IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

FEDERAL INSURANCE COMPANY **PLAINTIFF**

v. **CIVIL ACTION NO.: 1:15-CV-236-LG-RHW**

SINGING RIVER HEALTH SYSTEM **DEFENDANT**

SINGING RIVER HEALTH SYSTEM'S VERIFIED ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT AND COUNTERCLAIM FOR PRELIMINARY AND PERMANENT INJUNCTION AND OTHER RELIEF

COMES NOW the Defendant, Singing River Health System (hereinafter "SRHS"), by and through counsel, and hereby files this Answer to Complaint for Declaratory Judgment herein and in doing so would state as follows:

FIRST DEFENSE

The Complaint should be dismissed for failure to join all necessary parties to effect full and complete resolution of the issues presented in the Complaint.

SECOND DEFENSE

The Complaint should be dismissed for failure to state a claim as to which relief may be granted.

THIRD DEFENSE

AND NOW without waiving any of the foregoing defenses, SRHS would state as follows to the numbered paragraphs of the Complaint:

I. PARTIES

1. Admitted on information and belief.

2. Admitted, except for the last sentence thereof. It is specifically denied that SRHS, as a separate entity, has authority to bind any other entity, person, or party that has been sued in the underlying cases as a defendant, or any person, entity, or party that is suing in the underlying cases as a plaintiff, or any others that may be represented by any of them. It is specifically alleged that all such parties must be

joined herein for full and complete relief by Federal Insurance Company on its Complaint for Declaratory Relief. *Coleman v. Mississippi Farm Bureau Ins. Co.*, 708 So.2d 6 (Miss. 1998).

II. JURISDICTION AND VENUE

3. It is admitted that Federal Insurance Company ("Federal"), acting through its wholly owned affiliate, Chubb & Son, Inc. (referred to collectively as "the Insurers" or "Chubb/Federal"), has taken a position inconsistent with law and Mississippi's public policy that it is entitled to erode coverage limits and reduce the funds available to pay for the defense and indemnity by the amount spent to pay for the defense of each and all of its insureds. It is also admitted that the Insurers contend that they are entitled to do so in direct contradiction of the clear terms of Federal's own policies of insurance which are the subject of the Court's jurisdiction herein and that to do so with a public entity is in clear violation of Mississippi law and public policy. It is admitted that this Court is a proper place for these issues to be decided at least on the Counter Claim stated herein.

4. Denied to the extent that the relief request by Federal will require, if granted, either direct or indirect payment of monies in violation of the 11th Amendment to the United States Constitution.

5. Denied to the extent that the relief request by Federal will require, if granted, either direct or indirect payment of monies in violation of the 11th Amendment to the United States Constitution.

6. Denied. Federal has, through its retained counsel to defend all of the SRHS lawsuits, in fact taken a position that there is no validity to the claims asserted against SRHS. SRHS admits that there is no such validity and/or veracity. The first sentence of paragraph 6 is also denied as inconsistent with communications from Chubb & Son and Federal. Each allegation in all paragraphs herein that has not been specifically admitted is denied and strict proof thereof demanded.

III. THE INSURANCE POLICY AND COVERAGE POSITIONS

7. It is admitted that one Federal policy is apparently attached as Exhibit "A" to the Complaint for Declaratory Judgment. It is specifically denied that the version of the Federal policy attached is the only policy that should be properly considered in determining the coverage and bad faith issues in this litigation.

8. Denied.

9. SRHS agrees that Federal has denied coverage under the ELI/EPL coverage section of one policy; however despite that denial, Federal has continued to provide a defense through *Moeller*[1] counsel subject to a reservation of rights but without paying defense costs as Mississippi law requires when rights are reserved and when independent counsel retained for each of its insureds. Federal's defense of so called non-covered claims has waived any coverage defense that could be relied upon if, in fact, there were any.

10. It is admitted that Federal has taken the bad faith position that it is entitled to erode policy limits and walk away from SRHS and other insureds for whom it has provided a defense and retained several lawyers in order to expedite their "erosion" position.

IV. COVERAGE AND DEFENSE OBLIGATIONS

A. The Policy Affords "Claims Made" Coverage with Defense Costs Eroding the Limit of Liability

11. Denied as stated. It is admitted that paragraph 11 quotes out of context some aspects of a portion of one policy. It is also admitted that the phrase "defense costs," per the policy, may, but will not necessarily, erode applicable limits. It is denied that such erosion is legally proper here or consistent with any policy language.

12. Denied as stated. It is admitted that paragraph 12 quotes out of context some aspects of a portion of one policy. It is also admitted that the phrase "defense costs" may, but will not necessarily, erode applicable limits. It is denied that such erosion is legally proper here or consistent with any policy language.

13. Denied as stated. It is admitted that paragraph 13 quotes out of context some aspects of a portion of one policy. It is also admitted that the phrase "defense costs" may, but will not necessarily, erode applicable limits. It is denied that such erosion is legally proper here or consistent with any policy language.

[1] *Moeller v. American Guar. and Liab. Ins. Co.*, 707 So. 2d 1062 (Miss. 1996).

14. Denied as stated. It is admitted that paragraph 14 quotes out of context some aspects of a portion of one policy. It is also admitted that the phrase "defense costs" may, but will not necessarily, erode applicable limits. It is denied that such erosion is legally proper here or consistent with any policy language.

15. Denied as stated. It is admitted that paragraph 15 contains an inaccurate, incomplete description of what Chubb and Federal claim to be defense costs in one of the applicable policies. It is specifically admitted that only the defense costs that are a part of a "loss" under the terms of the policy could, if otherwise permissible under Mississippi law and public policy which is denied, serve to reduce any limits under any policy issued by Chubb/Federal.[2]

16. It is denied as stated that the Fiduciary Coverage Section of one policy contains all of the potential coverage that is available to SRHS or other insureds. It is admitted that the only defense costs that are a part of a loss which may be properly subtracted under any applicable Federal/Chubb policy are those costs that an insured, such as SRHS or other insured that the Insurers are defending, is legally obligated to pay, even if such were permissible under *Moeller* and/or with respect to a public entity under Mississippi law and public policy. In no event, under Mississippi law or otherwise, is SRHS, or any of the insureds that Chubb/Federal have been defending, legally obligated to pay the defense costs that the Insurers wish to subtract from any limits. The Insurers know this and its position, which is contrary to its own policy language, is in bad faith and materially contributes to unjustified and unwarranted financial stress and damage to SRHS and materially interferes with SRHS's ability to attempt to resolve the underlying claims and continue to provide jobs and health care as well as charitable work in the area.

17. Denied as stated. The response to number 16 above is incorporated herein as if fully copied in words and figures.

18. Denied as stated. The response to number 16 above is incorporated herein as if fully copied in words and figures.

[2] Chubb & Son and Federal are treated as "the Insurers" for purposes of pleadings herein.

19. Denied. In addition, the allegations in response to number 16 above are incorporated herein as if fully copied in words and figures. The Insurer's position alleged in paragraph 19 and its filing of this baseless suit are evidence of the Insurers' bad faith for the failure to comply with its own policies and Mississippi law and public policy to the detriment of all the insureds who it has agreed to defend and for whom it has retained attorneys under reservations of rights, and/or amounts to Chubb's intentional interference, for its own direct benefit, with Federal's duty to defend.

B. <u>The claims asserted in the SRHS Lawsuits are "Related Claims" under the Policy</u>

20. Denied.

21. Denied.

22. Denied.

23. Denied.

24. Denied. Specifically, the EPL Coverage is in addition to the coverage available under the fiduciary coverage under one of the applicable polices attached. It is also additional under the policy for 2015-16, which is applicable here as well.

25. Denied.

C. <u>There is no coverage under ELI/EPL Coverage Section</u>

26. Denied.

27. Denied as stated. The allegation is incomplete and the Insurers know that an exception to this exclusion, even if it were otherwise applicable, bars its application and use to deny any coverage to SRHS herein under all applicable policies. Denied as to all policies. This position by Chubb/Federal has been waived because of their defense of what they claim are non-covered claims.

28. Denied.

29. Denied.

30. Denied.

31. Denied.

D. Additional policy provisions may also exclude coverage

32. Denied.

33. Denied.

E. There is no applicable Third Party Liability Coverage

34. It is admitted that the one policy provided herein provides for third-party liability coverage and that neither Federal nor Chubb have previously taken a position to either reserve rights or deny coverage under that coverage and have waived any right to do so by that failure.

35. Denied as stated and as incomplete.

36. Denied. At a minimum, the policy language with regard to these allegations is ambiguous and, more specifically, it is clear that the recently filed *Beasley*[3] litigation falls clearly within the coverages available here. Each of the plaintiffs in the underlying suits are, at a minimum, persons protected pursuant to allegedly applicable federal, state, and local statutory or common law anywhere in the world. The Insurers know this and to contend otherwise is evidence of bad faith.

37. Denied.

F. Federal has properly complied with its defense obligations

38. It is denied that Federal has complied with its defense obligations. It is admitted that Federal has hired multiple lawyers who are defending multiple parties with the same interest in order to, and as part of a plan, scheme, or design, hurriedly spend money and claim that it has spent and eroded all limits so that Federal and Chubb can walk away from SRHS, SRHS employees, directors, and, frankly, from the plaintiffs in the underlying suits to the extent that they may be entitled to recover under any of the coverages available through Federal and Chubb or because of the conduct of either or both. This position is inconsistent with the law, public policy, and the policy language.

39. Denied. *Moeller* specifically requires the Insurers to pay out of their own funds for lawyers retained to defend under a reservation of rights. The Insurers each know this. The Insurers knew

[3] *Beasley v. Singing River Health System, et al.*, Chancery Court of George County, Mississippi, Cause No. 2014-0230-MF.

when they reserved rights and retained all defense counsel that *Moeller* prohibited them from reducing available limits to any insured being defended either by amounts spent for each insureds' own defense or by amounts spent for the defense of other insureds.

40. SRHS admits that Federal voluntarily agreed to pay for the defense of each insured under a reservation of rights. SRHS admits that Federal's positions are illegal, improper, and in bad faith.

G. Funding of Defense Costs

41. Denied. This circumstance exists only because of Federal's and Chubb's failure to comply with Mississippi law, Mississippi public policy, and the terms of the policies involved.

42. Denied. Federal has not paid anything. Federal has only used indemnity funds under one policy that were paid for by premium charged to SRHS to pay for the defense of the underlying litigation when it full well knows that under its own polices applicable here, the only defense costs that are included in the loss that could be subtracted are defense costs that insureds are legally obligated to pay. There are no such defense costs here in any underlying case. Any contrary position is materially inconsistent with policy language and factually baseless: it is bad faith, and/or gross negligence and willful disregard of all insureds' rights under all applicable policies. By retaining the void provisions and relying upon them here, the Insurers are guilty of bad faith breach of contract. *Richards v. Allstate Ins. Co.*, 693 F.2d 502 (5th Cir. 1982).

43. Denied. Federal's and Chubb's actions through its agents, brokers, employees, managers, officers, directors, including Paul Douglas, and unknown others, constitute significant prejudice to SRHS and presumably other defendants in the underlying suits causing damages, compensatory as well as, without limitation, attorneys fees and expenses necessitated by this action, the defense of it and the prosecution of the Counter Claim.

44. Each of the allegations contained in paragraph 44 of the Complaint herein is denied.

45. The paragraph beginning with the statement "WHEREFORE, Federal Insurance Company" and each subpart thereof is specifically denied.

VERIFIED COUNTERCLAIM FOR
PRELIMINARY INJUNCTION AND OTHER RELIEF

AND NOW without waiving any of the foregoing defenses or responses to the specific allegations of the Complaint for Declaratory Judgment, SRHS, joined by Counter-Claimant Singing River Health System Foundation (SRHSF), pursuant to Rules 13(h), 19, and 20 of the Federal Rules of Civil procedure, hereby file their Verified Counterclaim for Preliminary and Permanent Injunction and other relief and would state to the Court as follows:

INTRODUCTION

1. **COME NOW,** Counter-Claimants, Singing River Health System, Singing River Hospital System, and Singing River Heath System Foundation (hereinafter collectively referred to as "SRHS" and/or "SRHSF" for the Foundation only) and asserts this Counterclaim seeking coverage under the indemnity and duty to defend obligations of insurance policies issued by Federal Insurance Company, controlled and implemented and interfered with by Chubb & Son, Inc. a/k/a The Chubb Group of Insurance Companies (hereinafter Federal and Chubb are referred to collectively as "Chubb/Federal" or "the Insurers") and accepted in reliance upon the recommendations of the Insurers' agent and broker BancorpSouth Insurance Services, Inc., through its Stewart, Sneed and Hewes division (hereinafter referred to as "BS/SS", i.e., BancorpSouth/Stewart Sneed).

2. This Counterclaim seeks recovery for bad faith, breach of contract, and related claims, including tortious conduct against the Insurers for their own conduct, and the conduct of their agents, including Paul Douglas. Because remedies at law cannot adequately protect SRHS and SRHSF, SRHS seeks the immediate issuance of a preliminary and/or permanent injunction from this Court, to prevent the Insurers from unilaterally withdrawing its defense of SRHS and other defendants in the underlying suits and to prevent the Insurers from refusing to pay for the future defense of those entities and individuals which it has defended in multiple, duplicative litigation filed in Federal and State Court[4]. For each claim

[4] See list of suits in **Appendix 1**, attached hereto as a true and correct copy, which includes a list of all defense counsel retained as *Moeller* counsel for SRHS and multiple other defendants and who they represent in the various suits, which is a true and correct list as of the filing of this suit. The reference to *Moelle*r counsel is reference to the

against each of the foregoing, SRHS justifiably relied upon the advice and professional recommendations of the agents, employees, and representatives of the Insurers, said agents at all times acting within the scope of their agency for the Insurers and thus binding the Insurers by their conduction, silence, and misrepresentations regarding SRHS's decisions as to the nature, scope, and limits of insurance coverage necessary to reasonably protect SRHS with sufficient amounts of the proper types of coverage.

JURISDICTION

3. This Court has jurisdiction of the subject matter of this action and the authority to issue a preliminary and permanent injunction against Chubb and Federal herein under F.R.Civ.P. Rule 65 without the requirement of bond from SRHS as a public entity. There is complete diversity of citizenship between the counter-plaintiffs and the counter-defendants and the amount in controversy far exceeds $75,000. 28 U.S.C. § 1332. The counterclaim also seeks declaratory relief 28 U.S.C. § 2201, 2202.

VENUE

4. Venue is proper in this Court and this division as Counter-Plaintiff's home office and principal place of business are located in Jackson County, in the Southern Division of this Court, and the claims arose and the causes of action accrued in Jackson County.

THE PARTIES

5. Singing River Health System, (singularly SRHS) formerly known as Singing River Hospital System, is a community hospital organized pursuant to Miss. Code Ann. §41-13-10 (Rev. 2009) and is located in Jackson County, Mississippi. To the extent that SRHS is supported by funds provided by the State of Mississippi, is required to operate in accordance with rules and regulations of the State, and receives and may receive funds from the Tort Claims Fund to pay judgments, if any, and fees if abandoned by the Insurers, then SRHS is an alter ego of the State. SRHS has been at all material times a public entity under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., and the Mississippi Tort Claims Board's Rules and Regulations.

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lead opinion in *Moeller*, *supra*, mandating that any time an insurer reserves rights to later deny coverage, that it must pay for independent counsel, chosen by the insured to whom a defense if offered.

6. Singing River Health System Foundation f/k/a Coastal Medical Healthcare Foundation, Inc. is a 501(c)(3) non-profit corporation organized under and governed by Mississippi law, and is located in Jackson County, Mississippi. Its official name was changed to Singing River Health System Foundation on September 29, 2014. It has paid premiums for its own policies through the Insurers' BancorpSouth's insurance division, Stewart, Sneed and Hewes, to Federal/Chubb. **Exhibit A.** The Insurers have completely ignored coverages under separate policies of insurance applicable to the underlying suits to the detriment of SRHSF and to the detriment of SRHS and other insureds. SRHSF is joined herein by SRHS to this Counterclaim as a Counter-Claimant pursuant to F.R.Civ.P. 13 (h), 19, and 20. SRHSF has formally waived service and process and has joined in this counterclaim.

7. The foregoing Singing River entities are singularly and jointly referred to as SRHS and make these claims on behalf of one for the other, including those improperly named entities in multiple suits.[5] The Insurers are currently defending both SRHSF and SRHS in three suits: *Lay*, *Almond* and *Jones*. However, the Insurers are attempting to subtract limits separately available to SRHSF under separate policies from the limits under the one policy involved in its declaratory action, all of which conduct is baseless, contrary to law and the policies, and grossly negligent in willful disregard of all insureds' rights and in bad faith, justifying recovery by both SRHS and SRHSF of all tort and contract damages for tortious breach of contract, conversion, and extra-contractual damages including punitive damages, attorneys fees, expenses, costs, and pre- and post-judgment interest.

8. Chubb & Son, Inc. a/k/a The Chubb Group of Insurance Companies ("Chubb") is a New Jersey corporation doing business in Mississippi and with its registered agent for process C.T. CORPORATION SYSTEM 645 LAKELAND DRIVE EAST DR., STE 101 FLOWOOD, MS 39232. It has operated as the claims manager of Federal Insurance Company and held itself out as an insurer to SRHS at all material times. Chubb has also acted in concert with others, including Federal Insurance

[5] Singing River Health System is incorrectly identified as Singing River Health Services Foundation, Singing River Hospital System Foundation, Inc., Singing River Hospital System Employee Benefit Fund, Inc., Singing River Health System Foundation, Inc., Singing River Health Benefit Fund, Inc., and Singing River Hospital System in several of the underlying lawsuits.

Company, to wrongfully and improperly ignore policy language, the law, and entire policies and to eliminate and limit insurance coverage, thus converting moneys otherwise available for the protection of SRHS and SRHSF, bought by and paid for said entities, and further breaching the duty to defend, improperly "eroding" potential indemnity available to protect SRHS and even all the plaintiffs in the underlying cases, more specifically described, *infra*. Chubb, jointly and severally with Federal, has breached duties to the Counter-Plaintiffs without any reasonable basis and has further interfered with the provision of coverage through its alter ego company Federal Insurance Company, including specifically the duty to defend imposed by Mississippi law. Federal and Chubb are alter egos of each other and the improper action by either binds the other. It is joined herein as a Counter-Defendant to the Counterclaim pursuant to F.R.Civ.P. 13(h), 19, and 20.

9. Federal Insurance Company ("Federal") is an Indiana corporation with its principal place of business in New Jersey, authorized to and doing business in Mississippi. It can be served with process upon its registered agent C.T. CORPORATION SYSTEM OF MISSISSIPPI 645 LAKELAND DRIVE EAST DR., STE 101 FLOWOOD, MS 39232. It has operated in concert with Chubb in a civil conspiracy in its attempt to wrongfully and improperly eliminate and limit insurance coverage and avoid its duty to defend and potentially indemnify, all to the detriment of SRHS, other insureds, and all the plaintiffs in the underlying cases. Federal has tortiously breached all of its contracts of insurance with SRHS and SRHSF and/or aided and abetted in Chubb's breaches of contract and duties and by its conduct and actions, has waived any defenses to coverage that have been or could have been alleged under any insurance policies issued to SRHS and SRHSF.

10. John Does 1-10 are those companies, including those included in the Chubb Group of Insurance Companies, and individuals who conspired with Federal/Chubb and/or otherwise breached duties owed to SRHS and/or SRHSF and/or put in motion and/or concealed tortious conduct related to the Insurers' failures to comply with Mississippi law, public policy, and the duty to defend.

FACTUAL BACKGROUND[6]

11. At all material times, both Chubb and Federal are alter-egos of each other, each binding the other. Chubb acted as "claim manager" for its related company Federal, directing and controlling Federal's decisions related to coverage and the duty to defend at all material times to this matter. At all material times, Federal was required to follow, and did follow, Chubb's directions with respect to all coverage-related decisions and on information did follow Chubb's directions including Federal's refusal to pay *Moeller*[7] counsel with its own funds, in direct contradiction to Mississippi law and public policy. Such refusal constitutes conversion of the policy limits purchased by SRHS.

12. The events giving rise to the underlying suits are alleged to have occurred at least from mid-2008 forward. The suits listed in **Appendix 1** do not allege the same claims for purpose of being lumped together by the Insurers to limit coverage. The most recent suit, *Beasley*, was made in the 2015-16 policy period and for that additional reason has additional limits available.

13. No admissions are made or intended concerning any alleged improper conduct by SRHS, its officers, directors, or employees with respect to the allegations of the underlying complaints, all of which are denied and all defenses to which are reserved. Any insurer however, is obligated to defend its insured even if the claims are false, as here.

14. The Insurers, and their agents and employees, including Douglas, made the calculated decision, individually and/or jointly and severally, to refuse to pay *Moeller* counsel from the Insurers' own funds and to hire and pay several *Moeller* counsel with the intent to and actual effect of justifying their recent, wrongful position to leave the SRHS Defendants "high and dry" in all of the underlying cases by no longer paying defense costs. **Exhibit C**. The Insurers' positions are not authorized by or found in any policy and ignore the fact that the Insurers obtained agreements from the various defense counsel to abide by their litigation guidelines, i.e., hired them. **Exhibit D**—exemplars of correspondence between

[6] SRHS reserves the right to rely upon additional facts in this matter whether now known or hereinafter discovered and or revealed otherwise.
[7] *See* fn. 1.

Chubb and defense counsel confirming their retention as *Moeller* counsel by Chubb and Federal. In doing so, the Insurers acknowledged on multiple occasions that all the attorneys that it had obligated itself to pay are *Moeller* counsel.

15. At all material times hereto, the Insurers and their agents and employees were all and each bound by the law of Mississippi relative to providing a defense to SRHS and others.

16. At all times material hereto, the Insurers and their agents, employees, and representatives were bound by Mississippi law regarding the obligation to pay for *Moeller* counsel when rights are reserved.

17. At all material times all of the policies obligated the Insurers to comply with the applicable insurance laws of the state of Mississippi.

18. At all material times all of the policies obligated the Insurers to comply with the applicable insurance laws of the state of Mississippi. Chubb and Federal, and their agents, officers, and directors, were required to comply with Mississippi law, public policy and the terms of their own policies.

19. The Insurers have defended SRHS and some of the other SRHS defendants under reservations of rights. However, they have not reserved rights related to all applicable policy periods, claims, and/or available coverage, yet have proceeded to defend all of the claims.[8] The Insurers have otherwise voluntarily defended what they claim are clearly non-covered claims. Jointly or separately those actions waive any coverage defenses they might otherwise have. They have defended SRHSF without taking any position whatsoever under its separate policies and thus have waived all defenses to coverage and the limits of coverage to SRHSF for that separate reason. Because the Insurers have lumped SRHS and SRHSF together, the coverage available under those policies is also available to SRHS.

20. For each case and each insured defendant, Federal and its captive claims manager, Chubb, have failed and refused to pay one penny toward the defense of these cases out of their own funds.

[8] The Insurers' have yet to issue a formal reservation of rights or denial of coverages related to any of the claims made in the *Beasley* suit; however, they have informally notified SRHS that its "coverage position will remain the same as expressed in the prior communications, and as outlined in the declaratory judgment action." **Exhibit P.** Regardless, the Insurers' have previously and are currently providing a defense in that matter, thus waiving any coverage defenses they could conjure after the fact.

This is a breach of the Insurers' duty to defend obligations, which are wholly independent of any duty to indemnify. The effect of this conduct means that the Insurers have in effect required SRHS, a public entity, to pay a premium to buy insurance to protect the Insurers, not SRHS, from having to pay attorneys fees out of their own funds, even when they reserve rights, contrary to Mississippi law and public policy. The Insurers' conduct in using the "limits" purchased by SRHS and SRHSF to pay for its own obligation amounts to conversion.

21. Upon information and belief, the Insurers did not obtain a coverage opinion prior to denying coverage or reserving rights from independent counsel and for that reason alone may not rely upon any advice of counsel defense to any claims herein. Alternatively, the Insurers have no right to rely upon legal opinions that are patently and objectively incorrect. Their position – that an insurer who reserves rights but defends, does not have to pay from its own funds for the *Moeller* counsel defending its insured – is patently and objectively inconsistent with Mississippi law and public policy. At all times material, including the issuance and implementation of the liability coverages under the policies here, SRHS reasonably expected that the Insurers, their agents, and representatives would not attempt to limit coverage in any way inconsistent with Mississippi law and public policy.

22. The Insurers are not permitted to insert provisions in a policy of insurance that attempt to reduce available limits below what is mandated by Mississippi statute or case law. They are not permitted to retain provisions that are inconsistent with the law. The Insurers are not permitted to insert provisions in a policy of insurance that attempts to reduce available limits below what is mandated by the rules and regulations adopted by the Mississippi Tort Claims Board.

23. The Insurers have never sought nor obtained the requisite board approval from either SRHS Board of Trustees or Jackson County Board of Supervisors (BOS) or the Mississippi Tort Claims Board (MTCB) for any insurance policy with any eroding limit. It is against public policy in Mississippi to insert limiting terms and conditions in any insurance policy for a public entity, such as SRHS, unless the insurer presents to the appropriate boards sufficient information for each board to investigate, evaluate, and make a reasoned decision concerning the acceptance or rejection of any such limiting terms

and conditions. Such limiting terms and conditions that have not been adopted in the official minutes of these boards have no validity nor are they binding on SRHS, a public entity, or upon SRHSF, its charitable affiliate.

24. None of the limiting terms and conditions that the Insurers rely upon here were ever presented in the manner previously described, nor were said limiting terms and conditions, after reasonable investigation based on facts presented by the Insurers or its agents, ever approved and/or adopted into the official minutes of SRHS's Board, the BOS, or the MTCB after such presentation.

25. The policies issued by the Insurers are all boilerplate policies and were not prepared specifically for the needs of SRHS, a public entity within the jurisdiction of the Mississippi Tort Claims Board.

26. Neither the Insurers nor its agents ever offered, at any material time, public entity insurance to SRHS.

27. Providing healthcare services in Mississippi, as is provided by SRHS and by SRHSF with SRHS's charitable support, is an important governmental function and a matter of legitimate public interest and concern to the citizens of Mississippi. This public interest will be detrimentally affected if the Insurers are allowed to refuse to pay for the defense costs of the Singing River Health System litigation.

28. Liability insurance provided to a public entity is designed to protect the public fisc. Liability insurance to a public entity that does not protect the public fisc is illusory. The position taken by the Insurers seeks to validate illusory coverage and exposes the public to payment for the defense by allowing the Insurers to illegally convert public funds by using the indemnity limits purchased by premium paid by SRHS and SRHSF to their own use to pay what the Insurers by law, public policy, and by the terms of the policies owe.

29. The obligation to pay for *Moeller* counsel out of an insurer's own funds is a legal requirement in Mississippi when an insurer reserves its rights to deny or limit coverage.

30. The *Moeller* obligation is not a matter of contract; it is a legal requirement imposed by Mississippi law. *Moeller* applies when any liability insurer reserves rights.

31. It is improper for any insurer to reserve rights in order to hire multiple lawyers for the purpose of eroding limits. The reservations of rights here was improper and was for an improper purpose.

32. There was no basis for the reservation of rights here and the reservations, themselves, breached the duty to defend. They were an essential part of a scheme employed by Federal and Chubb to try to spend SRHS's and SRHSF's limits to walk away from the SRHS litigation. Having reserved rights, by choice, the Insurer and its claims manager are bound to comply with *Moeller*.

33. Failure to comply with *Moeller* is a breach of the duty to defend.

34. To the extent that *Moeller* counsel are not paid from the Insurers' own funds, the SRHS defendants suffer damage by having to pay for same and/or, according to the Insurers, additionally suffer a reduction in indemnity limits due to all defense cost and fees being paid to each and all of the *Moeller* counsel retained to defend under the Insurers' reservation of rights.

35. The foregoing decisions by the Insurers were made and have been maintained without any investigation into the coverage issues other than an investigation, if any, conducted by the claims person impermissibly wearing two hats, Paul Douglas. Douglas, acting for the Insurers breached duties to the SRHS defendants. At all times he was acting for and within the course and scope of his position with the Insurers and they are bound by his conduct.

36. Chubb/Federal first received notice of the issues pertaining to the matters giving rise to these suits on or before November 21, 2014, well within the extended reporting period of the 2013-2014 policy. The Insurers have totally disregarded this notice for the purpose of limiting the available coverage. By their conduct they have waived any objection to applicability of this policy period, even if such existed.

37. Not long after the first suit was filed, on January 16, 2015, Chubb/Federal, through Paul Douglas, issued a denial and reservation of rights letter. **Exhibit E.** This reservation of rights letter was "supplemented" on January 21, 2012. **Exhibit F.** Chubb/Federal has denied coverage, reserved rights, and forced a public entity to erode policy limits contrary to law and public policy. The only way an insurer

could arguably erode policy limits would be with a specific presentation, by the insurer or its agent, to the board of that entity describing and explaining the potential for exposure.

38. In its January 16, 2015 letter, Chubb confirmed that Federal had "the right and duty to defend." Moreover, Chubb confirmed for Federal the following:

> Because of the nature of this action, at the request of various parties Federal has consented to your request to Andrea Kimball of the Dentons law firm and Roy C. Williams of the firm of Dogan & Wilkinson, PLLC to defend the SHRS entities the Plan and Michael Heidelberg; Tommy Leonard; Lawrence H. Cosper; Morris G. Strickland; Ira Polk; Chris Anderson; Stephanie Barnes Taylor and Michael Crews, Kevin Holland, Marva Fairley-Tanner, William C. Descher, Martin D. Bydalek, Eric D. Washington, G. Chris Anderson. Federal has also consented to the representation of Dr. Hugo Quintana by Stephen Peresich, Esq. of Page, Mannino, Peresich & McDermott, PLLC and Drs. Vice and Nunenmacher by John Banahan, Esq. of Bryan, Nelson, Schroeder, Castigiloa & Banahan, PLLC. In addition, Federal's consent to these firms is subject to the reservations set forth in this letter and such firm's compliance with the *Litigation Management Guidelines*, which will be provided to the each firm.

39. None of the provisions under which "reservations" were alleged were fairly negotiated and approved by the SRHS Board, BOS, or MTCB nor is any approval reflected in any official minutes of any such board. Therefore, same are void and unenforceable against SRHS as a public entity, and thus also its charitable affiliate, SRHSF.

40. All conditions including notice conditions have been met under all policies by SRHS and SRHSF.

41. On January 16, 2015, Chubb, on behalf of Federal, acknowledged that coverage was triggered by the allegations of the underlying complaints under Insuring Clause 1 (Fiduciary Claims), Insuring Clauses 2 and 3 (D & O Wrongful Acts against Insured Persons and the Organization), and Insuring Clause 4 (Employment Practices Wrongful Acts against Insured Persons and the Organization). Chubb, on behalf of Federal, took no position regarding Third Party Liability Coverage.

42. Insuring Clauses 2 and 3 have a $5,000,000.00 limit.

43. The Insurers have neither denied nor reserved rights under Insuring Clauses 2 and 3 for any insured.

44. None of the so-called reservations relied upon by Chubb and Federal are the alleged basis for relief that they seek in their declaratory action and cannot at this time be determined on the known facts.

45. No provision precluding a duty to defend by the insured under any coverage, including but not limited to Insuring Clauses 2 and 3, has ever been presented, negotiated, and approved at any given time by the SRHS Board, BOS, and MTCB. All such provisions are void and unenforceable against SRHS as a public entity, and thus also its charitable affiliate, SRHSF.

46. Federal has a duty to defend SRHS under each coverage of each of its policies identified in this counterclaim.

47. Federal has a duty to defend SRHSF under each coverage of each of its policies identified in this counterclaim.

48. No exception to any duty to defend under any coverage was ever presented, negotiated, and approved at any given time by the SRHS Board, BOS, and MTCB. All such provisions, limitations, and exceptions are void and unenforceable against SRHS as a public entity, and thus also its charitable affiliate, SRHSF.

49. Thus, Chubb's actions are an attempt to use those "reservations" as an illegal springboard to walk away from their insureds at great detriment to them.

50. SRHS justifiably relied on the Insurers' agents, whose actions, statements, and representations and/or concealments bind the Insurers, jointly and severally, insofar as duties assumed by the Insurers through its agents to conduct proper enterprise risk assessment and determination of the proper amount and type of insurance coverage to purchase to best protect SRHS, all being duties and obligations assumed by said Counter-Defendants. SRHS, its officers, directors, and employees, justifiably relied upon said the Insurers' agents to perform those functions in accordance with the applicable duties imposed upon them professionally and as required by fiduciaries acting in such capacities. SRHS's reliance was justified and was necessary to ultimately protect the taxpayers of Mississippi and Jackson County.

51. The Insurers knew that SRHS acted in reliance upon their assessments and determinations regarding coverage. However, the Insurers failed to treat SRHS's interests equal with their own and went about a calculated attempt to reduce the amount of limits they incorrectly and unilaterally announced was the only coverage available. The Insurers' took these actions without any investigation and, upon information and belief, without the benefit of legal counsel regarding Mississippi law. This joint corporate decision by Chubb/Federal and their agents, employees, and representatives was made while purposely ignoring *Moeller*, Mississippi public policy, statutory law, and judicial precedent. By ignoring those controlling principles, the Insurers have "eroded" coverage as quickly as possible in order to walk away from their insureds, potentially leaving them without funds to pay for defense and exposing the taxpayers through SRHS and/or others to payment of these funds at a time of extreme financial stress for SRHS.

52. At all times in making these decisions and taking these actions, the Insurers, their agents, employees, and representatives knew that SRHS was a major employer in Jackson County; that SRHS was and remains in precarious financial circumstances; that leaving SRHS and others high and dry with no defense funds further exacerbates those issues; and that SRHSF was a charitable foundation, supported by SRHS and providing indigent assistance for health care. The Insurers also knew at all material times that SRHSF had its own policies. The Insurers also knew that taking these actions was inconsistent with Mississippi law and public policy, yet they did so with grossly negligent actions, willfully and wantonly disregarding SRHS's rights without any arguable or legitimate reason do so.

53. In 1996, the Mississippi Supreme Court announced that, as a matter of law, not of contract, if any liability insurer defended any insured under a reservation of rights, that insured was entitled to have the insurer pay for independent counsel from that insurer's own funds. This is the *Moeller* case, *supra*; such independent counsel is commonly referred to as "*Moeller* counsel." Each of the firms representing SRHS and its officers and directors in the underlying suits is *Moeller* counsel and has been since being retained. Hiring but not paying for *Moeller* counsel is a breach of the duty to defend by an insurer.

54. By failing to include any provisions in its policies or a Mississippi endorsement[9] recognizing the foregoing command by the Mississippi Supreme Court, the Insurers are guilty of bad faith. *Richards*, *supra*. This failure was intentionally exacerbated to SRHS's detriment, and to the detriment of its officers, directors, and employees as well as to the plaintiffs in the underlying suits, because the Insurers have wrongfully and willfully, without any reason or excuse, acted inconsistent with this positive mandate of Mississippi law by subtracting the amount that it has paid for these independent lawyers for each of the insureds and SRHS (i.e., *Moeller* counsel) from the only coverage they wrongfully claim is available.

55. The Insurers directly and through Douglas have, jointly and severally, purposefully ignored the rights of each entity and/or person defended, including SRHS, to have their *Moeller* counsel paid for by the Insurer, not the insured Defendant. Here, the Insurers' willful and intentional actions[10] are compounded because, as a result of their non-payment, their actions actually result in each insured paying the defense costs incurred by every other defendant insured. Nowhere is this allowed in law. It is not thus stated, even in the policies, and it is inconsistent with Mississippi law – both facts known and charged to the Insurers and its agents and representatives at all material times.

56. *Moeller* and its progeny[11] also mandate that by defending allegations that are not covered, an insurer waives any right to contest coverage as to such claims. This has occurred here in each case and as a result, all those positions are waived. Each so-called reservation of rights letter is also a denial letter for all except one coverage provision under one policy. The Insurers have undertaken and pursued the defense of those allegedly uncovered claims. As to each, and in each case where that has occurred, the Insurers have legally waived all defenses to coverage because Mississippi law does not treat the duty to defend as cavalierly as the Insurers have done here. The same is true for any action for which the Insurers

[9] There are state-based amending endorsements in the policies. **Exhibit K.** One recognizing *Moeller* could have been easily added showing how the Insurers would comply with the law when it reserved rights. Here, however, the Insurers compound the error by intentionally failing to comply with the law and trying to spend the insureds' indemnity money as fast as they can.

[10] This includes the actions undertaken by others within the Insurers, named as John Does herein.

[11] *Twin City Fire Ins. Co. v. City of Madison, Miss.*, 309 F.3d 901 (5th Cir. 2002); *Liberty Mutual v. Tedford*, 2009 WL 2986192 (N.D. Miss).

have provided a defense without any reservation of rights, which has occurred in certain cases here. By waiving their rights, if in fact there were any, to deny coverage under any of the policies, the Insurers have also waived the right to attempt, though improperly, to "erode" coverage and to deny a defense under any policy. Waiver of all these defenses to coverage in one case as to SRHS bars asserting them in the other cases as well. The Insurers should be estopped from doing so.

57. An omnibus mediation was scheduled in the SRHS litigation to commence in late July. Because there is a continued, though improper denial of coverage and wrongful subtraction from SRHS' indemnity limits by the Insurers, they were requested to participate in the mediation by their insureds, including both individuals and the SRHS defendants. **Exhibit G.** The Insurers refused to come to the mediation even to appear to argue that they have no coverage. This is a breach of the duty to defend.

58. On July 17, 2015, the Insurers filed a declaratory judgment action in this Court, failing to name all necessary and indispensible parties including the underlying Plaintiffs and many other persons they are defending through *Moeller* counsel they retained. The Plaintiffs in the underlying suits have the right to challenge the Insurers wrongful conduct. **Exhibit B**. That action fails to address the totality of the issues involved or the interests of multiple other entities and/or persons directly involved in these matters.

59. Along with providing a "courtesy" copy of their complaint against SRHS and after having spent nearly $800,000.00, if not more by now, on multiple *Moeller* fees, plus litigation expenses, the Insurers took the position that the only funds remaining available to defend all these suits is approximately $200,000.00. Through their counsel, the Insurers advised that they wanted to just pay that money to the "insureds" and walk away from these cases. This is nowhere provided in the policy. Without any justification for same, the Insurers unilaterally refused to participate in any mediation, thus, separately for this action, breaching the duty to defend SRHS. That mediation could potentially move toward resolution of all claims, allowing SRHS and it current officers, directors, and employees to continue focusing upon improving this key health care system and the services it provides. Any breach of the duty to defend waives any defenses to coverage under Mississippi law. The Insurers, their agents, and

employees have breached the duty to defend all, proximately causing damage to SRHS including interfering materially with the ability of SRHS to resolve the matters.

60. At no point in the pursuit of their own unjustified and calculated position to deny the rights of SRHS under their policies and the law did the Insurers offer $1,000,000.00. They certainly have not offered the limits available under SRHSF's policies they have never mentioned. They spent most of it all on *Moeller* defense counsel that they either intentionally or with willful and gross negligence hired for that purpose, first, and then subtracted it, and only then, while still defending under reservation of rights in some instances, took this inconsistent and unjustified position on the eve of a very important mediation. Again, this was done knowing the financial issues facing SRHS, which SRHS's current management is working tirelessly to resolve and improve. The lawsuit filed against SRHS alone, is incomplete and does not acknowledge the effect of the Insurers' multiple breaches of contract, without reason, and wavier of any coverage defenses by conduct and actions including breach of the duty to defend, nor does it address all the policies and waivers of coverage defenses.

61. Moreover, the Insurers, their agents, and employees sold and are trying to give effect to a policy of insurance providing coverage with eroding limits. At all material times, all Defendants knew or should have known that SRHS was a public entity and as such, ultimately, the obligation to pay for the Insurers attempt to "erode" falls on the public. The contentiousness seen in the public media regarding this litigation generally illustrates these concerns. However, knowing that SRHS was a public entity, the Insurers and their agents and employees as well as BS/SS knew or should have known that it was improper to include so-called eroding provisions in any liability coverage. Doing so is against Mississippi's public policy and is unenforceable in the adhesion contracts that this agent and these Insurers provided to SRHS. Each of the Federal/Chubb policies of insurance from 2008 forward is attached as collective **Exhibit H.** The policies demonstrate this unenforceable provision, and the current action is required in part due to the Insurers attempt to enforce the unenforceable.

62. At all material times, neither the Insurers nor their agents suggested to nor offered SRHS insurance specifically designed for a public entity. The insuring recommendations SRHS relied upon to

protect the enterprise were for the same type of insurance that might be suggested for a private hospital system. BS/SS breached their duties to provide appropriate enterprise risk management to SRHS, leaving SRHS with difficulties in securing the coverage it is entitled to absent, yet also because of, the wrongful acts of the Insurers, their employees and agents, including the sharing of defense information with the persons who decide coverage. SRHS has and continues to be damaged thereby.

63. The Insurers' attempt to enforce eroding limits provisions, even if they otherwise could in the face of *Moeller's* legal mandate, is unjustifiable bad faith because it is directly contradicted by the language of the policies. Their own policies limit the "defense costs" that can be subtracted from or eroded under all coverages to "defense costs" that the insured – SRHS and the SRHS defendants – become "legally obligated" to pay. It is the Insurers' policy, it is their language and they are bound by what they wrote. It is not proper for them to unilaterally change it after notice of suit, and no reasonable insured would read the policy any other way in reliance on same. They are required as a matter of law under M*oell*er to pay for all of the SRHS defendants' defense costs, attorneys fees and expenses until all the underlying matters and any new proceedings are concluded. Separately, they are also bound as a matter of indisputable fact under their own policy language to do the same, even if they had never reserved rights. Upon information and belief, they knew this and attempted to hide the ball and avoid their responsibilities to SRHS and SRHSF by reserving rights and hiring as many *Moeller* lawyers as they could but whom they intentionally planned not to pay from their own funds.

64. The policies provide that defense costs can be eroded ***IF, but only if***, they are part of "Loss" as "Loss" defined in the policies. Not one penny of what the Insurers have paid for the defense of the SRHS defendants, under reservation of rights, of any of the underlying suits is included as part of the Defense Costs they included in "Loss" as the Insurers have defined it. The language of the policies tells us that the Insurers are ignoring their own language to the detriment of their insureds and to the potential availability of health care in Mississippi. It also says that as a matter of contract, even without any reservation, they cannot do what they are willfully and intentionally doing here. In relevant part the policy says:

Loss means:

(a)

the amount that any Insured Person (for purposes of Insuring Clause 1 and 2), or the Organization (for purposes of Insuring Clause 3**) becomes legally obligated to pay on account of any covered D&O Claim or Organization Claim, as applicable, including but not limited to:**

****

(vii) Defense Costs; or

(b) the amount which any Insured (for purposes of Insuring Clause 4 and 5) **becomes legally obligated to pay on account of any covered Employment Claim or Third Party Claim,** including but not limited to:

****

The same definitions apply to the Fiduciary Coverage under which the Insurers reserve rights:

(viii) Defense Costs.

Defense Costs means that part of **Loss** consisting of reasonable costs, charges, fees (including but not limited to attorneys' fees and experts' fees) and expenses (other than regular or overtime wages, salaries or fees or benefits of the directors, officers or **Employees** of the **Organization)** incurred in defending any **Claim** and the premium for appeal, attachment or similar bonds.

Loss means **the amount that any Insured becomes legally obligated to pay** on account of any covered **Fiduciary Claim,** including but not limited to damages, judgments, settlements, pre-judgment and post-judgment interest, **Defense Costs** and, solely with respect to Insuring Clause 2, **Settlement Fees.**

The first page of the policy states:

"THE APPLICABLE LIMIT(S) OF LIABILITY TO PAY "LOSS" WILL BE REDUCED, AND MAY BE EXHAUSTED, BY "DEFENSE COSTS" UNLESS OTHERWISE SPECIFIED HEREIN."

65. The Insurers have clearly limited the "**Defense Costs**" that could be included in the "**Loss**" that may be subtracted from policy limits even if they could "erode" contrary to *Moeller* and public policy. Clearly the policies "**otherwise specified**" the Defense Cost that they would even attempt to erode by providing that Defense Costs, under Loss, are only those that the insured becomes legally obligated to pay. It was the Insurers that used the phrase "**that any insured becomes legally obligated to pay**" as the modifier of the term "**defense costs**" under their definition of "**Loss.**" It was also the Insurers who chose to state in their policy that only items that constitute "**Loss**" are to be subtracted from the limits. They are bound by the terms of their policy to pay the full defense costs for all of their insureds by the language of their policies until these matters are resolved.

66. The Insurers thus manufactured a "reservation of rights" to allow them avoid the provisions of their own policies and "cut their losses" while leaving SHRS and the folks it employs and services high and dry, unless relief is afforded as is proper in this Court for such conduct.

67. SRHS and SRHSF are not legally obligated to pay any fees and/or expenses related to the defense of the underlying suits and cannot be held to such an obligation by any party. If they were for some reason held to owe defense costs in any of the cases and the Insurer was required to pay them, that would be the Defense Cost that is a part of Loss that may reduce the limit. That is reasonable: if the Insurer has to pay Defense Costs BECAUSE the insured is legally obligated to pay them, indemnity limits are reduced. This, however, has nothing to do with the duty to defend or the duty under *Moeller* to pay for *Moeller* counsel from the Insurers' own funds and it is consistent with the Insurer's own language.

68. SRHS has not been sued in the underlying cases for payment of any Defense Costs as defined in any policy. The Insurers knew this when denying coverage, when taking their recent position refusing to attend mediation, as well as when filing a declaratory action against SRHS. The Insurers have refused to reconsider their position.

69. The Insurers' attempt to enforce eroding limits provisions, even if they otherwise could without *Moeller's* mandate, is unjustifiable bad faith and is against the public policy of the State of Mississippi. As to the public and this public entity, the Insurers' actions in providing said policies make the protection of the public treasury illusory, and SRHS has been and continues to be damaged by such unenforceable provisions. SRHS's damages have been exacerbated by Federal's filing of the declaratory judgment action. That action was filed by the Insurers in retaliation for SRHS asking them if they were going to continue to defend under the reservations (as legally required) after they had paid $1,000,000.00 in fees and expenses to *Moeller* counsel. **Exhibit G**. SRHS has advised the Insurers of the impropriety of their actions including their failure to join all underlying Plaintiffs to the additional expense of SRHS and under *Moeller*. For those reasons the Insurers have been asked to dismiss that matter without prejudice and litigate these issues before the good Citizens of Jackson County. *Id.* The Insurers have failed and refused, and therefore, SRHS seeks recovery in this case for all litigation expenses, fees, and costs

incurred because of that suit with pre-judgment and post-judgment interest. SRHS also seeks all damages, extra-contractual or punitive, that may be applicable for Federal's conduct in filing this suit and further breaching the duty to defend with respect to the July 2015 mediation.

70. The Insurers have policies other than the policy upon which they sue in this action which mandate defense and indemnity of some or all of the SRHS defendants.

71. From on or about June 16, 2008 through the current date, the Insurers provided coverage through separate polices written for the Singing River Health Care Foundation f/k/a Coastal Medical Healthcare Foundation, Inc. (separately referred to as "SRHSF" or the "Foundation").

72. The Foundation is a charitable institution and nonprofit corporation for charitable purposes which provides health care in association with SRHS. It was formed in 1997 and substantial annual support for its charitable efforts is made by and through SRHS.

73. The Foundation is the named insured in Federal policy number 8120-3003. Said policy has been in force and effect at all material times that the Insurers have known about any and all of the underlying cases.

74. Neither Chubb nor Federal has ever denied coverage or issued a reservation of rights under this policy for any SRHS defendant including the Foundation. The Foundation is directly named as a defendant in three of the underlying cases.[12] The Insurers and BS/SS were informed that the Foundation had been directly sued and have proceeded to defend the Foundation. The Insurers have waived any coverage defenses which might have been available, if any, as to the Foundation and all SRHS defendants. A copy of the 2014-15 and 2015-16 policies are attached. **Exhibit I.** Any and all individuals who have been sued or may be as officers,[13] employees, or directors of the Foundation are insured under the terms of that coverage. Each of these policies provides a $1,000,000.00 limit per occurrence with an aggregate of $2,000,000.00.

[12] *Cynthia N. Almond v. Singing River Health System, et al.*, Chancery Court of Jackson County, Mississippi, Civil Action No.: 2014-2653; *Thomas Jones, et al. v. Singing River Health Services Foundation, et al.*, United States District Court for Southern District of Mississippi, Civil Action No.: 1:14cv447; *Virginia Lay, et al. v. Singing River Health System, et al.*, Chancery Court of Jackson County, Mississippi, Civil Action No.: 2015-0060.

[13] Mr. Lee Bond is the subject of a motion to amend which proposed to add him as a defendant in the *Almond* case.

75. Any defense costs incurred on behalf of the Foundation cannot in good faith be subtracted from the coverage under any other policy, even if such were allowed, particularly under the separate SRHS policies also issued by the same Insurers. Yet the Insurers are doing it here with no basis whatsoever. The Insurers' failure to address these policies and their separate improper attempt to subtract payments for defense costs attributable to defense of the Foundation from defense costs payable under SRHS' policies both amounts to tortious breach of contract and bad faith, justifying the Foundation and any other insured sued to recover all their damages, contractual, compensatory, and punitive, plus all attorneys fees, expenses and cost incurred herein.

76. Federal has a separate duty to defend the Foundation under these policies and has not done so, months into these suits. It is barred from alleging defenses to coverage, if any exist, due to this conduct and breach of the duty to defend. Chubb has a continuing duty to refuse to interfere with these duties.

77. Federal also has a duty to continue to defend the Foundation under SRHS's separate policies as well. Chubb has a duty to not interfere with that obligation.

78. Federal/Chubb has not allocated one penny of defense cost to the Foundation's separate policy.

79. Federal/Chubb have never evaluated coverage in any way at this point for the Foundation under its own policies despite being on notice of suits against it. The Insurers have waived all coverage defenses. *Moeller*, public policy, and the policies themselves mandate that these policies provide coverage and the duty to defend requires that from these policies, as well as others, the Insurers continue to pay for all defense fees, costs, and expenses unless and until all the underlying matters are resolved.

80. To the extent the Insurers have defended any SRHS defendant for allegedly non-covered claims and/or defended non-covered entities or persons, then they are a volunteer and cannot subtract their own voluntary payments from any policy limit even if it were otherwise authorized.

81. At no time prior to or during the offering of any policy or renewal of coverage did the Insurers or their agents make any presentation for consideration by the SRHS Board of Trustees, the

Jackson County Board of Supervisors, or the Mississippi Tort Claims Board advising that the Insurers would take the position that any policy limits would be reduced by money paid to defend any case. At no material time did BS/SS make any presentation to the SRHS Board of Trustees for the Board's approval in the event the Insurers defended any claim under a reservation of rights. BS/SS and the Insurers did not seek approval for such "eroding" provisions nor was any obtained. For this reason, regardless of other reasons, the so call "eroding limits" do not apply to SRHS because it is a public entity, and such erosion would place the public fisc at risk for unanticipated expenditures. The Insurers and BS/SS, their agent, knew or should have known this when they cavalierly ignored the requirements imposed upon them in underwriting, issuing, and taking defense positions regarding insurance for a public entity (SRHS) and breaching duties imposed upon them in regard thereto. For these reasons alone, no provisions or limitations in these policies other than those approved in Mississippi law are enforceable against a public entity such as SRHS.

82. At all times material hereto, BS/SS, with the knowledge of and on behalf of the Insurers and consistent with actual and apparent authority granted to BS/SS, held itself as a regional insurance brokerage operation providing risk management and insurance programs for SRHS. It represented itself as an acknowledged leader in those industries providing insurance professionals with a high level of expertise in insurance and risk management. It also represented itself to SRHS as possessing competency in, among other things, loss prevention. SRHS was repeatedly told during presentations of insurance programs to accomplish those goals that "We value your trust and have always held it in the highest regard; therefore, we will continue to do all that we can to fully represent you in the insurance marketplace." SRHS's management was entitled to rely upon these and other representations made by BS/SS and did do so at all material times. BS/SS owed fiduciary duties, which it breached, and as a result, SRHS has been and continues to be damaged by BS/SS's failures, as alleged herein and as may be otherwise determined, to meet its own announced standard of conduct: its "commitment to excellence." **Exhibit J.**

83. SRHS and SRHSF reasonably relied upon this relationship with the Insurers' agent and representative, and the Insurers are liable for any damage flowing from the breach of each of the duties assumed by BS/SS and actions taken for and on behalf of the Insurers in sales, underwriting and claims handling. The Insurers are also bound by any knowledge related to the issues in the matter that was either actually known or should have been known to their agent, BS/SS, in the failure to comply with the duties imposed upon BS/SS as the long time, trusted agent for the Insurers, including any liability for failure to procure coverage beyond that the Insurers claim that they provide. Liability to defend all these cases to conclusion arises as a result of breach of these duties in contract, in tort, failure to procure, estoppel and waiver.

84. After the Insurers denied coverage and reserved rights, SRHS discovered that the coverage positions were provided by Chubb on behalf of Federal by its technician, Paul Douglas. SRHS also learned that Douglas had responsibility for both the defense (defending the lawsuits) and the coverage (determining if there was coverage) roles within the two Companies. Douglas's assumption of this dual role in a reservation-of-rights or coverage denial situation was a breach of the Insurers' duty to defend and thus waives any defenses to and/or alleged limitations on coverage. Douglas' conduct in regard to same was tortious and in willful disregard of his obligations to SRHS. The Insurers are bound by his conduct. On information and belief, Chubb/Federal also had a separate adjuster in that same dual role for one defendant in the underlying suits whose claims were being separately handled.

85. Information acquired by Douglas, Chubb, and Federal related to the defense of claims against SRHS and other defendants was provided to and used by Douglas, Chubb, and Federal in making decisions on coverage – all in direct violation of Mississippi law and the duty to defend, thus precluding any defense or limitations on coverage below all policy limits. At all material times, all of these entities and persons knew that such sharing of coverage and defense information was prohibited.

86. Upon information and belief, Douglas is an attorney though not licensed in Mississippi and he along with other non-Mississippi attorneys provided "coverage" advice and opinions to the Insurers in connection with their scheme to avoid their responsibilities to SRHS, though completely

ignoring the separate responsibilities owed to the Foundation. As such he was practicing law without a license in Mississippi a fact known to and authorized by the Insurers. Such action is a *per se* violation of Mississippi law, precludes reliance upon such advice, and alone requires entry of judgment against the Insurers herein for all defense costs, jointly and severally with each other.

87. The Insurers have no "advice of counsel" defense to this Counterclaim.

88. Chubb/Federal shared its liability defense files with their outside coverage counsel, which is also a separate breach of the duty to defend and which prohibition was at all material times known to the Insurers and their representatives. *Twin City Fire Ins. Co. v. City of Madison, Miss.*, 309 F.3d 901 (5th Cir. 2002).

89. The Insurers breached the contract and the duty to defend by not responding to inquiries regarding mediation and its blatant, wrongful refusal to attend the July 29, 2015, mediation in direct contradiction to a Mississippi Amendatory Endorsement. **Exhibit K.**

90. At all material times, before and after any loss, BS/SS was the duly authorized agent acting for and on behalf of Chubb and Federal. To the extent BS/SS breached duties for failure to properly evaluate and manage risks and to offer and provide proper and sufficient insurance, Chubb and Federal are vicariously, but jointly and severally, liable for and with BS/SS for damages arising from said conduct and breaches.

91. SRHS and SRHSF have provided proper notice of each suit under the package policy for all coverages and the package policy was in full force at all material times. SRHS has complied with all conditions necessary to perfect claims under any and all coverages as to each suit. Alternatively, both the Insurers and their agent had actual knowledge of all material facts concerning the suits and coverage for SRHS and SRHSF, binding the Insurers to such knowledge.

92. The Insurers positions on coverage and limitations are incorrect and known by them to be incorrect. The Insurers have been asked to reconsider those positions and have, without basis, refused to do so. **Exhibits L-N**. In refusing to reconsider its position, for each day it fails do so, the Insurers continue to breach the continuing obligation to reevaluate coverage.

93. Upon information and belief and in violation of their duties to SRHS, the Insurers have no system in place, even now, to re-evaluate coverage, waiver of defenses, or the impact of *Moeller* and Mississippi public policy on its disastrous, wrongful decisions regarding coverage and defense. Separate from its defense of the underlying cases and the pursuit of SRHS in an incomplete declaratory judgment action, from the beginning the Insurers have wrongfully commingled defense and coverage issues for the sole purposes of developing and accomplishing a plan to spend its limit and walk away from SRHS, an insured that it states it "values."

94. The one policy under which Chubb and Federal denied coverage and reserved rights was its HealthCare Portfolio Policy number 8211-9592 as renewed at least from March 2008 through March 2015. Chubb/Federal's denial and reservation of rights positions were first made on January 15, 2015, and supplemented on January 21, 2015. Chubb/Federal has issued no further denial or reservation of rights letters. Chubb has only denied coverage and reserved rights under one policy, the policy spanning March 2014 - March 2015, even though other policies are implicated, further waiving coverage defenses as to same.

95. The *Beasley* suit filed in the Chancery Court in George County is subject to the version of the policies issued by renewal effective in March 2015. To date, no formal reservation of rights or denial has been issued as to this suit but Chubb/Federal advised on July 28, 2015, that this suit was going to be "treated" as the others, meaning apparently that this suit too will be defended under the same reservation of rights procedure but charging *Moeller* counsel to the insureds. The Insurers knew or should have known that the Beasley suit was to be filed prior to the filing of their incomplete and wrongfully based declaratory action in federal court. Nevertheless, it asked the federal court to rule that it has no coverage for any case, without limitation, including unknown cases filed subsequent to the declaratory action. Minimal comparison of Beasley and the other suits shows that it is not the same. Any position by the Insurers that no covered claim will be established under any coverage for the allegations of that Complaint is at best magical thinking. No investigation was conducted concerning this suit. This action

and the Insureds' tender of its own calculation of remaining policy limits are actual and anticipatory breaches of contract in bad faith.

96. The Insurers announcing their coverage position before evaluation of coverage regarding Beasley is a breach of the contract, breach of the duty to defend, an independent tort and done with gross negligence, and willfully to enrich the Insurers improperly and unjustly at the cost and prejudice to the insureds.

97. Chubb/Federal have no basis under Mississippi law to deny coverage if it is possible that, regarding the claims alleged in any of the underlying suits, a claim can be established that is covered.

98. Chubb/Federal's reservations of rights letters state they were sent because they were required by "existing law." **Exhibits E, F.** This is an intentional misrepresentation designed to obscure the insurers' scheme to pay as many lawyers as possible and abandon SRHS and SRHSF. Having chosen to be bound by that existing law, they are bound by it.

99. That existing law referred to just *ante* includes the *Moeller* case mandates, by which Chubb/Federal and their employees are bound, including Douglas, as well as *Southern Farm Bureau Cas. Ins. Co. v. Logan*, 119 So.2d 268, 270–71 (Miss. 1960) ("The insurer's ultimate liability is not the criterion for determining whether the insurer is obligated to defend"), *Twin City Fire Ins. Co. v. City of Madison, Miss.*, 309 F.3d 901 (5th Cir. 2002) ("When the alleged misconduct of the insurer concerns the duty to defend, the insurer may be liable despite an exclusion otherwise applicable"), and *Liberty Mut. Ins. Co. v. Tedford*, 658 F. Supp. 2d 786 (N.D. Miss. 2009) ("When a conflict of interest arises between an insured and the insurer, particularly through a reservation of rights or the situation in which some claims are clearly not covered by the insurance policy, the insurer is under an obligation to permit the insured to select his or her own individual counsel with the fees and **costs to be paid by the insurer**").

100. At all times material to this case, including when the Insurers issued its denials and reservations and took every action taken with respect to defense of SRHS, the Insurers knew it was bound by the "existing law" expressed in the cases noted in the preceding paragraph.

101. At all times material to the issues in this case, all ambiguities affecting the existence and the amount of coverage in the applicable policy or policies must be resolved in favor of the explanation that provides the broadest coverage.

102. Chubb/Federal's assertion that all insured persons can be bound by only suing one SRHS entity in its narrow, insufficient declaratory action is contrary to law and constitutional due process. This position is inconsistent with and not provided for in any policy.

103. Policy number 8211-9592, renewed in March 2014 and again in March 2015, provides coverages including Executive Liability and Executive Indemnification; Entity Coverage; Employment Practices Liability; Third Party Liability and Fiduciary Liability. The stated limit for the first four coverages is $5,000,000.00 and the stated limit for the last coverage is $1,000,000.00. The policy states that there is an aggregate limit of $5,000,000.00 for each policy period. **Exhibit H,** specifically the 2013, 2014, and 2015 policies. All other issues notwithstanding, the Beasley case is subject to limits that are separate from those applicable to other suits.

104. Other bases for coverage notwithstanding, under the 2013, 2014, and 2015 versions of the policy, the Employment Practices Insurance coordinates with the Fiduciary Coverage. Where both apply, the EPL coverage and its limit apply first – at least $5,000,000.00. If each applies, the Fiduciary Limit of $1,000,000.00 applies only after the $5,000,000.00 EPL limit is exhausted. The Insurers have refused to recognize the clear applicability of the EPL limit to these claims. EPL coverage at least applies to each case during each policy period because the phrase "retaliatory treatment" is not defined in the exception to the sole basis upon which the Insurers claim that EPL does not apply.

105. The common ordinary meaning of "retaliatory" is "to oppose;" the common ordinary meaning of "treatment" is a manner of dealing.

106. SRHS has opposed the positions asserted by the underlying Plaintiffs' claims in each case that they have enforceable rights protected by law to be enforced.

107. The Insurers have no basis under the law, the facts or its policy to claim that the limits have been or will be exhausted by the expenditure of $1,000,000.00 or any other sum for claims filed

during the 2014-15 policy year and no basis whatsoever to claim that even one penny of any limit has been expended for claims like Beasley made during the 2015-16 policy year. The Insurers knew the Beasley claim was coming, yet filed a declaratory judgment action ignoring it thereby breaching the contract.

108. Coverage has been triggered under each of the coverage sections of the applicable policies. The Insurers have admitted that coverage has been triggered under the Directors and Offers Coverage, the Employment Practices Liability Coverage, and the Fiduciary Coverage.

109. The initial claim report made to the Insurers on November 21, 2014, was within the extended reporting period of the 2013-14 policy period. A covered claim in that period would be covered by separate policy limits to later reported claims. The Insurers took the position that this report has no applicability to its coverage decision all in order to avoid applying a third policy period to some claims. Notice to the broker/agent is notice to the Insurers.

110. Not long after being required to retain counsel to counter the unjustified and incomplete positions taken by the Insurers (Chubb for and on behalf of Federal and binding as to both), SRHS raised issues questioning the Insurers decisions, including its failure to act in some instances, and advised that there was at least $11,000,000.00 potential limits available for multiple reasons, independent of the fact that defense costs could not be subtracted. Chubb/Federal and Douglas received the correspondence outlining these issues on March 6, 2015. **Exhibit L.** Weeks later, Douglas advised that he and the Insurers, still wearing dual hats, were considering those questions. **Exhibit M.** However, it was not until May 6, 2015, that the Insurers responded through counsel and did not address many of the issues raised. **Exhibit N**. The Insurers have yet to adequately respond to this date, and its declaratory action in federal court is the latest in their wrongful attempt and failure to comply with the law, the insurance policies, and the public policy of Mississippi.

CAUSES OF ACTION

I. Preliminary and Permanent Injunction

111. The Insurers have breached the duty to defend at least under the mandates of *Moeller* by subtracting the amount of funds paid to *Moeller* counsel from the indemnity limits where the positive law of Mississippi clearly requires that the Insurers pay for *Moeller* counsel from their own funds.

112. Other issues notwithstanding, it is clear that the Insurers breached their own policy and the duty to defend by initially refusing to even acknowledge mediation and later refusing to appear for the mediation set for July 29, 2015, in Ocean Springs, Mississippi.

113. The Insurers are also bound by facts that were undisputed in response the SRHS March 6, 2015 letter.

114. The Insurers' tender of "remaining limits" is a breach of the duty to defend, nowhere authorized by the law or the policy. The indemnity limits remain the same.

115. The Insurers' filing of a declaratory action against SRHS is nothing more than seeking judicial imprimatur for their illegal conduct, pretending that they have not breached duties nor waived all coverage defenses without even offering the claimants an opportunity to contest same.

116. Moreover, the filing of Federal's complaint acknowledges that the reservation of rights continues. The Insurers continue to defend some cases under a reservation and in doing so nothing about their obligations under *Moeller* has changed. In fact, the issue raised in that action – whether the Insurers will have any further duties when the $1,000.000.00 fiduciary coverage limit is exhausted – only begs the question: the second part of their *Moeller* obligation, which remains unacknowledged, is that *Moeller* defense counsel must be paid by the Insurers and NOT by any insured.

117. The Insurers must defend and pay all the fees and expenses incurred in defending the underlying cases. *Moeller* requires it as a matter of law; the policies require it by specific terms even if there had been no reservation.

118. *Richards, supra,* confirms that the failure to include a specific Mississippi endorsement advising that the insurer will pay for independent counsel for the insureds when it reserves rights, breaches its obligations to all insureds and specifically SRHS.

119. Also inconsistent with *Moeller*, the Insurers have assumed defense costs for what they say (incorrectly) are non-covered claims. In doing so, the Insurers waive any coverage defenses as to all such claims.

120. The Insurers have failed to address all potential coverages under which a defense could be owed and have continued to defend all claims, thereby waiving all coverage defenses under at least the third party coverage portion of the policy and/or policies.

121. At least for the foregoing reasons and the facts stated in this Verified Answer and Counterclaim, there is not only a substantial likelihood that SRHS will prevail on the merits of its claims for coverage as stated herein, it is a virtual certainty as to the Insurers' separate legal obligation and contractual obligations to continue to pay to defend the underlying cases until they are all concluded.

122. Further, the conduct of the Insurers in walking away from that defense based upon its ignoring applicable law and refusing to even attend a mediation, all while "claiming" to value SRHS as an insured, is in breach of its duty to defend and materially limits the potential efficacy of any mediation which is best approached globally so that SRHS can move forward and focus solely on providing health care to Jackson County and the Gulf Coast. It would, upon information and belief, place an additional burden of approximately $200,000.00 per MONTH upon SRHS, a potentially crushing blow to the entire system. To allow the Insurers to walk away based upon their refusal to acknowledge *Moeller*'s requirements and Mississippi public policy continues to exacerbate the financial stress upon the largest employer in Jackson County which provides health care services for literally hundreds of thousands of people annually. The potential harm in the Insurers discontinuing payment of defense costs for the lawyers they have retained as *Moeller* counsel to defend SRHS is equally obvious.

123. Any possible harm to the Insurers by requiring them to continue the path they have chosen, to continue to pay *Moeller* counsel, and to preclude them from pursuing an incomplete declaratory judgment action is imaginary. The Insurers will actually save money in the costs of pursuing that case. Requiring them, if they chose to actually defend this conduct, to do it in the Circuit Court of Jackson County is also not a detriment. It is justice. Further, any possible detriment the Insurers could

articulate is far outweighed by the detrimental effects of placing SRHS in the position of spending nearly two hundred thousand dollars per month paying *Moeller* lawyers in its Insurers' place.

124. There can be no dispute that an injunction will serve the public interest. In fact, no other result at this stage of this case is consistent with the public interest.

125. No amount of recovery of damages at some point in the unknown future can provide adequate relief to preclude the irreparable harm that SRHS will suffered if the Insurers are allowed to refuse to pay out of their own pocket for *Moeller* counsel and are allowed to enforce an eroding policy limit which is directly contrary to Mississippi law and public policy.

126. For the foregoing reasons and as may be further developed by argument and evidence, the Insurers should be immediately, mandatorily enjoined from withdrawing from the defense and withdrawing from the payment of defense costs for SRHS or any insureds until all the underlying claims/cases are fully resolved and they should be mandatorily enjoined to dismiss, without prejudice, to dismiss the declaratory action they filed in this Court. As SRHS is a public entity no bond should be required for the issuance of said injunction.

II. Waiver, Estoppel, Unenforceable and Void Provisions

127. SRHS and SRHSF restate the preceding paragraphs in this Verified Answer and Counterclaim.

128. Based upon their actions and conduct the Insurers have waived and/or are otherwise estopped to assert any coverage defenses in any coverage part of the package policy and any renewal thereof.

129. Furthermore, the policy terms are waived and Federal/Chubb are obligated to apply coverage per the policy language that is mandated in the current versions of the ISO Commercial General Liability Form (1988).

130. The Insurers and their agents knew and otherwise should have known that they were offering, writing, and underwriting insurance for a health care provider for a large number of Mississippi citizens at all times material hereto.

131. At all material times hereto in selling, underwriting, and providing insurance including the years 2008 through the present, the Insurers and their agents actually knew or are charged with knowledge that they were providing insurance coverage to a public entity and its charitable arm.

132. At all times material including during the years 2008 through the current date, the Insurers and its agents knew and are charged with knowledge that SRHS's and SRHSF's provision of heath care services is a matter of great public concern and interest to the citizenry of the state of Mississippi.

133. At all times material prior to the alleged formation of any contracts by way of any policies from at least 2008 forward, the Insurers were as a matter of law charged with knowledge that for a public entity the only limitations properly placed upon any coverage provided to a public entity such as SRHS were provided for in the formal rules and regulations of the Mississippi Tort Claims Board, adopted pursuant to enabling authority of Miss. Code Ann. § 11-46-1*et seq.*

134. At all times material hereto, the Insurers and their agents were charged with knowledge that without specific negotiation with the various Boards—including the Board of Trustees of SRHS and its charitable arm SRHSF, the Board of Supervisors of Jackson County, and the Mississippi Tort Claims Board—any limitations on any coverage inconsistent with the provisions of the current version of the 1988 ISO Commercial General Liability Policy, as of the date of issuance of any policy, could not be enforceable against such public entity.

135. Despite this knowledge, prior to the formation of any contracts, neither the Insurers nor their representatives sought nor obtained approval for insuring SRHS as a public entity based upon any terms other than those adopted by the Tort Claims Board pursuant to enabling legislation by the Mississippi Legislature to give effect to the details of the full extent that sovereign immunity had been waived by SRHS.

136. Having failed to present the issues and obtain such approval prior to issuing and/or renewing any policies for SRHS, Federal Insurance is barred by waiver, estoppel, and the principle of Sovereign Immunity from enforcing or attempting to enforce any limitations upon any coverage not

included in the current version of the 1988 Commercial General Liability form at the time any policy was issued to SRHS.

137. The foregoing precludes the application of any limitations or exclusions or insuring language contained in the coverage for SRHS that is inconsistent with any such provisions in the applicable 1988 forms, all of which provide coverage on an "occurrence" basis and do not provide for the erosion of coverage of any kind. As a result, as a matter of law, each policy issued to SRHS and SRHSF from at least March 2008 forward must be applied as occurrence policies and cannot be the subject of any erosion provisions.

138. The only limitations and exclusions on coverage for any public entity, such as SRHS, at any material time are those contained in the current version of ISO 1988 Commercial General Liability policy form.

139. The only form approved by MTCB is the current version of the 1988 ISO Commercial General Liability form.

a. No forms were presented for approval by the Insurers to the MTCB.

b. No forms were presented for approval by the Insurers to the BOS.

c. No forms were presented for approval by the Insurers to the SRHS Board.

140. The Insurers have also fully defended without either denying coverage or reserving any rights under the only approved limitations and exclusions as to any coverage available to SRHS as a public entity: the "current" form of any 1988 ISO Commercial General Liability form and have thus completely and fully waived any defense to coverage that could have been asserted to SRHS and SRHSF.

141. Assuming, but not conceding, that any limits to coverage apply to indemnity because of waiver, estoppel, and sovereign immunity applicable here, at the very least, the allegations of each of the underlying suits invoke alleged events during each policy year from 2008 forward and coverage is triggered under all coverages for each year as a matter of law. As a result, even if aggregate limits can be relied upon by Federal, which is denied, the total amount of limits available for indemnity is at least $41,000,000.00, far above the $1,000,000.00 limit under the one coverage Federal alleges here. This

would be $5,000,000.00 for each year for seven years, or $35,000,000.00, plus an additional $2,000,000.00 for the fiduciary coverage policies and an additional $4,000,000.00 aggregate coverage for SRHSF under its separate policies.

142. The duty to defend is separate and apart from the duty to indemnify under Mississippi. At all material times the insurers and their agents are bound by this principle.

143. The foregoing limits apply as a matter of law, independent of *Moeller* issues, other public policy issues and the terms of the contracts that are inconsistent with the Insurers' positions. Federal is required to defend SRHS and SRHSF fully and completely from its own funds independent of the above limits available for indemnity purposes available for the benefit of SRHS and SRHSF as well as other insureds and potentially, even the underlying plaintiffs.

144. The Court is requested to enter judgment to the foregoing effect establishing the amount of indemnity owed by Federal, and separately mandating that Federal pay for the defense of SRHS, SRHSF and all insureds until the underlying suits now filed which may be filed on these issues are fully concluded.

145. SRHS and SRHSF ask for all expenses, costs and attorneys fees incurred in obtaining this relief and for such other relief to which either or both may be entitled.

III. Civil Conspiracy

146. SRHS and SRHSF restate the preceding paragraphs in this Verified Answer and Counterclaim.

147. From the first notice of these underlying claims and suits the Insurers, directly and through their agents, Stewart Sneed and Hewes, a division of BancorpSouth (BS/SS), and Douglas, on their behalf, have willfully and intentionally engaged in a civil conspiracy designed to spend limits quickly, ignoring their duty to defend SRHS and the dictates of Mississippi law and public policy, and to walk away leaving their insureds in dire straits facing monumental legal expenses.

148. SRHS and SRHSF have and continue to be damaged by this conduct proximately causing same.

149. SRHS and SRHSF are entitled to judgment jointly and severally against the Insurers and any involved John/Jane Does, for all its damages including all fees and expenses incurred in pursuit of this action, compensatory, and punitive damages and pre- and post-judgment interest at the legal rate thereon for which let execution issue. To the extent SRHS and/or SRHSF pays to defend the individual insureds/defendants or each other in the underlying suits, any and all costs incurred are considered additional damages.

IV. Breach of Contract

150. SRHS and SRHSF restate the preceding paragraphs in this Verified Answer and Counterclaim.

151. The Insurers directly and through the conduct of their agents and employees, without any justifiable or arguable reason, acted with at least gross negligence, amounting to willfully wrong and/or intentional conduct toward SRHS.

152. Said conduct proximately caused foreseeable damages to SRHS including attorneys' fees and expenses, in these and the underlying cases and in the pursuit of the relief herein.

153. The Counter-Defendants stated herein are liable for all damages proximately caused thereby, jointly and severally, for which let execution issue.

V. Tortious Breach of Contract

154. SRHS and SRHSF restate the preceding paragraphs in this Verified Answer and Counterclaim.

155. The breaches of contract described herein were tortious and without any good faith, and the damages caused thereby are continuing.

156. Each of the Counter-Defendants named here is liable for tortious breach of contract and compensatory and punitive damages as well as all fees and expenses incurred in the action as well as pre- and post-judgment interest at the legal rate, for which let execution issue.

VI. Breach of Fiduciary Duty

157. SRHS and SRHSF restate the preceding paragraphs in this Verified Answer and Counterclaim.

158. Each of the Counter-Defendants herein had fiduciary duties to SRHS and SRHSF in their dealings with SRHS and owed SRHS at all material times the duty of utmost good faith.

159. These duties were breached, repeatedly, and continue to be breached, said breaches proximately causing damages to SRHS, in the form of fees, expenses, interest, expert costs, litigation costs, compensatory damages, and other losses.

160. The breaches of these obligations were such that they subject each of the Counter-Defendants, jointly and severally, to punitive damages and attorneys' fees, expenses, and costs incurred in this matter and SRHS is entitled to a judgment for all its damages against all defendants, jointly and severally, plus pre-judgment and post-judgment interest, for which let execution issue.

VII. Breach of Duty of Good Faith and Fair Dealing and Bad Faith

161. SRHS and SRHSF restate the preceding paragraphs in this Verified Answer and Counterclaim.

162. The Insurers conduct as described herein and as may be otherwise discovered constitutes a clear violation of the duty of good faith and fair dealing and bad faith toward its insured SRHS, particularly with reference to, but not limited to, the duty to defend.

163. The breaches of these obligations were such that they subject each of the Counter-Defendants, jointly and severally, to punitive damages and attorneys' fees, expenses, and costs incurred in this matter and SRHS is entitled to a judgment for all its damages against all Counter-Defendants, jointly and severally, plus pre-judgment and post-judgment interest, for which let execution issue.

VIII. Vicarious Liability

164. SRHS restates the preceding paragraphs in this Verified Answer and Counterclaim.

165. Each of the corporate Counter-Defendants herein are bound by the actions, conduct, and misfeasance and malfeasance of their employees and agents involved with SRHS in, but not limited to,

promoting, presenting, selling, underwriting, issuing, and claims handling regarding SRHS insurance coverage and its risk management.

166. The Insurers are vicariously liable for the actions and conduct of its agent Stewart, Sneed and Hewes, a division of BancorpSouth (BS/SS), which at all material times acted for the Insurers in enterprise risk management for the SRHS and placing the policies in suit. As a result, the Insurers are liable for the conduct of said agent SRHS and SRHSF for any damages of any kind herein, jointly and severally with BS/SS.

IX. Interference with contract and business relations

167. SRHS and SRHSF restate the preceding paragraphs in this Verified Answer and Counterclaim.

168. Chubb masquerading as a claims handler for Federal, intentionally and willfully, without authority and without adequate or any investigation or legal authority, while commingling defense and coverage among other actions, materially interfered for its own benefit and to the detriment of SRHS with the proper application of Mississippi law and public policy with respect to the duty to defend and the so-called eroding of policy limits. Upon information and belief, Douglas also engaged in such wrongful conduct.

169. This wrongful conduct proximately resulted the in the positions taken by Federal, or taken by Chubb acting as Federal, and are clearly incorrect under the law, public policy, and the subject insurance policy/ies all to the detriment and damage of SRHS and SRHSF including contractual, compensatory, and punitive and extra-contractual damages in an amount to be determined by a jury from Jackson County, and as to which SRHS and SRHSF are entitled to a judgment against Chubb and Federal, jointly and severally, for which let execution issue.

X. CONVERSION

170. SRHS and SRHSF restate the preceding paragraphs in this Verified Answer and Counterclaim.

171. By attempting to and actually subtracting fees and expenses incurred in defending the underlying cases from indemnity limits the Insurers are converting monies properly held for the benefit of SRHS and SRHSF to pay any judgment or settlement.

172. These limits were purchased by SRHS and SRHSF. The Insurers' actions amount to the improper use and conversion of said sums to their own benefit for which conduct they are liable in compensatory and punitive damages plus attorneys' fees, costs, expenses and pre- and post-judgment interest.

XI. ACTIONS PRECLUDED BY THE PUBLIC POLICY OF MISSISSIPPI

173. SRHS and SRHSF restate the preceding paragraphs in this Verified Answer and Counterclaim.

174. In addition to breaching contracts in bad faith and violation of Mississippi law regarding the duty to defend in bad faith and the other claims herein, the conduct of the Insurers and the positions are directly contrary to the public policy of Mississippi and directly contrary to the financial interests of the citizens of Mississippi.

175. The Counter-Plaintiffs, in addition to the relief requested herein, are entitled to relief for this additional reason and declaratory judgment barring enforcement of these positions on coverage and so-called eroding limits to the financial detriment of a public entity such as SRHS under the facts here.

176. Additionally, allowing the Insurers to act directly inconsistent with the public policy of Mississippi against SRHS will detrimentally impact the very existence of SRHSF, the organization through which SRHS delivers substantial and valuable charitable support to Mississippi citizens and which SRHS has and continues to assume providing substantial financial support annually for the operation of SRHSF. This support would be materially undermined if the Insurers, because of their breaches inconsistent with Mississippi law and public policy, are allowed at this late stage, chosen by them, to dump approximately $200,000.00 per month additional expenditures upon that public entity.[14]

[14] This action by the Insurers and, indeed, their declaratory action, are both likely violations of the 11th Amendment to the United States Constitution because, at least, it will "require" as states public entity to expend funds that may

177. In addition to the foregoing allegations, the public policy of Mississippi is expressed, without limitation, at least in the following:

a. Miss Code Ann. § 41-13-11 dealing with public healthcare entities like SRHS states:

> "Notwithstanding the authority to purchase or provide liability insurance as provided for in subsection (4) of this section, **any community hospital, owner or board of trustees shall be subject to and shall be governed by the provisions of Section 11-46-1 et seq., Mississippi Code of 1972, for any cause of action which accrues from and after October 1, 1993, on account <u>of any wrongful or tortious act or omission</u> of any such governmental entity,** as defined in Section 11-46-1, Mississippi Code of 1972, **<u>or its employees relating to or in connection with any activity or operation of any community hospital</u>."**

b. The Statute continues:

> "Such insurance **shall be for such amounts** of coverage **and shall cover** such trustees, employees, volunteers, departments, installations, equipment, facilities and activities **as the board of trustees**, in its discretion, **shall determine."**

178. It is therefore the stated public policy applicable to any coverage bought by a public healthcare facility that the "amount" of insurance that covers the facilities, its officers, directors and employees, "shall be" what the board buys. The Insurers and their agents were charged with knowledge of this requirement at all material times mandating that the nature and amount of coverage is what the board buys, not some uncertain amount based upon some "eroding" of those limits purchased by the board. This principle has long been recognized in Mississippi law under the Mississippi Financial Responsibility Law and the Mississippi Underinsured Motorist Law as salient examples. Regardless of policy terms, there can be "no reduction" of limits beyond those that "shall be" selected by the board of SRHS at least.

179. With that knowledge, the Insurers and their agents and employees made no attempt to present any alternative suggestion to the SRHS's Board for considered approval of the potential for there

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or will come from the state treasury and/or the Department of Finance and Administration or will require the use of monies paid through the State (limited) Medicaid Program for health care services for the payment of the these "fees" in the place of the insurers. SRHS does not waive the right to claim relief based upon these Constitutional principles.

to be zero "0" liability obligations to the Insurer despite the Board's acceptance of limits and paying for them with public funds or quasi public funds. No such approval being sought or obtained and entered in the minutes, the Insurers are bound to the limits and cannot erode to the detriment of the public entity.

180. Moreover pursuant to the Tort Claims Act, which recognizes and continues with limited exceptions the existence of sovereign immunity for entities such as SRHS and their employees and agents, the Tort Claims Board ("TCB") was formed and promulgated rules regarding the nature and kind of insurance that a public entity such as SRHS can purchase. Those regulations provide that the terms and exclusions provided for in the Insurance Services Office (ISO) Commercial General Liability (CGL) form, **Exhibit O**, are approved for the use by entities such as SRHS to use to protect that public entity. There is absolutely nothing in the forms approved by the Tort Claims Board's Rules and Regulations, **Exhibit Q**, that contain any allowance for an insurer taking away by erosion or any other means, any limits that the SRHS purchased for protection of it as a public entity. This action by the TCB pursuant to statute is another expression of Mississippi Public Policy to limit exposure of public entities such as SRHS for protection of the public and, here, protection of the health care provided to Mississippians.

181. As a matter of common law, the Courts of Mississippi refuse to enforce obligations assumed by public entities such as SRHS that are not fairly, openly, and explicitly negotiated and approved after such by any applicable governing authority. At no point in any process of issuing any involved policy of insurance did the Insurers and their agent fully and fairly negotiate any limiting and reducing language which they attempt to rely upon as part of their scheme to leave SRHS and SRHSF, and potentially the public treasury, high and dry. Any such limiting "terms, conditions, or exclusions" and any such eroding language which was not, consistent with Mississippi public policy, fairly and fully presented and negotiated with the Board of SRHS and specifically presented and specifically approved by the Board are, as a matter of law, not enforceable against SRHS in any way.

182. *Moeller*, a separate expression of Mississippi public policy, establishes a legal obligation when there is a reservation of rights (voluntarily issued by the Insurers and binding on them)[15] and expresses Mississippi public policy that insurers who reserve rights are required as a matter of law to pay for defense costs of independent counsel for the insured who are "*Moeller*" counsel. All counsel defending the underlying cases are "*Moeller*" counsel. The Insurers claim that all the counsel defending the underlying cases are "*Moeller*" counsel. The Insurers are required to pay out of their own funds for all defense work done by all *Moeller* counsel. Inconsistent with Mississippi public policy expressed by *Moeller*, the Insurers cannot do what they are doing and cannot use policy provisions, even if otherwise valid, to avoid the requirement of that public policy.

183. For each and all of the foregoing reasons, the Insurers are liable, directly and vicariously, under each coverage for the face amount of each coverage for at least policy years 2013-14; 2014-15 and 2015-16 for the SRHS policies to SRHS and SRHSF (for voluntarily paying for their defense under those policies and not considering SRHSF's own policies) for indemnity purposes. Moreover, they are clearly not entitled to enforce any "erosion" of coverage for SRHS and to the detriment of SRHSF. The Counter-Claimants are entitled to a declaratory judgment to this effect and an award of all damages proximately caused thereby. The Counter-Defendants are also liable for all extra-contractual damages and tort damages including attorneys' fees, expenses and costs. Additionally they should be assessed punitive damages in the largest amount allowed by law under Miss. Code Ann. 11-1-65 as an example to others who may in the future wish to cavalierly treat their obligations to another community hospital system in this State and/or any other public entity.

184. Independent of all other considerations, if the Insurers were permitted under any circumstances to stop paying and withdraw from the defense of their insureds, such action would result in significant, unjustified prejudice to SRHS, SRHSF, and any and all other insureds reasonably relying

[15] Nowhere in any communication from the Insurers did they expressly reserve the right to refuse to pay for defense costs as long as their reservations existed. This is however, the net effect of what they are trying to do, which is illegal under Mississippi law and public policy.

upon the Insureds' retention of *Moeller* counsel to defend them in the underlying litigation. Equitable principles preclude this result on these facts—independent of contractual and tort considerations.

WHEREFORE PREMISES CONSIDERED, SRHS seeks the following relief:

1. That this Court set an immediate, emergency hearing as soon as SRHS and SRHSF can be heard to hear argument and any proof as may be necessary for the issuance of a temporary injunction against CHUBB and FEDERAL requiring them or either of them to continue to pay the defense costs of counsel they have retained and/or paid as *Moeller* counsel pending the final resolution of the underlying cases. Further, said injunction should require the Insurers to appear at mediations and participate in the defense of and any attempted resolutions for the benefit of its insureds, SRHS and SRHSF. Further as to the obligation to continue to defend under *Moeller* that the court advance that for a hearing on the merits under Rule 65 because it is clear that such is required as a matter of Mississippi law and public policy, independent of contract.

2. That as to such issues the law and the policies both clearly but separately obligate the payment of all past, present, and future cost of defending the underlying actions until they are each finally concluded; that the Court advance said hearing to a hearing on the merits as to that obligation pursuant to Rule 65, leaving only for resolution at trial any issues concerning the appropriate recovery against the Counter-Defendants beyond their continued payment for the defense of these cases and a final declaratory judgment that the actions of the Insurers are invalid and improper violations of Mississippi case law, Mississippi statutory law, Mississippi public policy and not supported by their own policy language. It is also requested that the injunction entered at this stage be permanent in nature and consistent with the relief requested herein.

3. Since SRHS is a public entity, that any injunction issue without the necessity of any bond in accordance with the law.

4. That upon the trial of this matter that SRHS and the Foundation be awarded a judgment for all monies and damages, including attorneys fees, expenses, and costs that they have had to incur to challenge the Insurers illegal conduct and because of being exposed to this risk and the multiple breaches

of duty as described herein as may be determined by the jury for contractual, extra-contractual, punitive, and compensatory damages, subject to pre-judgment and post-judgment interest and attorney fees and expenses incurred in connection with all these matters and incurred in this case and that as to all said amounts, that the judgment provide that execution shall forthwith issue in favor of SHRS and SRHSF jointly and severally as to each defendant.

5. That the Court find that, pursuant to the allegations of each of the underlying suits invoking alleged events during each policy year from 2008 forward, coverage is triggered under all coverages for each year as a matter of law, resulting at least $41,000,000.00 limits available for indemnity.

6. That the foregoing limits apply as a matter of law and that the Insurers are required to defend SRHS and SRHSF fully and completely from its own funds independent of the above limits available for indemnity purposes for SRHS's and SRHSF's benefit, as well as the benefit of other insureds and potentially even the plaintiffs in the underlying suits.

7. That this Court enter judgment to the foregoing effect establishing the amount of indemnity owed by Federal, and separately mandating that Federal pay for the defense of SRHS, SRHSF and all insureds until the underlying suits now filed which may be filed on these issues are fully concluded.

8. SHRS and SRHSF reserve the right to amend this Complaint as may be necessary to add parties and/or claims as the case moves forward. SRHS and SRHSF now state their continuing motion for relief in accordance with the proof presented herein and for such other relief as to which it may entitled including all costs, expenses, and attorneys' fees incurred in this actions and pre-suit challenges to the insurers' illegal conduct, plus pre- and post-judgment interest on all amounts in the amount of eight (8) percent per annum, the legal rate authorized by Mississippi law.

RESPECTFULLY SUBMITTED, this the 14th day of August 2015.

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DAN W. WEBB

CORPORATE VERIFICATION

The undersigned, being duly sworn, deposes and states as follows: I am Lee Bond. I serve as the Chief Financial Officer for the Singing River Health System and have personal knowledge of the events giving rise to this action on behalf of Singing River Health System and for and on behalf of the Singing River Health System Foundation f/k/a as Coastal Mississippi Healthcare Foundation, Inc. and of the facts contained herein. I am authorized to make this Verification on behalf of Singing River Health System and for Singing River Health System Foundation and based on my personal knowledge, the facts alleged in this Verified Answer and Counterclaim are true and correct.

LEE BOND

Sworn to and subscribed before me, this the 14 day of August, 2015.

Brenda H Edwards
Notary [seal]

STATE OF MISSISSIPPI NOTARY PUBLIC ID # 8661 BRENDA H. EDWARDS Commission Expires Aug. 10, 2019 JACKSON COUNTY

My commission expires: 8/10/19

CERTIFICATE OF SERVICE

I, Dan W. Webb, on behalf of Defendant, Singing River Health System, do hereby certify that I have this day sent a true and correct copy of the above and foregoing ***Verified Answer to Complaint for Declaratory Judgment and Counterclaim for Preliminary and Permanent Injunction and Other Relief*** with the Clerk of the Court using the ECF system, which sent notification of such filing to the following ECF participants:

James G. Wyly
Scott Ellzey
PHELPS DUNBAR LLP
NorthCourt One, Suite 300
2304 19th Street
Gulfport, MS 39501

THIS the 14th day of August, 2015.

/s/ Dan W. Webb
DAN W. WEBB