

**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,	§	CIVIL ACTION NO.: 21-258
	§	
Plaintiffs,	§	
v.	§	
	§	
ALLIED WORLD SPECIALTY	§	
INSURANCE COMPANY	§	
	§	
Defendant,	§	

PLAINTIFFS’ ORIGINAL COMPLAINT

Plaintiffs Windermere Oaks Water Supply Corporation (“WSC”), Dana Martin, William Earnest, Thomas Michael Madden, Robert Mebane, Patrick Mulligan, Joe Gimenez, David Bertino, Mike Nelson, Dorothy Taylor, and Norman Morse (collectively, “Plaintiffs”) hereby file this, their Original Complaint, against Defendant Allied World Specialty Insurance Company (“Allied World”). Plaintiffs respectfully would show this Court the following:

I.
PARTIES

1. Plaintiff WSC is a non-profit Texas corporation with its corporate office and principal place of business located in Spicewood, Texas. Thus, WSC is a citizen of Texas.
2. Plaintiff Dana Martin (“Martin”) is an individual that resides and intends to remain in the State of Texas. Thus, Martin is a citizen of Texas.

3. Plaintiff William Earnest (“Earnest”) is an individual that resides and intends to remain in the State of Texas. Thus, Earnest is a citizen of Texas.

4. Plaintiff Thomas Michael Madden (“Madden”) is an individual that resides and intends to remain in the State of Texas. Thus, Madden is a citizen of Texas.

5. Plaintiff Robert Mebane (“Mebane”) is an individual that resides and intends to remain in the State of Texas. Thus, Mebane is a citizen of Texas.

6. Plaintiff Patrick Mulligan (“Mulligan”) is an individual that resides and intends to remain in the State of Texas. Thus, Mulligan is a citizen of Texas.

7. Plaintiff Joe Gimenez (“Gimenez”) is an individual that resides and intends to remain in the State of Texas. Thus, Gimenez is a citizen of Texas.

8. Plaintiff David Bertino (“Bertino”) is an individual that resides and intends to remain in the State of Texas. Thus, Bertino is a citizen of Texas.

9. Plaintiff Mike Nelson (“Nelson”) is an individual that resides and intends to remain in the State of Texas. Thus, Nelson is a citizen of Texas.

10. Plaintiff Dorothy Taylor (“Taylor”) is an individual that resides and intends to remain in the State of Texas. Thus, Taylor is a citizen of Texas.

11. Plaintiff Norman Morse (“Morse”) is an individual that resides and intends to remain in the State of Texas. Thus, Morse is a citizen of Texas.

12. Defendant Allied World is a Delaware corporation with its principal place of business in the State of New York. Accordingly, Allied World is a citizen of both Delaware and New York. On information and belief, Allied World is duly authorized to and does conduct insurance business in Texas. Allied World may be served with process through its agent for service of process, Corporation Service Company, 211 E 7th Street, Suite 620, Austin, Texas 78701-3218.

II.
VENUE AND JURISDICTION

13. This Court has jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1332(a)(1) because Plaintiffs and Allied World are citizens of different states and the amount in controversy exceeds \$75,000.00, excluding interest and costs.

14. Venue is proper in this District and Division pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated are in this District. Moreover, Allied World is subject to the Court’s personal jurisdiction with respect to this action, as it issued the insurance policies to WSC in this District and conducts regular business in this District.

III.
BACKGROUND FACTS

15. This is an insurance coverage dispute between Plaintiffs and Allied World based on Allied World’s breach of its contractual duty to defend Plaintiffs with respect to 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”).

A. The Underlying Lawsuit

16. The Underlying Lawsuit revolves around the sale by WSC of an approximately 10-acre tract within the Spicewood Airport community (hereinafter, the “Airport Tract”).

17. Rene Ffrench, John Richard Dial, and Stuart Bruce Sorgen (the “Underlying Claimants”) allegedly are members/customers and owners of the assets and revenues of the water supply and sewer service cooperative (the “Cooperative”¹). WSC is allegedly organized under Chapter 67 of the Texas Water Code and is the entity that operates the Cooperative.

¹ Whether WSC is actually a Cooperative is in dispute in the Underlying Lawsuit. Nothing asserted in this lawsuit against Allied World shall be deemed an admission, concession, or argument that WSC is a Cooperative. Rather, the

18. Based on both the certificate of formation and the bylaws of WSC, the Underlying Claimants allege that, “WSC has no power to engage in activities or use assets in a manner that is not in furtherance of the legitimate business of a ‘water supply cooperative’ or ‘sewer service cooperative.’”² As a cooperative, any year-end revenues not otherwise needed for operations of the enterprise allegedly are required to be returned to the “Owners.”

19. The Underlying Claimants allege that WSC is not a stakeholder in the Cooperative, and, as such, is prohibited from making profit. Moreover, it “cannot operate at a loss; the . . . Owners are required to make up any shortfall through increases in rates and fees, assessments or otherwise.”³

20. A Board of Directors elected by and from the Owners operates and manages the Cooperative’s assets. Officers elected by the Board from among its Directors carry out day-to-day operations. The Board is comprised of five (5) Directors and three (3) Officers, who are identified as the President, Vice President and Secretary-Treasurer. The Directors and Officers have the fiduciary duties of an agent/manager. The Non-Profit Act requires that each Director and Officer shall discharge these duties in good faith, with ordinary care, and in a manner reasonably believed to be in the best interest of the Owners of the Cooperative enterprise.

21. According to the Underlying Claimants, Texas statutes and WSC’s governing document limit WSC’s power to convey real property interests of the Cooperative enterprise that WSC holds in the Cooperative’s name. The Board allegedly has no power to approve or effectuate

assertions herein and any references to WSC as a Cooperative in this pleading and this lawsuit are setting forth and identifying the factual allegations made against WSC in the Underlying Lawsuit by the Underlying Claimants.

² Second Amended Original Petition filed on November 15, 2019 in the Underlying Lawsuit (the “Underlying Second Amended Petition”), p. 15; Third Amended Original Petition filed on August 24, 2020 in the Underlying Lawsuit (the “Underlying Third Amended Petition”), p. 10.

³ Underlying Second Amended Petition, p. 17; Underlying Third Amended Petition, p. 12.

any conveyance that is contrary to this expressed limitation, give away a valuable Cooperative asset, or to transfer an asset for a fraction or none of its market value. Rather, in keeping with its agency/managerial role, the Board has a duty to secure the highest price obtainable for assets that are no longer needed for Cooperative purposes.

22. Pursuant to state statute, the power to convey real property interests in the WSC's name is triggered only when such conveyance is authorized by "appropriate resolution" of the Board.⁴ The Board can only approve or adopt a resolution by majority vote at a duly noticed open meeting and otherwise in compliance with the WSC's governing documents and applicable law.

23. According to the Underlying Claimants, any transaction between the organization and a sitting Director is presumptively adverse. The Board purportedly can authorize such a transaction only by valid Board action upon fulfillment of several special conditions, which includes the Board's receipt of full disclosure by the interested Director and a determination by a majority of disinterested Directors made in good faith that the transaction is fair to the organization and is in the organization's best interests. An additional condition is that the minutes of the Board meeting at which action is taken must reflect the interested Director's disclosure and a statement that the Board was aware of the conflict of interest and nevertheless decided the transaction was fair to the WSC and was in the WSC's best interests.

24. The Underlying Claimants allege that the Owners have the right, and its Directors have the duty, to rescind any unlawful approval and to prevent and/or annul any conveyance or transaction made pursuant to such unlawful approval.

25. Directors who unreasonably delay or refuse to take such steps allegedly breach their duty to act with ordinary care and in a manner reasonably believed to be in the best interest of the

⁴ Underlying Second Amended Petition, p. 19; Underlying Third Amended Petition, p. 15.

enterprise. Such misconduct, however, does not estop the WSC or its Owners from recovering their property or its value.

26. According to the Underlying Claimants, in 2013, the Board (at that time including Mulligan, Earnest and Madden) voted to upgrade the WSC's wastewater treatment facilities and relocate them away from the Airport Tract. Purportedly, the Directors agreed unanimously that relocating the facilities would free the valuable Airport Tract for sale and be the "highest and best use" of the Airport Tract.⁵

27. The sale of the Airport Tract allegedly was identified as one of the key components for funding the upgraded wastewater treatment plant improvements and other Cooperative needs.

28. The Board allegedly committed to the Owners that the Airport Tract would be sold for the best possible price, and the proceeds would be used to defray the cost of the new facilities and for other Cooperative purposes.

29. Following the August 2013 meeting, Directors Mulligan, Earnest, and Madden claimed to have gathered deeds and other records in preparation to engage a real estate professional to market the Airport Tract. At the Board's February 18, 2014 meeting, Mulligan allegedly was directed to obtain a survey and appraisal of the land to be sold. The Underlying Claimants allege that these Directors did none of these things.

30. The Board allegedly never listed, advertised, or marketed the Airport Tract.

31. Around this same time, Martin (who was not yet a member of the Board), a local real estate agent and an owner of Windermere Airport, LLC ("Windermere Airport"), purportedly put together a proposal for the purchase by Windermere Airport of a 0.558-acre tract within the Airport Tract from the Windermere Oaks Property Owners' Association ("POA") at "fair market

⁵ Underlying Second Amended Petition, p. 21; Underlying Third Amended Petition, p. 17.

value.”⁶ Martin’s offer price was allegedly based on a recent sale of a 1.415-acre hangar lot on Cessna Lane for \$185,000, or \$3.00 per square foot.

32. According to the Underlying Claimants, POA members had been using a 30,000-square-foot portion of the Airport Tract for storage of boats and other items (the “Storage Tract”). By e-mail dated April 3, 2014, Taylor allegedly notified Mebane of the Board’s vote to market the Airport Tract as a single parcel and requested that the POA items be removed from the Storage Tract.

33. In late 2014, the TCEQ approved the WSC’s Closure Plan for the old wastewater treatment plant. This, according to the Underlying Claimants, should have cleared the way for prompt and aggressive marketing and sale of the Airport Tract. The Directors, however, allegedly never followed through with any listing or other marketing.

34. Martin was elected to the WSC’s Board in 2015. Shortly thereafter, she allegedly took actions associated with the purchase of a portion of land known as Tract G, a Cooperative-owned hangar lot across from the Airport Tract, for \$95,000, which equaled \$12.75 per square foot. The Underlying Claimants allege that there is no record the Board ever voted on, or even considered, any transaction involving Tract G.

35. Thereafter, Martin allegedly was again involved with efforts by the POA to purchase the Storage Tract. The POA’s proposed price was around \$20,000 - \$25,000, or in the range of \$0.66 - \$0.83 per square foot. The minutes of the Board’s July 16, 2015 meeting allegedly reflect that the Directors (including Martin, Mebane, Earnest, Madden and Mulligan) discussed the POA’s offer in executive session but then rejected it.

⁶ Underlying Second Amended Petition, p. 22; Underlying Third Amended Petition, p. 19.

36. Martin thereafter presented the other Directors with a “Purported Appraisal” of the Airport Tract, but this appraisal did not, according to the Underlying Claimants, reflect the fair market value of the Airport Tract. The Underlying Claimants further allege that there was no indication that the Board ever professionally listed or marketed the Airport Tract or that the Board ever fielded any offers or negotiated for sale of the Airport Tract.

37. In March 2016, Martin allegedly began efforts to purchase the Airport Tract for herself or her own entity. The Underlying Claimants allege that she was involved as seller (in her capacity as WSC fiduciary) and purchaser (for her own personal financial gain).

38. Martin claimed that Mebane (then-President of the Board) decided that the Airport Tract should not be sold as a single parcel, as the Board had planned for years. Rather, Martin claimed that Mebane determined that the Board should dispose of the “most valuable and desirable 3.8 acres of the Airport Tract with all of the Airport Tract’s frontage along the Piper Lane taxiway to a sitting WSC Director for a fraction of its market value.”⁷ Martin claimed that the March 2016 transaction was “negotiated” and that she made a “good faith” offer to purchase, which was countered by other Directors.⁸ The Underlying Claimants assert that the Board’s records are devoid of any such negotiations.

39. According to the Underlying Claimants, the “disinterested Directors” were the same ones that had acknowledged a duty to market the Airport Tract as a whole to obtain the best possible offer and were aware that the Board had conveyed a comparable property for \$12.75 per square foot. None of the Directors allegedly disclosed to the Owners prior to the Board’s December 19, 2015 meeting that they intended to authorize the piecemeal transfer of the Airport Tract and

⁷ Underlying Second Amended Petition, p. 26; Underlying Third Amended Petition, p. 23.

⁸ Underlying Second Amended Petition, p. 27; Underlying Third Amended Petition, p. 23.

all of the taxiway frontage for a fraction of the comparable property. The proposed transaction was never mentioned as a discussion or action item on any posted meeting agenda for any Board meeting. Instead, the Board allegedly raised the topic out of the blue at its regular meeting on December 19, 2015, and, after a five-minute executive session, Mebane, Madden and Mulligan unanimously voted to accept an offer from Martin on behalf of Friendship Homes & Hangars, LLC (“FFH, LLC”) to carve off the frontage and separate the remainder of the Airport Tract from all taxiway access for a “net price” of \$200,000, or \$1.19 per square foot. The Underlying Claimants allege that there was no “appropriate resolution” to approve this sale. Moreover, the Board did not allegedly fulfill the special conditions required to approve an interested-Director transaction.

40. Prior to closing, Martin allegedly subdivided the land she intended to purchase into two platted hangar lots. Mebane, as WSC President, allegedly signed Martin’s subdivision plat on March 3, 2016. The plat was approved and recorded on March 8, 2016. The plat Martin prepared and processed, and that Mebane signed on behalf of the WSC, allegedly failed to reserve a taxiway for the remainder of the Airport Tract. The Underlying Claimants allege that there are no posted records reflecting a resolution to adopt the land transfer to Martin.

41. On or about March 13, 2016, Mebane and Madden allegedly executed and delivered a document purporting to be a resolution in which they “certified,” as President and Secretary of the WSC, respectively, that the resolution stated therein was “an accurate reproduction of the one made” by the Board and was “legally adopted on the date of the [February 22, 2016] meeting of the Board of Directors, which was called and held in accordance with the law and the bylaws of the corporation, at which a quorum was present.”⁹

⁹ Underlying Second Amended Petition, p. 29; Underlying Third Amended Petition, p. 26.

42. The resolution described the property to be conveyed as two platted hangar lots by reference to the recorded plat, not as unplatted acreage. However, the Underlying Claimants allege that no resolution was considered or actually adopted at the February 22, 2016 meeting or any other time.

43. Mebane executed two deeds, each of which conveyed one platted hanger to FHH, LLC.

44. The Underlying Claimants assert that, if the Board had marketed the Airport Tract as a whole and sold it for the best possible price, WSC could have retired all of its outstanding debt in March 2016 and had additional amounts left over to pay facility costs and upgrade equipment.

45. Instead, the Owners allegedly sustained an immediate loss of \$500,000 in cash when the Board sold the most desirable portion of the Airport Tract to an interested director.

46. The Underlying Claimants further assert that the remainder of the Airport Tract was rendered unmarketable, and had its value instantly diminished by \$640,000, when it was separated from taxiway access.

47. Martin allegedly later replatted the hanger lots again to create a third hangar lot, which was conveyed to Johann and Michael Mair. The profit from Martin's sale to the Mairs allegedly should have benefited WSC and the Owners as opposed to Martin individually.

48. The Underlying Claimants assert that WSC still has debt outstanding and incurred additional debt to pay expenses that could and should have been covered by the proceeds from the sale of the Airport Tract. The Board allegedly has struggled with strategies to restructure the debt.

49. The Board purportedly has postponed needed repairs and the acquisition of a generator and other equipment needed to provide the Cooperative services and to remain in

compliance with applicable regulations. At the same time, the Board allegedly has raised rates, service fees, and membership fees. Moreover, the Board also allegedly has allowed the Cooperative to become financially dependent on collecting standby fees from nonpatrons.

50. The Board's composition changed in 2018. At that time, the Board allegedly investigated the March 2016 transaction, engaging a professional forensic appraiser to analyze the financial impact of the sale. The appraiser's report allegedly confirmed that the Owners sustained an immediate loss of more than \$1,000,000.

51. According to the Underlying Claimants, the March 2016 "fire sale" was unauthorized, improper, and unfair to the Owners and involved breaches of fiduciary duty and other misconduct by Directors. The newly constituted Board allegedly determined that its fiduciary duties required prompt efforts to recover the misappropriated property or to otherwise make the Owners whole by pursuing all available avenues of relief. Accordingly, the Board directed WSC's counsel to send a demand letter to Martin and FHH, outlining the numerous unauthorized and illegal acts that led to the sale.

52. The Underlying Claimants allege that, from and after the March 2016 "fire sale," the legitimate business of the Cooperative has been continuously compromised as a result of the acts and omissions of the agents responsible for managing the assets it uses to operate.

53. The Underlying Claimants assert that the Director Defendants Martin, Earnest, Madden, Mabane, Mulligan, Gimenez, Bertino, Nelson, Taylor, and Morse (the "Director Defendants") engaged in various *ultra vires* acts in violation of Section 20.002(c) of the Texas Business Organizations Code, including the unauthorized conveyance of property; improper use of Cooperative assets; improper disbursement of Cooperative assets to benefit the Directors; and failure to recover loss.

54. The Underlying Claimants specifically assert:

Had the Airport Tract been properly marketed and sold for what it was worth in March 2016, the Owners would have netted well over \$1,000,000. They could have extinguished the outstanding debt, acquired needed equipment, made a healthy allocation to the reserve fund and received a respectable dividend, all in furtherance of the legitimate business of a water supply and sewer service Cooperative. Instead, the Cooperative's unfaithful fiduciaries gave away valuable property interests for next to nothing, devalued other property interests, and now propose not only to leave that transaction intact but to make it worse by giving away the Piper Lane taxiway. The Owners have been burdened with unnecessary debt service and higher rates and fees, and the Cooperative still doesn't have needed equipment and facilities. The Board has no power to manage the Cooperative's assets in this manner.

55. The Underlying Claimants also assert claims that the Director Directors breached their fiduciary duty to the WSC.

56. The Underlying Claimants seek to recover the damages that the Director Defendants purportedly caused based on their alleged conduct. They also seek exemplary damages and attorneys' fees, as permitted by law.

B. The Insurance Policies

57. Allied World issued to WSC 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").

58. The Policies have multiple coverage forms, including the Public Officials and Management Liability Coverage Form claims-made coverage (the "POML Coverage"), which provides coverage for Wrongful Acts, subject to a limit of \$1,000,000 for each claim, and coverage for Injunctive Relief, subject to a limit of \$5,000 for each action for injunctive relief. The POML Coverage is subject to a \$3,000,000 aggregate limit for all Claims, all Wrongful Acts, and Offenses, and all Actions for Injunctive Relief. The retroactive date on each policy is identified as March 17, 2000.

C. Request for Coverage and Allied World’s Wrongful Denial of Coverage

59. On May 31, 2019, WSC and the Director Defendants submitted the Underlying Lawsuit to Allied World, requesting defense and indemnity under the Policies.

60. The First Amended Original Petition was filed on November 4, 2019, and the Second Amended Complaint was filed on November 5, 2019. On November 8, 2019, WSC and the Director Defendants again submitted to Allied World a request for defense and indemnity under the Policies based on the allegations in the Second Amended Original Petition. WSC and the Director Defendants then sent a follow up letter dated November 22, 2019.

61. By letter dated December 19, 2019, Allied World—through its authorized third-party claims administrator, Network Adjusters, Inc.— wrongfully denied coverage and refused to provide a defense for WSC and the Director Defendants based on the allegations within the Second Amended Original Petition.

62. WSC and the Director Defendants retained coverage counsel, who sent a letter to Allied World dated May 18, 2020 requesting that Allied World reconsider its improper coverage position. To date, Allied World has not responded to that May 18, 2020 challenge letter.

63. While continuing to self-fund the defense and awaiting Allied World’s response to the May 18, 2020 challenge letter, the Underlying Plaintiffs filed their Third Amended Original Petition on August 24, 2020. WSC and the Director Defendants submitted the Third Amended Original Petition to Allied World on August 25, 2020, along with a follow up as to the status of Allied World’s coverage review with respect to the Underlying Lawsuit.

64. In fact, the undersigned contacted Mr. Flynn and his supervisor, Bryan Wakefield, on numerous occasions by e-mail and telephone to follow up on the status of Allied World’s coverage review, including on May 18, 2020, June 12, 2020, August 25, 2020, October 7, 2020,

October 23, 2020, October 29, 2020, November 3, 2020, November 20, 2020, December 2, 2020, December 3, 2020, December 7, 2020, December 16, 2020, December 29, 2020, January 8, 2021, January 27, 2021, February 9, 2021, February 18, 2021, February 26, 2021, March 2, 2021, March 5, 2021, March 9, 2021, March 10, 2021, March 11, 2021, March 12, 2021, and March 16, 2021.

65. Despite these communications with Allied World and repeated assurances that a written response to the challenge letter would be forthcoming, Allied World has yet to formally respond.

66. Mr. Flynn communicated to the undersigned on March 10, 2021 via telephone that Allied World would be issuing a coverage letter shortly and that it would not be a denial. To date, however, Allied World has not issued that referenced coverage letter.

IV.
CAUSES OF ACTION

Count I
Declaratory Judgment

67. Plaintiffs incorporate by reference paragraphs 1 through 66, above, as if restated herein in their entirety.

68. The POML Coverage in the policies issued to WSC—as the Named Insured—states as follows:

A. COVERAGE A. INSURING AGREEMENT – LIABILITY FOR MONETARY DAMAGES

1. We will pay those sums that the insured becomes legally obligated to pay as “damages” arising out of a “claim” for:

a. a “wrongful act,” . . .

* * *

We will have the right and duty to defend any “claim” seeking those “damages.” . . .

* * *

2. This insurance applies to “claims” for “wrongful acts” or offenses only if:

- a. The “wrongful act” or offense takes place in the “coverage territory,” and after the retroactive date shown in the declarations and before the end of the policy period; and
 - b. A “claim” is first made against any insured in accordance with paragraph 3.c. below, during the policy period or any Extended Reporting Period we provide according to **SECTION VII. – EXTENDED REPORTING PERIODS.**
3. A “claim” will be deemed to have been made at the earliest of the following times:
 - a. When notice of such “claim” is first received by any insured or by us, whichever comes first; or
 - b. When you become aware of a “wrongful act” or an offense which may subsequently give rise to a “claim” being made against any insured, and you give written notice to us, as described in **SECTION VI. – CONDITIONS,** of such circumstances as soon as practicable but no later than:
 - (1) The end of the policy period; or
 - (2) The end of any applicable Extended Reporting Period.
4. All related “claims” based on or arising out of: the same, related or continuous “wrongful acts” or offenses; or “wrongful acts” or offenses which arise from a common nucleus of facts; or the same act or interrelated acts of one or more insureds, shall be considered a single claim, which is first made when the earliest of such “claims” was made. All “damages” from all related “claims,” regardless of the number of:
 - a. Insureds;
 - b. Plaintiffs; or
 - c. “Claims” made; shall be subject to one “Each Claim” Limit of Insurance, and one Deductible.

69. Thus, Allied World (identified as “we” in the insuring agreement) agreed to pay those sums that the insured becomes legally obligated to pay as “damages” arising out of a “claim” for a “wrongful act,” as those terms are defined in the Policies. Allied World has a duty to defend the insureds against any “claim” seeking those damages, provided the “wrongful act” takes place after the retroactive date and the “claim” is first made against any insured during the policy period or any Extended Reporting Period.

70. In the Underlying Lawsuit, the Underlying Claimants seek to recover from Plaintiffs, who qualify as insureds under the Policies, “damages” that arise out of a “claim” for a

“wrongful act.” The “claim” was first made during an applicable Allied World policy period and timely submitted to Allied World for coverage.

71. Allied World has a duty to defend and, if necessary, indemnify Plaintiffs in connection with claims asserted in the Underlying Lawsuit under the POML Coverage. No exclusions or limitations to coverage apply to negate the duty to defend or indemnify the Plaintiffs/Insureds under the POML Coverage.

72. Allied World also improperly denied coverage under Coverage B of the Policies, which has the following insuring agreement:

C. COVERAGE B. INSURING AGREEMENT - DEFENSE EXPENSES FOR INJUNCTIVE RELIEF

1. We will pay those reasonable sums the insured incurs as “defense expenses” to defend against an action for “injunctive relief” because of a “wrongful act,” . . . to which this insurance applies.

73. The term “injunctive relief” means equitable relief sought through a demand for the issuance of a permanent, preliminary or temporary injunction, restraining order, or similar prohibitive writ against an insured, or order for specific performance by an insured.

74. In the Underlying Lawsuit, the Underlying Claimants seek injunctive relief against Plaintiffs.

75. No exclusions or limitations to coverage apply to negate coverage under Coverage B of the Policies.

76. By failing to defend Plaintiffs under Coverage A and refusing to provide coverage under Coverage B, Allied World has caused Plaintiffs to have to retain their own counsel and defend themselves against the claims in the Underlying Lawsuit without the benefit of insurance despite coverage existing.

77. An actual controversy exists concerning Plaintiffs' request for coverage under the Policies, and a present and practical needs exists for the Court to resolve this dispute.

78. A declaration by the Court of the rights and obligations of Plaintiffs and Allied World with respect to coverage for the Plaintiffs under the Policies will materially advance the interest of the parties.

79. Accordingly, pursuant to 28 U.S.C. § 2201, the Plaintiffs request that the Court enter a declaratory judgment against Allied World that Allied World has a duty to defend under Coverage A and, if necessary, a duty to indemnify Plaintiffs under Coverage A in connection with the Underlying Lawsuit. The Plaintiffs further request that the Court enter a declaratory judgment against Allied World that Allied World owes Plaintiffs coverage under Coverage B of the Policies in connection with the Underlying Lawsuit. Plaintiffs further request any other relief this Court deems proper.

Count II Breach of Contract

80. Plaintiffs incorporate by reference paragraphs 1 through 66, above, as if restated herein in their entirety.

81. The Policies constitute valid and enforceable contracts between Plaintiffs, as insureds, and Allied World, as the company providing the insurance under the Policies.

82. Under Coverage A of the Policies, Allied World promised to defend the insureds in connection with a "claim" seeking "damages" potentially covered by the Policies, and, if necessary, indemnify the insureds for those sums that the insureds become legally obligated to pay as "damages" arising out of a "claim" for a "wrongful act." Coverage applies if the "claims" for "wrongful acts" takes place after the retroactive date and is first made during the policy period or any Extended Reporting Period.

83. The Underlying Lawsuit is a “claim” that implicates Allied World’s duty to defend the insured because it is a “claim” for a “wrongful act” seeking “damages” that was first made and properly reported to Allied World during the applicable policy period.

84. Further, no exclusions or limitations in the Policies apply to bar coverage.

85. Allied World’s failure to defend the insureds under Coverage A of the Policies is a material breach of the parties’ contract.

86. Under Coverage B of the Policies, Allied World promised to pay those reasonable sums the insured incurs as “defense expenses” to defend against an action for “injunctive relief” because of a “wrongful act.”

87. The Underlying Lawsuit contains claims for “injunctive relief” that implicate this coverage under the Policies.

88. Further, no exclusions or limitations in the Policies apply to bar coverage under Coverage B.

89. Allied World’s failure to provide coverage under Coverage B of the Policies is a material breach of the parties’ contract.

90. As a direct and proximate result of Allied World’s material breaches of contract, Plaintiffs have suffered damages in an amount to be determined at trial, including attorneys’ fees and expenses incurred in defense of the Underlying Lawsuit, pre-judgment interest, and any other costs and relief that this Court deems appropriate.

Count III
Prompt Payment of Claims Act

91. Plaintiffs incorporate by reference paragraphs 1 through 66, above, as if restated herein in their entirety.

92. The failure of Allied World to promptly accept its obligation to defend Plaintiffs in connection with the claims asserted against them in the Underlying Lawsuit constitutes a violation of Section 542.051 *et seq.* of the Texas Insurance Code, which is known as the Prompt Payment of Claims Act. The Act is a strict liability statute triggered by Allied World's refusal to provide a defense.

93. Plaintiffs, therefore, in addition to their claim for damages, are entitled to penalty interest on those damages at the rate of 18% per annum, as well as the attorneys' fees incurred by Plaintiffs in pursuing their claim for coverage, as set forth in Section 542.060 of the Texas Insurance Code.

Count IV
Attorneys' Fees Under the Civil Practice and Remedies Code

94. Plaintiffs engaged the undersigned counsel to prosecute this lawsuit against Allied World and agreed to pay reasonable attorneys' fees and expenses through trial and any appeal.

95. As an alternative to the Prompt Payment of Claims Act, Plaintiffs pray that they be awarded all reasonable attorneys' fees incurred in prosecuting their causes of action through trial and any appeal pursuant to Section 38.001 of the Texas Civil Practice and Remedies Code.

V.
CONDITIONS PRECEDENT

96. All conditions precedent to Plaintiffs' right to recover under the Policies have occurred, have been fully performed, or have been waived by Allied World.

PRAYER

Plaintiffs hereby pray that, upon final hearing of this matter, this Court declare that Allied World is obligated to provide a defense to Plaintiffs in connection with the Underlying Lawsuit and declare that Allied World is obligated to pay for Plaintiffs' "defense expenses" incurred in defending against an action for "injunctive relief" in the Underlying Lawsuit. Plaintiffs request the

court to adjudge that, by failing to comply with these contractual obligations, Allied World has breached its contract and violated the Prompt Payment of Claims Act. Further, Plaintiffs request that the Court adjudge that Plaintiffs recover all damages from and against Allied World that they may reasonably establish by a preponderance of the evidence, and that this Court award penalty interest under the Prompt Payment of Claims Act, attorneys' fees through trial and any appeal, costs of court, pre- and post-judgment interest, and such other and further relief, at law or in equity, to which Plaintiffs may show themselves to be justly entitled.

Respectfully submitted,

/s/ Blake H. Crawford

Blake H. Crawford

Lead Attorney to be Noticed

State Bar No. 24065096

blake@shidlofskylaw.com

Douglas P. Skelley

State Bar No. 24056335

doug@shidlofskylaw.com

SHIDLOFSKY LAW FIRM PLLC

7200 N. Mopac Expy., Ste. 430

Austin, Texas 78731

512-685-1400 (Phone)

866-232-8412 (Fax)

**ATTORNEYS FOR PLAINTIFFS
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**