

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 §
GIMENEZ; DAVID BERTINO; MIKE §
NELSON; DOROTHY TAYLOR; and §
NORMAN MORSE, §

Plaintiffs,

C.A. NO. 21-258

V.

ALLIED WORLD SPECIALTY §
INSURANCE COMPANY, §

Defendant.

**ALLIED WORLD SPECIALTY INSURANCE COMPANY’S ANSWER
AND AFFIRMATIVE DEFENSES TO PLAINTIFFS’ ORIGINAL COMPLAINT**

Defendant, Allied World Specialty Insurance Company (“Allied World”), files this answer and affirmative defenses to Plaintiffs’ Original Complaint, and respectfully shows the Court the following:

ANSWER

1. Allied World lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 1.

2. Allied World lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 2.

3. Allied World lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 3.

4. Allied World lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 4.

5. Allied World lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 5.

6. Allied World lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 6.

7. Allied World lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 7.

8. Allied World lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 8.

9. Allied World lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 9.

10. Allied World lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 10.

11. Allied World lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 11.

12. Allied World admits the allegations in Paragraph 12.

13. Allied World admits the allegations in Paragraph 13.

14. Allied World admits the allegations in Paragraph 14.

15. Allied World admits that this matter arises out of a lawsuit styled *Rene Ffrench, et al. v. Friendship Homes & Hangars, LLC, et al.*, Cause No. 48292 pending in the 33rd Judicial District Court of Burnet County, Texas (the “Underlying Lawsuit”); however, Allied World denies that it breached its contractual duty to defend Plaintiffs.

16. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 16.

17. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 17.

18. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 18.

19. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 19.

20. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 20.

21. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 21.

22. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 22.

23. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 23.

24. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 24.

25. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 25.

26. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 26.

27. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 27.

28. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 28.

29. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 29.

30. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 30.

31. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 31.

32. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 16.

33. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 33.

34. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 34.

35. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 35.

36. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 36.

37. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 37.

38. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 38.

39. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 39.

40. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 40.

41. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 41.

42. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 42.

43. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 43.

44. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 44.

45. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 45.

46. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 46.

47. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 47.

48. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 48.

49. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 49.

50. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 50.

51. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 51.

52. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 52.

53. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 53.

54. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 54.

55. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 55.

56. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations inconsistent therewith set forth in Paragraph 56.

57. Allied World admits that it issued to Windermere Oaks Water Supply Corporation (“WSC”) as the Named Insured Commercial Water Plus Package policy number 5105-0560, which was in effect annually for consecutive policy periods from March 17, 2016 to March 17, 2020 (the “Policies”), the terms of which speak for themselves and denies any allegations inconsistent therewith as set forth in Paragraph 57.

58. Allied World states that the terms of the Policy speak for themselves and Allied World denies any allegations inconsistent therewith as set forth in Paragraph 58.

59. Allied World admits that WSC and the Director Defendants submitted a notice of claim to Allied World on May 31, 2019 and states that correspondence to Allied World providing such notice speaks for itself and Allied World denies any allegations in Paragraph 59 inconsistent therewith.

60. Allied World admits that the First Amended Petition in the Underlying Lawsuit was filed on November 4, 2019 and that a Second Amended Petition in the Underlying Lawsuit was filed on November 5, 2019. Allied World further admits that WSC and the Director Defendants sent a letter to Allied World on November 8, 2019, the content of which speaks for itself, and Allied World denies any allegations inconsistent therewith as set forth in Paragraph 60. Allied World also admits that WSC and the Director Defendants sent a letter to Allied World dated November 22, 2019, the content of which speaks for itself and Allied World denies any allegations inconsistent therewith as set forth in Paragraph 60.

61. Allied World admits that its third-party administrator, Network Adjusters, Inc., sent a letter dated December 19, 2019 in connection with the Second Amended Petition filed in the Underlying Lawsuit, the content of which speaks for itself and Allied World denies any allegations inconsistent therewith as set forth in Paragraph 61. Allied World further denies that it wrongfully denied coverage for the Second Amended Petition.

62. Allied World admits that coverage counsel for WSC and the Director Defendants sent a letter to Allied World, through its third-party administrator, Network Adjusters, Inc., dated May 18, 2020, the content of which speaks for itself and Allied World specifically denies any allegations inconsistent therewith as set forth in Paragraph 62. Allied World further denies the

implication of the impropriety of not responding to the May 18, 2020 letter, as that letter was written in connection with the allegations set forth in the Second Amended Petition filed in the Underlying Lawsuit, and, not long after that letter was issued, a Third Amended Original Petition was filed in the Underlying Lawsuit on August 24, 2020. Allied World then issued a supplemental coverage position letter dated April 12, 2021 in connection with the Third Amended Original Petition filed in the Underlying Lawsuit.

63. Allied World admits that the Third Amended Original Petition was filed in the Underlying Lawsuit on August 24, 2020. Allied World further admits that WSC and the Director Defendants, through counsel, submitted the Third Amended Original Petition to Allied World on August 25, 2020, the content of such submission speaks for itself and Allied World denies any allegations in Paragraph 63 inconsistent therewith.

64. Allied World admits that there were discussions between Mr. Flynn, Mr. Wakefield and WSC and the Director Defendants' coverage counsel, the contents of which speak for themselves and Allied World denies any allegations set forth in Paragraph 64 that are inconsistent therewith.

65. Allied World denies the allegations set forth in Paragraph 65 as it issued a coverage position letter in connection with the Third Amended Petition on April 12, 2021.

66. Allied World denies the allegations set forth in Paragraph 66.

67. Allied World incorporates each and every answer to the allegations set forth in Paragraphs 1 through 66 as if the same were set forth fully herein.

68. Allied World admits that the Policies provide Public Officials and Management Liability ("POML") coverage, the terms of such coverage speak for themselves, and Allied World denies any allegations contained in Paragraph 68 inconsistent therewith.

69. Allied World states that the terms of the POML coverage speak for themselves and denies any allegations inconsistent therewith as set forth in Paragraph 69. Further, Paragraph 69 calls for a legal conclusion to which no response is required. To the extent a response is required, Allied World denies the allegations in Paragraph 69.

70. Paragraph 70 calls for a legal conclusion to which no response is required. To the extent a response is required, Allied World denies the allegations in Paragraph 70.

71. Allied World denies the allegations in Paragraph 71.

72. Allied World states that the terms of Coverage B of the Policies speak for themselves and denies any allegations inconsistent therewith as set forth in Paragraph 72. Further, Allied World denies that it improperly denied coverage under Coverage B of the Policies.

73. Allied World states that the definition of “injunctive relief” as set forth in the Policies speaks for itself and denies any allegations in Paragraph 73 inconsistent therewith.

74. Allied World states that the allegations in the Underlying Lawsuit speak for themselves and Allied World denies any allegations in Paragraph 74 inconsistent therewith.

75. Allied World denies the allegations in Paragraph 75.

76. Allied World denies the allegations in Paragraph 76.

77. Paragraph 77 calls for a legal conclusion to which no response is required. To the extent a response is required, Allied World denies the allegations in Paragraph 77.

78. Paragraph 78 calls for a legal conclusion to which no response is required. To the extent a response is required, Allied World denies the allegations in Paragraph 78.

79. Paragraph 79 calls for a legal conclusion to which no response is required. To the extent a response is required, Allied World denies the allegations in Paragraph 79.

80. Allied World incorporates each and every answer to the allegations set forth in Paragraphs 1 through 79 as if the same were set forth fully herein¹.

81. Allied World admits that the Policies constitute valid and enforceable contracts between WSC and Allied World. Allied World states that the terms of the Policies speak for themselves and Allied World denies any allegations in Paragraph 81 inconsistent therewith.

82. Allied World states that the terms of Coverage A of the POML coverage section in the Policies speak for themselves and denies any allegations in Paragraph 82 inconsistent therewith. Further, Paragraph 82 calls for a legal conclusion to which no response is required. To the extent a response is required, Allied World denies the allegations in Paragraph 82.

83. Paragraph 83 calls for a legal conclusion to which no response is required. To the extent a response is required, Allied World denies the allegations in Paragraph 83.

84. Allied World denies the allegations in Paragraph 84.

85. Paragraph 85 calls for a legal conclusion to which no response is required. To the extent a response is required, Allied World denies the allegations in Paragraph 85.

86. Allied World states that the terms of Coverage B of the POML coverage section in the Policies speak for themselves and denies any allegations in Paragraph 86 inconsistent therewith. Further, Paragraph 86 calls for a legal conclusion to which no response is required. To the extent a response is required, Allied World denies the allegations in Paragraph 86.

87. Paragraph 87 calls for a legal conclusion to which no response is required. To the extent a response is required, Allied World denies the allegations in Paragraph 87.

88. Allied World denies the allegations in Paragraph 88.

¹ Paragraph 80 of Plaintiffs' complaint states that "Plaintiffs incorporate by reference paragraphs 1 through 66 above, as if restated in their entirety." Presumably, this is a typo, which is why Allied World incorporates by reference its answers to Paragraphs 1 through 79 of Plaintiffs' complaint.

89. Paragraph 89 calls for a legal conclusion to which no response is required. To the extent a response is required, Allied World denies the allegations in Paragraph 89.

90. Paragraph 90 calls for a legal conclusion to which no response is required. To the extent a response is required, Allied World denies the allegations in Paragraph 90.

91. Allied World incorporates each and every answer to the allegations set forth in Paragraphs 1 through 90 as if the same were set forth fully herein.²

92. Paragraph 92 calls for a legal conclusion to which no response is required. To the extent a response is required, Allied World denies the allegations in Paragraph 92.

93. Paragraph 93 calls for a legal conclusion to which no response is required. To the extent a response is required, Allied World denies the allegations in Paragraph 93.

94. Allied World lacks sufficient knowledge or information to form a belief about the truth of the allegations in Paragraph 94.

95. Paragraph 95 calls for a legal conclusion to which no response is required. To the extent a response is required, Allied World denies the allegations in Paragraph 95.

96. Paragraph 96 calls for a legal conclusion to which no response is required. To the extent a response is required, Allied World denies the allegations in Paragraph 96.

With respect to relief sought against Allied World:

Allied World denies that it is obligated to provide a defense to Plaintiffs in the Underlying Lawsuit, that it is obligated to pay for Plaintiffs' "defense expenses" incurred in defending against an action for "injunctive relief" in the Underlying Lawsuit, that it has breached its contractual

² Paragraph 91 of Plaintiffs' complaint also states that "Plaintiffs incorporate by reference paragraphs 1 through 66 above, as if restated in their entirety." Again, presumably, this is a typo, which is why Allied World incorporates by reference its answers to Paragraphs 1 through 90 of Plaintiffs' complaint.

obligations under the Policies, and that it violated the Prompt Payment of Claims Act. Allied World further denies that Plaintiffs are entitled to any damages, including penalty interest under the Prompt Payment of Claims Act, attorneys' fees through trial and any appeal, costs of court, and pre-and post-judgment interest, as requested. Finally, Allied World denies that Plaintiffs are entitled to any other or further relief from this Court.

ADDITIONAL AND AFFIRMATIVE DEFENSES

Without limiting the scope of the foregoing denials, Allied World asserts the following additional and affirmative defenses:

1. No coverage is available under either Coverage A or Coverage B of the POML coverage section of any of the Policies for the Underlying Lawsuit because the Contractual Liability Exclusion (Exclusion No. 11) precludes coverage for the Underlying Lawsuit in its entirety.

2. The Contractual Liability Exclusion states that the insurance does not apply under either Coverage A or Coverage B of the POML coverage section 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.”

3. The Contractual Liability Exclusion applies to bar coverage for “damages”, “defense expenses”, costs and loss in connection with the Underlying Lawsuit because all of the allegations set forth in the Underlying Lawsuit are based upon, attributable to, arise out of, are in consequence of, and/or are related to WSC's agreements to convey certain property interests of

the WSC, including the sale of the airport tract to Plaintiff Dana Martin and her alter ego company, Friendship Homes and Hangars, LLC, as alleged in the Underlying Lawsuit.

4. Additionally, no coverage is available under either Coverage A or Coverage B of the POML coverage section of any of the Policies for the Underlying Lawsuit because the Criminal Acts Exclusion (Exclusion No. 12) and Violation of Law Exclusion (Exclusion No. 19) preclude coverage for the Underlying Action in its entirety.

5. The Criminal Acts Exclusion states, in relevant part, that the insurance does not apply under either Coverage A or Coverage B of the POML coverage section 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, the exclusion also states 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.”

6. Similarly, the Violation of Law Exclusion provides that the insurance does not apply under either Coverage A or Coverage B of the POML coverage section to “‘damages’, ‘defense expenses’, costs or loss arising from an insured’s willful violation of any federal, state, or local law, rule or regulation.”

7. The Criminal Acts and Violations of Law Exclusions apply to bar coverage for the Underlying Lawsuit because there was a finding in a lawsuit related to the Underlying Lawsuit captioned *TOMA Integrity, Inc., et al. v. Windermere Oaks Water Supply Corporation*, Case No. 47531, filed in the 33rd District Court of Burnet County, Texas (the “TOMA Action”) 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 to Martin and by not listing any items on the agenda for that meeting.

8. Further, that finding is a “final adjudication” as required under the Criminal Acts Exclusion because after the trial court in the TOMA Action issued its order finding that WSC violated TOMA, WSC did not challenge the trial court’s order. The plaintiffs did appeal, however, arguing that the trial court abused its discretion in failing to void the WSC board’s actions in light of the TOMA violation. Nonetheless, the appellate court affirmed the trial court’s order that the WSC board violated TOMA, but that it would not void the board’s actions and entered a judgment on June 21, 2019 stating same.

9. Accordingly, because both the Criminal Acts and Violation of Law Exclusions preclude coverage arising out of the willful violation of statute, rule or regulation and because there has been a final adjudication that WSC violated TOMA in connection with the meeting discussing the sale of the airport tract, which sale is the subject of the allegations in the Underlying Lawsuit, both exclusions serve to bar coverage for the Underlying Lawsuit in its entirety.

RESERVATION OF ADDITIONAL DEFENSES

Allied World expressly reserves its right to amend and/or supplement this Answer and these Affirmative Defenses to assert additional defenses under the Policies and applicable law.

JURY DEMAND

Allied World requests a trial by jury on all issues so triable.

PRAYER

WHEREFORE, Allied respectfully requests that the Court enter judgment in its favor and against the Plaintiffs as follows:

- a. Declare that Allied World is not obligated under any of the Policies to defend, or

pay any defense costs, or indemnify the Plaintiffs in the Underlying Lawsuit;

b. Declare that Plaintiffs are not entitled to recover any interest, costs, or other damages against Allied World;

c. That the Plaintiffs' Original Complaint be dismissed with prejudice;

d. That Allied World be awarded its costs, including reasonable attorneys' fees, in this Action; and

e. That Allied World be awarded all other just and proper relief this Court deems proper.

Respectfully submitted,

s/ Joseph A. Ziemianski

Joseph A. Ziemianski

Attorney-In-Charge

Texas State Bar No. 00797732

E-mail: jziemianski@cozen.com

OF COUNSEL:

COZEN O'CONNOR

1221 McKinney, Suite 2900

Houston, Texas 77010

Telephone: (832) 214-3900

Telecopier: (832) 214-3905

ATTORNEY FOR DEFENDANT,
ALLIED WORLD SPECIALTY INSURANCE
COMPANY

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served on all counsel of record via the Court's electronic filing system on April 29, 2021.

s/ Joseph A. Ziemianski _____

Joseph A. Ziemianski