IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WINDERMERE OAKS WATER SUPPLY CORPORATION; DANA MARTIN; WILLIAM EARNEST; THOMAS MICHAEL MADDEN; ROBERT MEBANE; PATRICK MULLIGAN; JOE GIMINEZ; DAVID BERTINO; MIKE NELSON; DOROTHY TAYLOR; and NORMAN MORSE,	§	CIVIL ACTION NO. 1-21-CV-258-RP
Plaintiffs,	§	
v.	§	
ALLIED WORLD SPECIALTY INSURANCE COMPANY,	§	
Defendant.	§	

DEFENDANT ALLIED WORLD SPECIALTY INSURANCE COMPANY'S CROSS-MOTION FOR SUMMARY JUDGMENT REGARDING THE DUTY TO DEFEND AND BRIEF IN SUPPORT
AND
RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING THE DUTY TO DEFEND

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and in accordance with this Court's Local Rules, defendant Allied World Specialty Insurance Company ("Allied World") files this, its Cross-Motion for Summary Judgment Regarding the duty to Defend and Brief in Support, which also serves as its response to Plaintiffs' Motion for Partial Summary Judgment Regarding the Duty to Defend, and would respectfully show this Court as follows:

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. OVERVIEW

This is an insurance coverage dispute the Plaintiffs brought against Allied World, alleging that Allied World is obligated to defend the Plaintiffs against claims in an ongoing underlying state court lawsuit captioned *Rene Ffrench, et al. v. Friendship Homes & Hangars, LLC, et al.*, Cause No. 48292, pending in the 33rd Judicial Circuit of Burnet County, Texas (the "Underlying Lawsuit"). The Underlying Lawsuit involves claims made by members/customers and owners of a water supply and sewer cooperative ("Cooperative") against Windermere Oaks Water Supply Corporation ("WSC"), which owns and operates the Cooperative, and certain of its directors based upon, arising out of, relating to, and in consequence of an agreement entered into by WSC to sell a certain tract of land within the Spicewood Airport community (the "Airport Tract").

Plaintiffs have moved for partial summary judgment regarding Allied World's alleged duty to defend the Underlying Lawsuit. Allied World now cross-moves for summary judgment, seeking a ruling that it does not have a duty to defend. Allied World asks the Court to deny Plaintiffs' motion and grant its motion for the reasons set forth below.

II. SUMMARY JUDGMENT EVIDENCE

In support of its Cross-Motion for Summary Judgment, Allied World relies on the following exhibits already filed by Plaintiffs in support of its "Motion for Partial Summary Judgment Regarding the Duty to Defend":

PLAINTIFFS' EXHIBIT	DESCRIPTION
A, Document 1	Allied World Commercial Water Plus Package Policy No. 5105-0560-03 issued to WSC for the policy period March 17, 2016 to March 17, 2017
C	The Third Amended Original Petition filed in the Underlying Lawsuit ("Third Amended Petition")

Allied World also relies on the following other exhibits in support of its Cross-Motion for Summary Judgment:

ALLIED WORLD'S EXHIBIT	DESCRIPTION
A	First Amended Petition filed in the TOMA Lawsuit
B	Trial court's Final Judgment entered in the TOMA Lawsuit dated November 13, 2018
C	June 21, 2019 decision of the Court of Appeals Sixth Appellate District of Texas at Texarkana issued in connection with the appeal of the November 13, 2018 Final Judgment issued in the TOMA Lawsuit and the Court of Appeals Judgment entered in connection with that decision

III. ISSUES TO BE RULED UPON BY THE COURT

The only matter at issue is whether Allied World has a contractual duty to defend the Plaintiffs with respect to the Underlying Lawsuit under the Public Officials and Management Liability coverage part ("POML Coverage Part") of the relevant policy issued by Allied World to WSC as the Named Insured. Because the answer to that question is no, Plaintiffs cannot recover under the Texas Prompt Payment of Claims Act, codified at Section 542.051 *et seq.* of the Texas Insurance Code, as Texas law is clear that for the Texas Prompt Payment of Claims Act to apply, there must be a valid duty to defend.

IV. SUMMARY OF ALLIED WORLD'S ARGUMENT

The terms of the POML Coverage Part of the policy exclude coverage for all of the claims alleged in the Underlying Lawsuit. There are three relevant exclusions at issue.

Pursuant to Exclusion 11, the POML Coverage Part does not provide coverage for "damages," "defense expenses," costs or loss based upon, attributed to, arising out of, in consequence of, or in any way related to any contract or agreement to which the insured is a party

or a third-party beneficiary, including, but not limited to, any representations made in anticipation of a contract or any interference with the performance of a contract.

Under Texas law, an exclusion using the phrase "arising out of" is given a broad, general, and comprehensive interpretation, and Texas courts have found the phrase "arising out of" to mean originating from, having its origin in, growing out of, or flowing from, or, in short, incident to, or having a connection with. Indeed, when an exclusion prevents coverage for injuries "arising out of" particular conduct, that claim need only bear an incidental relationship to the described conduct for the exclusion to apply. Additionally, Texas courts interpreting exclusions using substantially similar broad lead-in language as used in Exclusion 11 have found such exclusions to be unambiguous, and, that all that must be demonstrated for that exclusion to apply is that the subject claim be causally connected to the written contract or agreement.

All of the allegations in the Underlying Lawsuit in the very least bear an incidental relationship to WSC's agreement sell the Airport Tract, which is all that is required under Texas law for Exclusion 11 to apply. Further, there is a clear causal connection between the agreement to sell the Airport Tract and the claims at issue in the Underlying Lawsuit, since all of the causes of action and relief sought therein directly flow from WSC and the director defendants' agreement to sell the Airport Tract. Plaintiffs, in their motion, have not provided any persuasive argument, nor pointed to any relevant Texas law, as to why Exclusion 11 does not apply.

Although the application of Exclusion 11 is dispositive, two other exclusions also preclude coverage. Exclusion 12 of the POML Coverage Part provides that coverage does not apply to "damages," "defense expenses," costs or loss arising out of or contributed to by any fraudulent, dishonest, criminal or malicious act of the insured, or the willful violation of any statute, ordinance or regulation committed by or with the knowledge of the insured. The exclusion does state,

however, that Allied World will defend the insured for covered civil action subject to the other terms of the POML Coverage Part until either a judgment or final adjudication establishes such an act, or the insured confirms such act. Similarly, Exclusion 19 of the POML Coverage Part provides that coverage does not apply to "damages," "defense expenses," costs or loss arising from an insured's willful violation of any federal, state, or local law, rule or regulation.

There was a previous finding in a related lawsuit captioned, *TOMA Integrity, Inc., et al. v. Windermere Oaks Water Supply Corporation*, Case No. 47531, also venued in the 33rd District Court of Burnet County, Texas (the "TOMA Lawsuit"), that the WSC board violated the Texas Open Meetings Act ("TOMA") by not providing public notice to the WSC members in connection with the meeting discussing the sale of the Airport Tract and by not listing any items on the agenda for that meeting. Further, that finding is a "final adjudication" as required under Exclusion 12 because it was upheld on appeal. Accordingly, because: (1) there has been a finally adjudicated finding that WSC violated TOMA; (2) that violation was "willful"; and (3) both Exclusions 12 and 19 also contain the broad "arising out of" lead in language discussed above, these exclusions likewise preclude coverage for the Underlying Lawsuit. Plaintiffs also present no compelling arguments as to why these exclusions do not apply.

Finally, because Allied World does not have a duty to defend the Plaintiffs in the Underlying Lawsuit, Plaintiffs are not entitled to recover under the Texas Prompt Payment of Claims Act.

V. LEGAL STANDARD

A. Summary Judgment

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter

of law.[1] A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party.[2]

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue.[3] Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment.[4] Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim.[5] If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted.[6]

B. Insurance Contract Interpretation

In a diversity case involving the interpretation of a contract, courts apply the substantive law of the forum state.[7] Consequently, Texas rules of contract interpretation control this case.

Under Texas law, insurance policies are interpreted under the rules of construction that apply to contracts generally.[8] In interpreting a policy, a court must read all parts together, giving meaning to each sentence, clause, and word, to avoid making any portion inoperative.[9] The parties'

---

1 FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Ragas v. Tennessee Gas Pipeline Company*, 136 F.3d 455, 458 (5th Cir. 1998).

2 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

3 *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986);

4 *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996).

5 *Ragas*, 136 F.3d at 458.

6 *Celotex*, 477 U.S. at 322-23.

7 *McLane Foodservice, Inc. v. Table Rock Restaurants*, L.L.C., 736 F.3d 375, 377 (5th Cir. 2013).

8 *Sharp v. State Farm Fire & Cas. Ins. Co.*, 115 F.3d 1258, 1260 (5th Cir. 1997) (citing *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995)).

9 *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 748 (Tex. 2006).

intent "is governed by what they said, not by what they intended to say but did not."[10] The terms used in an insurance contract are given their commonly understood or generally accepted meaning unless otherwise defined in the policy.[11]

An ambiguity does not arise simply because the parties offer opposing interpretations, and extrinsic evidence may not be admitted for the purpose of creating an ambiguity.[12] As in all contracts, the court looks first to the language of the contract itself, and "[w]hen there is no ambiguity, it is the court's duty to give the words used their plain meaning."[13]

The insured initially has the burden to plead and prove that the insurance policy at issue covers the benefits sought.[14] The insurer bears the burden of showing that a policy exclusion applies.[15] If the insurer meets this burden, then the insured must show that the claim does not fall within the exclusion or that it comes within an exception to the exclusion.[16]

Whether an insurer has a duty to defend is distinct from whether the insurer has a duty to indemnify.[17] To determine whether an insurer has a duty to defend, Texas courts apply the "eight-corners rule." That rule "provides that when an insured is sued by a third party, the liability insurer is to determine its duty to defend solely from [the] terms of the policy and the pleadings of the third-party claimant."[18] This approach requires that the court compare only the "four corners" of the pleading with the "four corners" of the policy.[19] "Resort to evidence outside the four corners of these two documents is generally prohibited."[20] However, Texas courts recognize a narrow

---

10 *Id*. at 746.
11 *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 8 (Tex. 2007).
12 *Fiess*, 202 S.W.3d at 746.
13 *Sharp*, 115 F.3d at 1261.
14 *See Nat'l Union Fire Ins. Co. of Pittsburgh, Penn. v. Puget Plastics Corp.*, 532 F.3d 398, 401 (5th Cir. 2008).
15 *See id*. at 404.
16 *See Century Surety Co. v. Hardscape Constr. Specialties, Inc.*, 578 F.3d 262, 265 (5th Cir. 2009).
17 *D.R. Horton-Tex., Ltd. v. Markel Int'l Ins. Co.*, 300 S.W.3d 740, 743 (Tex. 2009).
18 *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305, 307 (Tex. 2006).
19 *Allstate Ins. Co. v. Disability Servs. of the Sw. Inc.*, 400 F.3d 260, 263 (5th Cir. 2005) (applying Texas law).
20 *Id*.

exception to the "eight-corners rule", in that they will allow extrinsic evidence when determining whether or not an insurer has a duty to defend, when such evidence is relevant to an independent and discrete coverage issue, not touching on the merits of the underlying third-party claim.[21]

The court construes the policy language and then examines the factual allegations in the underlying suit to determine whether those allegations state a claim covered by the insured's policy.[22] An insurer has no legal obligation to defend a suit if the underlying petition does not allege facts within the scope of coverage.[23]

VI. UNDISPUTED FACTS

A. The Allegations in the Underlying Lawsuit[24]

The Underlying Lawsuit arises out of the sale of the Airport Tract by WSC to Dana Martin ("Martin"), at the time a member of the board of WSC, and her alter ego Friendship Home and Hangars, LLC ("FHH").[25] The underlying plaintiffs, who are certain member/owners and customers of WSC, assert that defendants, former and current WSC board members and WSC itself, breached their fiduciary duties to WSC by approving the sale of the Airport Tract and by failing to pursue claims related to that land sale. The Third Amended Petition succinctly summarizes the essence of underlying plaintiffs' claims as follows: "In 2015-2016 the WSC exceeded its powers and the Director Defendants on the Board exceeded their authority and breached their duties by transferring land to Martin for pennies on the dollar," and in "2019 the

---

21 *See GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d at 308; *see also Gonzales v. American States Ins. Co.*, 628 S.W.2d 184, 187 (Tex. App. – Corpus Christi 1982, no writ) (court holding that facts extrinsic to the petition relating only to coverage, not liability, may be considered to determine a duty to defend, where such evidence does not contradict any allegation in the petition).

22 *See id*.

23 *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 187 (Tex. 2002).

24 Only the allegations set forth in the Third Amended Petition will be discussed herein since it is the "live" pleading in the Underlying Lawsuit, and, as conceded by Plaintiffs in their motion, "the document relevant to whether Allied World has an ongoing duty to defend." *See* Dkt. #11, p. 2, fn. 3.

25 Plaintiffs' Exhibit ("Ex.") C at WSC00214.

Director Defendants on the Board caused the WSC to multiply the loss by approving a 'settlement agreement' with Martin and her alter ego FHH that left the 2016 fire sale transaction largely intact and gave Martin even more valuable WSC property for no consideration."[26]

The Third Amended Petition also states that it "[i]t has already been determined that the action (if any was taken) on the fire sale transfer to Martin at the February 22, 2016 [board] meeting was in violation of TOMA [the Texas Open Meetings Act]."[27] And that after this meeting, the WSC board entered into a "Sham Resolution" legally adopting the agreement to transfer the Airport Tract to Martin and FHH.[28]

As result of these actions by the underlying defendants, the Third Amended Petition sets forth the following causes of action and seeks the following relief in connection therewith. First, the underlying plaintiffs allege *ultra vires* actions against the defendants, which they contend are breaches of fiduciary duty, corporate waste, and constructive fraud.[29] As a result of these actions, the plaintiffs seek (a) to enjoin or set aside the 2016 transaction, the "Amended and Superseding Agreement" entered into in October 2019 and all transactions made pursuant to such agreement, and the advancement of litigation expenses to the director defendants; (b) pursuant to Section 20.002(c)(2) of the Tex. Bus. Orgs. Code, judgment on behalf of WSC and the director defendants for all loss and injury to the WSC and its member owners not restored pursuant to Sections 20.002(c)(1) and (d) of the Tex. Bus. Orgs. Code; and (c) confirmation and enforcement of a constructive trust as and to the platted hangar lots transferred in 2016 and all other property transferred to or for the benefit of Martin and as to the extent necessary, they plead for an offset

---

26 *Id.*
27 *Id.* at WSC00244-WSC00245.
28 *Id.* at WSC00237.
29 *Id.* at WSC00243-WSC00251.

for all amounts and benefits received by Martin or FHH in connection with the wrongfully acquired property.[30]

Second, the underlying plaintiffs set forth several causes of action against FHH: (1) that FHH is liable for the acts and omissions of Martin because it is her alter ego[31]; (2) in the alternative that FHH is liable for the misconduct of the director defendants described in the Third Amended Petition because it had knowledge of the misconduct and participated in it or accepted the benefits of it[32]; and (3) in the further alternative, a cause of action for civil conspiracy between FHH and the director defendants because (a) the 2016 board agreed with FHH to cause the WSC to transfer title to the valuable airport property for pennies on the dollar, to grant free preemptive purchase right and to landlock the remainder tract by not reserving a taxiway easement across the land conveyed; and (b) the 2019 board agreed with FHH to leave the 2016 transaction largely intact and to transfer additional valuable WSC land to WSC for no consideration, and as a result of this conspiracy, underlying plaintiffs allege that WSC and its member owners have been injured.[33]

Third, underlying plaintiffs seek exemplary damages, which plaintiffs allege they are entitled to because (a) the 2016 board and FHH behaved with malice in participating with each other to transfer valuable Cooperative assets and rights for the benefit of a sitting director, Martin, and for very little consideration; and (b) the 2019 board and FHH behaved with malice in participating with each other to transfer more valuable WSC land for Martin's benefit and to relinquish other valuable rights in 2019.[34]

---

30 *Id.* at WSC00251-WSC00252.
31 *Id.* at WSC00252.
32 *Id.* at WSC00253.
33 *Id.* at WSC00254.
34 *Id.* at WSC00254-WSC00255.

Finally, underlying plaintiffs seek an application under Section 22.512(b) of the Tex. Bus. Orgs. Code for the court to declare that the 2019 board's ratification of one or more of the defective corporate acts described in the petition is invalid and ineffective.[35]

B. The TOMA Lawsuit

As acknowledged in the Third Amended Petition, "[i]t has already been determined that the action (if any was taken) on the fire sale transfer to Martin at the February 22, 2016 [board] meeting was in violation of TOMA."[36] This determination was made in connection with the TOMA Lawsuit[37], wherein the trial court held that WSC violated TOMA, by failing to include the subject of the prospective sale of the Airport Tract when it held a public meetings at which WSC's board authorized the sale.[38]

After the trial court in the TOMA action issued its order, WSC did not challenge the trial court's finding that the board violated TOMA; however, the plaintiffs appealed, arguing that the trial court abused its discretion in failing to void the WSC board's actions in light of the TOMA violation.[39] The appellate court affirmed the trial court's order (i.e. that the board violated TOMA, but that it would not void the board's actions) and entered a judgment on June 21, 2019 stating same.[40]

C. The Pertinent Policy Provisions

Allied World issued to "Windermere Oaks Water Supply Corporation" as the Named Insured, Commercial Water Package Plus Policy No. 5105-0560-03, for the policy period from

35 *Id.* at WSC00255
36 *Id.* at WSC00244.
37 *See* Allied World's Ex. A
38 Allied World's Ex. B and Ex. C at Allied World 011.
39 Allied World's Ex. C, at Allied World 011.
40 *Id.* at Allied World 018

March 17, 2016 to March 17, 2017 (the "Policy").[41] The Policy contains multiple coverage parts. However, as Plaintiffs concede in their motion for summary judgment, the only potentially applicable coverage part with respect to the Underlying Lawsuit is the POML Coverage Part.[42]

The pertinent provisions of the POML Coverage Part are set forth within the discussion in the Argument and Authorities section below.

VII. ARGUMENT AND AUTHORITIES

A. Exclusion 11 bars coverage for all claims alleged in the Underlying Lawsuit.

Exclusion 11 to the POML Coverage Part provides that the Policy does not apply under either Coverage A or Coverage B to:

> "Damages," "defense expenses," costs or loss based upon, attributed to, arising out of, in consequence of, or in any way related to any contract or agreement to which the insured is a party or a third-party beneficiary, including, but not limited to, any representations made in anticipation of a contract or any interference with the performance of a contract.[43]

The goal of policy interpretation is "to ascertain the parties' true intent as expressed by the plain language they used."[44] To give effect to that intent, the policy "should be interpreted as a whole," enforcing the terms "in accordance with the plain meaning of its terms."[45] Any interpretation that would strip the policy language of meaning or render any term or provision surplusage is unreasonable and should be rejected.[46]

---

41 Plaintiffs' Ex. A, Document 1. While Plaintiffs appear to put a series of policies issued by Allied World to WSC at issue in their complaint in this action, Plaintiffs concede in their motion for summary judgment that if coverage is available at all, it is only available under the Policy. *See* Dkt. #1, p. 9, fn. 56. As such, the Policy is the only policy at issue in this litigation.

42 *See* Dkt. #11, p. 9.

43 Plaintiffs' Ex. A, Document 1 at WSC00122.

44 *Certain Underwriters at Lloyd's of London v. Sterling Custom Homes, Inc.*, 705 Fed. Appx. 259, 265 (5th Cir. 2017) (quoting *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 893 (Tex. 2017)); *see also Gilbert Texas Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126-27 (Tex. 2010) ("Courts strive to honor the parties' agreement and not remake their contract… The parties' intent is governed by what they said in the insurance contract…").

45 *Sterling*, 705 Fed. Appx. at 264 (quoting *Primo*, 512 S.W.3d at 892).

46 *See Ideal Mut. Ins. Co. v. Last Days Evangelical Ass'n*, 783 F.2d 1234, 1238 (5th Cir. 1986) (an interpretation is not reasonable if it would strip policy language of meaning)).

Under Texas law, an exclusion using "arising out of" language is "given a broad, general and comprehensive interpretation,"[47] and the term "arising out of" is ordinarily understood to mean "originating from", "having its origin in", "growing out of" or "flowing from", or, in short, "incident to, or having a connection with."[48] Therefore, when an exclusion prevents coverage for injuries "arising out of" particular conduct, "a claim need only bear an incidental relationship to the described conduct for the exclusion to apply."[49]

Indeed, in construing contract exclusions, Texas courts have repeatedly held that where such exclusions contain the phrase "arising out of" or similar language, the contract or the breach of that contract need not have caused the injuries, but rather, the contract or the breach of contract must merely have had an "incidental relationship to or connection with the injuries."[50]

In interpreting a substantially similar contractual liability exclusion, the court in *Carolina Casualty Insurance Company v. Sowell* held that the exclusion was unambiguous, and was to be applied if the claim "could not exist" without the subject contract.[51]

The exclusion at issue in *Sowell* precluded coverage for claims made against an insured "based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving any oral or written contract or agreement."[52] The case involved purported insurance coverage for underlying lawsuits filed in the aftermath of Hurricane Katrina, arising out of a dispute concerning a leased property that was damaged in the hurricane.[53] Property insurance

---

47 *Scottsdale Ins. Co. v. Tex. Sec. Concepts & Investigation*, 173 F.3d 941, 943 (5th Cir. 1999).

48 *EMCASCO Ins. Co. v. Am. Int'l Specialty Lines Ins. Co.*, 438 F.3d 519, 524-25 (5th Cir. 2006).

49 *Sport Supply Group, Inc. v. Columbia Cas. Co*., 335 F.3d 453, 458 (5th Cir. 2003).

50 *Gemini Ins. Co. v. Andy Boyd LLC*, 243 Fed. App'x 814, 816 (5th Cir. 2007); *see also Scottsdale Ins. Co. v. Mt. Hawley Ins. Co.*, 2011 U.S. Dist. LEXIS 156386, at *27 (S.D. Tex. June 15, 2011) ("Here, the breach of contract exclusion encompassed any claim or 'suit' directly or indirectly 'arising out of' breaches of contract or warranty, and thus by its plain language does not limit its application to breach of contract or warranty claims only…")

51 *See Carolina Cas. Ins. Co. v. Sowell*, 603 F. Supp. 2d 914, 926 (N.D. Tex. 2009).

52 *Id.* at 925.

53 *Id.* at 920.

coverage for the warehouse was much less than the full amount of warehouse damage, and the lessors and lessees of the property, and certain principals, directors or officers of each, were parties in the lawsuits brought to establish liability among themselves for failure to obtain sufficient insurance for the warehouse and ensuing damage for loss of use.[54]

The insureds' main argument in *Sowell*, similar to Plaintiffs' main argument in its motion as to why Exclusion 11 should not apply here, was that the exclusion should be confined to breach of contract claims.[55] Like Plaintiffs, the insureds relied on *Admiral Insurance Company v. Briggs*[56] in making their argument.[57] In *Briggs*, the insured's former landlord sued it for stock fraud, alleging that the insured made material misrepresentations concerning its future success in order to convince the landlord to accept the insured's stock instead of cash for payment on the lease.[58] The insured argued that the stock fraud claim fell within the contract exclusion because it "involved" the lease contract.[59] The court rejected the insured's argument, emphasizing the fact that the terms of the exclusion as a whole, including the "involving" language, required a "causal relationship between the contract and the claim."[60] The court concluded that "[t]he lease contract did not cause the stock fraud claim, it simply provided the context in which the stock fraud took place."[61]

However, the *Sowell* court distinguished *Briggs* on the basis of causation because in *Briggs*, the lease was simply part of the context of the underlying lawsuit, and the misrepresentation claims against the insureds would have existed with or without it.[62] In *Sowell*, however, the court found,

---

54 *Id.* at 920-921.
55 *Id.* at 925.
56 264 F.Supp. 2d 460 (N.D. Tex. 2003).
57 *Id.* at 462-63
58 *Id.* at 463.
59 *Id.*
60 *Id.* at 463.
61 *Id.*
62 *Sowell*, 603 F. Supp. 2d at 926-927.

that the lease at issue "provides more than context" in that "[a]ll of the claims are causally connected to the lease contract and could not exist without the lease. They are all clearly based upon, arise out of, result from, are in consequence of, or involve the lease."[63] The court also specifically noted that the exclusion at issue did not only contain the phrase "arising out of" of contract, "but to claims 'based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving any oral or written contract or agreement," and that the insured "does not even address, much less dispute, the plain meaning of these other phrases, which clearly reflect that the exclusion applies pervasively to claims that are causally connected to written contracts… ."[64]

As was the case in *Sowell*, all of the claims in the Underlying Lawsuit are clearly based upon, arise out of, or in some way involve WSC's agreement to sell the Airport Tract to Martin and FHH. Indeed, this is made pointedly clear on the third page of the Third Amended Petition: "In 2015-2016, the WSC exceeded its powers and the Director Defendants on the Board exceeded their authority and breached their duties by transferring the land to Martin for pennies on the dollar."[65]

Further, all of the causes of action set forth in the Third Amended Petition refer to the agreement to sell the Airport Tract, and seek damages as a result of defendants' agreement to sell the Airport Tract, and the underlying plaintiffs explicitly seek to "enjoin or set aside" the sale of the Airport Tract, as well as the "Amended and Superseding Agreement" keeping the sale in place.[66]

Accordingly, all of the claims plainly arise out of or in the very least, are "in any way

---

63 *Id.* at 927.
64 *Id.* at 926.
65 Plaintiffs' Ex. C, at WSC00214.
66 *Id.* at WSC00243-WSC00255.

related" to the agreement by WSC to transfer the Airport Tract to Martin and FHH. Without the WSC entering into that agreement and the board subsequently ratifying that agreement, there would be no claims against the defendants. In other words, like in *Sowell*, the claims in the Underlying Lawsuit could not exist without the subject agreement, as it is the foundation for all of the causes of action alleged against the defendants. Texas law is clear that Exclusion 11 precludes coverage.

Despite the plain application of Exclusion 11, Plaintiffs make several unsuccessful attempts to demonstrate why the exclusion does not apply. As an initial matter, Plaintiffs argue that the exclusion does not apply because the "focus of the Underlying Lawsuit is not on any contract or any representations in anticipation of any contract, but rather on the *pre*-contract misdeeds and conduct by the Directors, which fall outside the scope of the Contractual Liability Exclusion."[67] However, as already demonstrated, for Endorsement 11 to apply, there need only be an incidental relationship between the allegations and the excluded conduct.[68] As such, the agreement at issue, i.e. the agreement to sell the Airport Tract, need not be the "focus" of the Underlying Lawsuit in order for Exclusion 11 to preclude coverage (although, as already demonstrated, the agreement is, in fact, the "focus" of the Underlying Lawsuit). Further, Plaintiffs' reliance on *Admiral Insurance Company, Inc. v. Briggs* in support of this argument has already been discredited above.

Plaintiffs also contend that "courts around the country" have found that if a claim involves "pre-contract" misdeeds, breach of contract exclusions have been found not to apply.[69] In the first instance, the plain language of the exclusion belies this argument. The exclusion specifically states

---

67 Dkt. #11, p. 16.
68 *Sport Group, Inc. v. Columbia Cas. Co*., 335 F.3d at 458.
69 Dkt. #11, p. 19.

that the excluded conduct includes "any representations made in anticipation of a contract."[70] Therefore, Exclusion 11 contemplates "pre-contract misdeeds."

Moreover, the two cases cited by Plaintiffs in support of this argument can be easily distinguished. *Clark School for Creative Learning, Inc. v. Philadelphia Indemnity Insurance Company*,[71] does not even involve the interpretation of a contract exclusion, but rather a Known Circumstances Exclusion.[72] And, that case does not, as Plaintiffs contend, stand for the proposition that a "breach of contract exclusion was inapplicable to 'pre-contract misdeeds' because they were based on conduct independent of the contracts."[73] In fact, the *Clark School* court rejected the insureds' reliance on ***other*** cases from ***other*** courts that had held that "pre-contract-misdeeds" were not covered by the specific contract exclusions at issue in those cases when interpreting the Known Circumstances Exclusion at issue in the *Clark School* case.[74]

In *Church Mutual Insurance Company v. U.S. Liability Insurance*,[75] the exclusion at issue excluded coverage for claims "made against any Insured arising out of, directly or indirectly resulting from or in consequence of, or in any way involving…any actual or alleged breach of contract."[76] Unlike Exclusion 11, this language does not include as part of the precluded conduct,

---

70 *See* Plaintiffs' Ex. A, Document 1, at WSC00122.

71 2012 WL 6771835 (D. Mass. Dec. 26, 2012).

72 *Id.* at *4.

73 Dkt. #11, p. 19, fn. 118.

74 2012 WL 6771835, at *5 ("The Court finds *McPeek v. Travelers Casualty & Surety Co. of America*, No. 2:06–CV–114, 2006 WL 1308087 (W.D.Pa. May 10, 2006), and *Church Mutual Insurance Co. v. U.S. Liability Insurance Co.*, 347 F.Supp.2d 880 (S.D.Cal.2004), on which the School relies, are of little aid here. The exclusions at issue in both of these cases, although also using the term 'arising out of,' referred specifically to liability under a contract. *See McPeek*, 2006 WL 1308087, at *3 (the exclusionary language stated that claims "for or arising out of any alleged liability of any Insured under any express contract or agreement" were not covered); *Church Mut.*, 347 F.Supp.2d at 884 (the breach of contract exclusion excluded coverage for claims 'made against any Insured arising out of, directly or indirectly resulting from or in consequence of, or in any way involving ... any actual or alleged breach of contract'). Thus, those courts held that claims alleging 'pre-contract misdeeds' were not covered by the exclusions because they were based on conduct independent of the contracts themselves. *See, e.g.*, *McPeek*, 2006 WL 1308087, at *4. The Known Circumstances Exclusion here is not limited to contractual liability as the exclusions in these other cases were; the scope of the exclusion here is broader.").

75 347 F. Supp. 2d 880 (S.D. Cal. 2004).

76 *Id.* at 884.

any representations made in anticipation of a contract. This alone distinguishes it from the language in Exclusion 11. Moreover, the exclusion in *Church Mutual* is limited to claims involving "any actual or alleged ***breach*** of contract." [emphasis supplied]. Exclusion 11 is not so limited. All that is required for Exclusion 11 to apply is that the claim is attributed to, arising out of, in consequence of, or in any way related to a contract or agreement to which the insured is a party or a third-party beneficiary. Accordingly, *Church Mutual* has no application here.

Plaintiffs next argue that Exclusion 11 does not apply because the breach of fiduciary duty claims "could stand on their own independent of any contract or agreement," which is "exemplified by the numerous allegations regarding the Directors' *ultra vires* acts."[77] This argument is plainly belied by the allegations in the Third Amended Petition as delineated above, which demonstrate that each of the *ultra vires* acts and the relief sought by the underlying plaintiffs in connection with the those acts all explicitly relate to the agreement to sell the Airport Tract.[78]

By way of examples, the Third Amended Petition explicitly alleges that "[t]he 2016 Board engaged in constructive fraud when it caused the WSC to transfer valuable WSC property to Martin and FHH for pennies on the dollar," and that the "2019 Board engaged in constructive fraud when it approved and caused the WSC to implement the 'Amended and Superseding Agreement' leaving the 2016 fire sale largely intact and giving Martin even more valuable airport property for no consideration."[79] Further, the petition states that the directors breached their fiduciary duties by entering into the "Sham Resolution," wherein the WSC board approved the land transfer of the Airport Tract to Martin.[80] Additionally, the petition alleges that the directors engaged in corporate waste by "causing the WSC to give away valuable property interests for next to nothing," and that

---

77 Dkt. #11, p. 19.
78 Plaintiffs' Ex. C at WSC00243-WSC00252.
79 *Id.* at WSC00250.
80 *Id.* at WSC00237 and WSC00244.

the defendant directors "had no power to authorize or approve a transaction is adverse to the WSC."[81] Therefore, Plaintiffs cannot with a straight face argue that the *ultra vires* actions alleged in the Underlying Lawsuit "could stand on their own independent of any contract or agreement."

Also, Plaintiffs cite to only one out-of-state, and distinguishable, case to stand for this proposition: *American Chemical Society v. Leadscope, Inc.*[82] In that case, the court was asked to interpret an exclusion, which precluded coverage for claims "alleging, arising out of, based upon, or attributable to any actual or alleged contractual liability of the Company or any other Insured under any express contract or agreement" and the parties' disagreement as to the applicability of that exclusion concerned their differing interpretations of the term 'contractual liability,' for which there was no specific definition in the policy.[83] Indeed, the court's entire holding that the conversion claim in the subject lawsuit did not apply turned on the fact that the exclusion at issue ***required*** that a claim arise out of or be based upon "contractual liability," a phrase not contained in the language of Exclusion 11.[84] Accordingly, *American Chemical* case has no application here.

Plaintiffs also argue that Exclusion 11 does not apply because there are "no allegations that the Directors (except Martin) are even parties to any contract or agreement used to convey the Airport Tract."[85] Plaintiffs contend that because Exclusion 11 utilizes "the insured" as opposed to "any insured" or "an insured," pursuant to the "Separation of Insureds" provision, Exclusion 11 is applicable on its face because there is no indication that any Directors (except Martin) were parties to any contact at issue.[86] This argument also has no merit.

---

81 *Id.* at WSC00246-WSC00247.

82 2005 WL 1220746 (Ohio Ct. App. May 24, 2005).

83 *Id.* at *8.

84 *Id.* at *10 ("For these reasons, ACS's claim for conversion neither necessarily arises from nor is based upon contractual liability, and Clause 4(h) does not apply to preclude coverage for Blower, Johnson, and Myatt for the purposes of determining National Union's duty to advance defense costs.").

85 *See* Dkt. #11, p. 19.

86 *Id.*

The only case relied on by Plaintiffs in making this argument is *King v. Dallas Fire Ins. Co.*[87] In that case, the Texas Supreme Court considered the effect of a separation of insureds clause in the context of whether an "occurrence" had taken place giving rise to a duty to defend.[88] A policy insured both an employer and its employee who were sued by a third party after the employee allegedly attacked the third party.[89] Among other claims, the third party asserted a claim against the employer for negligent hiring, training, and supervision.[90] The insurer denied coverage contending that there was no "occurrence" under the policy because the attack was intentional.[91] The court disagreed and found that the separation of insureds clause expressly created separate policies for the employer and the employee.[92] Thus, determining whether there had been an "occurrence" required looking at the policy as if the employer were the only insured.[93] Solely from the employer's perspective, the "occurrence" was the alleged negligence, which was not intentional, and, as such, the court concluded that the insurer had a duty to defend the employer.[94]

Therefore, *King* does not control the outcome of the application of Exclusion 11 because that case only addressed the effect of a separation of insureds clause in the context of whether an "occurrence" had taken place under that policy, as opposed to the interpretation of the language of an exclusion like the one at issue here.

Finally, Plaintiffs contend that Exclusion 11 is "ambiguous as used in the Policy."[95] However, this argument immediately fails since Plaintiffs themselves cite to a Texas case in their

87 85 S.W. 3d 185 (Tex. 2002).
88 *Id.* at 187.
89 *Id.*
90 *Id.*
91 *Id.*
92 *Id.* at 188.
93 *Id.*
94 *Id.* at 189.
95 Dkt. #11, p. 20.

motion where the court made no finding that a similar exclusion was ambiguous.[96] Additionally, as already discussed above, the court in *Sowell* explicitly found a similarly worded contractual liability exclusion to be unambiguous.[97]

For all of these reasons, Exclusion 11 applies to preclude coverage for the Underlying Lawsuit, and, as such, Allied World has no duty to defend under the Policy.

B. Exclusions 12 and 19 also preclude coverage for the Underlying Lawsuit.

While the application of Exclusion 11 is dispositive, two other exclusions also preclude coverage for the Underlying Lawsuit.

Exclusion 12 to the POML Coverage Part provides, in relevant part, that the Policy does not apply under either Coverage A or Coverage B to:

> "Damages," "defense expenses," costs or loss arising out of or contributed to by any fraudulent, dishonest, criminal or malicious act of the insured…, or the willful violation of any statute, ordinance or regulation committed by or with the knowledge of the insured. However, we will defend the insured for covered civil action subject to the other terms of this Coverage Form until either a judgment or final adjudication establishes such an act, or the insured confirms such act.[98]

Similarly, Exclusion 19 precludes coverage under Coverages A and B of the POML Coverage Part for "'[d]amages,' 'defense expenses,' costs, or loss arising from an insured's willful violation of any federal, state, or local law, rule, or regulation."[99]

Both of these exclusions contain the terms "arising out of" or "arising from." As such, as already set forth above, under Texas law, all Allied World must demonstrate is that the Underlying Lawsuit only bears an incidental relationship to the described conduct for the exclusion to apply.

---

96 *See Admiral Ins. Co. v. Briggs*, 264 F. Supp. 2d at 460.

97 *See Carolina Cas. Ins. Co. v. Sowell*, 603 F. Supp. at 925 (court concluding that a contract exclusion providing that the insurer "shall not be liable to make any payment for Loss in connection with a Claim made against any insured…based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving any oral or written contract or agreement" to be "unambiguous" and, as such, the court must give "its terms their plain meaning.").

98 Plaintiffs' Ex. A., Document 1, at WSC00122.

99 *Id.* at WSC00123.

The Third Amended Petition specifically acknowledges that "[i]t has already been determined that the action (if any was taken) on the fire sale transfer to Martin at the February 22, 2016 [board] meeting was in violation of TOMA."[100] Accordingly, the petition alone demonstrates that the Underlying Lawsuit bears an incidental relationship to the finding that WSC violated TOMA.

Further, while Plaintiffs contend that the TOMA violation was not "willful," they also concede that because the term "willful" is not defined in the Policy, it must be given its plain and ordinary meaning under Texas law, while reading the term "in context and in light of the rules and grammar of common usage."[101] In making this argument, Plaintiffs state that Texas courts have recognized that the word "willful" means "intentional; deliberate" or "having or showing a stubborn and determined intention to do as one wants, regardless of the consequences or effects," and that the Third Amended Petition "is simply devoid of factual allegations that there was any intentional, deliberate, or stubborn conduct by the Directors."[102]

Even conceding the fact that Texas courts have so defined the term "willful" to "having or showing a stubborn and determined intention to do as one wants, regardless of the consequences or effects," the Third Amended Petition does contain such allegations. The gravamen of the Underlying Lawsuit is that the defendants agreed to sell the Airport Tract to Martin and FHH for "pennies on the dollar" even though that agreement allegedly ran afoul of the financial interests of the Cooperative. Given this, the fact that the WSC board held a closed meeting without posting that the agenda of the meeting would include the discussion of the sale of the Airport Tract, falls squarely in the definition of "willful," since the board stubbornly did what it wanted (discuss the

100 Plaintiffs' Ex. C, at WSC00244-WSC00245.
101 *Anadarko Petroleum Corp. v. Houston Cas. Co.*, 573 S.W.2d 187, 193 (Tex. 2019).
102 Dkt #11, pp. 22-23.

sale of the Airport Tract to Martin) regardless of the consequences (a violation of TOMA or any damage to the Cooperative as a result of the sale).

Further, there is no merit to Plaintiffs' argument that liability can be found under TOMA regardless of a party's mental state with respect to whether a meeting is permitted.[103] In making this argument, Plaintiffs rely on *Tovar v. State*, which interprets Section 551.144 of the Texas Government Code[104], and not the section relevant in this case, Section 551.041.[105] For this reason alone, *Tovar* is not applicable.

Regardless, even if *Tovar* did have any application to this case, Plaintiffs' description of the holding in that case is misleading. While the court in *Tovar* did hold that there need not be proof as to an individual's mental state with respect to whether he knew a closed meeting was prohibited under the law, the statute still required proof that the individual ***knowingly*** called a closed meeting.[106] Therefore, Plaintiffs' reliance on *Tovar* should be disregarded.

For all of these reasons, in the very least, Exclusion 19 applies to bar coverage, because the Underlying Lawsuit arises from WSC's willful violation of TOMA.

Exclusion 12 also applies because there has been a final adjudication that WSC violated TOMA. This determination was made in connection with the TOMA Lawsuit, wherein the trial court held that WSC violated TOMA, by failing to include the subject of the prospective sale of the Airport Tract when it held the meeting on February 22, 2016.[107] After the trial court in the TOMA action issued its order, WSC did not challenge the trial court's finding that the board

---

103 *Id.*, p. 23.

104 978 S.W.2d 584, 587 (Tex. Crim. App. 1998).

105 *See* Allied World Ex. B at Allied World 009 and C at Allied World 001.

106 *Tovar v. State*, 978 S.W.2d at 587 ("In order to convict appellant, the jury charge in this case only required the jury to find that appellant acted knowingly with regard to calling, aiding in calling or organizing, or participating in the special closed meeting. The jury charge did not require the jury to find that appellant possessed any mental state with regard to the special closed meeting not being permitted under the Act.").

107 Allied World Ex. B, at Allied World 009.

violated TOMA; however, the plaintiffs appealed, arguing that the trial court abused its discretion in failing to void the WSC board's actions in light of the TOMA violation.[108] The appellate court affirmed the trial court's order (i.e. that the board violated TOMA, but that it would not void the board's actions) and entered a judgment on June 21, 2019 stating same.[109] As such, because: (1) there has been a final adjudication that WSC violated TOMA, (2) the violation was willful for the reasons set forth above; and (3) the allegations in the Underlying Lawsuit bear an incidental relationship to the finally adjudicated TOMA violation, Exclusion 12 also applies to preclude coverage.

Nonetheless, Plaintiffs argue that under Texas law, a "final adjudication" in similar exclusions means that the exclusion only applies if there is a finding of a willful violation through final judgment or settlement in the Underlying Lawsuit, not in a parallel coverage action or parallel lawsuit.[110] However, the plain language of Exclusion 12 does not specifically limit a finding to one that is made in the Underlying Lawsuit. Accordingly, Plaintiffs' argument fails on this basis alone.

Moreover, the case relied on by Plaintiffs, *Pendergast-Holt v. Certain Underwriters at Lloyd's of London*[111] does not, as Plaintiffs contend, stand for this proposition under Texas law. In *Pendergast-Holt*, the Fifth Circuit was not even interpreting an exclusion that contained the term "final adjudication," but rather a money laundering exclusion, which barred coverage for loss resulting from any claim "arising directly or indirectly as a result of or in connection with any act or acts (or alleged acts) of Money Laundering," but also provided that the insured would pay defense costs "until such time it is determined that the alleged act or alleged acts did in fact

---

108 Allied World's Ex. C, at Allied World 011.
109 *Id.* at Allied World 018.
110 *See* Dkt. #11, p. 23.
111 600 F.3d 562 (5th Cir. 2010).

occur."[112] The court referred to another exclusion in the subject policy which was not at issue in the litigation, to demonstrate the difference between how courts interpret exclusions using the phrase "in fact," as opposed to "final adjudication."[113]

Further, the Fifth Circuit did not, as Plaintiffs contend, state that under Texas law the final adjudication must occur in the underlying proceeding. Instead, what the court stated was that "when a D&O policy requires a 'final adjudication' to trigger an exclusion, 'courts have consistently held that the adjudication must occur in the underlying D&O proceeding,' rather than in a parallel coverage action or other lawsuit."[114] In making this proclamation, however, the Fifth Circuit cited to a treatise, Dan A. Bailey, *D&O Policy Commentary*, 702 PLI/Lit 205, 215 (Feb. 17-18, 2004), and not any other decisions by any other courts, which provided: "For those forms which require a final adjudication, courts have consistently held that the adjudication must occur in the underlying D&O proceeding (not in coverage litigation) and therefore the exclusion is inapplicable if the claim against the D&Os is settled."[115] Accordingly, all the treatise says is that "final adjudication" cannot occur in the context of any parallel coverage litigation or if the case is settled, which is not what Allied World is arguing. It does not explicitly state that an insurer cannot rely on a final adjudication in a companion and related proceeding, which is explicitly cited to in the Underlying Lawsuit, in order for an exclusion using the phrase "final adjudication" to apply.

---

112 *Id.* at 567.

113 *Id.* at 572 ("The underwriters nonetheless contend that 'it is determined . . . in fact' is not ambiguous because it stands in meaningful contrast to the language of the fraud exclusion. That exclusion is triggered only by a 'final adjudication' that fraud 'in fact' occurred. Because we must interpret the D&O Policy 'in such a way as to give effect to each term . . . so that none will be rendered meaningless,' the underwriters argue that 'determined . . . in fact' must be construed to mean something other than a 'final adjudication.' They maintain that only the latter requires a judicial decisionmaker.").

114 *Id.*

115 *Id.* at 572, fn. 28.

Finally, there is no merit to Plaintiffs' argument that reliance on an adjudication from another related lawsuit is improper under Texas's "eight corners rule."[116] This is because Texas courts have recognized a narrow exception to this rule in that they will allow extrinsic evidence when determining whether or not an insurer has a duty to defend, when such evidence is relevant to an independent and discrete coverage issue, not touching on the merits of the underlying third-party claim.[117] The final adjudication of the TOMA violation is only relevant to an independent and discrete coverage issue (whether Exclusion 12 applies) and has no impact on the merits of the Underlying Lawsuit. Regardless, Texas law is clear that courts can take judicial notice of a decision of another court.[118] Therefore, Allied World's reliance on the final adjudication in the TOMA Lawsuit falls well within the narrow exception of the "eight corners" rule.

For all of these reasons, both Exclusion 12 and Exclusion 19 also bar coverage for the Underlying Lawsuit.

C. Allied World did not violate the Prompt Payment of Claims Act.

Plaintiffs claim they are entitled to damages under the Texas Prompt Payment of Claims Act, consisting of penalty interest on the amount of its defense costs incurred in connection with the Underlying Lawsuit.[119]

The Texas Supreme Court has held that, for the Texas Prompt Payment of Claims Act to apply, there must be a valid duty to defend.[120] As explained above, Exclusions 11, 12, and 19 bar

---

116 Dkt. #11, p. 24.

117 *See GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d at 310 (Tex. 2006); *see also Gonzales v. American States Ins. Co.*, 628 S.W.2d at 187(court holding that facts extrinsic to the petition relating only to coverage, not liability, may be considered to determine a duty to defend, where such evidence does not contradict any allegation in the petition).

118 *See Sparkman v. Charles Schwab & Co.*, 336 Fed. App'x 413 (5th Cir. 2009) ("One court may take judicial notice of another district court's judicial actions."); *see also Rittinger v. Healthy Alliance Life Ins. Co.*, 2016 WL 5404769, at *3 fn 2 (S.D. Tex. July 27, 2016) ("The Court may take judicial notice of proceedings in another court.").

119 TEX. INS. CODE ANN. §542.060 (West 2021).

120 *See Progressive Country Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005).

coverage for all of Plaintiffs' claims in the Underlying Lawsuit. Allied World therefore had no duty to defend Plaintiffs or pay their defense costs.[121]

Because Allied World has no obligation to pay Plaintiffs' defense costs, Plaintiffs do not have a claim under the Texas Insurance Code for penalty damages due to a failure to promptly pay those defense costs.[122] As the Supreme Court of Texas explains, "an insured cannot recover policy benefits as damages for an insurer's statutory violation if the policy does not provide the insured a right to receive those benefits."[123] Under the terms of the policy, Plaintiffs are not entitled to a defense or indemnity for the Underlying Lawsuit. Because Plaintiffs are not owed any payment under the Policy, their claim for an alleged failure to make prompt payment fails as a matter of law. Allied World has no liability under Texas Insurance Code § 542 and is entitled to judgment as a matter of law with respect to the Plaintiffs' claim for violation of the Texas Prompt Payment of Claims Act.

VIII. CONCLUSION AND PRAYER

WHEREFORE, Allied World respectfully requests that this Honorable Court deny Plaintiffs' motion for summary judgment, grant this cross-motion for summary judgment, and order that Plaintiffs take nothing on any of their claims against Allied World pertaining to its alleged duty to defend.

---

121 *See* Plaintiffs' Ex. A, Document 1 at WSC00119 ("[W]e will have no duty to defend the insured against any 'claim' seeking 'damages' for a 'wrongful act'…to which this insurance does not apply.").

122 TEX. INS. CODE ANN. § 542, *et seq.*

123 *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 489-490 (Tex. 2018); *see also Nat'l Union Fire Ins. v. Hudson Energy*, 780 S.W.2d 417, 427 (Tex.App.—Texarkana 1989), *aff'd*, 811 S.W.2d 552 (Tex. 1991) ("Delays or refusal to pay are not unreasonable where there is a legitimate question of policy construction.").

Respectfully submitted,

/*s/ Joseph A. Ziemianski*
Joseph A. Ziemianski
Attorney-In-Charge
Texas State Bar No. 00797732
Federal No. 25915
E-mail: jziemianski@cozen.com
COZEN O'CONNOR
1221 McKinney, Suite 2900
Houston, Texas 77010
Telephone: (832) 214-3900
Telecopier: (832) 214-3905

Stephanie A. Nashban
Pro Hac Vice
Email: snashban@cozen.com
COZEN O'CONNOR
123 North Upper Wacker Drive, Suite 1800
Chicago, Illinois 60606
Telephone: (312) 382-3100
Telecopier: (312) 382-8910

ATTORNEYS FOR DEFENDANT,
ALLIED WORLD SPECIALTY INSURANCE COMPANY

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served upon all known counsel of record on August 27, 2021, via the Court's electronic filing system.

/s/ Joseph A. Ziemianski
Joseph A. Ziemianski