

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
Civil Action No. 5:09-CV-143

ARSENAL DIGITAL SOLUTIONS)
WORLDWIDE, INC.,)
)
Plaintiff,)
)
v.)
)
AMERICAN INTERNATIONAL SOUTH)
INSURANCE COMPANY,)
)
Defendant.)

ANSWER

COMES NOW defendant American International South Insurance Company (“AISIC”), by and through its attorneys, and hereby responds to the numbered allegations of plaintiff’s Complaint as follows:

1. Paragraph 1 of the Complaint sets forth a characterization of plaintiff’s claims herein to which no response is required; to the extent a response is required, defendant AISIC admits that plaintiff has characterized this action as a “insurance coverage action.” Defendant AISIC denies the remaining allegations contained in Paragraph 1 of the Complaint.

2. Defendant AISIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of the Complaint and, therefore, denies the same.

3. Defendant AISIC admits that it is a foreign insurance company authorized to do business in the State of North Carolina, and it is a Pennsylvania corporation with its principal place of business in New York and it issued policy number 673-33-91. Defendant AISIC denies the remaining allegations contained in Paragraph 3 of the Complaint.

4. Paragraph 4 contains allegations to which no response is required; to the extent that a response is required, Defendant AISIC denies the allegations contained in Paragraph 4 of the Complaint.

5. Defendant AISIC admits that it is not a citizen of North Carolina. Except as herein specifically admitted, defendant AISIC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 5 of the Complaint and, therefore, denies the same.

6. Denied.

7. Denied.

8. Defendant AISIC admits that the Policy speaks for itself. Except as herein specifically admitted, the allegations contained in Paragraph 8 of the Complaint are denied.

9. The allegations contained in Paragraph 9 of the Complaint contain legal conclusions to which no response is required. To the extent that a response is required, the allegations contained in Paragraph 9 of the Complaint are denied.

10. The Complaint in the Pollard Action speaks for itself. Except as herein specifically admitted, the allegations contained in Paragraph 10 of the Complaint are denied.

11. Defendant AISIC admits that plaintiff Arsenal Digital Solutions Worldwide, Inc., is a named insured under the Policy. Defendant AISIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding Arsenal Digital Solutions USA, Inc. at this time and, therefore, denies the same. The remaining allegations contained in Paragraph 11 of the Complaint are denied.

12. The Complaint in the Pollard Action speaks for itself. Except as herein specifically admitted, the allegations contained in Paragraph 12 of the Complaint are denied.

13. The Complaint in the Pollard Action speaks for itself. Except as herein specifically admitted, the allegations contained in Paragraph 13 of the Complaint are denied.

14. The Complaint in the Pollard Action speaks for itself. Except as herein specifically admitted, the allegations contained in Paragraph 14 of the Complaint are denied.

15. Defendant AISIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 15 of the Complaint and, therefore, denies the same.

16. Defendant AISIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16 of the Complaint and, therefore, denies the same.

17. Defendant AISIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 17 of the Complaint and, therefore, denies the same.

18. Defendant AISIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 18 of the Complaint and, therefore, denies the same.

19. Defendant AISIC admits that the Complaint in the Pollard Action speaks for itself and that the SEITF defendants are not insured under the Policy. Except as herein specifically admitted, the allegations contained in Paragraph 19 of the Complaint are denied.

20. Defendant AISIC admits that the Complaint in the Pollard Action speaks for itself. Except as herein specifically admitted, defendant AISIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 20 of the Complaint and, therefore, denies the same.

21. Defendant AISIC admits that the Complaint in the Pollard Action speaks for itself. Except as herein specifically admitted, defendant AISIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 21 of the Complaint and therefore, denies the same.

22. Defendant AISIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 22 of the Complaint and, therefore, denies the same.

23. Denied.

24. Defendant AISIC admits that the Policy speaks for itself. Except as herein specifically admitted, the allegations contained in Paragraph 24 of the Complaint are denied.

25. Defendant AISIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 25 of the Complaint and, therefore, denies the same.

26. Defendant AISIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 26 of the Complaint and, therefore, denies the same.

27. Defendant AISIC admits that the Policy speaks for itself. Except as herein specifically admitted, the allegations contained in Paragraph 27 of the Complaint are denied.

28. Defendant AISIC admits that the Policy speaks for itself. Except as herein specifically admitted, the allegations contained in Paragraph 28 of the Complaint are denied.

29. Defendant AISIC admits that the Policy speaks for itself. Except as herein specifically admitted, the allegations contained in Paragraph 29 of the Complaint are denied.

30. Defendant AISIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 30 of the Complaint and, therefore, denies the same.

31. Defendant AISIC admits that the Policy speaks for itself. Except as herein specifically admitted, the allegations contained in Paragraph 31 of the Complaint are denied.

32. Defendant AISIC admits that the Policy speaks for itself. Except as herein specifically admitted, the allegations contained in Paragraph 32 of the Complaint are denied.

33. Defendant AISIC admits that the Policy speaks for itself. Except as herein specifically admitted, the allegations contained in Paragraph 33 of the Complaint are denied.

34. Defendant AISIC admits that the letter to Mr. Brian C. Schneider, General Counsel of Arsenal, speaks for itself. Except as herein specifically admitted, the allegations contained in Paragraph 34 of the Complaint are denied.

35. Defendant AISIC admits that the letter to Mr. Brian C. Schneider, General Counsel of Arsenal, speaks for itself. Except as herein specifically admitted, the allegations contained in Paragraph 34 of the Complaint are denied.

36. Defendant AISIC admits that the Policy speaks for itself. Except as herein specifically admitted, the allegations contained in Paragraph 36 of the Complaint are denied.

37. Defendant AISIC admits that the Policy speaks for itself. Except as herein specifically admitted, the allegations contained in Paragraph 37 of the Complaint are denied.

38. Denied.

39. Defendant AISIC admits that the letter to Mr. Brian C. Schneider, General Counsel of Arsenal, speaks for itself. Except as herein specifically admitted, the allegations contained in Paragraph 39 of the Complaint are denied.

40. Denied.

41. Denied.

42. Denied.

43. Defendant AISIC incorporates herein by reference as if fully set forth its responses to allegations contained in Paragraphs 1-42 of the Complaint.

44. Defendant AISIC admits that the Policy speaks for itself. Except as herein specifically admitted, the allegations contained in Paragraph 44 of the Complaint are denied.

45. The allegations contained in Paragraph 45 of the Complaint contain legal conclusions to which no response is required. To the extent that a response is required, the allegations contained in Paragraph 45 of the Complaint are denied.

46. Denied.

47. Denied.

48. The allegations in the first sentence of Paragraph 48 of the Complaint are admitted. The allegations in the second sentence of Paragraph 48 of the Complaint are denied.

49. Denied.

50. Denied.

51. Denied.

52. Defendant AISIC incorporates herein by reference as if fully set forth its responses to the allegations contained in Paragraphs 1-51 of the Complaint.

53. Denied.

54. Denied.

55. Denied.

56. Denied.

57. Denied.

58. Defendant AISIC lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 58 of the Complaint, and, therefore, denies the same.

59. Denied.

60. Denied.

61. Denied.

62. Defendant AISIC incorporates herein by reference as if fully set forth its responses to the allegations contained in Paragraphs 1-61 of the Complaint.

63. Defendant AISIC admits that the Policy was sold to the plaintiff and that the Policy speaks for itself. Except as herein specifically admitted, the allegations contained in Paragraph 63 of the Complaint are denied.

64. Defendant AISIC admits that the Policy speaks for itself. Except as herein specifically admitted, the allegations contained in Paragraph 64 of the Complaint are denied.

65. Denied.

66. Denied.

67. Defendant AISIC admits that the letter to Mr. Brian C. Schneider, General Counsel of Arsenal, speaks for itself. Except as herein specifically admitted, the allegations contained in Paragraph 67 of the Complaint are denied.

68. Denied.

69. Denied.

70. Denied.

71. Denied.

72. Defendant AISIC incorporates herein by reference as if fully set forth its responses to the allegations contained in Paragraphs 1-71 of the Complaint.

73. Denied.

74. Denied.

75. Denied.

76. Denied.

77. Denied.

78. Denied.

79. Denied.

80. Defendant AISIC incorporates herein by reference as if fully set forth its responses to the allegations contained in Paragraphs 1-79 of the Complaint.

81. Denied, including each subparagraph thereof.

82. Denied.

FIRST AFFIRMATIVE DEFENSE

The Policy has limits of \$5 million excess of applicable retentions and the liability of defendant AISIC under the subject policy is limited accordingly as set forth in Clause 5 of the Policy.

SECOND AFFIRMATIVE DEFENSE

The obligations and liabilities of defendant AISIC under the Policy are subject to retention amounts to be borne by the insureds before any coverage is owed under the Policy as set forth in Clause 6 of the Policy.

THIRD AFFIRMATIVE DEFENSE

The damages claimed in the Pollard Action include damages or claims which are uninsurable as a matter of law and public policy, and, as such, defendant AISIC has no obligation to pay for any such amounts. Further, loss under the Policy is defined in Clause 2(k) to specifically exclude matters which may be deemed uninsurable under the law pursuant to which the Policy shall be construed, and as a result, defendant AISIC has no obligation to pay the loss claimed in the Complaint or is, alternatively, entitled to an allocation that will exclude any part of the losses claimed that are the result of such excluded and uncovered loss.

FOURTH AFFIRMATIVE DEFENSE

The damages claimed in the Pollard Action are damages that constitute disgorgement of profits or gains obtained by plaintiff and third parties and as such, coverage for any such damages is either excluded pursuant to Clause 2(k) of the Policy or otherwise not provided for under the Policy, and as a result, defendant AISIC has no obligation to pay the loss claimed in the Complaint, or is, alternatively, entitled to an allocation that will exclude any part of the losses claimed as a result of such excluded or uncovered loss.

FIFTH AFFIRMATIVE DEFENSE

The Policy states in Clause 4(a) as follows:

The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against an Insured: ...

(a) arising out of, based upon or attributable to the gaining in fact of any profit or advantage to which an Insured was not legally entitled.

As such, coverage for the claims for loss set forth in the Complaint are excluded from coverage afforded under the Policy, and as a result, defendant AISIC has no obligation to pay for the loss claimed in the Complaint or is, alternatively, entitled to allocation that would exclude any part of the losses claimed as a result of such excluded or uncovered loss.

SIXTH AFFIRMATIVE DEFENSE

The Policy states in Clause 4(c) as follows:

The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against an Insured: ...

(c) arising out of, based upon or attributable to the committing in fact of any criminal, fraudulent or dishonest act, or any willful violation of any statute, rule or law.

As such, coverage for the claims for loss set forth in the Complaint are excluded from the coverage afforded under the Policy, and as a result, defendant AISIC has no obligation to pay for the loss claimed in the Complaint or is, alternatively, entitled to allocation that would exclude any part of the losses claimed as a result of such excluded or uncovered loss.

SEVENTH AFFIRMATIVE DEFENSE

The Policy states in Clause 4(i) as follows:

The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against an Insured:...

(i) which is brought by any Insured or by the Company; or which is brought by any security holder of the Company, whether directly or derivatively, unless such security holder's Claim is instigated and continued totally independent of, and totally without the solicitation of, or assistance of, or active participation of, or intervention of, any Insured; provided, however, this exclusion shall not apply to:

(1) any Claim brought by an Individual Insured where such Claim is in the form of a cross-claim or third-party claim for contribution or indemnity which is part of and results directly from a Claim which is not otherwise excluded by the terms of this policy; or

(2) any Employment Practices Claim brought by an Employee of the Company other than an Employee who is or was a director, member of the Board of Managers or management committee member of the Named Entity.

As such, coverage for the claims for loss set forth in the Complaint are excluded from the coverage afforded under the Policy, and as a result, defendant AISIC has no obligation to pay for the loss claimed in the Complaint or is, alternatively, entitled to allocation that will exclude any part of the losses claimed as a result of such excluded or uncovered loss.

EIGHTH AFFIRMATIVE DEFENSE

The Policy states in Clause 4(h) as follows:

The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against an Insured: ...

(h) alleging, arising out of, based upon or attributable to any actual or alleged contractual liability of the Company or any other Insured under any express contract or agreement; provided, however, that with respect to the Employment Practice Claims, this exclusion shall not apply to the extent any liability does not arise under such express employment contract or agreement.

As such, coverage for the claims for loss set forth in the Complaint are excluded from the coverage afforded under the Policy, and as a result, defendant AISIC has no obligation to pay for the loss claimed in the Complaint or is, alternatively, entitled to allocation that will exclude any part of the losses claimed as a result of such excluded or uncovered loss.

NINTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the applicable statutes of limitations.

TENTH AFFIRMATIVE DEFENSE

To the extent plaintiff seeks repayment of legal fees and other expenses allegedly incurred by plaintiff prior to the institution of any suit, the Policy does not provide reimbursement for such pre-litigation expenses.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred to the extent that the AISIC Policy does not provide coverage for claims "alleging, arising out of, based upon or attributable to any actual or alleged act or omission of an Insured serving in any capacity, other than a director, officer, management committee member, member of the Board of Managers or Employee of the Company . . ."

TWELFTH AFFIRMATIVE DEFENSE

The Policy states in Clause 14 as follows:

Such insurance as is provided by this policy shall apply only as excess over any other valid and collectible insurance. This policy specifically shall be excess of any other policy pursuant to which any other insurer has a duty to defend a Claim for which this policy may be obligated to pay Loss.

The Policy is excess over any other valid and collectible insurance providing defense or indemnity to the Plaintiff or any of its subsidiaries, or any of its officers and directors in the Pollard Action.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, limited and otherwise subject to the terms, conditions and exclusions of the Policy.

WHEREFORE, defendant American International South Insurance Company, having answered the Complaint of the plaintiff, prays unto the Court as follows:

1. That plaintiff having recovered nothing of defendant AISIC and that plaintiff's Complaint be dismissed with prejudice;
2. That the Court declare that AISIC is not responsible for furnishing any defense to, or paying defense costs to or on behalf of Arsenal or any of its subsidiaries or officers and directors, and that AISIC is not obligated to reimburse Arsenal, or any of its subsidiaries or any of its officers and directors, for any settlements or judgments; in the alternative, that AISIC is entitled to an allocation with respect to portions of losses claimed by plaintiff for which coverage is not provided under the Policy;
3. That the cost of this action, including attorneys' fees as provided by law, be taxed against the plaintiff; and

4. That the Court grant to AISIC such other and further relief as may seem just and proper to the Court.

Respectfully submitted, this the 27th day of April, 2009.

WOMBLE CARLYLE SANDRIDGE & RICE
A Professional Limited Liability Company

/s/ Reid C. Adams, Jr.

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*Attorneys for Defendant American International
South Insurance Company*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an attorney at law licensed to practice in the State of North Carolina, is attorney for the answering defendants in this matter, and is a person of such age and discretion as to be competent to serve process.

That on April 27, 2009, he electronically filed the **ANSWER** with the Clerk of Court using CM/ECF system.

He also certifies that he served a copy thereof to the following by placing said copy in a first class postpaid envelope and addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and its contents in the United States Mail at Winston-Salem, North Carolina.

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