive pleadings in response to the plaintiffs' complaint, and that fifteen (15) days had elapsed from the date of default, and the default had not been opened as a matter of right or by order of the Court.

27. The Default Judgment attached to the Garnishment Action states that it further appeared to the court that counsel for the plaintiffs had certified the type of service perfected and the lack of responsive pleadings in accordance with U.S.C.R. Rule 15, and supplied the court with an Affidavit pursuant to the Servicemember's Civil Relief Act (50 U.S.C. App. § 501, et seq.) certifying that

Mr. McDavid was not active duty in any branch of the military or uniformed services at the time the plaintiffs' Complaint was filed and served per the Department of Defense Manpower Data Center.

28. The Default Judgment attached to the Garnishment Action states that the court considered the plaintiffs' Motion for Entry of Default Judgment pursuant to O.C.G.A. § 9-11-55 together with the record in the case and the arguments of counsel, and that the Court granted the plaintiffs' Motion for Entry of Default Judgment.

29. The Default Judgment attached to the Garnishment Action states that the court also noted that since the action involved unliquidated damages, it proceeded pursuant to O.C.G.A. § 9-11-55(a) to hear evidence and argument on the issue of damages without a jury, and that after consideration of the evidence submitted, the Court found in favor of the plaintiffs and against the defendants and awarded damages to Mr. Hawkins in the amount of Two Million Eight Hundred Thousand Dollars (\$2,800,000.00), and to Mrs. Hawkins in the amount of Three Hundred Eight Thousand Dollars (\$380,000.00).

30. The Default Judgment attached to the Garnishment Action states that the court specifically found that the acts of negligence committed by Mr. McDavid occurred within the course and scope of his employment with Cogar,

and therefore under the doctrine of *respondeat superior* the court concluded that Cogar was vicariously liable to the plaintiffs for all injuries and damages proximately caused by such negligence. As a result, the court concluded that the defendants were jointly and severally liable for the damages awarded to the plaintiffs.

The Garnishment Action

31. Mr. and Mrs. Hawkins filed the Garnishment Action on or about December 1, 2017 against Cogar as the defendant, and PNC Bank, National Association (Inc.) (“PNC”) as the Garnishee.

32. The Garnishment Action alleged that Mr. and Mrs. Hawkins claimed the amount of \$3,301,017.28 (consisting of \$3,180,000.00 in principal, and \$120,752.28 in post-judgment interest) was due from the Garnishee PNC based upon a judgment reached against Cogar in Case No. 2016-RCCV-561 in the Superior Court of Richmond County, Georgia.

33. The Garnishment Action alleged that the referenced judgment against Cogar was attached to the Garnishment Action, and was a Default Judgment entered May 16, 2017 in the Negligence Action.

34. As set forth above, Everest first received notice of the Garnishment Action on December 12, 2017.

The Virginia Action

35. The Virginia Action was received by the Circuit Court of Fairfax County, Virginia on December 12, 2017, and it was filed on behalf of Fernandez Hawkins and Terri Hawkins against The Cogar Group, Ltd., (“Cogar”), and Anthony S. McDavid (“McDavid”). The Virginia Action states that the judgment creditors are Fernandez Hawkins and Terri Hawkins. The Virginia Action also states that the judgment debtors are The Cogar Group, Ltd. And Anthony S. McDavid, and provides the last known post office address for each.

36. The Virginia Action further states that a judgment was obtained in the total amount of \$3,180,000.00, together with costs, which are set forth in an attached certified copy of the Default Judgment entered in the Superior Court of Richmond County, Georgia. The Virginia Action also states that the attached documents are true attested copies and represent the judgment of the Superior Court of Richmond County, Georgia and proof thereof.

37. On January 11, 2018, Everest received from Cogar for the first time notice of the Virginia Action.

The Everest Commercial General Liability Policy

38. Everest issued to Cogar a Commercial General Liability Policy, no. 51GL004049-151, for the period February 1, 2015 to February 1, 2016, with limits

of \$1 million each occurrence, and \$5 million general aggregate, subject to a \$5,000 per occurrence deductible (the "CGL Policy"). A copy of the CGL Policy is attached hereto and incorporated herein as Exhibit "D".

39. The insuring agreement of the CGL Policy for Coverage A, Bodily Injury and Property Damage Liability provides, in relevant part:

1. Insuring Agreement

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

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

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

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

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

* * *

40. The Everest CGL Policy includes the following provision regarding "Who Is An Insured," which provides in relevant part:

* * *

2. Each of the following is also an insured:
 - a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business . . .

* * *

41. The Everest CGL Policy includes the following Conditions respecting notice:

2. **Duties In The Event Of Occurrence, Offense, Claim Or Suit**
 - a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:

- (1) How, when and where the "occurrence" or offense took place;
 - (2) The names and addresses of any injured persons and witnesses; and
 - (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
- b.** If a claim is made or "suit" is brought against any insured, you must:
- (1) Immediately record the specifics of the claim or "suit" and the date received; and
 - (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

- c.** You and any other involved insured must:
- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
 - (2) Authorize us to obtain records and other information;
 - (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
 - (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.
- d.** No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or

incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or
- b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

* * *

42. The Everest CGL Policy includes, among others, the following definitions:

* * *

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

* * *

- 5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

* * *

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

* * *

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

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

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

- 18.** "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:
- a.** An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
 - b.** Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

The Everest Commercial Catastrophe Liability Policy

43. Everest issued to Cogar a Commercial Catastrophe Liability Policy, number 51CC001486-151, for the period February 1, 2015 to February 1, 2016, in the amount of \$1 million per occurrence and in the general aggregate, excess of a \$1 million each occurrence limit in the underlying Everest CGL Policy (the "CCL Policy"). A copy of the CCL Policy is attached hereto and incorporated herein as Exhibit "E".

44. The Insuring Agreement of the Everest CCL Policy provides:

1. Insuring Agreement

- a.** We will pay "net loss" in excess of the "retained limit" that the insured becomes legally obligated to pay as damages because of "injury" to which this insurance applies. But, the amount of "net loss" we will pay for damages is limited as described in Section III — Retained Limit and Limits Of Insurance. No other obligation or liability to pay "net loss" or perform acts or services is covered unless explicitly provided for under Defense and Supplementary Payments.
- b.** This insurance applies to:
 - (1)** "Bodily injury" and "property damage" only if the "bodily injury" or "property damage";
 - (a)** Is caused by an "occurrence"; and
 - (b)** Occurs during the "policy period"; and

- (2) "Personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed during the "policy period".

* * *

45. The Everest CCL Policy includes the following provision regarding "Who Is An Insured," which provides in relevant part:

* * *

3. Any other person or organization is an insured, who is included as an insured in "underlying insurance", but only to the extent of the insurance provided the insured under "underlying insurance", and not otherwise excluded by this Coverage Part.

* * *

46. The Everest CCL Policy includes the following relevant Conditions respecting notice:

3. Duties In The Event Of Occurrence, Claim Or Suit Covered By This Insurance

- a. You must see to it that we are notified as soon as practicable of any "occurrence" which may result in a claim to which this Coverage Part applies. To the extent possible, notice should include:
 - (1) How, when and where the "occurrence" took place;
 - (2) The names and addresses of any injured persons and witnesses; and
 - (3) The nature and location of any "injury" or damage.

b. If a claim is made or "suit" is brought against any insured to which this insurance applies, you must:

- (1) Immediately record the specifics of the claim or "suit" and the date received; and
- (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with any claim or "suit";
- (2) Authorize us to obtain records and other information;
- (3) Cooperate with us and any "underlying insurer" in the investigation, settlement or defense of the claim or "suit";
- (4) Comply with the terms of "underlying insurance"; and
- (5) Assist us, upon our request, in the enforcement of any right against any person or organization who may be liable to the insured because of "injury" or an "occurrence."

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense without our consent.

4. Legal Action Against Us

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or
- b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for "net loss" that is not payable under the terms of this Coverage Part or that is in excess of the applicable limit of insurance for this Coverage Part. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

* * *

47. The Everest CCL Policy includes, among others, the following definitions:

* * *

- 4. "Bodily injury" means bodily injury, sickness or disease sustained by any person, including death resulting from any of these at any time. But "bodily injury" does not include bodily injury, sickness, disease or death that arises out of "personal and advertising injury".

* * *

- 6. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

* * *

- 9. "Injury" means one or more of the following:

"Bodily injury", "property damage" or "personal and advertising injury".

* * *

- 16.** "Net loss" means the sums actually paid or payable in cash due to a claim for which the insured is liable either by a settlement to which we agreed or a final judgment. Such sums will include proper deductions for recoveries and salvage.
- 17.** "Occurrence" means;
- a.** With respect to "bodily injury" and "property damage", an accident, including continuous or repeated exposure to substantially the same general harmful conditions; or
 - b.** With respect to "personal and advertising injury", all damages sustained by any one person or organization.

* * *

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

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

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

23. "Retained limit" means, for Coverage A of this Coverage Part, the greater of:
- a. The Limits of Insurance for "underlying insurance" shown in the Declarations under Schedule Of Underlying Insurance For Coverage A; or
 - b. The Each Occurrence Self-Insured Retention shown in the Declarations that applies separately to each "occurrence",
24. "Suit" means a civil proceeding in which damages because of "injury" to which this insurance applies are alleged. "Suit" includes:
- a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
 - b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

* * *

26. "Underlying insurance" means for Coverage A of this Coverage Part, the policies, coverages and Limits of Insurance shown in the Declarations under Schedule Of Underlying Insurance For Coverage A, or renewals or replacements thereof not more restrictive.

* * *

COUNT I

DECLARATORY JUDGMENT

NO DUTY TO DEFEND OR INDEMNIFY THE NEGLIGENCE ACTION UNDER THE CGL POLICY OR THE CCL POLICY BECAUSE THERE IS AN ABSENCE OF COVERAGE

48. Everest restates and re-alleges Paragraphs 1 through 47 as though fully set forth herein.

49. Everest has no obligation to defend or indemnify Cogar or Mr. McDavid in connection with the Negligence Action to the extent that there is an absence of coverage based on their failure to satisfy conditions precedent to coverage under the Everest CGL Policy pursuant to the “Duties in the Event of Occurrence, Offense, Claim or Suit” provision contained therein based on:

- a. Cogar’s failure to notify Everest “as soon as practicable of an ‘occurrence’ . . . which may result in a claim;”
- b. Cogar and Mr. McDavid’s failure to notify Everest “as soon as practicable” of the Negligence Action brought against them; and
- c. Cogar and Mr. McDavid’s failure to “immediately send” to Everest “copies of any demands, notices, summonses or legal papers received in connection with” the Negligence Action.

50. Everest has no obligation to defend or indemnify Cogar or Mr. McDavid in connection with the Negligence Action to the extent that there is an absence of coverage based on their failure to satisfy conditions precedent to coverage under the Everest CCL Policy pursuant to the “Duties in the Event of

Occurrence, Claim or Suit Covered By This Insurance” provision contained therein based on:

- a. Cogar’s failure to notify Everest “as soon as practicable of any ‘occurrence’ which may result in a claim to which this Coverage Part applies;”
- b. Cogar and Mr. McDavid’s failure to notify Everest “as soon as practicable” of the Negligence Action brought against them; and
- c. Cogar and Mr. McDavid’s failure to “immediately send” to Everest “copies of any demands, notices, summonses or legal papers received in connection with” the Negligence Action.

51. Everest has been prejudiced by Cogar and Mr. McDavid’s failure to provide notice of the Negligence Action pursuant to the terms of the Everest CGL Policy and the Everest CCL Policy.

52. Everest is informed and believes that Cogar and Mr. McDavid nonetheless contend that the Everest CGL Policy and the Everest CCL Policy afford coverage for the allegations against them in the Negligence Action. As such, an actual and present dispute exists between Everest and Cogar and Mr. McDavid as to whether the claims at issue in the Negligence Action are afforded coverage under the Everest CGL Policy or the Everest CCL Policy.

53 Inasmuch as an actual and present controversy currently exists between Everest and Cogar and Mr. McDavid concerning their respective rights and obligations under the Everest CGL Policy and the Everest CCL Policy, Everest is entitled to a judicial determination of its rights and obligations pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure.

COUNT II

DECLARATORY JUDGMENT

NO DUTY TO DEFEND OR INDEMNIFY THE GARNISHMENT ACTION OR THE VIRGINIA ACTION UNDER THE CGL POLICY OR THE CCL POLICY BECAUSE THERE IS AN ABSENCE OF COVERAGE

54. Everest restates and re-alleges Paragraphs 1 through 53 as though fully set forth herein.

55. Because the Garnishment Action and the Virginia Action are based on and/or arise out of the default judgment obtained in the Negligence Action, Everest has no obligation to defend or indemnify Cogar or Mr. McDavid under the Everest CGL Policy or the Everest CCL Policy in connection with the Garnishment Action or the Virginia Action to the extent that there is an absence of coverage based on Cogar's and Mr. McDavid's failure to satisfy the conditions precedent to coverage respecting notice under the CGL Policy and the CCL Policy for the Negligence Action, as set forth above in paragraphs 49 and 50.

56. In the absence of coverage for the Negligence Action, Everest has no obligation to defend or indemnify Cogar or Mr. McDavid under the Everest CGL Policy in connection with the Garnishment Action or the Virginia Action because those actions do not include allegations encompassed within the terms of the Insuring Agreement of the Everest CGL Policy.

57. Everest has no obligation to defend or indemnify Cogar or Mr. McDavid under the Everest CCL Policy in connection with the Garnishment Action or the Virginia Action to the extent that there is an absence of coverage because there is no “injury’ alleged to which [the] insurance applies.”

58. Everest is informed and believes that Cogar and Mr. McDavid nonetheless contend that the Everest CGL Policy and the Everest CCL Policy afford coverage in connection with the Garnishment Action and the Virginia Action. As such, an actual and present dispute exists between Everest and Cogar and Mr. McDavid as to whether the Garnishment Action or the Virginia Action is afforded coverage under the Everest CGL Policy or the Everest CCL Policy.

59. Inasmuch as an actual and present controversy currently exists between Everest and Cogar and Mr. McDavid concerning their respective rights and obligations under the Everest CGL Policy and the Everest CCL Policy, Everest

is entitled to a judicial determination of its rights and obligations pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure.

WHEREFORE, Everest respectfully requests that this Court enter an Order:

1. Declaring that Everest has no obligation to defend or indemnify Cogar or Mr. McDavid in the Negligence Action, the Garnishment Action, or the Virginia Action;
2. Allowing a trial by jury on any material issues of fact; and
3. For such other and further relief as this Court deems just and proper.

Dated: January 22, 2018.

WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC

Nancy F. Rigby

Nicholas P. Panayotopoulos
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Nancy F. Rigby
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