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**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

BECKY McVAY,

Plaintiff,

Case No. 3:13-cv-00359

v.

ALLIED WORLD ASSURANCE COMPANY (U.S.),  
Inc., a Delaware company; YORK INSURANCE  
SERVICES GROUP, INC.; DOES I through X  
inclusive; DOE CORPORATION I through X,  
inclusive; DOE ORGANIZATION I through X,  
inclusive;

**JURY DEMANDED**

Defendants.

**AMENDED COMPLAINT**

Plaintiff, BECKY McVAY (“Mrs. McVay”) by and through her undersigned counsel,  
Nicole M. Harvey, Esq., and HARVEY LAW FIRM, PLLC, as and for her Complaint against the  
named Defendants hereby alleges and avers as follows:

**PARTIES, JURISDICTION & VENUE**

1. Mrs. McVay brings this action in Nevada against Defendants, which at all times  
pertinent hereto, were and still are conducting business and entered into contracts in Nevada, all in  
relation to the claims herein. Jurisdiction and venue are proper pursuant to 28 USC § 1332 herein  
because Defendants are not Nevada citizens, and Mrs. McVay’s claims are in excess of \$75,000.00.

2. The Defendant, Allied World Assurance Company (U.S.), Inc. (“Allied”), is, and at  
all times relevant hereto was, a company with a principal place of business located in New York,

1 New York, and authorized to transact business in Nevada as an insurer.

2 3. The Defendant, York Insurance Services Group, Inc., (“York”), is, and at all times  
3 relevant hereto was, a company with a principal place of business located in Warwick, Rhode  
4 Island, and authorized to transact business in Nevada as an insurer.

5 4. Mrs. McVay resides in Churchill County, Nevada.

6 5. Plaintiff does not know the true names or capacities of the Defendants sued herein as  
7 DOES I through X, inclusive; DOE CORPORATION I through X, inclusive; and DOE  
8 ORGANIZATION I through X, inclusive, and plaintiff prays leave to amend this Complain to insert  
9 the true names of those Defendants with proper allegations when they are ascertained. Plaintiff is  
10 informed and believes, and thereupon alleges that each of the Defendants designated herein by such  
11 fictitious names is responsible in some manner for the events and happening herein referred to, and  
12 thereby proximately caused injury and damages to Plaintiff. Plaintiff further alleges that each  
13 Defendant designated herein by such fictitious names are and at all times relevant hereto were,  
14 agents of each other and have ratified the acts of each other Defendant and acted within the course  
15 and scope of agency and have the right to control the actions of the remaining Defendants.

16 6. That at all times mentioned herein, defendants, and each of them, were the apparent  
17 ostensible principals, principals, apparent ostensible agents, agents, apparent ostensible servants,  
18 servants, apparent ostensible employees, employees, apparent ostensible assistants, assistants,  
19 apparent ostensible consultants and consultants of their co-defendants, and were as such acting  
20 within the course, scope, and authority of said agency and employment and that each of the  
21 defendants, as aforesaid, when acting as principal, was negligent in the hiring, training, retention  
22 and supervision of each and every other defendant as an agent, servant, employee, assistant and  
23 consultant.

### 24 **GENERAL ALLEGATIONS**

25 7. On or about August 6, 2009, Ms. McVay entered Fox Peak Station (“Fox Peak”) in  
26 Fallon, Churchill County, Nevada.

27 8. Fox Peak is owned and operated by the Fallon Tribal Development Corporation  
28 (“FTDC”) of the Fallon Paiute-Shoshone Indian Tribe (the “Tribe”).

9. On or about August 6, 2009, parts of the floor inside Fox Peak were wet and

1 slippery.

2 10. Ms. McVay is informed and believes and thereupon alleges, that on or about August  
3 6, 2009, parts of the floor were recently mopped before she entered Fox Peak.

4 11 On or about August 6, 2009, Ms. McVay slipped and fell on the wet floor at Fox  
5 Peak.

6 12. Ms. McVay had no way of knowing that the floor was recently mopped because she  
7 did not see any warning signs indicating that the floor was wet.

8 13. On or about August 6, 2009, Ms. McVay was lawfully and rightfully, and at the  
9 express invitation of FTDC, on the premises of Fox Peak.

10 14. That at all times mentioned herein, FTDC, and each of them, by their agents,  
11 servants, and employees, on their behalf, had a duty to exercise due care and caution for the safety  
12 of customers on or around the premises and a duty to maintain safe conditions.

13 15. It was the duty of FTDC, and each of them, to warn invitees of any dangerous  
14 conditions in or around the premises of Fox Peak.

15 16. FTDC breached its duty of care by failing to provide a safe condition for Ms. McVay  
16 inside Fox Peak and by negligently and carelessly failing to notify their patrons of the dangerous  
17 condition.

18 17. That as a direct and proximate result of the carelessness, recklessness and negligence  
19 of the FTDC, Ms. McVay has suffered and continues to suffer severe personal injuries, all to her  
20 general damage in a sum in excess of Seventy-Five Thousand Dollars \$75,000.00.

21 18. That as further direct and proximate result of the carelessness, negligence, and  
22 recklessness of the FTDC, Ms. McVay has incurred hospital, doctor and medical bills, and will  
23 incur further medical bills in the future, in an amount presently unknown, and to be proven at the  
24 time of trial.

25 19. That as a further, direct, and proximate result of the carelessness, negligence, and  
26 recklessness of the FTDC, Ms. McVay has incurred and will incur in the future, loss of earnings  
27 presently unknown, and in an amount to be proven at trial.

28 20. In or around September, 2009, Ms. McVay became aware that Defendant Allied is  
the property and casualty insurer for FTDC, and, upon information and belief, Allied was put on

1 notice of Ms. McVay's claims.

2 21. In or around September, 2009, Ms. McVay became aware that Defendant York is the  
3 third party administrator of her claim, on behalf of Allied, and York was put on notice of Ms.  
4 McVay's claims.

5 22. Ms. McVay sent a formal written demand to Defendants on November 10, 2010.

6 23. Defendants did not respond in writing to Ms. McVay's demand, instead conveying  
7 verbally that the claim was denied, without providing specific reasons for denial.

8 24. Upon information and belief, Defendants never investigated the underlying facts of  
9 Ms. McVay's claim.

10 25. When Defendants verbally conveyed denial of the claim, Defendants asserted their  
11 insured's sovereign immunity protected it from liability to Ms. McVay.

12 26. When Defendants finally committed their denial to writing on June 22, 2011,  
13 different reasons were cited – that adequate warning existed, and no other accidents had occurred.

14 27. Ms. McVay filed a complaint against Defendants with the State of Nevada Division  
15 of Insurance on or about July 7, 2011.

16 28. On July 27, 2011, York offered Ms. McVay \$5,000 to settle her claim, and the same  
17 day Allied responded to the Division of Insurance asserting it had made an offer of settlement to  
18 Ms. McVay.

19 29. Ms. McVay filed suit against the FTDC on January 27, 2011 in Churchill County  
20 Court.

21 30. On March 10, 2011, the parties stipulated to dismiss the action in Churchill County  
22 and file the action in Fallon Tribal Court ("Tribal Court").

23 31. Ms. McVay filed an action in Tribal Court on August 5, 2011.

24 32. FTDC filed a Motion to Dismiss in Tribal Court, which was granted on November  
25 28, 2011.

26 33. On February 7, 2012, Ms. McVay sought permission to amend her Complaint.<sup>1</sup>

27 34. At the July 9, 2012 Tribal Court hearing on Ms. McVay's Motion to Amend, counsel  
28 for FTDC stated:

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<sup>1</sup> Ms. McVay's Motion to Amend was denied, but that decision was overruled by the Tribe's appellate panel, and remanded to the trial court for further proceedings.

WILLIAMS: ...In this case your Honor, this is going beyond what's in the pleas *[sic]* a little bit but there is an insurance policy that covers this case and there is a writer *[sic]* to that insurance policy that says that the insurance company is not invoke sovereign immunity in defense unless it's approved by the client, which is the Corporation. And in this case I went before the Corporations *[sic]* Board and they authorized me to invoke the sovereign immunity defense for the Corporation. So even if we ended up down the road here we are going to end up with the same issue where it is going to be dismissed because sovereign immunity is still going to apply.

JUDGE: And that was done in writing?

WILLIAMS: Of course not done in writing, the writer does say that it needs to be in writing but I was at the Board meeting

JUDGE: The representation based upon?

WILLIAMS: Yes, we didn't do a writing because I am the Corporations *[sic]* General Counsel and the Insurance Company hired me to represent them in this case so I would be writing myself a memo saying invoke the sovereign immunity defense. I can go out hand write one right now and it would have the effect.

Hearing Transcript, 13:6 – 14:14, relevant portions attached as Exhibit 1.

35. Upon information and belief, Allied denied Ms. McVay's claims on the basis of a sovereign immunity defense that Allied did not have authority to assert.

36. York, as third party administrator, was a joint venturer with Allied, and subject to liability on the contract, fraud, and bad faith claims, herein.

## **CAUSES OF ACTION**

### **I. Breach of Contract**

1. Plaintiff hereby incorporates paragraphs 1 – 36 as though fully set forth herein.
2. Allied and the FTDC entered into a valid and existing contract for the provision of property and casualty insurance for Fox Peak, of which Mrs. McVay was a third party beneficiary.
3. York was Allied's third party administrator for the contract between Allied and FTDC.
4. Allied breached the contract when they denied coverage for Mrs. McVay's claim;
5. York, as third party administrator, is subject to liability on this contract claim; and
5. Mrs. McVay sustained damages in excess of \$75,000 as a result of the breach.

**II. Contractual Breach of the Covenant of Good Faith and Fair Dealing**

1. Plaintiff hereby incorporates paragraphs 1 – 36 as though fully set forth herein;

2. Allied and FTDC were parties to a contract for the provision of insurance for Fox Peak, of which Mrs. McVay was a third party beneficiary;

3. York was Allied's third party administrator for the contract between FTDC and Allied;

4. Allied and York owed duties of good faith to Mrs. McVay;

5. Allied and York breached their duty by performing in a manner that was unfaithful to the purpose of the contract when they denied her claim without investigation and on the basis of its insured's sovereign immunity, and

6. York, as third party administrator, is subject to liability on this bad faith claim; and

7. Mrs. McVay's justified expectations were thus denied.

8. As a proximate result of Allied's and York's breach, Plaintiff has been damaged in excess of \$75,000.

WHEREFORE, the Plaintiff prays for judgment against Defendants for:

1. Damages in an amount to be proven at trial, jointly and severally, or as the Court may see fit, together with interest on that amount until paid;

2. Reasonable attorney's fees;

3. Costs of suit;

4. Punitive damages for Allied's bad faith;

5. Punitive damages for York's bad faith; and

6. Such other and further relief as the court may deem just and proper.

DATED this 29th day of August, 2013.

/s/ Nicole M. Harvey, Esq.

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