

1 McCormick, Barstow, Sheppard,
Wayte & Carruth LLP
2 James P. Wagoner, #58553
jim.wagoner@mccormickbarstow.com
3 Lejf E. Knutson, #234203
lejf.knutson@mccormickbarstow.com
4 Nicholas H. Rasmussen, #285736
nrasmussen@mccormickbarstow.com
5 Graham A Van Leuven, #295599
graham.vanleuven@mccormickbarstow.com
6 7647 North Fresno Street
Fresno, California 93720
7 Telephone: (559) 433-1300
Facsimile: (559) 433-2300

8 Attorneys for Defendant New York
9 Marine and General Insurance Company

10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

13 Travelers Commercial Insurance
Company, a Connecticut Corporation,

14 Plaintiff,

15 v.

16 New York Marine and General
17 Insurance Company, a Delaware
Corporation,

18 Defendant.

Case No. 2:21-cv-5832-GW (PDx)

**DEFENDANT NEW YORK
MARINE AND GENERAL
INSURANCE COMPANY'S
ANSWER TO FIRST AMENDED
COMPLAINT, COUNTERCLAIM,
AND DEMAND FOR JURY TRIAL**

Hon. George H. Wu

19
20 COMES NOW DEFENDANT NEW YORK MARINE AND GENERAL
21 INSURANCE COMPANY (“NEW YORK MARINE”) and Answers the First
22 Amended Complaint of PLAINTIFF TRAVELERS COMMERCIAL INSURANCE
23 COMPANY (“Travelers”) as follows:

24 1. Answering Paragraph 1, NEW YORK MARINE submits that the
25 allegation requires no response under Federal Rules of Civil Procedure, Rule 12, but
26 to the extent a response is required, denies the allegation that it “fail[ed] to meet its
27 obligation to provide its and Travelers’ mutual insured ... with independent counsel
28

1 to defend the insured in an underlying defamation action”, and further denies that it
2 “breached ... its insurance policy and its obligations” to its insured. NEW YORK
3 MARINE further denies that “[i]t has unfairly forced Travelers to pay [NEW YORK
4 MARINE’S] proper share of defense costs”, and so also denies the allegations therein
5 that Travelers has been damaged in any way on account of any conduct by NEW
6 YORK MARINE, that Travelers is entitled to judgment or a declaration, and further
7 denies the allegation implied therein that NEW YORK MARINE failed to provide the
8 insured “with a proper defense.” NEW YORK MARINE further denies that the
9 allegation therein that “Travelers is entitled to reimbursement from NEW YORK
10 MARINE” of amounts that Travelers has spent to defend the mutual insured, whether
11 by way of equitable contribution or any other claim or cause of action, and denies the
12 implied allegation therein that it failed to “defend the[] mutual insured with proper
13 counsel and adequate experts and vendors.”

14 2. Answering Paragraph 2, NEW YORK MARINE admits the allegations
15 therein.

16 3. Answering Paragraph 3, NEW YORK MARINE denies the allegation
17 therein that “ProSight” is a “corporation existing under the law of the State of New
18 York, with its principal place of business in Morristown, New Jersey”. NEW YORK
19 MARINE further denies that “ProSight is, and at all times relevant was, an insurance
20 carrier eligible to do business and doing business as an insurer in the State of
21 California”—indeed, inasmuch as “ProSight” is not a named defendant in the present
22 action, it is unclear to NEW YORK MARINE why the allegations concerning
23 “ProSight” are alleged herein. In light of the foregoing, NEW YORK MARINE also
24 denies the allegation therein that “ProSight” is a “corporation existing under the law
25 of the State of New York,” and denies the allegation that its “principal place of
26 business in Morristown, New Jersey”, to the extent that Travelers intends but fails to
27 assert that allegation against NEW YORK MARINE, as NEW YORK MARINE is a
28 company existing under the laws of the State of Delaware with a principal place of

1 business in New York City within the State of New York. NEW YORK MARINE
2 further admits that it is an insurer “eligible to do business and doing business as an
3 insurer in the State of California.”

4 4. Answering Paragraph 4, NEW YORK MARINE admits the allegation
5 that the matter is subject to the jurisdiction of this Court based on the amount in
6 controversy and the diversity of citizenship between the parties. However, NEW
7 YORK MARINE denies the allegation that any sums “should have been paid by
8 ProSight”, and further denies that it is “incorporated in New York”, inasmuch as it is
9 incorporated in Delaware, and has a principal place of business in New York City in
10 the state of New York.

11 5. Answering Paragraph 5, NEW YORK MARINE admits the allegation
12 that the Court has personal jurisdiction over the parties based on the fact that the
13 dispute arises over policies of insurance issued in California, and admits that it
14 operated its business continuously in California as an insurer at all times relevant to
15 the present complaint.

16 6. Answering Paragraph 6, NEW YORK MARINE admits the allegation
17 that venue is proper in this judicial district because the dispute arises out of policies
18 of insurance issued in this district, but denies the remaining allegations that “a
19 substantial part of the events which are the subject of the claims asserted here took
20 place in this judicial district, including that the underlying defense has involved
21 extensive activities in the County of Los Angeles.”

22 7. Answering Paragraph 7, NEW YORK MARINE admits the allegations
23 therein.

24 8. Answering Paragraph 8, NEW YORK MARINE has insufficient
25 information to admit or deny whether the insured is a California resident and so denies
26 that allegation, but admits that the insured was “sued in Virginia state court”. NEW
27 YORK MARINE further admits that the Underlying Action “seeks damages for
28 defamation”, and admits that the Underlying Action originally obligated both

1 Travelers and New York Marine to defend the insured, to the extent such obligation
2 was or is not otherwise excused. However, NEW YORK MARINE denies that it has
3 an ongoing obligation to defend the insured in light of: (1) the insured’s refusal of the
4 defense properly provided by NEW YORK MARINE through appointed defense
5 counsel; and/or (2) the refusal of independent counsel retained by the insured and
6 funded by Travelers to cooperate with or facilitate the participation of defense counsel
7 appointed by NEW YORK MARINE, and Travelers’ unclean hands with respect to
8 that lack of cooperation including by way of its failure to require that independent
9 counsel which it approved and appointed cooperate with and facilitate the active
10 participation of NEW YORK MARINE’s appointed counsel in the defense.

11 9. Answering Paragraph 9, NEW YORK MARINE admits the allegations
12 therein to the extent that the allegations of the complaint in the underlying action
13 originally triggered Travelers’ and NEW YORK MARINE’S respective duties to
14 defend the insured, but denies that NEW YORK MARINE has an ongoing obligation
15 to defend the insured in light of: (1) the insured’s refusal of the defense properly
16 provided by NEW YORK MARINE through appointed defense counsel; and/or (2)
17 the refusal of independent counsel retained by the insured and funded by Travelers to
18 cooperate with or facilitate the participation of defense counsel appointed by NEW
19 YORK MARINE, and Travelers’ unclean hands with respect to that lack of
20 cooperation including by way of its failure to require that independent counsel
21 cooperate with and facilitate the active participation of NEW YORK MARINE’s
22 appointed counsel in the defense.

23 10. Answering Paragraph 10, NEW YORK MARINE admits the allegation
24 therein that Travelers “agreed to defend the mutual insured” in the Underlying Action
25 “under a reservation of rights”. However, to the extent that the lead counsel retained
26 by the insured and funded by Travelers to defend the Underlying Action was licensed
27 in Virginia and not California, NEW YORK MARINE denies the allegation therein
28 that Travelers’ “reservation of rights and California law” imposed any obligation on

1 Travelers to provide a defense to the insured through independent counsel, whether
2 under *San Diego Navy Federal Credit Union v. Cumis Insurance Society*, 162
3 Cal.App.3d 358 (1984), Civil Code § 2860, and/or Civil Code § 1646, since under
4 Virginia law, even when retained by an insurer defense counsel has only the insured
5 as a client, and so no conflict exists which would trigger the insured’s right to
6 independent counsel under Civil Code § 2860, as previously held by this Court in its
7 January 6, 2022 Order. Nevertheless, responding to that allegation, NEW YORK
8 MARINE admits that Travelers “offered to pay for independent defense counsel of
9 the mutual insured’s own selection” and consequently assumed a duty to provide
10 independent counsel to the insured. NEW YORK MARINE further denies the
11 allegation therein that “Travelers offered to pay for independent defense counsel of
12 the mutual insured’s own selection, subject to the rate limitations of California Civil
13 Code section 2860”, since Travelers instead agreed to pay independent counsel its
14 substantially higher hourly rates, and only subsequently required that independent
15 counsel accept “the rate limitations of California Civil Code section 2860” in or about
16 May 2021. Subject to the foregoing, NEW YORK MARINE admits the allegation
17 therein that “Travelers has paid the fees of the mutual insured’s independent defense
18 counsel”, but lacks sufficient information to determine whether Travelers has paid all
19 or merely some portion of such fees, and consequently denies the allegations to the
20 extent they impliedly allege that Travelers has paid 100% of all fees and costs incurred
21 to date.

22 11. Answering Paragraph 11, NEW YORK MARINE admits the allegation
23 therein that it “accepted its obligation to defend the insured under a reservation of
24 rights”, but denies the remaining allegations therein that its “reservation of rights
25 triggered the mutual insured’s right to independent counsel under California law,
26 under the holding of *Cumis*, Civil Code Section 2860, and Civil Code section 1646”,
27 since, as the Court concluded in its January 6, 2022 Order, the reservation of rights
28 issued by NEW YORK MARINE is a “general” reservation of rights which “is not

1 sufficient to create a duty on the insurer to provide independent counsel”. NEW
2 YORK MARINE further denies the allegation since, as also held by the Court in its
3 January 6, 2022 Order, “under California law [NEW YORK MARINE] would not
4 have such obligation because the Virginia lawyer [retained by NEW YORK
5 MARINE] – whose professional conduct is unquestionably governed/measured by
6 Virginia law – has no undivided loyalty.”

7 12. Answering Paragraph 12, NEW YORK MARINE denies the allegations
8 therein that its “reservation of rights letter—like Travelers’ reservation of rights
9 letter—indicated that indemnity coverage could be denied based on the insured’s
10 knowledge and / or intent with respect to the alleged events giving rise to the
11 Underlying Action”, since as held by the Court in its January 6, 2022 Order, the
12 reservation of rights issued by NEW YORK MARINE is a “general” reservation of
13 rights which “is not sufficient to create a duty on the insurer to provide independent
14 counsel”. NEW YORK MARINE further denies the allegation since, as also held by
15 the Court in its January 6, 2022 Order, “under California law [NEW YORK
16 MARINE] would not have such obligation because the Virginia lawyer [retained by
17 NEW YORK MARINE] – whose professional conduct is unquestionably
18 governed/measured by Virginia law – has no undivided loyalty.”

19 13. Answering Paragraph 13, NEW YORK MARINE admits that it “did not
20 agree to provide the mutual insured with independent defense counsel”, but to the
21 extent the allegations therein imply that it had an obligation to do so, denies such
22 obligation since as held by the Court in its January 6, 2022 Order, the reservation of
23 rights issued by NEW YORK MARINE is a “general” reservation of rights which “is
24 not sufficient to create a duty on the insurer to provide independent counsel”. NEW
25 YORK MARINE further denies the allegation since, as also held by the Court in its
26 January 6, 2022 Order, “under California law [NEW YORK MARINE] would not
27 have such obligation because the Virginia lawyer [retained by NEW YORK
28 MARINE] – whose professional conduct is unquestionably governed/measured by

1 Virginia law – has no undivided loyalty.”

2 14. Answering Paragraph 14, NEW YORK MARINE denies the allegations
3 therein.

4 15. Answering Paragraph 15, NEW YORK MARINE admits the allegations
5 therein, and observes that its position was confirmed correct by the Court as reflected
6 in its January 6, 2022 Order holding that NEW YORK MARINE’s reservation of
7 rights letter did not trigger the insured’s right to independent “*Cumis*” counsel under
8 Civil Code § 2860.

9 16. Answering Paragraph 16, NEW YORK MARINE denies the allegations
10 therein, and in particular, denies that NEW YORK MARINE was engaged in any
11 “scheme” to deny the insured’s rights—a position again confirmed correct by the
12 Court as reflected in its January 6, 2022 Order holding that NEW YORK MARINE’s
13 reservation of rights letter did not trigger the insured’s right to independent “*Cumis*”
14 counsel under Civil Code § 2860.

15 17. Answering Paragraph 17, NEW YORK MARINE admits the allegations
16 therein to the extent that it appointed defense counsel, but denies the allegation to the
17 extent it alleges that the insured opposed retention of the counsel so-appointed by
18 NEW YORK MARINE inasmuch as the counsel which NEW YORK MARINE
19 appointed *had originally been retained by the insured* to represent her in the defense
20 of the Underlying Action.

21 18. Answering Paragraph 18, NEW YORK MARINE denies the allegations
22 therein that it “ha[d] its appointed counsel do next to nothing and ‘piggy-back’ on the
23 work of the mutual insured’s independent defense counsel, paid for by Travelers”, as
24 NEW YORK MARINE in fact intended and instructed its appointed defense counsel
25 to act as “lead counsel” with respect to the defense of the Underlying Action. NEW
26 YORK MARINE further denies the allegation since any failure of appointed counsel
27 to participate fully in the defense of the insured was the result of the affirmative
28 refusal of independent counsel retained by the insured and funded by Travelers to

1 cooperate with, and its active obstruction of, the participation of NEW YORK
2 MARINE’s appointed counsel.

3 19. Answering Paragraph 19, NEW YORK MARINE generally admits the
4 allegation therein, and denies the same only to the extent that counsel withdrew on
5 November 6, 2020, rather than November 20, 2020.

6 20. Answering Paragraph 20, NEW YORK MARINE generally admits the
7 allegations therein, and denies the same only to the extent that counsel withdrew on
8 November 6, 2020, rather than November 20, 2020. NEW YORK MARINE further
9 denies the allegation therein to the extent that the allegation does not reflect that NEW
10 YORK MARINE’s agreement was subject to a reservation of all of NEW YORK
11 MARINE’S rights.

12 21. Answering Paragraph 21, NEW YORK MARINE denies the allegation
13 that “Travelers acknowledged [NEW YORK MARINE’S] agreement”, but admits the
14 allegation that Travelers demanded that NEW YORK MARINE reimburse Travelers
15 for sums incurred by independent counsel retained by the insured and funded by
16 Travelers from the date of the insured’s tender; however, NEW YORK MARINE
17 further denies the allegations therein to the extent that appointed defense counsel
18 withdrew from the defense on November 6, 2020, rather than November 20, 2020.

19 22. Answering Paragraph 22, NEW YORK MARINE denies the allegation
20 therein as NEW YORK MARINE has previously paid Travelers the sum of
21 \$621,693.43.

22 23. Answering Paragraph 23, NEW YORK MARINE denies the allegation
23 therein as NEW YORK MARINE has previously paid Travelers the sum of
24 \$621,693.43.

25 24. Answering Paragraph 24, NEW YORK MARINE acknowledges that it
26 extended a defense to the mutual insured subject to a reservation of its rights—as
27 Travelers itself has done—and so denies the allegation therein to the extent that it
28 implies that NEW YORK MARINE’s provision of a defense pursuant to routine and

1 legally-recognized reservation of its rights—just like Travelers has done—somehow
2 reflects a “scheme” or a deliberate intent by NEW YORK MARINE to *wrongfully*
3 deny the insured the benefit of the NEW YORK MARINE policy. NEW YORK
4 MARINE further denies that it has “indicated” any particular position to the insured,
5 to Travelers, or to any other person or entity, with respect to the coverage available to
6 the insured, including the availability or non-availability of indemnity for the insured,
7 beyond the “general” reservation of rights pursuant to which it originally assumed the
8 insured’s defense as acknowledged in the Court’s January 6, 2022 Order. In addition,
9 NEW YORK MARINE denies the remaining allegations of paragraph 24 in their
10 entirety.

11 25. Answering Paragraph 25, NEW YORK MARINE denies the allegation
12 therein “that its defense obligations should be determined under the law of Virginia”,
13 as New York Marine’s position is that it is the relationship between the insured, the
14 insured’s Virginia-based and licensed defense counsel, and the insurer which is
15 governed by Virginia law, for purposes of ascertaining NEW YORK MARINE’s
16 obligations under California law.

17 26. Answering Paragraph 26, NEW YORK MARINE submits that the
18 allegation requires no response under Federal Rules of Civil Procedure, Rule 12, but
19 nevertheless denies the allegations therein to the extent they relate the substance of
20 the dispute at hand.

21 27. Answering Paragraph 27, NEW YORK MARINE denies the allegations
22 therein.

23 28. Answering Paragraph 28, NEW YORK MARINE admits the allegations
24 therein.

25 29. Answering Paragraph 29, NEW YORK MARINE restates the
26 admissions and denials previously set forth in paragraphs 1- 28 as appropriate.

27 30. Answering Paragraph 30, NEW YORK MARINE submits that the
28 allegation requires no response under Federal Rules of Civil Procedure, Rule 12, but

1 admits that a present controversy exists between Travelers and NEW YORK
2 MARINE as to NEW YORK MARINE’S obligations with respect to the defense of
3 the insured in the Underlying Action and as to Travelers’ entitlement to recovery from
4 NEW YORK MARINE of sums incurred by Travelers in connection with the defense
5 provided through independent counsel retained by the insured and funded by
6 Travelers.

7 31. Answering Paragraph 31, NEW YORK MARINE admits the allegation
8 of subpart a. therein that it originally had a duty to defend the insured except to the
9 extent otherwise excused. However, NEW YORK MARINE denies that it has an
10 ongoing obligation to defend the insured in light of: (1) the insured’s refusal of the
11 defense properly provided by NEW YORK MARINE through appointed defense
12 counsel; and/or (2) the refusal of independent counsel retained by the insured and
13 funded by Travelers to cooperate with or facilitate the participation of defense counsel
14 appointed by NEW YORK MARINE, and Travelers’ unclean hands with respect to
15 that lack of cooperation including by way of its failure to require that independent
16 counsel which it approved and appointed cooperate with and facilitate the active
17 participation of NEW YORK MARINE’s appointed counsel in the defense.

18 Answering subpart b. therein, NEW YORK MARINE denies the allegation that
19 it had or has any duty to provide defense through “independent counsel of the
20 insured’s choosing”, since as held by the Court in its January 6, 2022 Order, the
21 reservation of rights issued by NEW YORK MARINE is a “general” reservation of
22 rights which “is not sufficient to create a duty on the insurer to provide independent
23 counsel”. NEW YORK MARINE further denies the allegation since, as also held by
24 the Court in its January 6, 2022 Order, “under California law [NEW YORK
25 MARINE] would not have such obligation because the Virginia lawyer [retained by
26 NEW YORK MARINE] – whose professional conduct is unquestionably
27 governed/measured by Virginia law – has no undivided loyalty.”

28 Answering subpart c. therein, NEW YORK MARINE denies the allegations

1 that it breached its duty to defend, either by refusing to provide the insured “with
2 independent defense counsel of the insured’s choosing”, or by “failing to provide [the
3 insured] an adequate defense”, and further denies that allegations that it breached the
4 duty to defend by “not paying its attorneys to do adequate work to defend the insured
5 and not replacing its chosen Virginia attorneys at all when they withdrew from the
6 defense”. Answering subpart d. therein, NEW YORK MARINE further denies the
7 allegations therein. Furthermore, answering subpart e. therein, NEW YORK
8 MARINE denies that it “has an obligation to pay [at] least half of the fees, costs, and
9 expenses incurred by independent defense counsel on a going forward basis” to the
10 extent that NEW YORK MARINE may provide a defense to the insured through
11 counsel it appoints, and/or to the extent that its ongoing obligation to provide a
12 defense to the insured has been excused in light of: (1) the insured’s refusal of the
13 defense properly provided by NEW YORK MARINE through appointed defense
14 counsel; and/or (2) the refusal of independent counsel retained by the insured and
15 funded by Travelers to cooperate with or facilitate the participation of defense counsel
16 appointed by NEW YORK MARINE, and Travelers’ unclean hands with respect to
17 that lack of cooperation including by way of its failure to require that independent
18 counsel which it approved and appointed cooperate with and facilitate the active
19 participation of NEW YORK MARINE’s appointed counsel in the defense.

20 32. Answering Paragraph 32, NEW YORK MARINE submits that the
21 allegation requires no response under Federal Rules of Civil Procedure, Rule 12, but
22 admits that a present controversy exists between Travelers and NEW YORK
23 MARINE as to NEW YORK MARINE’S obligations with respect to the defense of
24 the insured in the Underlying Action and as to Travelers’ entitlement to recovery from
25 NEW YORK MARINE of sums incurred by TRAVELERS in connection with the
26 defense provided through independent counsel retained by the insured and funded by
27 Travelers.

28 33. Answering Paragraph 33, NEW YORK MARINE submits that the

1 allegation requires no response under Federal Rules of Civil Procedure, Rule 12, but
2 admits that a present controversy exists between Travelers and NEW YORK
3 MARINE as to NEW YORK MARINE’S obligations with respect to the defense of
4 the insured in the Underlying Action and as to Travelers’ entitlement to recovery from
5 NEW YORK MARINE of sums incurred by TRAVELERS in connection with the
6 defense provided through independent counsel retained by the insured and funded by
7 Travelers.

8 34. Answering Paragraph 34, NEW YORK MARINE submits that the
9 allegation requires no response under Federal Rules of Civil Procedure, Rule 12, but
10 otherwise denies Travelers’ entitlement to the relief requested therein.

11 35. Answering Paragraph 35, NEW YORK MARINE restates the
12 admissions and denials previously set forth in paragraphs 1-28 and 30-34 above as
13 appropriate.

14 36. Answering Paragraph 36, NEW YORK MARINE admits the allegation
15 therein that Travelers and NEW YORK MARINE “each owe the insured a defense in
16 the Underlying Action”. However, NEW YORK MARINE denies that it has an
17 ongoing obligation to defend the insured in light of: (1) the insured’s refusal of the
18 defense properly provided by NEW YORK MARINE through appointed defense
19 counsel; and/or (2) the refusal of independent counsel retained by the insured and
20 funded by Travelers to cooperate with or facilitate the participation of defense counsel
21 appointed by NEW YORK MARINE, and Travelers’ unclean hands with respect to
22 that lack of cooperation including by way of its failure to require that independent
23 counsel which it approved and appointed cooperate with and facilitate the active
24 participation of NEW YORK MARINE’s appointed counsel in the defense.

25 37. Answering Paragraph 37, NEW YORK MARINE has insufficient
26 information to admit or deny the allegations therein, and therefore denies the same.

27 38. Answering Paragraph 38, NEW YORK MARINE denies the allegations
28 therein.

1 therein.

2 **THIRD AFFIRMATIVE DEFENSE**

3 44. As a third, separate defense, the First Amended Complaint and each of
4 its causes of action are barred because Plaintiff has failed to name and join all
5 necessary parties.

6 **FOURTH AFFIRMATIVE DEFENSE**

7 45. As a fourth, separate defense to all claims for relief alleged in the First
8 Amended Complaint, NEW YORK MARINE alleges that it acted in accordance with
9 the terms of its policy and applicable law and that Plaintiff and/or its insured are not
10 entitled to benefits under the policy because the insured has failed to satisfy conditions
11 precedent to coverage, including by failing to cooperate with NEW YORK MARINE
12 and its appointed defense counsel.

13 **FIFTH AFFIRMATIVE DEFENSE**

14 46. As a fifth, separate defense, the First Amended Complaint and each of
15 its causes of action are barred because NEW YORK MARINE has reasonably
16 performed and discharged in good faith each and every obligation, if any, owed to the
17 insured and/or to Travelers.

18 **SIXTH AFFIRMATIVE DEFENSE**

19 47. As a sixth, separate defense, the First Amended Complaint and each of
20 its causes of action are barred because all of NEW YORK MARINE's actions with
21 respect to Plaintiff and the insured were done in good faith and/or in a manner
22 consistent with business necessity.

23 **SEVENTH AFFIRMATIVE DEFENSE**

24 48. As a seventh, separate defense, the First Amended Complaint and each
25 of its causes of action are barred, in whole or in part, because NEW YORK MARINE
26 did not, either directly, legally, or proximately cause and/or contribute to Plaintiff's
27 alleged damages, injuries, or losses.

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EIGHTH AFFIRMATIVE DEFENSE

49. As an eighth, separate defense, the First Amended Complaint and each of its causes of action are barred, in whole or in part, by the doctrine of laches.

NINTH AFFIRMATIVE DEFENSE

50. As a ninth, separate defense, the First Amended Complaint and each of its causes of action are barred, in whole or in part, by Travelers’ “unclean hands.” Specifically, any failure by NEW YORK MARINE’S appointed defense counsel to fully participate in the defense of the insured up to and including its withdrawal from the defense on November 6, 2020 resulted from the conduct of independent counsel appointed by the insured and funded by Travelers who affirmatively and deliberately refused to cooperate with and actively sought to obstruct, prevent and limit the participation of NEW YORK MARINE’s appointed counsel (who was originally retained by the insured) in the insured’s defense, and moreover, that Travelers either deliberately encouraged and fomented the conduct of independent counsel in affirmatively and deliberately refusing to cooperate with New York Marine’s appointed counsel and actively sought to obstruct, prevent and limit their participation, and/or failed to insist that independent counsel cooperate with and facilitate the participation of NEW YORK MARINE’s appointed defense counsel, including by failing to either bring an action to enforce independent counsel’s obligation to cooperate with NEW YORK MARINE’s appointed counsel as Travelers was entitled to do pursuant to Civil Code § 2860(f), or in the alternative, to decline to pay or delay payment of its invoices until its independent counsel did so.

NEW YORK MARINE further contends that Travelers has “unclean hands” because it has inhibited and sought to obstruct NEW YORK MARINE’S ongoing participation in the defense of the insured, including by failing to timely provide copies of status reports, invoices, billing audits and proofs of payment, despite NEW YORK MARINE’s repeated requests to both Travelers and independent counsel for such documents and information, including by failing to either request such status

1 reports or to insist upon their provision as required of independent counsel under Civil
2 Code §§ 2860(d) and (f), and/or by instructing and/or encouraging independent
3 counsel to not share all or certain of such invoices, status reports and other relevant
4 information with NEW YORK MARINE despite NEW YORK MARINE's repeated
5 requests.

6 Accordingly, and on account of the foregoing conduct, NEW YORK MARINE
7 contends that Travelers' claims and rights of recovery are barred in whole or in part.

8 **TENTH AFFIRMATIVE DEFENSE**

9 51. As a tenth, separate defense, the First Amended Complaint and each of
10 its causes of action are barred, in whole or in part, to the extent that Plaintiff has failed
11 to mitigate, minimize or avoid the harm for the claims alleged in this action, and any
12 recovery against Defendant must, therefore, be reduced by the amount of any such
13 costs and/or damages thereby incurred by Plaintiff.

14 **ELEVENTH AFFIRMATIVE DEFENSE**

15 52. As an eleventh, separate defense, the First Amended Complaint and each
16 of its causes of action are barred, in whole or in part, because any obligation of NEW
17 YORK MARINE to Plaintiff and/or the insured has been excused.

18 **TWELFTH AFFIRMATIVE DEFENSE**

19 53. As a twelfth, separate defense, NEW YORK MARINE is entitled to an
20 offset against any amount awarded to Plaintiff on account of the First Amended
21 Complaint and each of its causes of action for sums already incurred by NEW YORK
22 MARINE in the defense of the INSURED, and/or for sums already paid to Plaintiff.

23 **ADDITIONAL DEFENSES**

24 54. NEW YORK MARINE reserves the right to assert additional defenses
25 based on information learned or obtained during discovery.

26 **PRAYER FOR RELIEF**

27 WHEREFORE, NEW YORK MARINE prays as follows:

28 1. That Plaintiff takes nothing by way of the First Amended Complaint on

1 file herein

2 2. That in the event the Court determines that it should declare the rights
3 and the duties of the parties as requested by Travelers' First Amended Complaint, that
4 the Court declare that:

5 a. NEW YORK MARINE has no duty to defend the mutual insured;

6 b. That NEW YORK MARINE has no obligation to provide the
7 insured with a defense with independent defense counsel of the insured's choosing;

8 c. That NEW YORK MARINE has satisfied its duty to defend the
9 insured in the UNDERLYING ACTION by appointing defense counsel to represent
10 the INSURED, and that NEW YORK MARINE has not breached its duty to defend
11 the insured by failing to provide it with an adequate defense, including by failing to
12 pay attorneys fees to do adequate work to defend the insured or by not replacing its
13 appointed retained attorneys at all when they withdrew from the defense;

14 d. That NEW YORK MARINE has no obligation to reimburse
15 Travelers for one half of the costs and expenses incurred by Travelers in the defense
16 of the insured or any other amount; and

17 e. That NEW YORK MARINE has no obligation to pay at least one
18 half of the fees, costs and expenses incurred by independent counsel appointed by
19 Travelers on a going-forward basis or any other amount.

20 3. That the Court not enjoin NEW YORK MARINE from refusing to
21 participate in the defense of the underlying action via independent counsel selected
22 by the insured nor order NEW YORK MARINE pay at least 50% of the attorneys
23 fees, costs and expenses incurred by independent counsel appointed by Travelers
24 going forward or any other amount.

25 4. That NEW YORK MARINE be awarded judgment in its favor on
26 Plaintiff's First Amended Complaint.

27 5. That NEW YORK MARINE be awarded its costs of suit; and

28 6. That NEW YORK MARINE be awarded such other and further relief as

1 the court deems just and proper.

2 Dated: March 25, 2022

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

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By: /s/ James P. Wagoner
James P. Wagoner
Lejf E. Knutson
Nicholas H. Rasmussen
Graham A. Van Leuven
Attorneys for Defendant New York Marine and
General Insurance Company

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COUNTERCLAIM

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Defendant and Counterclaimant New York Marine and General Insurance Company (“New York Marine”) brings this Counterclaim against Plaintiff and Counter-Defendant Travelers Commercial Insurance Company (“Travelers”) and alleges as follows:

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GENERAL ALLEGATIONS

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The Travelers Insurance Policy

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1. Travelers issued homeowners policy no. 601627108 634 1 to the mutual insured for the policy period November 14, 2018 to November 14, 2019 (the “Travelers Policy”). The Travelers Policy was issued/delivered to the mutual insured in California. The coverage provided by the Travelers Policy extends to otherwise covered or potentially covered damages because of defamation. The Travelers policy promised a defense to any lawsuit seeking such damages.

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2. New York Marine issued a commercial general liability policy, policy no. 201800012500, which provides coverage to the mutual insured for the policy period July 18, 2018 to July 18, 2019 (the “New York Marine Policy”). The New York Marine policy includes coverage for claims of “defamation” subject to its terms,

1 conditions and limitations.

2 **The Underlying Action**

3 3. In or about March 2019, the mutual insured was sued in Virginia state
4 court (“the Underlying Action”). The Underlying Action seeks damages for
5 defamation. The Underlying Action states claims which are potentially within the
6 scope of both the Travelers and New York Marine Policies subject to the terms,
7 provisions and limitations of the New York Marine policy.

8 **New York Marine’s Acceptance of the Insured’s Defense**

9 4. In or about September 4, 2019, the insured tendered the Underlying
10 Action to New York Marine.

11 5. Upon information and belief, the insured also tendered the Underlying
12 Action to Travelers on or about September 4, 2019.

13 6. On October 1, 2019, New York Marine accepted the insured’s defense
14 subject to a reservation of its rights.

15 7. New York Marine appointed the law firm Cameron McEvoy PLLC
16 (“Cameron McEvoy”), to defend the insured in the Underlying Action. At the time it
17 appointed Cameron McEvoy to represent the insured in the Underlying Action,
18 Cameron McEvoy was already representing the insured in that litigation, having been
19 previously retained by the insured.

20 8. Cameron McEvoy is located in Fairfax, Virginia, and the attorneys
21 retained to defend the insured in the Underlying Action are licensed in, *inter alia*,
22 Virginia but not in California.

23 9. In appointing Cameron McEvoy, New York Marine expressly instructed
24 that firm that it was to serve as “lead counsel” in the defense of the insured in the
25 Underlying Action.

26 **Travelers’ Acceptance of the Insured’s Defense**

27 10. By way of an October 7, 2019 reservation of rights letter, Travelers
28 agreed to assume the insured’s defense in the Underlying Action, subject to a

1 reservation of Travelers’ rights as set forth therein.

2 11. Travelers’ October 7, 2019 reservation of rights letter offered to provide
3 the insured with independent counsel.

4 12. Following Travelers’ October 7, 2019 reservation of rights letter, the
5 insured retained and Travelers has funded the insured’s defense through New York
6 based attorney Roberta Kaplan of the law firm Kaplan Hecker & Fink LLP
7 (“Kaplan”).

8 13. In or about June 2020, the insured replaced the Kaplan firm with
9 Virginia-based and licensed attorney Elaine Bredehoft of the law firm Charlson
10 Bredehoft Cohen Brown & Nadelhaft, P.C (“Charlson Bredehoft”).

11 14. Although Travelers has permitted the insured and both the Kaplan and
12 Charlson Bredehoft firms to retain and utilize other attorneys and firms to assist in the
13 representation of the insured, the Kaplan firm and, subsequently, the Charlson
14 Bredehoft firm, were the only firms funded by Travelers who were primarily
15 responsible for the insured’s defense.

16 15. Further, although Civil Code § 2860(c) states that “[t]he insurer's
17 obligation to pay fees to the independent counsel selected by the insured is limited to
18 the rates which are actually paid by the insurer to attorneys retained by it in the
19 ordinary course of business in the defense of similar actions in the community where
20 the claim arose or is being defended”, Travelers did not enforce this requirement on
21 independent counsel retained by the insured and funded by Travelers. Instead,
22 Travelers permitted the independent counsel retained by the insured and funded by
23 Travelers to bill and receive payment at independent counsel’s own usual and
24 customary rates—rates which are higher than “the rates which are actually paid by”
25 Travelers “to attorneys retained by it in the ordinary course of business in the defense
26 of similar actions in the community where the claim arose or is being defended”.

27 16. Specifically, in or about June 10, 2020, Travelers entered into an
28 agreement with independent counsel pursuant to which independent counsel was

1 permitted to bill its usual and customary hourly rates, without limitation on those
2 amounts, subject to a purported agreement that this would constitute a “capped fee of
3 \$2,500,000.00 through post-trial motions”.

4 17. As of February 2021, independent counsel had exhausted the purported
5 fee cap of “\$2,500,000”, but trial remained more than a year away. Rather than
6 holding independent counsel to the June 2020 agreement, on May 18, 2021 Travelers
7 entered into a new agreement with independent counsel pursuant to which it vitiated
8 the original purported “capped fee” and agreed to continue to pay independent
9 counsel’s ongoing fees and costs. On information and belief, by way of the new May
10 18, 2021 agreement, Travelers exercised its right under Civil Code § 2860 to limit
11 payments to independent counsel to “the rates which are actually paid by” it “to
12 attorneys retained by it in the ordinary course of business in the defense of similar
13 actions in the community where the claim arose or is being defended”, and then only
14 on a going-forward basis.

15 18. As a result, on information and belief, Travelers has incurred in excess
16 of \$5,000,000 in defense fees and costs in connection with the underlying action, far
17 in excess of the amounts which Travelers was required to pay in light of the provisions
18 of Civil Code § 2860(c) upon which it could have relied.

19 **The Conduct of the Underlying Defense**

20 19. Following Travelers’ and New York Marine’s respective reservations of
21 rights, Travelers and New York Marine, through the respective counsel funded by
22 each, proceeded to defend the insured in the Underlying Action.

23 20. However, independent counsel retained by the insured and funded by
24 Travelers consistently refused to cooperate with Cameron McEvoy and deliberately
25 obstructed and prevented Cameron McEvoy’s active involvement in the defense of
26 the insured. Specifically, independent counsel retained by the insured and funded by
27 Travelers frequently omitted Cameron McEvoy and its attorneys from
28 communications with the Court and opposing counsel, and from case-related emails.

1 Independent counsel retained by the insured and funded by Travelers also frequently
2 omitted and failed to notify or include Cameron McEvoy in discussions and
3 consideration of case strategy and tactics, and frequently failed to include Cameron
4 McEvoy in pleadings and notices, including by removing them from the pleadings,
5 proofs of service, and other notices.

6 21. In or about August 2020, the Charlson Bredehoft firm entered into a
7 stipulation to continue trial without: (1) including Cameron McEvoy in discussions
8 surrounding the stipulation; (2) notifying Cameron McEvoy that such a stipulation
9 was contemplated; or (3) including Cameron McEvoy on the stipulation or related
10 proofs of service; with the result that Cameron McEvoy learned of the stipulation and
11 the Court's resulting Order through the Court's publicly available docket.

12 22. Travelers has inhibited and obstructed New York Marine's ongoing
13 participation in the defense of the insured by failing to timely provide copies of status
14 reports, invoices, billing audits and proofs of payment, despite New York Marine's
15 requests to Travelers and independent counsel for such documents and information,
16 including by failing to either request that independent counsel provide such status
17 reports, by failing to insist upon their provision as required of independent counsel
18 under Civil Code §§ 2860(d) and (f), and/or by instructing and/or encouraging
19 independent counsel to not share all or certain of such invoices, status reports, and
20 relevant information with New York Marine despite New York Marine's requests.

21 23. Travelers was aware that the independent counsel which it was funding
22 refused to cooperate with or facilitate the Cameron McEvoy firm's participation in
23 the defense.

24 24. Indeed, in a March 21, 2020 email to attorney Sean Roche of Cameron
25 McEvoy, Pamela Johnson, Travelers' Assistant Vice President, Claim Professional,
26 Intellectual Property, Business Torts, who was responsible for handling the
27 Underlying Action on behalf of Travelers, expressly acknowledged that she had
28 spoken to independent counsel "about billing, sharing the work, etc." and stated that

1 her conversation with independent counsel “did not go well”.

2 25. Notwithstanding Travelers’ March 2020 conversation with them,
3 independent counsel continued to refuse to cooperate with or facilitate Cameron
4 McEvoy’s active participation in the defense of the Underlying Action.

5 26. Travelers thereafter both failed to insist that independent counsel
6 cooperate with and facilitate the full and active participation of the Cameron McEvoy
7 firm in the defense of the insured in the Underlying Action and to enforce independent
8 counsel’s cooperation with Cameron McEvoy as it was authorized to do under Civil
9 Code § 2860(f).

10 27. As a result of independent counsel’s refusal to cooperate with or
11 facilitate its active participation in the defense of the Underlying Action and
12 Travelers’ failure to obtain or require its cooperation, on November 6, 2020, the
13 Cameron McEvoy firm withdrew from its representation of the insured in that action.

14 **FIRST CAUSE OF ACTION – DECLARATORY RELIEF – NEW YORK**
15 **MARINE DID NOT OWE A DUTY TO DEFEND THE INSURED**
16 **THROUGH INDEPENDENT COUNSEL**

17 **(Against Travelers)**

18 28. New York Marine hereby incorporates by reference paragraphs 1-27 of
19 this Counterclaim as though fully set forth and alleged herein.

20 29. Under California law, a “general” reservation of an insurer’s rights does
21 not trigger an insured’s right to independent counsel.

22 30. Under Virginia law, insurer-appointed defense counsel only has the
23 insured for a client.

24 31. Virginia does not apply any legal presumption that defense counsel
25 retained an insurer to defend an insured under a reservation of rights will do anything
26 in the conduct of the insured’s defense which is inconsistent with the insured’s
27 interests.

28 32. New York Marine’s October 1, 2019 reservation of rights did not trigger

1 any right in the insured to independent counsel since, as the Court concluded in its
2 January 6, 2022 Order, the reservation of rights issued by New York Marine is a
3 “general” reservation of rights which “is not sufficient to create a duty on the insurer
4 to provide independent counsel”.

5 33. Additionally, because the Underlying Action is litigated in Virginia state
6 court and the Cameron McEvoy firm and the attorneys appointed by New York
7 Marine to defend the insured in the Underlying Action are licensed in Virginia but
8 not in California, no conflict existed between the insured, defense counsel, and New
9 York Marine, and consequently New York Marine’s reservation of rights did not
10 trigger a right in the insured to independent counsel under Civil Code § 2860 because
11 no conflict existed between them under Virginia law.

12 34. Accordingly, New York Marine did not owe a duty to defend the insured
13 through independent counsel because: (1) its reservation of rights did not trigger the
14 right to independent counsel as a matter of California law since, as the Court
15 concluded in its January 6, 2022 Order, the reservation of rights issued by New York
16 Marine is a “general” reservation of rights which “is not sufficient to create a duty on
17 the insurer to provide independent counsel”; and (2) because under Virginia law, the
18 Virginia-licensed attorneys of the Cameron McEvoy firm which New York Marine
19 appointed to defend the insured could have no conflict, no obligation to defend the
20 insured through independent counsel was triggered under California law, whether
21 pursuant to Civil Code § 2860 or any other provision of California law.

22 35. Because New York Marine’s October 1, 2019 reservation of rights did
23 not obligate it to provide the insured with independent counsel in connection with the
24 Underlying Action, New York Marine, by providing a defense in the Underlying
25 Action through appointed counsel the Cameron McEvoy firm, did not fail to defend
26 the insured.

27 36. New York Marine is informed and believes based on the allegations of
28 Travelers’ First Amended Complaint herein, as well as the discussions,

1 correspondence, and documents exchanged between New York Marine and Travelers,
2 that Travelers disputes each of the foregoing contentions, and that accordingly, an
3 actual, justiciable controversy exists between New York Marine and Travelers as to
4 these matters.

5 37. Wherefore, New York Marine is entitled to a declaration that it owed no
6 duty to defend the insured in the Underlying Action through independent counsel both
7 because: (1) its reservation of rights did not trigger the insured’s right to independent
8 counsel as a matter of California law since, as the Court concluded in its January 6,
9 2022 Order, the reservation of rights issued by New York Marine is a “general”
10 reservation of rights which “is not sufficient to create a duty on the insurer to provide
11 independent counsel”; and (2) because under Virginia law the Virginia-licensed
12 attorneys of the Cameron McEvoy firm which New York Marine appointed to defend
13 the insured could have no conflict of interest in representing the insured upon their
14 appointment by New York Marine, New York Marine had no obligation to defend the
15 insured through independent counsel under California law, whether pursuant to Civil
16 Code § 2860, or any other provision of California law.

17 **SECOND CAUSE OF ACTION – DECLARATORY RELIEF – NEW YORK**
18 **MARINE DID NOT FAIL TO PROVIDE A DEFENSE TO ITS INSURED**
19 **(Against Travelers)**

20 38. New York Marine hereby incorporates by reference paragraphs 1-37 of
21 this Counterclaim as though fully set forth and alleged herein.

22 39. New York Marine’s October 1, 2019 reservation of rights did not give
23 rise to any obligation to provide the insured with independent counsel in connection
24 with the defense of the Underlying Action.

25 40. Because New York Marine’s October 1, 2019 reservation of rights did
26 not give rise to any obligation to provide the insured with independent counsel in
27 connection with the defense of the Underlying Action, New York Marine did not
28 breach any obligation to the insured or to Travelers by providing a defense to the

1 insured through appointed counsel, the Cameron McEvoy firm who was originally
2 obtained by the insured.

3 41. New York Marine is informed and believes based on the allegations of
4 Travelers' First Amended Complaint herein, as well as the discussions,
5 correspondence and documents exchanged between New York Marine and Travelers,
6 that Travelers disputes each of the foregoing contentions, and that accordingly, an
7 actual, justiciable controversy exists between New York Marine and Travelers as to
8 these matters.

9 42. Wherefore, New York Marine is entitled to a declaration that it did not
10 breach any duty to the insured or to Travelers by defending the insured through
11 appointed counsel, the Cameron McEvoy firm who was originally retained by the
12 insured.

13 **THIRD CAUSE OF ACTION – DECLARATORY RELIEF –**
14 **REIMBURSEMENT**
15 **(Against Travelers)**

16 43. New York Marine hereby incorporates by reference paragraphs 1-42 of
17 this Counterclaim as though fully set forth and alleged herein.

18 44. From the outset of New York Marine's participation in the defense of
19 the insured, Travelers has wrongfully contended that New York Marine owed a duty
20 to defend the insured through independent counsel, and in particular, that New York
21 Marine reimburse Travelers for 50% of the fees and costs it incurred in funding
22 independent counsel retained by the insured, and thereafter participate with it in
23 funding independent counsel on a 50/50 basis going forward.

24 45. In agreeing to defend the insured through independent counsel, Travelers
25 failed or refused to exercise its right to limit amounts paid to independent counsel to
26 "the rates which are actually paid by" Travelers "to attorneys retained by it in the
27 ordinary course of business in the defense of similar actions in the community where
28 the claim arose or is being defended", instead entering into improvident agreements

1 with independent counsel pursuant to which independent counsel was permitted to
2 charge, and Travelers paid, higher rates and fees than the rates and fees which
3 Travelers could have limited counsel to under Civil Code § 2860(c), and then
4 ultimately failed even to enforce what limitations on independent counsel's fees were
5 contained in its agreements with independent counsel.

6 46. Travelers was aware that independent counsel consistently refused to
7 cooperate with or facilitate the participation of New York Marine's appointed
8 counsel, the Cameron McEvoy firm, in the defense of the insured, but whether
9 through its negligence, indifference, or as part of a deliberate scheme to obtain New
10 York Marine's participation with it in its ill-conceived and improvident agreements
11 with independent counsel, Travelers failed to insist upon and obtain independent
12 counsel's agreement to cooperate with and facilitate the full and active participation
13 of the Cameron McEvoy firm in the defense of the insured, including by withholding
14 payment of some or all of independent counsel's fees, by bringing an action for
15 declaratory relief against independent counsel, or by seeking an injunction against
16 independent counsel as it was permitted to do under Civil Code § 2860(f) to enforce
17 independent counsel's obligation to cooperate with Cameron McEvoy and facilitate
18 its participation in the defense of the insured.

19 47. As a result of the inequitable conduct of Travelers, the Cameron McEvoy
20 firm withdrew from the insured's defense in the Underlying Action on November 6,
21 2020.

22 48. Following the November 6, 2020 withdrawal of the Cameron McEvoy
23 firm from the insured's defense in the Underlying Action, New York Marine, subject
24 to a reservation of rights, has to date paid Travelers at least the sum of \$621,693.43,
25 reflecting 50% of the fees and costs incurred by independent counsel from November
26 6, 2020 through February 28, 2021.

27 49. Nevertheless, despite numerous and repeated requests from New York
28 Marine, neither Travelers nor independent counsel has provided New York Marine

1 with copies of all status reports, invoices, billing audits, and related materials
2 reflecting all amounts incurred by independent counsel and/or paid by Travelers to
3 independent counsel since November 6, 2020, nor has New York Marine received
4 status updates or other documents reflecting all the work performed by independent
5 counsel since that date.

6 50. Travelers’ conduct in entering into improvident agreements with
7 independent counsel under which Travelers agreed to pay independent counsel
8 amounts in excess of the amounts Travelers was obligated to pay under Civil Code §
9 2860(c), in failing to enforce limitations in its agreements with independent counsel,
10 in failing to require that independent counsel—whether voluntarily or otherwise—
11 cooperate with and facilitate the Cameron McEvoy firm’s full and active participation
12 in the defense of the Underlying Action, and in failing provide New York Marine with
13 copies of all relevant reports, invoices, and other documents reflecting the work
14 performed and the fees and costs incurred by independent counsel, amounts to
15 “unclean hands” which should bar, in whole or in part, any right of Travelers to
16 recover amounts from New York Marine, including for fees and costs incurred by
17 Travelers to defend the insured after the November 6, 2020 withdrawal of the
18 Cameron McEvoy firm from the insured’s defense, including sums for which New
19 York Marine, under reservation of rights, has reimbursed Travelers.

20 51. Under California law, where an insurer properly offers a defense through
21 appointed counsel, and the insured refuses the defense, neither the insured nor other
22 insurers which fund the insured’s defense may recover from the non-participating
23 insurer for sums incurred to defend and/or indemnify the insured.

24 52. The refusal of independent counsel to cooperate with or facilitate the
25 active participation of Cameron McEvoy in the defense of the Underlying Action and
26 Travelers’ failure to obtain or enforce independent counsel’s cooperation with
27 Cameron McEvoy, which resulted in Cameron McEvoy’s withdrawal from the
28 defense, amounts to a “refusal” by the insured and/or Travelers of the defense

1 rightfully extended by New York Marine and unclean hands by Travelers.

2 53. Because of the insured's and Travelers' "refusal" of the defense offered
3 by New York Marine and Travelers' unclean hands, Travelers is not entitled to any
4 recovery for amounts incurred by it in the defense of the Underlying Action.

5 54. As such, New York Marine is entitled to recover the sum of \$621,693.43
6 previously paid to Travelers on or about January 18, 2022 under reservation of rights,
7 in reimbursement of 50% of the defense fees incurred by independent counsel and
8 paid by Travelers for the period from Cameron McEvoy's withdrawal on November
9 6, 2020 through February 28, 2021, under reservation of New York Marine's rights,
10 as well as interest on that amount from January 18, 2022.

11 55. New York Marine is also entitled to recover any additional amounts
12 which it may pay to Travelers on account of defense fees incurred following the
13 withdrawal of the Cameron McEvoy firm, as well as interest on those amounts from
14 the date of payment by New York Marine.

15 56. New York Marine is informed and believes, based on the allegations of
16 Travelers' First Amended Complaint herein as well as the discussions,
17 correspondence, and documents exchanged between New York Marine and Travelers,
18 that Travelers disputes each of the foregoing contentions, and that accordingly, an
19 actual, justiciable controversy exists between New York Marine and Travelers as to
20 these matters.

21 57. Wherefore, New York Marine is entitled to a declaration that: (1) New
22 York Marine is entitled to reimbursement of the \$621,693.43 previously paid to
23 Travelers on or about January 18, 2022 under reservations, plus interest from that
24 date; (2) that New York Marine is entitled to reimbursement of any additional
25 amounts paid to Travelers in reimbursement of defense fees and costs incurred after
26 the November 6, 2020 withdrawal of Cameron McEvoy, plus interest from the date
27 of such payment(s) by New York Marine; and (3) that Travelers is not entitled to
28 recover any additional sums from New York Marine for costs incurred by independent

1 counsel in the defense of the underlying action after November 6, 2022.

2 **PRAYER FOR RELIEF**

3 WHEREFORE, NEW YORK MARINE prays as follows:

4 1. That it be awarded judgment in its favor on all of the causes of action set
5 forth herein including for an award of damages in the amount of \$621,693.43 plus
6 interest from January 18, 2022;

7 2. For a declaration that it did not owe any duty to provide the insured with
8 independent counsel;

9 3. For a declaration that it did not breach any duty to the insured or to
10 Travelers by defending the insured through appointed counsel originally selected by
11 the insured;

12 4. For a declaration that in entering into improvident agreements with
13 independent counsel under which Travelers agreed to pay independent counsel
14 amounts in excess of the amounts Travelers was obligated to pay under Civil Code §
15 2860(c), in failing to enforce limitations in its agreements with independent counsel,
16 and in failing to obtain or enforce independent counsel’s cooperation with Cameron
17 McEvoy and facilitate its full and active participation in the defense of the Underlying
18 Action, as Travelers was entitled to do under Civil Code § 2860(f), and in failing to
19 provide New York Marine with copies of all relevant reports, invoices, and other
20 documents reflecting the work performed and fees and costs incurred by independent
21 counsel, that Travelers engaged in inequitable conduct and has “unclean hands” which
22 completely bar, in whole or in part, any claim which Travelers has for recovery of
23 defense fees which it incurred following the November 6, 2020 withdrawal of the
24 Cameron McEvoy firm from the insured’s defense in the Underlying Action;

25 5. For a declaration that: (1) that New York Marine is entitled to
26 reimbursement of any additional amounts paid to Travelers in reimbursement of
27 defense fees and costs incurred after the November 6, 2020 withdrawal of Cameron
28 McEvoy, plus interest from the date of such payment(s) by New York Marine; and

1 (2) Travelers is not entitled to recover any additional sums from New York Marine
2 for costs incurred by independent counsel in the defense of the underlying action after
3 November 6, 2022;

4 6. That it be awarded its costs of suit;

5 7. For interest;

6 8. For such other and further relief as the Court deems just and proper.

7 Dated: March 25, 2022

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

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By: /s/ James P. Wagoner

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James P. Wagoner

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Lejf E. Knutson

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Nicholas H. Rasmussen

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Graham A. Van Leuven

14

Attorneys for Defendant New York Marine and
General Insurance Company

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JURY DEMAND

16

Defendant and Counterclaimant NEW YORK MARINE hereby demands a jury
trial to the fullest extent facilitated by law.

17

Dated: March 25, 2022

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

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19

By: /s/ James P. Wagoner

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James P. Wagoner

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Lejf E. Knutson

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Nicholas H. Rasmussen

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Graham A. Van Leuven

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Attorneys for Defendant New York Marine and
General Insurance Company

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PROOF OF SERVICE

Travelers Commercial Insurance Company v. New York Marine and General Insurance Company

STATE OF CALIFORNIA, COUNTY OF FRESNO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Fresno, State of California. My business address is 7647 North Fresno Street, Fresno, CA 93720.

On March 25, 2022, I served true copies of the following document(s) described as **DEFENDANT NEW YORK MARINE AND GENERAL INSURANCE COMPANY’S ANSWER TO FIRST AMENDED COMPLAINT, COUNTERCLAIM, AND DEMAND FOR JURY TRIAL** on the interested parties in this action as follows:

Mark D. Peterson
Kathleen O. Peterson
Amy Howse
Cates Peterson LLP
4100 Newport Place, Suite 230
Newport Beach, CA 92660
Telephone: (949) 724-1180
Email: markpeterson@catespeterson.com
kpeterson@catespeterson.com
ahowse@catespeterson.com

Attorneys for Plaintiff Travelers Commercial Insurance Company

BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on March 25, 2022, at Fresno, California.

/s/ Marisela Taylor
Marisela Taylor