

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)

Consolidated for Pre-Trial Purposes  
 with 2:22-cv-04685-GW (PDx)

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

Hon. George H. Wu

20 New York Marine and General  
 21 Insurance Company, a Delaware  
 Corporation,  
 22  
 Counter-Claimant

23 v.

24 Travelers Commercial Insurance  
 25 Company, a Connecticut Corporation,  
 26  
 Counter-Defendant

1 COMES NOW Defendant New York Marine and General Insurance Company  
2 (“New York Marine”) and files its Amended Answer to the First Amended Complaint  
3 of Plaintiff Travelers Commercial Insurance Company (“Travelers”) as follows:

4 1. Answering Paragraph 1, New York Marine submits that the allegation  
5 requires no response under Federal Rules of Civil Procedure, Rule 12, but to the extent  
6 a response is required, denies the allegation that it “fail[ed] to meet its obligation to  
7 provide its and Travelers’ mutual insured ... with independent counsel to defend the  
8 insured in an underlying defamation action”, and further denies that it “breached ...  
9 its insurance policy and its obligations” to its insured. New York Marine further  
10 denies that “[i]t has unfairly forced Travelers to pay [New York Marine’s] proper  
11 share of defense costs”, and so also denies the allegations therein that Travelers has  
12 been damaged in any way on account of any conduct by New York Marine , that  
13 Travelers is entitled to judgment or a declaration, and further denies the allegation  
14 implied therein that New York Marine failed to provide the insured “with a proper  
15 defense.” New York Marine further denies that the allegation therein that “Travelers  
16 is entitled to reimbursement from New York Marine ” of amounts that Travelers has  
17 spent to defend the mutual insured, whether by way of equitable contribution or any  
18 other claim or cause of action, and denies the implied allegation therein that it failed  
19 to “defend the[] mutual insured with proper counsel and adequate experts and  
20 vendors.”

21 2. Answering Paragraph 2, New York Marine admits the allegations  
22 therein.

23 3. Answering Paragraph 3, New York Marine denies the allegation therein  
24 that “ProSight” is a “corporation existing under the law of the State of New York,  
25 with its principal place of business in Morristown, New Jersey”. New York Marine  
26 further denies that “ProSight is, and at all times relevant was, an insurance carrier  
27 eligible to do business and doing business as an insurer in the State of California”—  
28 indeed, inasmuch as “ProSight” is not a named defendant in the present action, it is

1 unclear to New York Marine why the allegations concerning “ProSight” are alleged  
2 herein. In light of the foregoing, New York Marine also denies the allegation therein  
3 that “ProSight” is a “corporation existing under the law of the State of New York,”  
4 and denies the allegation that its “principal place of business in Morristown, New  
5 Jersey”, to the extent that Travelers intends but fails to assert that allegation against  
6 New York Marine , as New York Marine is a company existing under the laws of the  
7 State of Delaware with a principal place of business in New York City within the  
8 State of New York. New York Marine further admits that it is an insurer “eligible to  
9 do business and doing business as an insurer in the State of California.”

10 4. Answering Paragraph 4, New York Marine admits the allegation that the  
11 matter is subject to the jurisdiction of this Court based on the amount in controversy  
12 and the diversity of citizenship between the parties. However, New York Marine  
13 denies the allegation that any sums “should have been paid by ProSight”, and further  
14 denies that it is “incorporated in New York”, inasmuch as it is incorporated in  
15 Delaware, and has a principal place of business in New York City in the state of New  
16 York.

17 5. Answering Paragraph 5, New York Marine admits the allegation that the  
18 Court has personal jurisdiction over the parties based on the fact that the dispute arises  
19 over policies of insurance issued in California, and admits that it operated its business  
20 continuously in California as an insurer at all times relevant to the present complaint.

21 6. Answering Paragraph 6, New York Marine admits the allegation that  
22 venue is proper in this judicial district because the dispute arises out of policies of  
23 insurance issued in this district, but denies the remaining allegations that “a substantial  
24 part of the events which are the subject of the claims asserted here took place in this  
25 judicial district, including that the underlying defense has involved extensive  
26 activities in the County of Los Angeles.”

27 7. Answering Paragraph 7, New York Marine admits the allegations  
28 therein.

1           8.       Answering Paragraph 8, New York Marine has insufficient information  
2 to admit or deny whether the insured is a California resident and so denies that  
3 allegation, but admits that the insured was “sued in Virginia state court”. New York  
4 Marine further admits that the Underlying Action “seeks damages for defamation”,  
5 and admits that the Underlying Action originally obligated both Travelers and New  
6 York Marine to defend the insured, to the extent such obligation was or is not  
7 otherwise excused. However, New York Marine that it has an ongoing obligation to  
8 defend the insured in light of: (1) the insured’s refusal of the defense properly  
9 provided by New York Marine through appointed defense counsel; and/or (2) the  
10 refusal of “independent counsel” retained by the insured and funded by Travelers to  
11 cooperate with or facilitate the participation of defense counsel appointed by New  
12 York Marine , and Travelers’ unclean hands with respect to that lack of cooperation  
13 including by way of its failure to require that “independent counsel” which it approved  
14 and appointed cooperate with and facilitate the active participation of New York  
15 Marine ’s appointed counsel in the defense.

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

27           10.       Answering Paragraph 10, New York Marine admits the allegation  
28 therein that Travelers “agreed to defend the mutual insured” in the Underlying Action

1 “under a reservation of rights”. However, to the extent that the lead counsel retained  
2 by the insured and funded by Travelers to defend the Underlying Action was licensed  
3 in Virginia and not California, New York Marine denies the allegation therein that  
4 Travelers’ “reservation of rights and California law” imposed any obligation on  
5 Travelers to provide a defense to the insured through independent counsel, whether  
6 under *San Diego Navy Federal Credit Union v. Cumis Insurance Society*, 162  
7 Cal.App.3d 358 (1984), Civil Code § 2860, and/or Civil Code § 1646, since under  
8 Virginia law, even when retained by an insurer defense counsel has only the insured  
9 as a client, and so no conflict exists which would trigger the insured’s right to  
10 independent counsel under Civil Code § 2860, as previously held by this Court in its  
11 January 6, 2022 Order. Nevertheless, responding to that allegation, New York Marine  
12 admits that Travelers “offered to pay for independent defense counsel of the mutual  
13 insured’s own selection” and consequently assumed a duty to provide independent  
14 counsel to the insured. New York Marine further denies the allegation therein that  
15 “Travelers offered to pay for independent defense counsel of the mutual insured’s  
16 own selection, subject to the rate limitations of California Civil Code section 2860”,  
17 since Travelers instead agreed to pay “independent counsel” its substantially higher  
18 hourly rates, and only subsequently required that “independent counsel” accept “the  
19 rate limitations of California Civil Code section 2860” in or about May 2021. Subject  
20 to the foregoing, New York Marine admits the allegation therein that “Travelers has  
21 paid the fees of the mutual insured’s” retained defense counsel which it characterizes  
22 as “independent counsel”, but lacks sufficient information to determine whether  
23 Travelers has paid all or merely some portion of such fees, and consequently denies  
24 the allegations to the extent they impliedly allege that Travelers has paid 100% of all  
25 fees and costs incurred to date, and further denies, based on lack of information and  
26 belief, that such counsel constituted “independent counsel” within the meaning of  
27 Civil Code § 2860 and/or *San Diego Navy Federal Credit Union v. Cumis Ins. Society,*  
28 *Inc.*, 162 Cal.App.3d 358 (1985).

1           11. Answering Paragraph 11, New York Marine admits the allegation  
2 therein that it “accepted its obligation to defend the insured under a reservation of  
3 rights”, but denies the remaining allegations therein that its “reservation of rights  
4 triggered the mutual insured’s right to independent counsel under California law,  
5 under the holding of *Cumis*, Civil Code Section 2860, and Civil Code section 1646”,  
6 since, as the Court concluded in its January 6, 2022 Order, the reservation of rights  
7 issued by New York Marine is a “general” reservation of rights which “is not  
8 sufficient to create a duty on the insurer to provide independent counsel”. New York  
9 Marine further denies the allegation since, as also held by the Court in its January 6,  
10 2022 Order, “under California law [New York Marine] would not have such  
11 obligation because the Virginia lawyer [retained by New York Marine ] – whose  
12 professional conduct is unquestionably governed/measured by Virginia law – has no  
13 undivided loyalty.”

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

26           13. Answering Paragraph 13, New York Marine admits that it “did not agree  
27 to provide the mutual insured with independent defense counsel”, but to the extent the  
28 allegations therein imply that it had an obligation to do so, denies such obligation

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

9 14. Answering Paragraph 14, New York Marine denies the allegations  
10 therein.

11 15. Answering Paragraph 15, New York Marine admits the allegations  
12 therein, and observes that its position was confirmed correct by the Court as reflected  
13 in its January 6, 2022 Order holding that New York Marine’s reservation of rights  
14 letter did not trigger the insured’s right to independent “*Cumis*” counsel under Civil  
15 Code § 2860.

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

22 17. Answering Paragraph 17, New York Marine admits the allegations  
23 therein to the extent that it appointed defense counsel, but denies the allegation to the  
24 extent it alleges that the insured opposed retention of the counsel so-appointed by  
25 New York Marine inasmuch as the counsel which New York Marine appointed *had*  
26 *originally been retained by the insured* to represent her in the defense of the  
27 Underlying Action.

28 18. Answering Paragraph 18, New York Marine denies the allegations

1 therein that it “ha[d] its appointed counsel do next to nothing and ‘piggy-back’ on the  
2 work of the mutual insured’s independent defense counsel, paid for by Travelers”, as  
3 New York Marine in fact intended and instructed its appointed defense counsel to act  
4 as “lead counsel” with respect to the defense of the Underlying Action. New York  
5 Marine further denies the allegation since any failure of appointed counsel to  
6 participate fully in the defense of the insured was the result of the affirmative refusal  
7 of “independent counsel” retained by the insured and funded by Travelers to  
8 cooperate with, and its active obstruction of, the participation of New York Marine’s  
9 appointed counsel.

10 19. Answering Paragraph 19, New York Marine generally admits the  
11 allegation therein, and denies the same only to the extent that counsel withdrew on  
12 November 6, 2020, rather than November 20, 2020.

13 20. Answering Paragraph 20, New York Marine generally admits the  
14 allegations therein, and denies the same only to the extent that counsel withdrew on  
15 November 6, 2020, rather than November 20, 2020. New York Marine further denies  
16 the allegation therein to the extent that the allegation does not reflect that New York  
17 Marine’s agreement was subject to a reservation of all of NEW YORK MARINE’S  
18 rights.

19 21. Answering Paragraph 21, New York Marine denies the allegation that  
20 “Travelers acknowledged [New York Marine’s] agreement”, but admits the allegation  
21 that Travelers demanded that New York Marine reimburse Travelers for sums  
22 incurred by “independent counsel” retained by the insured and funded by Travelers  
23 from the date of the insured’s tender; however, New York Marine further denies the  
24 allegations therein to the extent that appointed defense counsel withdrew from the  
25 defense on November 6, 2020, rather than November 20, 2020.

26 22. Answering Paragraph 22, New York Marine denies the allegation therein  
27 as New York Marine has previously paid Travelers the sum of \$621,693.43.

28 23. Answering Paragraph 23, New York Marine denies the allegation therein



1 as New York Marine has previously paid Travelers the sum of \$621,693.43.

2       24. Answering Paragraph 24, New York Marine acknowledges that it  
3 extended a defense to the mutual insured subject to a reservation of its rights—as  
4 Travelers itself has done—and so denies the allegation therein to the extent that it  
5 implies that New York Marine’s provision of a defense pursuant to routine and  
6 legally-recognized reservation of its rights—just like Travelers has done—somehow  
7 reflects a “scheme” or a deliberate intent by New York Marine to *wrongfully* deny the  
8 insured the benefit of the New York Marine policy. New York Marine further denies  
9 that it has “indicated” any particular position to the insured, to Travelers, or to any  
10 other person or entity, with respect to the coverage available to the insured, including  
11 the availability or non-availability of indemnity for the insured, beyond the “general”  
12 reservation of rights pursuant to which it originally assumed the insured’s defense as  
13 acknowledged in the Court’s January 6, 2022 Order. In addition, New York Marine  
14 denies the remaining allegations of paragraph 24 in their entirety.

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

21       26. Answering Paragraph 26, New York Marine submits that the allegation  
22 requires no response under Federal Rules of Civil Procedure, Rule 12, but  
23 nevertheless denies the allegations therein to the extent they relate the substance of  
24 the dispute at hand.

25       27. Answering Paragraph 27, New York Marine denies the allegations  
26 therein.

27       28. Answering Paragraph 28, New York Marine admits the allegations  
28 therein.

1           29.     Answering Paragraph 29, New York Marine restates the admissions and  
2 denials previously set forth in paragraphs 1- 28 as appropriate.

3           30.     Answering Paragraph 30, New York Marine submits that the allegation  
4 requires no response under Federal Rules of Civil Procedure, Rule 12, but admits that  
5 a present controversy exists between Travelers and New York Marine as to New York  
6 Marine’s obligations with respect to the defense of the insured in the Underlying  
7 Action and as to Travelers’ entitlement to recovery from New York Marine of sums  
8 incurred by Travelers in connection with the defense provided through “independent  
9 counsel” retained by the insured and funded by Travelers.

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

21          Answering subpart b. therein, New York Marine denies the allegation that it  
22 had or has any duty to provide defense through “independent counsel of the insured’s  
23 choosing”, since as held by the Court in its January 6, 2022 Order, the reservation of  
24 rights issued by New York Marine is a “general” reservation of rights which “is not  
25 sufficient to create a duty on the insurer to provide independent counsel”. New York  
26 Marine further denies the allegation since, as also held by the Court in its January 6,  
27 2022 Order, “under California law [New York Marine] would not have such  
28 obligation because the Virginia lawyer [retained by New York Marine] – whose

1 professional conduct is unquestionably governed/measured by Virginia law – has no  
2 undivided loyalty.”

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

23         32. Answering Paragraph 32, New York Marine submits that the allegation  
24 requires no response under Federal Rules of Civil Procedure, Rule 12, but admits that  
25 a present controversy exists between Travelers and New York Marine as to New York  
26 Marine’s obligations with respect to the defense of the insured in the Underlying  
27 Action and as to Travelers’ entitlement to recovery from New York Marine of sums  
28 incurred by Travelers in connection with the defense provided through “independent

1 counsel” retained by the insured and funded by Travelers.

2 33. Answering Paragraph 33, New York Marine submits that the allegation  
3 requires no response under Federal Rules of Civil Procedure, Rule 12, but admits that  
4 a present controversy exists between Travelers and New York Marine as to New York  
5 Marine’s obligations with respect to the defense of the insured in the Underlying  
6 Action and as to Travelers’ entitlement to recovery from New York Marine of sums  
7 incurred by Travelers in connection with the defense provided through “independent  
8 counsel” retained by the insured and funded by Travelers.

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

12 35. Answering Paragraph 35, New York Marine restates the admissions and  
13 denials previously set forth in paragraphs 1-28 and 30-34 above as 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 ongoing  
17 obligation to defend the insured in light of: (1) the insured’s refusal of the defense  
18 properly provided by New York Marine through appointed defense counsel; and/or  
19 (2) the refusal of “independent counsel” retained by the insured and funded by  
20 Travelers to cooperate with or facilitate the participation of defense counsel appointed  
21 by New York Marine , and Travelers’ unclean hands with respect to that lack of  
22 cooperation including by way of its failure to require that “independent counsel”  
23 which it approved and appointed cooperate with and facilitate the active participation  
24 of New York Marine’s appointed counsel in the defense.

25 37. Answering Paragraph 37, New York Marine has insufficient information  
26 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 the  
9 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 and  
12 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 performed  
16 and discharged in good faith each and every obligation, if any, owed to the insured  
17 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 respect  
21 to Plaintiff and the insured were done in good faith and/or in a manner consistent with  
22 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 did  
26 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 reports or to insist

1 upon their provision as required of “independent counsel” under Civil Code §§  
2 2860(d) and (f), and/or by instructing and/or encouraging “independent counsel” to  
3 not share all or certain of such invoices, status reports and other relevant information  
4 with New York Marine despite New York Marine’s repeated requests.

5 Accordingly, and on account of the foregoing conduct, New York Marine  
6 contends that Travelers’ claims and rights of recovery are barred in whole or in part.

7 **TENTH AFFIRMATIVE DEFENSE**

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

13 **ELEVENTH AFFIRMATIVE DEFENSE**

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

17 **TWELFTH AFFIRMATIVE DEFENSE**

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

22 **THIRTEENTH AFFIRMATIVE DEFENSE**

23 54. As a thirteenth, separate defense, New York Marine owes no duty to  
24 defend or indemnify the insured as the basis of the insured’s liability does not qualify  
25 as an “occurrence” as that term is defined in the New York Marine Policy’s, personal  
26 liability coverage.

27 **FOURTEENTH AFFIRMATIVE DEFENSE**

28 55. As a fourteenth, separate defense, New York Marine owed no duty to



1 indemnify the parties' mutual insured in connection with the Underlying Action,  
2 while Travelers did indemnify the mutual insured in the Underlying Action, on  
3 account of which New York Marine has no duty to defend or to reimburse Travelers  
4 for defense fees which it incurred on behalf of the mutual insured in the Underlying  
5 Action.

6 **ADDITIONAL DEFENSES**

7 56. New York Marine reserves the right to assert additional defenses based  
8 on information learned or obtained during discovery.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, New York Marine prays as follows:

11 1. That Plaintiff takes nothing by way of the First Amended Complaint on  
12 file herein

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

16 a. New York Marine has no duty to defend the mutual insured;

17 b. That New York Marine has no obligation to provide the insured  
18 with a defense with independent defense counsel of the insured's choosing;

19 c. That New York Marine has satisfied its duty to defend the insured  
20 in the Underlying Action by appointing defense counsel to represent the INSURED,  
21 and that New York Marine has not breached its duty to defend the insured by failing  
22 to provide it with an adequate defense, including by failing to pay attorneys fees to  
23 do adequate work to defend the insured or by not replacing its appointed retained  
24 attorneys at all when they withdrew from the defense;

25 d. That New York Marine has no obligation to reimburse Travelers  
26 for one half of the costs and expenses incurred by Travelers in the defense of the  
27 insured or any other amount; and

28 e. That New York Marine has no obligation to pay at least one half



1 insured for the policy period November 14, 2018 to November 14, 2019 (the  
2 “Travelers Policy”). The Travelers Policy was issued/delivered to the mutual insured  
3 in California. The coverage provided by the Travelers Policy extends to otherwise  
4 covered or potentially covered damages because of defamation. The Travelers policy  
5 promised a defense to any lawsuit seeking such damages.

6 2. New York Marine issued a commercial general liability policy, policy  
7 no. 201800012500, which provides coverage to the mutual insured for the policy  
8 period July 18, 2018 to July 18, 2019 (the “New York Marine Policy”) pursuant to a  
9 personal liability coverage endorsement. The New York Marine policy includes  
10 coverage for claims of defamation, subject to its terms, conditions and limitations and  
11 also to California Public Policy as forth in Insurance Code § 533.

12 **The Underlying Action**

13 3. In or about March 2019, the mutual insured was sued in Virginia state  
14 court (“the Underlying Action”). The Underlying Action sought damages for  
15 defamation. The Underlying Action stated claims which were potentially within the  
16 scope of both the Travelers and New York Marine Policies subject to the terms,  
17 provisions and limitations of those policies, and as to the New York Marine Policy,  
18 California Public Policy as set forth in Insurance Code § 533.

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

20 4. In or about September 4, 2019, the mutual insured tendered the  
21 Underlying Action to New York Marine.

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

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

26 7. New York Marine appointed the law firm Cameron McEvoy PLLC  
27 (“Cameron McEvoy”), to defend the mutual insured in the Underlying Action. At the  
28 time it appointed Cameron McEvoy to represent the mutual insured in the Underlying

1 Action, Cameron McEvoy was already representing the mutual insured in that  
2 litigation, having been previously selected and retained by the mutual insured.

3 8. Cameron McEvoy is located in Fairfax, Virginia, and the attorneys  
4 retained to defend the mutual insured in the Underlying Action are licensed in, *inter*  
5 *alia*, Virginia, but not in California.

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

9 **Travelers’ Acceptance of the Mutual Insured’s Defense**

10 10. By way of an October 7, 2019 reservation of rights letter, Travelers  
11 agreed to assume the mutual insured’s defense in the Underlying Action, subject to a  
12 reservation of Travelers’ rights as set forth therein.

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

15 12. Following Travelers’ October 7, 2019 reservation of rights letter, the  
16 mutual insured also retained and Travelers funded the mutual insured’s defense  
17 through New York based attorney Roberta Kaplan of the law firm Kaplan Hecker &  
18 Fink LLP (“Kaplan”).

19 13. Pursuant to letter agreements dated April 24, 2020, June 2, 2020 and July  
20 27, 2022, Travelers retained and paid for the services of counsel with the law firm  
21 Eisner LLP, who were presented to New York Marine as the mutual insured’s  
22 “personal counsel”.

23 14. Travelers’ agreements with the Eisner firm obligated the Eisner firm to  
24 “assist in interacting with litigation counsel for Ms. Heard [in the underlying action]  
25 in the for purposes of providing advice to [her] regarding strategy and expenditures”,  
26 and negotiate “with [New York Marine] regarding increasing their contribution  
27 towards expenditures in defense of the” underlying action.

28 15. In or about June 2020, the mutual insured replaced the Kaplan firm with

1 Virginia-based and licensed attorney Elaine Bredehoft of the law firm Charlson  
2 Bredehoft Cohen Brown & Nadelhaft, P.C (“Charlson Bredehoft”) as her defense  
3 counsel.

4 16. In addition to the Kaplan and Charlson Bredehoft firms, Travelers  
5 permitted the mutual insured and both the Kaplan and Charlson Bredehoft firms to  
6 retain and utilize other attorneys and firms to assist in the representation of the mutual  
7 insured’s defense.

8 17. Further, although California Civil Code § 2860(c) states that “[t]he  
9 insurer's obligation to pay fees to the independent counsel selected by the insured is  
10 limited to the rates which are actually paid by the insurer to attorneys retained by it in  
11 the ordinary course of business in the defense of similar actions in the community  
12 where the claim arose or is being defended”, Travelers did not enforce this limitation  
13 on defense counsel retained by the mutual insured and funded by Travelers. Instead,  
14 Travelers permitted the defense counsel retained by the mutual insured and funded by  
15 Travelers to bill and receive payment at rates which are higher than “the rates which  
16 are actually paid by” Travelers “to attorneys retained by it in the ordinary course of  
17 business in the defense of similar actions in the community where the claim arose or  
18 is being defended”.

19 18. Specifically, in or about June 10, 2020, Travelers entered into an  
20 agreement with defense counsel Charlson Bredehoft pursuant to which Charlson  
21 Bredehoft was permitted to bill its usual and customary hourly rates, without  
22 limitation on those amounts, subject to a purported agreement that this would  
23 constitute a “capped fee of \$2,500,000.00 through post-trial motions”.

24 19. As of February 2021, Charlson Bredehoft had allegedly already  
25 exhausted the purported fee cap of \$2,500,000, but trial remained more than a year  
26 away. Rather than holding Charlson Bredehoft to the June 2020 agreement, on May  
27 18, 2021 Travelers entered into a new agreement with Charlson Bredehoft pursuant  
28 to which it vitiated the original purported “capped fee” and agreed to continue to pay

1 Charlson Bredehoft ongoing fees and costs. On information and belief, by way of the  
2 new May 18, 2021 agreement, Travelers exercised its right under Civil Code § 2860  
3 to limit payments to Charlson Bredehoft to “the rates which are actually paid by” it  
4 “to attorneys retained by it in the ordinary course of business in the defense of similar  
5 actions in the community where the claim arose or is being defended”, and then only  
6 on a going-forward basis.

7 20. As a result, on information and belief, Travelers has incurred in excess  
8 of \$10,000,000 in defense fees and costs in connection with the underlying action, far  
9 in excess of the amounts which Travelers was required to pay in light of the provisions  
10 of California Civil Code § 2860(c) upon which it could have initially relied.

11 **The Conduct of the Underlying Defense**

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

15 22. Notwithstanding the general nature of New York Marine’s reservation  
16 of rights letter, Travelers contended that New York Marine was obligated to defend  
17 the mutual insured through independent counsel.

18 23. In furtherance of its position, Travelers embarked on a course of conduct,  
19 designed to coerce New York Marine into agreeing to share with Travelers in the  
20 defense of the mutual insured through defense counsel retained by the mutual insured  
21 and funded by Travelers, rather than through Cameron McEvoy, the firm initially  
22 retained by the mutual insured and which was subsequently retained as the mutual  
23 insured’s defense counsel by New York Marine as was New York Marine’s right  
24 under the policy and the law.

25 24. As reflected in the April 24, 2020 and June 2, 2020 letter agreements,  
26 Travelers’ retention of the Eisner firm was in furtherance of its goal of obtaining New  
27 York Marine’s participation in its funding of the defense through defense counsel  
28 funded by Travelers, rather than through New York Marine’s rightfully retained

1 defense counsel, Cameron McEvoy.

2 25. Communications between Travelers and the Eisner firm also reflect that  
3 Travelers improperly retained the Eisner firm to “steer” the insured towards  
4 “independent counsel” whom Travelers preferred, in contravention of her rights under  
5 California law.

6 26. At no time prior to the commencement of this litigation was it disclosed  
7 to New York Marine that the Eisner firm had actually been retained by and was being  
8 funded by Travelers.

9 27. On numerous occasions, Travelers instructed and directed defense  
10 counsel retained by the insured and funded by Travelers to decline New York  
11 Marine’s requests for information, and/or applauded and encouraged defense  
12 counsel’s unilateral statements that it would not cooperate with and/or provide  
13 information to NY Marine.

14 28. For example, in June 2020, Charlson Bredehoft informed Travelers that  
15 Charlson Bredehoft was not returning a call from Cameron McEvoy and asking for  
16 an update about “when the hammer [would] fall”, to which Travelers responded that  
17 it could not tell Cameron McEvoy to “step down” because Travelers had not hired  
18 that firm.

19 29. Additionally, in August 2020, an attorney from Charlson Bredehoft sent  
20 Travelers a proposed draft of correspondence intended to be sent from Charlson  
21 Bredehoft to Cameron McEvoy in which Charlson Bredehoft would ask Cameron  
22 McEvoy about planning for mutual cooperation in the defense of the Underlying  
23 Action going forward. In response, as described by Charlson Bredehoft, Travelers  
24 “slapped” the “hand” of the attorney from Charlson Bredehoft who drafted the  
25 proposed correspondence “and told [Charlson Bredehoft] to hold off” on sending the  
26 correspondence to Cameron McEvoy.

27 30. Consistent with those communications, defense counsel retained by the  
28 mutual insured and funded by Travelers consistently refused to cooperate with

1 Cameron McEvoy and deliberately obstructed and prevented Cameron McEvoy’s  
2 active involvement in the defense of the mutual insured. Specifically, defense counsel  
3 retained by the mutual insured and funded by Travelers frequently omitted Cameron  
4 McEvoy and its attorneys from communications with both the Court and opposing  
5 counsel and also from case-related emails. Defense counsel retained by the mutual  
6 insured and funded by Travelers also frequently omitted and failed to notify or include  
7 Cameron McEvoy in discussions and consideration of case strategy and tactics, and  
8 frequently failed to include Cameron McEvoy in pleadings and notices, including by  
9 removing its name from the pleadings, proofs of service, and other notices.

10 31. In or about August 2020, the Charlson Bredehoft firm entered into a  
11 stipulation to continue trial without: (1) including Cameron McEvoy in discussions  
12 surrounding the stipulation; (2) notifying Cameron McEvoy that such a stipulation  
13 was contemplated; or (3) including Cameron McEvoy on the stipulation or related  
14 proofs of service; with the result that Cameron McEvoy only learned of the stipulation  
15 and the Court’s resulting Order continuing the trial through the Court’s publicly  
16 available docket.

17 32. Travelers has inhibited and obstructed New York Marine’s ongoing  
18 participation in the defense of the mutual insured by failing to timely provide copies  
19 of status reports, invoices, billing audits and proofs of payment, despite New York  
20 Marine’s multiple requests to both Travelers and defense counsel for such documents  
21 and information, including by failing to either request that defense counsel provide  
22 such status reports, by failing to insist upon their provision as required of  
23 “independent counsel” under Civil Code §§ 2860(d) and (f), and/or by instructing  
24 and/or encouraging defense counsel to not share all or certain of such invoices, status  
25 reports, and other relevant information with New York Marine despite New York  
26 Marine’s requests.

27 33. Travelers was aware that the defense counsel which it was funding  
28 refused to cooperate with or facilitate the Cameron McEvoy firm’s participation in



1 the defense of the mutual insured.

2 34. Indeed, in a March 21, 2020 email to attorney Sean Roche of Cameron  
3 McEvoy, Pamela Johnson, Travelers’ Assistant Vice President, Claim Professional,  
4 Intellectual Property, Business Torts, who was responsible for handling the  
5 Underlying Action on behalf of Travelers, expressly acknowledged that she had  
6 spoken to defense counsel “about billing, sharing the work, etc.” and stated that her  
7 conversation with defense counsel “did not go well”.

8 35. Notwithstanding Travelers’ March 2020 conversation with them,  
9 defense counsel continued to refuse to cooperate with or facilitate Cameron McEvoy’s  
10 active participation in the defense of the Underlying Action.

11 36. Travelers thereafter both failed to insist that defense counsel cooperate  
12 with and facilitate the full and active participation of the Cameron McEvoy firm in  
13 the defense of the mutual insured in the Underlying Action and to require defense  
14 counsel’s cooperation with Cameron McEvoy as it was authorized to do under Civil  
15 Code § 2860(f).

16 37. As a result of defense counsel’s refusal to cooperate with or facilitate its  
17 active participation in the defense of the Underlying Action and Travelers’ failure to  
18 obtain or require its cooperation, on November 6, 2020, the Cameron McEvoy firm  
19 withdrew from its representation of the mutual insured in that action.

20 **FIRST CAUSE OF ACTION – DECLARATORY RELIEF – NEW YORK**  
21 **MARINE DID NOT OWE A DUTY TO DEFEND THE MUTUAL INSURED**  
22 **THROUGH INDEPENDENT COUNSEL**

23 **(Against Travelers)**

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

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

28 40. Under Virginia law, insurer-appointed defense counsel only has the

1 insured for a client.

2 41. Virginia does not apply any legal presumption that defense counsel  
3 retained by an insurer to defend an insured under a reservation of rights will do  
4 anything in the conduct of the insured's defense which is inconsistent with the  
5 insured's interests.

6 42. New York Marine's October 1, 2019 reservation of rights did not trigger  
7 any right in the insured to independent counsel since, as this Court has already  
8 concluded in its January 6, 2022 Order, the reservation of rights issued by New York  
9 Marine is a "general" reservation of rights which "is not sufficient to create a duty on  
10 the insurer to provide independent counsel". (*See* Minute Order on New York Marine  
11 Motion to Dismiss at 10 of 15 [Dkt. # 24].)

12 43. Additionally, because the Underlying Action was litigated in Virginia  
13 state court and the Cameron McEvoy firm and the attorneys appointed by New York  
14 Marine to defend the mutual insured in the Underlying Action are licensed in Virginia  
15 but not in California, no conflict existed between the mutual insured, defense counsel,  
16 and New York Marine, and consequently New York Marine's reservation of rights  
17 did not trigger a right in the insured to independent counsel under Civil Code § 2860  
18 because no conflict existed between them under Virginia law.

19 44. Accordingly, New York Marine did not owe a duty to defend the insured  
20 through independent counsel because: (1) its reservation of rights did not trigger the  
21 right to independent counsel as a matter of California law since, as the Court  
22 concluded in its January 6, 2022 Order, the reservation of rights issued by New York  
23 Marine is a "general" reservation of rights which "is not sufficient to create a duty on  
24 the insurer to provide independent counsel"; and (2) because under Virginia law, the  
25 Virginia-licensed attorneys of the Cameron McEvoy firm which New York Marine  
26 appointed to defend the mutual insured could not have a conflict, no obligation existed  
27 on the part of New York Marine to defend the mutual insured through independent  
28 counsel under California law, whether pursuant to Civil Code § 2860 or any other

1 principle or provision of California law.

2 45. Because New York Marine’s October 1, 2019 reservation of rights did  
3 not obligate it to provide the mutual insured with independent counsel in connection  
4 with the Underlying Action, New York Marine, by providing a defense in the  
5 Underlying Action through appointed counsel, the Cameron McEvoy firm, did not  
6 fail to defend the mutual insured.

7 46. New York Marine is informed and believes based on the allegations of  
8 Travelers’ First Amended Complaint herein, as well as the discussions,  
9 correspondence, and documents exchanged between New York Marine and Travelers,  
10 that Travelers disputes each of the foregoing contentions, and that accordingly an  
11 actual, justiciable controversy exists between New York Marine and Travelers as to  
12 these matters.

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

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1 **SECOND CAUSE OF ACTION – DECLARATORY RELIEF – NEW YORK**  
2 **MARINE DID NOT FAIL TO PROVIDE A DEFENSE TO ITS MUTUAL**  
3 **INSURED**

4 **(Against Travelers)**

5 48. New York Marine hereby incorporates by reference paragraphs 1-47 of  
6 this Counterclaim as though fully set forth and alleged herein.

7 49. New York Marine’s October 1, 2019 reservation of rights did not give  
8 rise to any obligation to provide the mutual insured with independent counsel in  
9 connection with the defense of the Underlying Action.

10 50. Because New York Marine’s October 1, 2019 reservation of rights did  
11 not give rise to any obligation to provide the mutual insured with independent counsel  
12 in connection with the defense of the Underlying Action, New York Marine did not  
13 breach any obligation to the mutual insured or to Travelers by providing a defense to  
14 the mutual insured through appointed counsel, the Cameron McEvoy firm, who was  
15 originally retained by the mutual insured.

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

22 52. Wherefore, New York Marine is entitled to a declaration that it did not  
23 breach any duty to the mutual insured or to Travelers by defending the mutual insured  
24 through appointed counsel, the Cameron McEvoy firm, who was originally retained  
25 by the mutual insured.

26 ///

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1 agreement to cooperate with and facilitate the full and active participation of the  
2 Cameron McEvoy firm in the defense of the mutual insured, including by withholding  
3 payment of some or all of defense counsel’s fees, by bringing an action for declaratory  
4 relief against defense counsel, or by seeking an injunction against defense counsel as  
5 it was permitted to do under Civil Code § 2860(f) to enforce defense counsel’s  
6 obligation to cooperate with Cameron McEvoy and facilitate its participation in the  
7 defense of the mutual insured.

8         57. As a result of the inequitable conduct of Travelers, the Cameron McEvoy  
9 firm withdrew from the mutual insured’s defense in the Underlying Action on  
10 November 6, 2020.

11         58. Following the November 6, 2020 withdrawal of the Cameron McEvoy  
12 firm from the mutual insured’s defense in the Underlying Action, New York Marine,  
13 subject to a reservation of rights, has to date paid Travelers at least the sum of  
14 \$621,693.43, reflecting 50% of the fees and costs incurred by defense counsel from  
15 November 6, 2020 through February 28, 2021. Notably, New York Marine had  
16 previously agreed to make this payment before Travelers disclosed that Travelers was  
17 funding the Eisner firm as “personal counsel” for the insured or that Travelers and the  
18 Eisner firm had coordinated to prevent “independent counsel” retained by the insured  
19 and funded by Travelers from cooperating with or involving Cameron McEvoy in the  
20 defense of the Underlying Action and obstructing it from doing so.

21         59. Despite requests from New York Marine, neither Travelers nor  
22 “independent counsel” retained by the insured and funded by Travelers provided New  
23 York Marine with routine status reports, communications, or updates. Nor did  
24 Travelers or “independent counsel” retained by the insured and funded by Travelers  
25 timely provide New York Marine with copies of all relevant invoices, billing audits,  
26 and related materials reflecting all amounts incurred by “independent counsel”  
27 retained by the insured and funded by Travelers and/or paid by Travelers to such  
28 counsel since November 6, 2020.

1           60. Travelers’ conduct in entering into improvident agreements with defense  
2 counsel pursuant to which Travelers agreed to pay its defense counsel amounts in  
3 excess of the amounts which Travelers was obligated to pay under Civil Code §  
4 2860(c), in failing to enforce limitations in its agreements with defense counsel, in  
5 failing to require that defense counsel—whether voluntarily or otherwise—cooperate  
6 with and facilitate the Cameron McEvoy firm’s full and active participation in the  
7 defense of the Underlying Action, and in failing provide New York Marine with  
8 copies of all relevant reports, invoices, and other documents reflecting the work  
9 performed and the fees and costs incurred by defense counsel, amounts to “unclean  
10 hands” which should bar, in whole or in part, any right of Travelers to recover  
11 amounts from New York Marine, including for fees and costs incurred by Travelers  
12 to defend the mutual insured after the November 6, 2020 withdrawal of the Cameron  
13 McEvoy firm from the mutual insured’s defense, and which requires Travelers to  
14 reimburse New York Marine sums which New York Marine has previously paid TO  
15 Travelers under reservation of rights.

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

21           62. The refusal of “independent counsel” retained by the insured and funded  
22 by Travelers to cooperate with or facilitate the active participation of Cameron  
23 McEvoy in the defense of the mutual insured in the Underlying Action and Travelers’  
24 failure to obtain or enforce defense counsel’s cooperation with Cameron McEvoy,  
25 which contributed to and resulted in Cameron McEvoy’s withdrawal from the  
26 defense, amounts to a “refusal” by the mutual insured and/or Travelers of the defense  
27 rightfully extended by New York Marine and unclean hands by Travelers.

28           63. Because of the mutual insured’s and Travelers’ “refusal” of the defense

1 offered by New York Marine and Travelers' unclean hands, Travelers is not entitled  
2 to any recovery for amounts incurred by it in the defense of the Underlying Action.

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

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

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

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

28 ///





1 75. Traveler's conduct was a substantial factor in causing New York  
2 Marine's harm.

3 **FIFTH CAUSE OF ACTION – COMMON LAW TORT OF ANOTHER**

4 76. New York Marine hereby incorporates by reference paragraphs 1-75 of  
5 this Counterclaim as though fully set forth and alleged herein.

6 77. Travelers wrongfully interfered with and obstructed New York Marine's  
7 contractual rights and obligations with respect to the defense of the mutual insured in  
8 the underlying action.

9 78. As a result of Travelers' wrongful conduct, New York Marine was and  
10 has been required to retain attorneys and has become obligated for other costs and  
11 expenses which are the result of the acts, errors and omissions of Travelers.

12 79. New York Marine is entitled to complete indemnity from Travelers,  
13 including an award of attorneys fees on account of the costs and expenses which it  
14 has been borne and incurred as a result of Travelers' wrongful conduct. Any costs  
15 and expenses that New York Marine has or will occur in this or any related litigation  
16 arising out of the defense of the underlying action arises solely out of and on account  
17 of the wrongful conduct of and the acts, errors and omissions of Travelers.

18 80. New York Marine is entitled to damages from Travelers in an amount  
19 according to proof.

20 **PRAYER FOR RELIEF**

21 WHEREFORE, NEW YORK MARINE prays as follows:

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

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

27 3. For a declaration that it did not breach any duty to the mutual insured or  
28 to Travelers by defending the mutual insured through appointed counsel originally

1 selected by the mutual insured;

2 4. For a declaration that in entering into improvident agreements with  
3 “independent counsel” retained by the insured and funded by Travelers under which  
4 Travelers agreed to pay such counsel amounts in excess of the amounts Travelers was  
5 obligated to pay under Civil Code § 2860(c), in failing to enforce limitations in its  
6 agreements with defense counsel, and in failing to obtain or enforce defense counsel’s  
7 cooperation with Cameron McEvoy and facilitate its full and active participation in  
8 the defense of the Underlying Action as Travelers was entitled to do under Civil Code  
9 § 2860(f), and in failing to provide New York Marine with copies of all relevant  
10 reports, invoices, and other documents reflecting the work performed and fees and  
11 costs incurred by defense counsel, that Travelers engaged in inequitable conduct and  
12 has “unclean hands” which bars, in whole or in part, any claim which Travelers may  
13 have for recovery of defense fees which it incurred following the November 6, 2020  
14 withdrawal of the Cameron McEvoy firm from the mutual insured’s defense in the  
15 Underlying Action;

16 5. For declarations that: (1) that New York Marine is entitled to  
17 reimbursement of any additional amounts paid to Travelers in reimbursement of  
18 defense fees and costs incurred after the November 6, 2020 withdrawal of Cameron  
19 McEvoy, plus interest from the date of such payment(s) by New York Marine; and  
20 (2) Travelers is not entitled to recover any additional sums from New York Marine  
21 for costs incurred by defense counsel in the defense of the underlying action after  
22 November 6, 2022;

23 6. For damages incurred according to proof;

24 7. That it be awarded its costs of suit;

25 8. That it be awarded its attorneys’ fees incurred in this action;

26 9. For pre-judgment interest;

27 10. For such other and further relief as the Court deems just and proper.  
28

1 Dated: January 23, 2023

McCORMICK, BARSTOW, SHEPPARD,  
WAYTE & CARRUTH LLP

2

3

By:           /s/ James P. Wagoner          

4

James P. Wagoner

5

Lejf E. Knutson

6

Nicholas H. Rasmussen

7

Graham A. Van Leuven

8

Attorneys for Defendant New York Marine and  
General Insurance Company

9

**JURY DEMAND**

10

Defendant and Counterclaimant NEW YORK MARINE hereby demands a jury

11

trial to the fullest extent facilitated by law.

12

Dated: January 23, 2023

13

McCORMICK, BARSTOW, SHEPPARD,  
WAYTE & CARRUTH LLP

14

By:           /s/ James P. Wagoner          

15

James P. Wagoner

16

Lejf E. Knutson

17

Nicholas H. Rasmussen

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Graham A. Van Leuven

19

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 January 23, 2023, I served true copies of the following document(s) described as **DEFENDANT NEW YORK MARINE AND GENERAL INSURANCE COMPANY’S AMENDED ANSWER TO FIRST AMENDED COMPLAINT, AMENDED 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 January 23, 2023, at Fresno, California.

/s/ Heather Ward  
Heather Ward

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