

United States District Court
District of Maryland
Southern Division

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| The Charter Oak Fire Insurance Company, et al., |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | Case No. 8:09-cv-00100-DKC |
| |) | |
| American Capital, Ltd., et al., |) | |
| |) | |
| Defendants. |) | |

Second Amended Complaint

Introduction

1. Plaintiffs The Charter Oak Fire Insurance Company (“Charter Oak”) and Travelers Property Casualty Company of America (“Travelers”) seek rescission or reformation of insurance contracts between the Plaintiffs and the Defendant American Capital, Ltd. (“American Capital”), formerly known as American Capital Strategies, Ltd. Charter Oak and Travelers also seek declaratory relief that they have no defense or indemnity obligations for underlying lawsuits against American Capital and various other entities on the grounds that the underlying lawsuits concern the conduct of non-insured entities.

2. American Capital intentionally concealed, misrepresented, omitted, and otherwise falsely presented to Travelers information material to its liability exposures and the scope of the

insurance it allegedly sought. In obtaining the insurance contracts from Charter Oak and Travelers, American Capital neither sought insurance nor paid premiums for insurance for subsidiaries. American Capital repeatedly represented to Charter Oak and Travelers in its applications and other submissions during the application process that it did not have any subsidiaries and that it was not seeking coverage for other entities. Now, in direct contradiction to those repeated representations, American Capital contends that it had sought coverage for subsidiaries when it obtained the insurance contracts from Charter Oak and Travelers. American Capital's misrepresentations, concealments, omissions, and presentation of otherwise false information prevented Charter Oak and Travelers from evaluating properly the scope and nature of American Capital's liability exposures, and Charter Oak and Travelers were induced to enter into the insurance contracts under false pretenses.

3. Now in spite of its representations, omissions, and otherwise false presentation of material facts, including the representations that it did not have subsidiaries and that it was not seeking coverage for other entities, American Capital demands coverage for numerous lawsuits against American Capital and its purported subsidiary, SPL, for injuries and deaths allegedly caused by tainted heparin originating in China through a Chinese joint venture. American Capital contends that it acquired SPL in August 2006. American Capital, however, did not notify Charter Oak and Travelers in August 2006 or at any other time that it had acquired SPL – a pharmaceutical manufacturer and importer. Moreover, consistent with its representations that it did not have any subsidiaries and that it was not seeking coverage for other entities, American Capital never asked to purchase coverage for SPL or any other entity when it renewed the insurance for 2007-08 and 2008-09. Furthermore, American Capital represented to Charter Oak and Travelers in 2008 that it had not acquired any operations in the past 5 years. As a result of American Capital's various misrepresentations, omissions, and otherwise false presentation of material facts to Charter Oak and Travelers in its applications and other supporting

documentation, Charter Oak and Travelers were prevented from properly evaluating their liability exposures. Indeed, American Capital was never charged and never paid any premiums with respect to the liability exposures of SPL or other entities.

4. Alternatively, even if the intentional misrepresentations, concealment, omissions, and otherwise false presentation of material facts to Charter Oak and Travelers by American Capital do not warrant rescission or reformation of the policies, Charter Oak and Travelers are entitled to a declaration that the insurance contracts – if valid at all – do not provide coverage for the underlying suits.

5. Among other reasons, Charter Oak and Travelers are entitled to a judicial declaration that the insurance contracts do not provide coverage for the underlying lawsuits because American Capital and SPL, without the consent of Charter Oak and Travelers, and despite early and repeated instructions from Charter Oak and Travelers not to enter into any settlement agreement regarding the heparin suits without their consent, entered into a settlement agreement with Baxter International, Inc. and Baxter Healthcare Corporations (herein collectively “Baxter”), co-defendants in the underlying heparin lawsuits. In so doing, American Capital and SPL deliberately breached the condition in the insurance contracts that an insured will not “voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.” American Capital and SPL also deliberately breached the condition that an insured may not recover on an “agreed settlement” unless the agreed settlement is signed by Charter Oak and Travelers.

6. In addition, the heparin lawsuits relate to a non-insured joint venture in China. As such, American Capital and SPL are not owed coverage for the heparin suits as the insurance contracts define “Who Is An Insured” such that “[n]o person or organization is an insured with respect to the conduct of any current or past . . . joint venture” Similarly, “[n]o person or organization is an insured with respect to the conduct of any current or past partnership” A

non-heparin lawsuit in Ohio against American Capital relates to the conduct of a non-insured partnership, and likewise, this Ohio lawsuit falls outside the coverage of the insurance contracts.

7. For these reasons, and for other reasons set forth below, Charter Oak and Travelers are entitled to a declaration that the insurance contracts be rescinded or reformed. In addition, Charter Oak and Travelers are entitled to a declaration that the insurance contracts, if found to be valid, do not provide coverage for the underlying heparin lawsuits..

Parties

8. Plaintiff Charter Oak is incorporated under the laws of the State of Connecticut with its principal place of business in Hartford, Connecticut.

9. Plaintiff Travelers is incorporated under the laws of the State of Connecticut with its principal place of business in Hartford, Connecticut.

10. Defendant American Capital, Ltd., formerly known as American Capital Strategies, Ltd., is incorporated under the laws of Delaware with its principal place of business in Bethesda, Maryland.

11. Defendant Scientific Protein Laboratories LLC is a Delaware limited liability company, and its sole member is a Delaware corporation with its principal place of business in Wisconsin.

12. Defendant SMG, formerly known as Spectator Management Group, is a partnership organized under the laws of Pennsylvania, which is owned by SMG Holdings I, LLC and SMG Holdings II, LLC, both of which in turn are wholly owned by SMG Holdings, Inc., a Delaware Corporation with its principal place of business in Pennsylvania.

Jurisdiction and Venue

13. This Court has jurisdiction pursuant to 28 U.S.C. § 1332 because there is complete diversity of citizenship between the Plaintiffs and Defendants and the amount in controversy, exclusive of interests and costs, exceeds \$75,000.

14. Venue of this action is properly situated in this District pursuant to 28 U.S.C. §1391(a)(2).

Facts

A. Insurance Contracts

15. American Capital and Charter Oak entered into three primary insurance contracts:

| | |
|---------------|--------------------------------|
| Policy No. | P-630-5074A126-COF-06 |
| Policy Period | June 14, 2006 to June 14, 2007 |

| | |
|---------------|--------------------------------|
| Policy No. | P-630-5074A126-COF-07 |
| Policy Period | June 14, 2007 to June 14, 2008 |

| | |
|---------------|--------------------------------|
| Policy No. | P-630-5074A126-COF-08 |
| Policy Period | June 14, 2008 to June 14, 2009 |

16. Each of the primary contracts has limits of liability of \$1 million per occurrence and \$2 million aggregate.

17. The premiums for the primary contracts were approximately: \$33,000 for the 2006-07 primary contract, \$38,000 for the 2007-08 primary contract, and \$53,000 for the 2008-09 primary contract.

18. American Capital and Travelers entered into three umbrella insurance contracts:

| | |
|---------------|--------------------------------|
| Policy No. | PSM-CUP-5074A126-TIL-06 |
| Policy Period | June 14, 2006 to June 14, 2007 |
| Policy No. | PSM-CUP-5074A126-TIL-07 |
| Policy Period | June 14, 2007 to June 14, 2008 |
| Policy No. | PSM-CUP-5074A126-TIL-08 |
| Policy Period | June 14, 2008 to June 14, 2009 |

19. The 2006-07 umbrella contract has limits of liability of \$10 million per occurrence and \$10 million aggregate. Each of the 2007-08 and 2008-09 umbrella contracts has limits of liability of \$20 million per occurrence and \$20 million aggregate.

20. The premiums for the umbrella contracts were approximately: \$9,000 for the 2006-07 umbrella contract, \$18,000 for the 2007-08 umbrella contract, and \$18,000 for the 2008-09 umbrella contract.

B. Underlying Heparin Lawsuits

21. Prior to April 10, 2009, more than one hundred (100) lawsuits were filed in numerous jurisdictions against American Capital and/or SPL, alleging deaths and injuries from allegedly tainted heparin. Heparin is a drug that is used to prevent the formation of clots within the blood of humans. Since April 10, 2009, American Capital has ceased forwarding heparin lawsuits to Charter Oak and Travelers.

22. The lawsuits variously allege that SPL is a subsidiary of, solely owned by, or majority owned by American Capital, and/or that American Capital is the parent of SPL. American Capital has inconsistently admitted or denied various of these allegations. American Capital also contends that SPL is a subsidiary of SPL Acquisition Corporation. SPL Acquisition Corporation has represented in a judicial proceeding that it has no parent corporation.

23. The lawsuits variously allege that one or more of the ingredients for the allegedly tainted heparin, including the active pharmaceutical ingredient (API) for heparin, became tainted or contaminated during processing in China by Changzhou SPL Company, Ltd. – a joint venture

between SPL and Tech-Pool Bio-Pharma Company, a Chinese firm. When tainted heparin was administered to patients in the United States, patients allegedly suffered injuries or died.

24. The lawsuits variously allege that the tainted heparin was shipped to the United States to be finished by Baxter or other companies, and then the finished heparin was distributed in the United States for administration to patients. Many of the heparin lawsuits also name the Baxter entities as defendants.

25. On information and belief, additional lawsuits continue to be filed against American Capital or SPL, alleging injuries and deaths caused by tainted heparin.

26. On behalf of itself and SPL, American Capital seeks coverage from Charter Oak and Travelers under the insurance contracts described herein with respect to the heparin lawsuits.

27. American Capital allegedly acquired SPL in August 2006, but did not advise Charter Oak and Travelers that it sought insurance for an entity engaged in the manufacture and importation of heparin when American Capital renewed the insurance contracts for the 2007-08 or the 2008-09 policy periods.

C. Non-Heparin Lawsuit

28. American Capital requested defense and indemnity for a non-heparin lawsuit that involves injury to a spectator during an event at the Nationwide Arena in Columbus, Ohio. During the event, a falling sheet of glass allegedly hit the spectator and knocked the spectator unconscious. The spectator brought suit in state court in Ohio against SMG and American Capital to recover for his injuries.

29. This lawsuit alleged that SMG specializes in sports-arena management, and alleged that American Capital is the parent company of SMG.

30. On behalf of itself and SMG, American Capital requested that Charter Oak or Travelers provide defense and indemnity in this lawsuit involving the spectator injury at the Nationwide Arena in Columbus, Ohio.

31. While American Capital now states that it and SMG do not seek coverage for the Nationwide Arena lawsuit from Charter Oak and Travelers, American Capital has not disavowed its position that it is owed coverage for lawsuits relating to entities that it never disclosed to Charter Oak and Travelers. American Capital's position as to SMG demonstrates that it made misrepresentations when it obtained the insurance contracts from Charter Oak and Travelers or that it never intended to obtain liability insurance with respect to other entities. American Capital admits that it will request defense and indemnity from Plaintiffs for other current or future lawsuits that relate to purported subsidiaries of American Capital.

D. False Representations by American Capital

32. American Capital, through its broker Marsh, has submitted to the Plaintiffs various insurance applications in connection with American Capital's request that the Plaintiffs issue insurance contracts to American Capital. At all times, Marsh was acting as an agent of American Capital.

33. On behalf of itself and SPL, American Capital seeks coverage from Charter Oak and Travelers for the heparin lawsuits, some of which allege that SPL is solely or majority owned by American Capital. On behalf of itself and SMG, American Capital asked that Charter Oak or Travelers provide a defense and indemnity for the lawsuit involving the spectator injury at the Nationwide Arena in Columbus, Ohio, which alleges that SMG is owned by American Capital.

34. In the insurance applications provided by American Capital to Charter Oak and Travelers in 2006 and 2008, American Capital answered "no" when asked whether it had any subsidiaries.

35. American Capital provided false answers to Charter Oak and Travelers when it was asked whether it had any subsidiaries.

36. To the extent that American Capital was supposedly seeking coverage for other entities, such as subsidiaries of American Capital or organizations over which American Capital maintains ownership or majority interest, American Capital provided false information and/or made material omissions to Charter Oak and Travelers regarding the non-existence of subsidiaries. Alternatively, such submissions demonstrate that American Capital neither sought nor obtained from Charter Oak and Travelers liability insurance with respect to other entities.

37. American Capital claims that it acquired SPL in August 2006. American Capital claims that it acquired SMG in June 2007. In the insurance application submitted by American Capital to Charter Oak and Travelers in 2008, American Capital answered “no” when asked whether it had acquired any operations in the past 5 years.

38. American Capital provided a false answer to Charter Oak and Travelers when asked if it had acquired any operations in the past 5 years.

39. To the extent that American Capital was supposedly seeking coverage for other entities, such as subsidiaries of American Capital or organizations over which American Capital maintains ownership or majority interest, American Capital provided false information and/or made material omissions to Charter Oak and Travelers regarding its not having acquired any operations in the past 5 years. Alternatively, such submissions demonstrate that American Capital neither sought nor obtained from Charter Oak and Travelers liability insurance with respect to operations that it acquired.

40. Prior to submitting the 2008 Application to Plaintiffs, American Capital had been named as a defendant in one or more heparin lawsuits. In the 2008 Application, American

Capital was asked whether there had been any product liability loss in the past 3 years.

American Capital answered “no.”

41. American Capital provided a false answer to Charter Oak and Travelers regarding the lack of any product liability loss in the past 3 years.

42. To the extent that American Capital was supposedly seeking coverage for other entities, such as subsidiaries of American Capital or organizations over which American Capital maintains ownership or majority interest, American Capital provided false information and/or made material omissions to Charter Oak and Travelers regarding the absence of any product liability loss in the past 3 years. Alternatively, such submissions demonstrate that American Capital neither sought nor obtained from Charter Oak and Travelers liability insurance with respect to other entities.

43. In early 2008, suspected tainted heparin was recalled, and the active pharmaceutical ingredient (API) for heparin was recalled also. After the recalls, American Capital submitted its 2008 Application. In the 2008 Application, American Capital was asked whether products had been recalled. American Capital answered “no.”

44. American Capital provided a false answer to Charter Oak and Travelers regarding the absence of recalled products.

45. To the extent that American Capital was supposedly seeking coverage for other entities, such as subsidiaries of American Capital or organizations over which American Capital maintains ownership or majority interest, American Capital provided false information and/or made material omissions to Charter Oak and Travelers regarding the absence of recalled products. Alternatively, such submissions demonstrate that American Capital neither sought nor obtained from Charter Oak and Travelers liability insurance with respect to other entities.

46. According to the heparin lawsuits, tainted heparin ingredients were processed in China for exportation to the United States. In one or more insurance applications, American Capital was asked whether foreign products were sold, distributed or used as components. American Capital answered “no.” American Capital also was asked whether foreign products were distributed in the United States. American Capital answered “no.”

47. American Capital furnished false answers to Charter Oak and Travelers regarding distribution of foreign products or foreign product components in the United States.

48. To the extent that American Capital was supposedly seeking coverage for other entities, such as subsidiaries of American Capital or organizations over which American Capital maintains ownership or majority interest, American Capital provided false information and/or made material omissions to Charter Oak and Travelers regarding distribution of foreign products or foreign product components in the United States. Alternatively, such submissions demonstrate that American Capital neither sought nor obtained from Charter Oak and Travelers liability insurance with respect to other entities.

49. According to the heparin lawsuits, tainted heparin was processed in China by a joint venture, Changzhou SPL Company Ltd. In its answers to one or more of the heparin lawsuits, SPL has admitted that SPL’s joint venture, Changzhou SPL Co., Ltd., manufactures heparin sodium API in China. In one or more of its applications, American Capital was asked whether it had been active in or was currently active in joint ventures. American Capital answered “no.”

50. American Capital provided a false answer to Charter Oak and Travelers regarding the non-existence of joint ventures.

51. To the extent that American Capital was supposedly seeking coverage for other entities, such as subsidiaries of American Capital or organizations over which American Capital maintains ownership or majority interest, American Capital provided false information and/or

made material omissions to Charter Oak and Travelers regarding the non-existence of joint ventures. Alternatively, such submissions demonstrate that American Capital neither sought nor obtained from Charter Oak and Travelers liability insurance with respect to other entities.

52. Prior to the time that American Capital submitted the 2008 insurance application to Charter Oak and Travelers, lawsuits alleging death and injury from tainted heparin had been brought against SPL or American Capital or both. In the 2008 application, American Capital was asked to give details of all liability claims exceeding \$10,000, or occurrences that may give rise to such claims, during the past 5 years. American Capital answered “no such claims.”

53. American Capital provided a false answer to Charter Oak and Travelers regarding the absence of any occurrence in the past 5 years that may give rise to a claim exceeding \$10,000.

54. To the extent that American Capital was supposedly seeking coverage for other entities, such as subsidiaries of American Capital or organizations over which American Capital maintains ownership or majority interest, American Capital provided false information and/or made material omissions to Travelers regarding the absence of any occurrence in the past 5 years that may give rise to a claim exceeding \$10,000.00. Alternatively, such submissions demonstrate that American Capital neither sought nor obtained from Charter Oak and Travelers liability insurance with respect to other entities.

55. Prior to the renewal of the policies in June 2008, American Capital and SPL were aware that heparin suits had been brought that named SPL, American Capital, or both as defendants. American Capital did not notify Charter Oak and Travelers of these lawsuits prior to or at the time that it renewed the policies in June 2008.

56. American Capital’s failure to notify Charter Oak and Travelers of the heparin suits prior to or at the time of the renewal misled Charter Oak and Travelers about the scope of

exposures for which American Capital was purportedly obtaining insurance from Charter Oak and Travelers.

57. To the extent that American Capital was supposedly seeking coverage for other entities, such as subsidiaries of American Capital or organizations over which American Capital maintains ownership or majority interest, American Capital provided false information and/or made material omissions to Charter Oak and Travelers when it failed to disclose the existence of the heparin lawsuits prior to or at the time of the renewal of the insurance policies in June 2008. Alternatively, the failure to disclose the heparin lawsuits demonstrates that American Capital neither sought nor obtained from Charter Oak and Travelers liability insurance with respect to other entities.

58. In connection with its purchase of insurance from Charter Oak and Travelers for the 2006-07 policy period, American Capital submitted to Charter Oak and Travelers a Premium and Loss Summary that showed claims paid and pending, known as “loss runs,” for premises/operations for the period of June 2004 through June 2006. Exhibit 1 is a true and correct copy of the Premium and Loss Summary. The Premium and Loss Summary showed no premises/operations liability claims paid or pending for the period June 2004 through June 2006.

59. In connection with its purchase of insurance from Charter Oak and Travelers for the 2006-07 policy period, American Capital did not submit a loss run for premises/operations for any other entity.

60. To the extent that American Capital was supposedly seeking coverage for other entities, such as subsidiaries of American Capital or organizations over which American Capital maintains ownership or majority interest, American Capital provided false information and/or made material omissions to Charter Oak and Travelers regarding its prior history of claims paid and pending. Alternatively, such submissions demonstrate that American Capital neither sought nor obtained from Charter Oak and Travelers liability insurance with respect to other entities.

61. American Capital submitted Commercial General Liability Exposure Schedules to Charter Oak and Travelers in order to obtain or renew liability insurance from Charter Oak and Travelers.

62. American Capital submitted a Commercial General Liability Exposure Schedule that listed the 2006-2007 exposure in order to purchase liability insurance for the 2006-07 policy period. Exhibit 2 is a true and correct copy of the Commercial General Liability Exposure Schedule for the 2006-2007 policy period.

63. American Capital submitted a Commercial General Liability Exposure Schedule that listed the 2007-2008 exposure in order to renew the liability insurance for the 2007-08 policy period. Exhibit 3 is a true and correct copy of the Commercial General Liability Exposure Schedule for the 2007-2008 policy period.

64. American Capital submitted a Commercial General Liability Exposure Schedule that listed the 2008-2009 exposure in order to renew the liability insurance for the 2008-09 policy period. Exhibit 4 is a true and correct copy of the Commercial General Liability Exposure Schedule for the 2008-2009 policy period.

65. The Commercial General Liability Exposure Schedules identified only offices of American Capital and gave only a risk rating classification for “office” and a risk rating basis for “area,” *i.e.*, square footage.

66. None of the Commercial General Liability Exposure Schedules stated a risk rating classification for manufacturing or a risk rating basis for sales.

67. None of the Commercial General Liability Exposure Schedules identified a manufacturing operation.

68. None of the Commercial General Liability Exposure Schedules identified other entities, such as subsidiaries of American Capital or organizations over which American Capital maintains ownership or majority interest.

69. None of the Commercial General Liability Exposure Schedules identified SPL.

70. To the extent that American Capital was supposedly seeking coverage for other entities, such as subsidiaries of American Capital or organizations over which American Capital maintains ownership or majority interest, American Capital provided false information and/or made material omissions to Charter Oak and Travelers regarding its commercial general liability exposures. Alternatively, such submissions demonstrate that American Capital neither sought nor obtained from Charter Oak and Travelers liability insurance with respect to other entities.

71. American Capital submitted a Commercial General Liability Exposure Schedule (Exhibit 3) listing the 2007-2008 exposure in order to renew the liability insurance for the 2007-08 policy period. This Schedule listed additional offices for the 2007-08 exposure in relation to the prior 2006-07 exposure.

72. Even though American Capital now claims that it acquired SPL in August 2006 and even though American Capital identified additional exposures for the 2007-2008 policy period, American Capital did not identify SPL as an exposure for the 2007-08 policy period.

73. American Capital identified new or additional exposures for the 2007-08 policy period, but it never identified SPL as a new or additional exposure for the 2007-08 policy period.

74. To the extent that American Capital was supposedly seeking coverage for other entities, such as subsidiaries of American Capital or organizations over which American Capital maintains ownership or majority interest, American Capital provided false information and/or made material omissions to Charter Oak and Travelers regarding new or additional commercial general liability exposures for the 2007-08 policy period. Alternatively, such submissions

demonstrate that American Capital neither sought nor obtained from Charter Oak and Travelers liability insurance with respect to other entities for the 2007-08 policy period.

75. American Capital submitted a Commercial General Liability Exposure Schedule (Exhibit 4) listing the 2008-2009 exposure in order to renew the liability insurance for the 2008-09 policy period. This Schedule listed additional offices for the 2008-09 exposure in relation to the prior 2007-08 exposure.

76. Even though American Capital now claims that it acquired SPL in August 2006 and even though American Capital identified additional exposures for the 2008-2009 policy period, American Capital did not identify SPL as an exposure for the 2008-09 policy period.

77. American Capital identified new or additional exposures for the 2008-09 policy period, but it never identified SPL as a new or additional exposure for the 2008-09 policy period.

78. To the extent that American Capital was supposedly seeking coverage for other entities, such as subsidiaries of American Capital or organizations over which American Capital maintains ownership or majority interest, American Capital provided false information and/or made material omissions to Charter Oak and Travelers regarding new or additional commercial general liability exposures for the 2008-09 policy period. Alternatively, such submissions demonstrate that American Capital neither sought nor obtained from Charter Oak and Travelers liability insurance with respect to other entities for the 2008-09 policy period.

79. During the 2007-08 policy period, American Capital requested that the Location Schedule of the Declarations Pages of the 2007-08 insurance contracts be updated to include new or additional office locations of American Capital. Exhibit 5 is a true and correct copy of the Change Endorsement effective February 22, 2008.

80. Even though American Capital now claims that it acquired SPL in August 2006 and even though American Capital requested that updates be made to the Location Schedule of the

Declarations Pages of the 2007-08 contracts, American Capital did not request that the Location Schedule for the 2007-08 contracts be updated to identify SPL.

81. To the extent that American Capital was seeking coverage for other entities, such as subsidiaries of American Capital or organizations over which American Capital maintained ownership or majority interest, American Capital provided false information and/or made material omissions to Charter Oak and Travelers when identifying other exposures for the 2007-08 policy period. Alternatively, such submissions demonstrate that American Capital neither sought nor obtained from Charter Oak and Travelers liability insurance with respect to other entities for the 2007-08 policy period.

82. American Capital contends that it acquired SPL in August 2006, but it never reported the acquisition of SPL to Charter Oak and Travelers.

83. To the extent that American Capital was supposedly seeking coverage for acquisitions of other entities, such as subsidiaries of American Capital or organizations over which American Capital maintains ownership or majority interest, American Capital provided false information and/or made material omissions to Charter Oak and Travelers regarding acquisitions. Alternatively, such submissions demonstrate that American Capital neither sought nor obtained from Charter Oak and Travelers liability insurance with respect to other entities.

84. American Capital made numerous misrepresentations and/or omissions in its submissions to Charter Oak and Travelers when it purchased and renewed liability insurance from Charter Oak and Travelers. The misrepresentations and/or omissions by American Capital to Charter Oak and Travelers were material and intentional.

85. Now in demanding coverage from Charter Oak and Travelers for underlying lawsuits, American Capital equivocates on whether SPL and other companies are or are not subsidiaries of American Capital. If American Capital had a subsidiary at the time that it

entered into the insurance contracts, then Charter Oak and Travelers are entitled to rescission or reformation of the insurance contracts as a result of American Capital's false representations. If American Capital contends that it did not consider its "portfolio" companies to be subsidiaries when it induced Charter Oak and Travelers to enter into the insurance contracts, then American Capital cannot now claim they are subsidiaries for the purposes of insurance coverage that it never paid for.

86. American Capital's misrepresentations and/or omissions altered materially the Plaintiffs' evaluation of the risks that they were being asked to underwrite for American Capital. If American Capital had provided truthful information that it had subsidiaries and/or that it sought coverage for other entities, or had disclosed any of the other matters identified above, Charter Oak and Travelers would not have issued insurance to American Capital, would have charged significantly greater premiums to American Capital, and/or have issued insurance on terms that foreclosed coverage for liability relating to other entities.

87. Heparin suits were first filed against American Capital and SPL beginning no later than March or April 2008. At that time, SPL Acquisition Corporation, on behalf of SPL and American Capital, tendered the heparin suits for a defense to SPL's insurance carrier, Columbia Casualty Company, but they did not even notify, much less request a defense, from Charter Oak and Travelers.

88. Charter Oak and Travelers did not learn that any heparin suit had been filed against American Capital until mid-August 2008, when American Capital, through its agent Marsh, forwarded its first notice of a heparin suit to Charter Oak and Travelers. The notice of this one suit carried a designation that the notice was "Notice of Potential Claim for Record Purposes Only," but did not request defense or indemnity for the suit.

89. This Notice provided no notice of scores of other heparin suits that had been previously filed. The Notice stated that the notice was "related to American Capital's ownership

interest in Scientific Protein Laboratories,” but did not specify the relationship between American Capital and SPL. Thereafter, other heparin suits were sent to Charter Oak and Travelers with this same or similar designation.

90. Although nothing was requested from Charter Oak or Travelers in connection with these “for Record Purposes Only” notices, Charter Oak and Travelers promptly reviewed same and requested a meeting with American Capital so that Charter Oak and Travelers could obtain additional information regarding the claims, proceed with their investigation, and determine whether American Capital was seeking coverage as to the heparin claims.

91. Hearing nothing from American Capital, Charter Oak and Travelers repeated their request for a meeting in writings dated September 18, 2008; September 26, 2008; and October 7, 2008. Charter Oak and Travelers advised American Capital that the requested meeting was “an essential step” to move forward with the investigation. Charter Oak and Travelers repeatedly asked American Capital whether American Capital was seeking coverage from Charter Oak and Travelers with respect to the heparin suits.

92. American Capital, however, refused to meet with Charter Oak and Travelers, or indicate whether or not it was seeking coverage for the heparin suits.

93. On October 8, 2008, American Capital finally responded to Charter Oak and Travelers’ request for a meeting, stating:

“[O]ur defense counsel has been in discussions with [underlying heparin] plaintiffs’ counsel to effect a no-cost dismissal of American Capital, Ltd. Because issues of coverage could be mooted by underlying events, we would prefer not to allocate resources at this time to discussing those coverage issues.”

American Capital’s October 8, 2008 correspondence said nothing about the claims asserted against SPL and made no request for defense and/or indemnification as to any claims asserted against American Capital.

94. On October 23, 2008, Charter Oak and Travelers sent another letter to American Capital by U.S. mail and facsimile, stating that Charter Oak and Travelers “still feel it is important to meet with you as soon as possible to discuss the status of the claims being asserted against American Capital We do not believe that further delay is the appropriate course of action.”

95. The October 23, 2008 letter also specifically reminded American Capital that it had not answered Charter Oak’s and Travelers’ inquiry as to whether American Capital was seeking defense and indemnity for the select lawsuits against American Capital previously noticed to Charter Oak and Travelers. Charter Oak and Travelers indicated that they “continue[d] to reserve all of their rights in this matter as they endeavor to investigate and evaluate the lawsuits.” The letter also specifically advised American Capital that Charter Oak and Travelers reserved their rights “to the extent that there was inadequate disclosure . . . in the placement or renewal of any of the [CGL or umbrella] policies.”

96. American Capital finally agreed to meet with Charter Oak and Travelers on November 4, 2008. American Capital, however, insisted that the discussions in the meeting be kept confidential and made subject to Federal Rule of Evidence 408.

97. On November 6, 2008, American Capital – for the first time – requested that Charter Oak and Travelers provide a “coverage position as to American Capital, Ltd and any entity alleged in the pleadings to be a direct or indirect affiliate of American Capital.”

98. On November 12, 2008, American Capital first submitted notices for certain select heparin suits that named SPL – but not American Capital – as a defendant. Neither American Capital nor SPL requested defense or indemnity for any heparin suits at that time.

99. On November 14, 2008, Charter Oak and Travelers sent a letter to American Capital, indicating Charter Oak’s and Travelers’ understanding that American Capital “has not

yet decided whether it will tender [the heparin] lawsuits to us for potential defense and indemnity” and, if that understanding was incorrect, to so inform Charter Oak and Travelers. Charter Oak and Travelers received no response.

100. On November 28, 2008, at the request of Charter Oak and Travelers, American Capital provided a chart which appeared to show that SPL, the defendant in the heparin suits, is owned by SPL Holdings LLC and that SPL Holdings LLC appears to be owned by SPL Acquisition Corporation. The chart did not provide any information as to any relationship between American Capital and SPL Acquisition Corporation, SPL Holdings LLC and/or SPL.

101. On December 4, 2008, American Capital purported to tender a “New General Liability Notice of Claim” to Charter Oak and Travelers of a non-heparin lawsuit involving injury to a spectator during an event at the Nationwide Arena in Columbus, Ohio. This non-heparin suit named Spectator Management Group (“SMG”) as a defendant. Charter Oak and Travelers learned shortly thereafter that SMG was one of American Capital’s numerous “portfolio companies” and that American Capital intended to tender this matter for purposes of coverage under the Charter Oak and Travelers insurance contracts. American Capital was dismissed from the suit, and later indicated that it was not seeking defense or indemnity for SMG. The purported December 2008 tender of the suit involving SMG was the first time, since the inception of the insurance contracts on June 14, 2006, that American Capital ever submitted a suit to either Charter Oak or Travelers for defense or indemnity with respect to one of its portfolio companies.

102. On December 29, 2008, American Capital and SPL provided to Charter Oak and Travelers a copy of a settlement agreement that they had entered into with Baxter on December 2, 2008. *See* Part F, *infra*. According to the settlement agreement, SPL asserted rights under insurance contracts issued to SPL, but SPL only asserted that it “may” have rights under the insurance contracts issued to American Capital by Charter Oak and Travelers.

103. Based on all of the above, and despite American Capital's continued evasiveness, and despite American Capital's representations that it had no subsidiaries and the submissions of loss runs and exposure schedules only for American Capital, Charter Oak and Travelers came to believe in December 2008 that American Capital might seek coverage on its own behalf for the heparin suits and for SPL and other portfolio companies under the Charter Oak and Travelers insurance contracts issued to American Capital, and that SPL and the other portfolio companies might claim to be insureds thereunder.

104. On January 16, 2009, less than a month after American Capital and SPL revealed (through the Baxter settlement agreement) that SPL "may" have rights under the Charter Oak and Travelers insurance contracts issued to American Capital, Charter Oak and Travelers filed this action against the Defendants, seeking rescission of those insurance contracts and a declaration voiding the insurance contracts *ab initio*, and asserting other claims for relief.

105. On February 17, 2009, American Capital and SPL – for the very first time – requested a defense for the heparin suits.

106. Charter Oak and Travelers promptly sought rescission of the insurance contracts after discovery of the grounds for rescission. Among other things, Charter Oak and Travelers sought rescission of the insurance contracts at issue by filing this action eighteen days after their receipt of the settlement agreement, wherein American Capital and SPL asserted that SPL "may" have rights under Charter Oak and Travelers insurance contracts issued to American Capital, and more than a month before American Capital and SPL first tendered a single heparin claim or suit to Charter Oak or Travelers for defense and potential indemnity.

107. Charter Oak and Travelers are entitled to rescission of the insurance contracts they issued to American Capital, based on American Capital's material misrepresentations, concealments, omissions, which were relied upon by Charter Oak and Travelers. Charter Oak and Travelers promptly sought rescission, and Defendants have suffered no prejudice.

E. No Coverage With Respect to the Conduct of a Joint Venture

108. In addition to rescission or reformation of the insurance contracts, Charter Oak and Travelers are entitled to a judicial declaration that they do not owe defense or indemnity for the heparin lawsuits on the grounds that potential liability for tainted heparin relates to the conduct of a non-insured joint venture.

109. The primary contracts and the umbrella contracts contain the following provision regarding joint ventures:

No person or organization is an insured with respect to the conduct of any current or past . . . joint venture . . . that is not shown as a Named Insured in the Declarations.

110. Changzhou SPL is a joint venture between SPL and Tech-Pool Bio-Pharma Company. Changzhou SPL is not listed as a named insured on the primary contracts or the umbrella contracts.

111. Charter Oak and Travelers do not owe defense or indemnity to American Capital or SPL in the heparin lawsuits because liability for tainted heparin relates to the conduct of Changzhou SPL – a non-insured joint venture. Accordingly, declaratory relief should be granted to Charter Oak and Travelers, declaring that Charter Oak and Travelers have no defense or indemnity obligations for the heparin lawsuits.

F. No Coverage Due to a Settlement Without the Consent of Charter Oak and Travelers

112. On October 23, 2008, Charter Oak and Travelers sent a letter to American Capital, instructing American Capital not to make any voluntary payments or settlements in connection with the heparin lawsuits without the prior express written consent of Charter Oak and Travelers. Furthermore, Charter Oak and Travelers expressly reserved their rights to disclaim coverage for the heparin lawsuits in the event that American Capital made a settlement or payment without the written consent of Charter Oak and Travelers.

113. The primary contracts state:

No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

Likewise, the umbrella contracts require that American Capital “[m]ust comply with the terms of the ‘underlying insurance.’”

114. On or about December 2, 2008, American Capital and SPL entered into one or more settlement agreements with Baxter in connection with the heparin lawsuits, pursuant to which SPL, *inter alia*, agreed to make payments to or on behalf of the Baxter entities, and American Capital and SPL agreed to assign rights to insurance proceeds and benefits under the 2007-08 primary contract to the Baxter entities.

115. American Capital and SPL made these agreements without giving notice to and without seeking or obtaining the consent of Charter Oak and Travelers.

116. American Capital and SPL made these agreements in violation of the express provisions in the insurance contracts that forbid voluntary payments and forbid voluntary assumption of obligations. American Capital and SPL made these agreements in disregard of the express written warnings from Charter Oak and Travelers not to make any voluntary payments or settlements in the heparin lawsuits. American Capital and SPL failed to give prior notice of the settlement agreement to Charter Oak and Travelers, and American Capital and SPL failed to obtain the consent of Charter Oak and Travelers for the settlement agreement. As a result, Charter Oak and Travelers are entitled to a judicial declaration that they do not have defense or indemnity obligations for the heparin lawsuits.

117. The primary contracts state:

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a “suit” asking for damages from an insured; or

- b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

The umbrella contracts impose the same conditions.

118. American Capital and SPL have filed counterclaims alleging that Charter Oak and Travelers have breached their duty to defend and that, as a result of the breach, American Capital and SPL allegedly have become obligated for payments to counsel defending Baxter as well as American Capital and SPL in the underlying heparin lawsuits. As such, American Capital and SPL impermissibly attempt to bind Charter Oak and Travelers to one or more of their settlement agreements with Baxter that they deliberately made without the knowledge and consent of Charter Oak and Travelers.

119. American Capital and SPL did not seek and did not obtain the consent of Charter Oak and Travelers for their agreements with Baxter.

120. American Capital and SPL breached the conditions of the insurance contracts requiring Charter Oak's and Travelers' written consent to their agreements with Baxter, and thereby, American Capital and SPL have negated any purported coverage for the heparin suits.

G. Other Reasons Why Coverage Does Not Exist

121. The primary contracts and umbrella contracts confine coverage as follows:

This insurance applies to "bodily injury" and "property damage" only if:

....

The "bodily injury" or "property damage" occurs during the policy period . . .

Plaintiffs Charter Oak and Travelers do not owe defense or indemnity for the heparin lawsuits to the extent that alleged injury took place outside the various policy periods.

122. The insurance contracts further confine coverage as follows:

This insurance applies to “bodily injury” and “property damage” only if:

....

Prior to the policy period, no insured listed under Paragraph 1. of Section II - Who Is An Insured and no “employee” authorized by you to give or receive notice of an “occurrence” or claim, knew that the “bodily injury” or “property damage” had occurred, in whole or in part. If such a listed insured or authorized “employee” knew, prior to the policy period, that the “bodily injury” or “property damage” occurred, then any continuation, change or resumption of such “bodily injury” or “property damage” during or after the policy period will be deemed to have been known prior to the policy period.

Plaintiffs Charter Oak and Travelers do not owe defense or indemnity for the heparin lawsuits under the 2008-09 contracts to the extent that the alleged injuries were known to American Capital prior to the policy period of the 2008-09 insurance contracts.

123. The primary contracts contain the following provision for non-cumulation of the each occurrence limit of liability:

Non cumulation of Each Occurrence Limit – If one “occurrence” causes “bodily injury” and/or “property damage” during the policy period and during the policy period of one or more prior and/or future policies that include a commercial general liability coverage part for the insured issued by us or any affiliated insurance company, the amount we will pay is limited. This policy’s Each Occurrence Limit will be reduced by the amount of each payment made by us and any affiliated insurance company under the other policies because of such “occurrence”.

124. The umbrella contracts state:

Non cumulation of Each Occurrence Limit – If one “occurrence” causes “bodily injury” and/or “property damage” during the policy period and during the policy period of one or more prior and/or future policies that include a COMMERCIAL EXCESS LIABILITY (UMBRELLA) INSURANCE policy for the insured issued by us or any affiliated insurance company, the amount we will pay is limited. This policy’s Each Occurrence Limit will be reduced by the amount of each payment made by us and any affiliated insurance company under the other policies because of such “occurrence.”

125. Charter Oak’s and Travelers’ obligations for the heparin lawsuits – if they have any obligations at all for the heparin lawsuits – are limited to a single Each Occurrence Limit of Liability, and any payment by Charter Oak or Travelers will reduce the Each Occurrence Limit of Liability under all of their respective contracts.

126. The primary contracts contain the following provision regarding who is an insured under the primary contracts:

The Named Insured in Item 1. of the Declarations is as follows:

The person or organization named in Item 1. of the Declarations and any organization, other than a partnership or joint venture, over which you maintain ownership or majority interest on the effective date of the policy. . . .

127. Charter Oak does not owe defense or indemnity to SPL or SMG to the extent that American Capital did not maintain ownership or majority interest in SPL or SMG on the date that the respective primary contract became effective or to the extent that SPL or SMG is a partnership or joint venture. Travelers does not owe defense or indemnity to SPL or SMG to the extent that SPL or SMG was not a subsidiary of American Capital on the date that the respective umbrella contract became effective.

128. The primary contracts contain the following provisions also:

Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as

a Named Insured if there is no other insurance available to that organization. However:

- a. Coverage under this provision is afforded only until the 180th day after you acquire or form the organization or the end of the policy period, whichever is earlier, unless reported to us in writing within 180 days.
- b. Coverage A does not apply to “bodily injury” or “property damage” that occurred before you acquired or formed the organization. . . .

. . . .

129. If American Capital acquired or formed SPL or SMG during the policy period of an insurance contract, no coverage exists to the extent that SPL or SMG is a partnership, joint venture, or limited liability company. Also, no coverage exists to the extent that other insurance is available to SPL or SMG. Further, no coverage exists to the extent that the alleged injury for which coverage is sought took place before the acquisition or formation of SPL or SMG or to the extent that the alleged injury took place 180 days after the acquisition of SPL or SMG.

130. The primary contracts state:

- a. You must see to it that we are notified as soon as practicable of an “occurrence” or an offense which may result in a claim. To the extent possible, notice should include:
 - (1) How, when and where the “occurrence” or offense took place;
 - (2) The names and addresses of any injured persons and witnesses; and
 - (3) The nature and location of any injury or damage arising out of the “occurrence” or offense.
- b. If a claim is made or “suit” is brought against any insured, you must:
 - (1) Immediately record the specifics of the claim or “suit” and the date received; and

(2) Notify us as soon as practicable

You must see to it that we receive written notice of the claim or “suit” as soon as practicable.

131. The umbrella contracts state:

- a. You must see to it that we are notified promptly of an “occurrence” or an “offense” which may result in a claim under this insurance. Notice should include:
 - (1) How, when and where the “occurrence” or “offense” took place; and
 - (2) The names and addresses of any injured persons and witnesses.
- b. If a claim is made or “suit” is brought against any insured which may result in a claim against this insurance, you must see to it that we receive prompt written notice of the claim or “suit.”

132. American Capital and SPL failed to provide Charter Oak and Travelers with timely notice regarding tainted heparin and heparin claims. American Capital’s and SPL’s failure to provide timely notice prejudiced Charter Oak and Travelers in responding to the heparin claims. Also, American Capital’s and SPL’s failure to provide timely notice prejudiced Charter Oak and Travelers because if timely notice had been provided, Charter Oak and Travelers would not have renewed the insurance contracts in June 2008.

133. The umbrella contracts contain the following provision regarding other insurance:

This insurance is excess over any other valid and collectible insurance whether such other insurance is stated to be primary, contributing, excess, contingent or otherwise. This provision does not apply to a policy bought specifically to apply in excess of this insurance.

134. Travelers does not owe defense or indemnity for the heparin lawsuits or the Nationwide Arena lawsuit, in whole or in part, to the extent that other insurance applies to those claims.

135. Travelers does not owe defense or indemnity for the underlying lawsuits, in whole or in part, to the extent the alleged injury was expected or intended or to the extent the underlying plaintiffs seek to impose punitive damages.

136. There may be other reasons why the insurance contracts do not provide coverage for the heparin lawsuits or the Nationwide Arena lawsuit in whole or in part.

Count I

(Rescission of Insurance Contracts)

137. Charter Oak and Travelers repeat and re-allege the allegations of paragraphs 1 through 136 of the Second Amended Complaint as though fully set forth herein.

138. American Capital made numerous intentional, material misrepresentations and omissions to Charter Oak and Travelers, including the misrepresentations that it did not have subsidiaries and that it was not seeking coverage for other entities. American Capital also omitted, concealed, and/or otherwise falsely presented material facts to Charter Oak and Travelers. American Capital now seeks coverage on behalf of itself and purported subsidiaries for lawsuits with respect to the conduct of its purported subsidiaries and/or other entities.

139. American Capital's misrepresentations, concealments, omissions, and otherwise false presentation of material facts to Charter Oak and Travelers, including its misrepresentation that it has no subsidiaries, were material to the risk assumed by and insured by Charter Oak and Travelers, and were relied upon by Charter Oak and Travelers.

140. Charter Oak and Travelers promptly sought rescission and have returned the policy premiums paid by American Capital with interest.

141. Charter Oak and Travelers are entitled to rescission of the insurance contracts with American Capital.

Count II

(Reformation of Insurance Contracts for Mutual Mistake)

142. Plaintiffs repeat and re-allege the allegations of paragraphs 1 through 141 of the Second Amended Complaint as though fully set forth herein.

143. American Capital did not intend to purchase insurance with respect to its purported subsidiaries, joint ventures, or other entities.

144. Neither Charter Oak nor Travelers intended to furnish insurance to American Capital with respect to American Capital's purported subsidiaries, joint ventures, or other entities.

145. American Capital now contends that the insurance contracts afford coverage for liability relating to American Capital's purported subsidiaries and/or other entities. American Capital and Charter Oak and Travelers, however, had a meeting of the minds that American Capital was not purchasing insurance for liability relating to American Capital's purported subsidiaries, joint ventures, or other entities.

146. Charter Oak and Travelers are entitled to reformation of the insurance contracts based on mutual mistake to foreclose coverage for, among other things, liability relating to American Capital's purported subsidiaries, joint ventures, or other entities.

Count III

(Reformation of Insurance Contracts for Unilateral Mistake)

147. Charter Oak and Travelers repeat and re-allege the allegations of paragraphs 1 through 146 of the Second Amended Complaint as though fully set forth herein.

148. American Capital engaged in inequitable or unconscionable conduct, requiring reformation of the insurance contracts.

149. American Capital did not intend to purchase insurance with respect to its purported subsidiaries, joint ventures, or other entities.

150. American Capital knew that Charter Oak and Travelers also did not intend to furnish insurance to American Capital with respect to American Capital's purported subsidiaries, joint ventures, or other entities.

151. American Capital obtained the insurance contracts believing that the contracts may provide coverage for American Capital's purported subsidiaries, joint ventures, or other entities, but knowing, among other things, that neither American Capital, Charter Oak, nor Travelers intended to insure American Capital's purported subsidiaries, joint ventures, or other entities.

152. Charter Oak and Travelers are entitled to reformation of the insurance contracts based on unilateral mistake in order to foreclose coverage for, among other things, liability relating to American Capital's purported subsidiaries, joint ventures, or other entities.

Count IV

(Declaratory Relief)

153. Plaintiffs repeat and re-allege the allegations of paragraphs 1 through 152 of the Second Amended Complaint as though fully set forth herein.

154. An actual and justiciable controversy exists between the Plaintiffs and Defendants as to the rights and obligations of the parties under the insurance contracts issued by the Plaintiffs to American Capital.

155. American Capital seeks coverage on behalf of itself and SPL for the heparin lawsuits. American Capital requested defense and indemnity on behalf of itself and SMG for the lawsuit involving the spectator injury at the Nationwide Arena in Columbus, Ohio.

156. Charter Oak and Travelers do not owe defense or indemnity for the heparin lawsuits or for the lawsuit involving the spectator injury at the Nationwide Arena in Columbus, Ohio, because, among other reasons, American Capital misrepresented that it did not have any subsidiaries or American Capital never intended to purchase insurance for liability relating to its purported subsidiaries, joint ventures, or other entities.

157. Charter Oak and Travelers do not owe defense or indemnity for the heparin lawsuits because the heparin lawsuits relate to the conduct of a non-insured joint venture and the insurance contracts expressly state that “[n]o person or organization is an insured with respect to the conduct of any current or past . . . joint venture”

158. Charter Oak and Travelers do not owe defense or indemnity for the heparin lawsuits because American Capital and SPL voluntarily entered into a settlement in connection with the heparin lawsuit in disregard of Charter Oak’s and Travelers’ express written warning not to enter into any voluntary settlement and in violation of express contract provision forbidding voluntary settlements.

159. Charter Oak and Travelers do not owe defense or indemnity for the lawsuit alleging spectator injury at the Nationwide Arena because this lawsuit relates to the conduct of a non-insured partnership and the insurance contracts expressly state that “[n]o person or organization is an insured with respect to the conduct of any current or past partnership”

160. For these and other reasons, Charter Oak and Travelers are entitled to a declaration pursuant to 28 U.S.C. § 2201 *et seq.*, that their respective insurance contracts do not provide defense or indemnity for (a) the heparin lawsuits; (b) the lawsuit involving the spectator’s injury at the Nationwide Arena in Columbus, Ohio; and (c) other current or future lawsuits against American Capital or its purported subsidiaries relating to the subsidiaries, joint ventures, or other entities.

Prayer for Relief

WHEREFORE, the Plaintiffs request that this Court grant judgment in their favor and that the Court:

- a. Rescind or reform the insurance contracts between the Plaintiffs and Defendant American Capital;
- b. Declare that the Plaintiffs do not owe defense or indemnity to the Defendants for the heparin lawsuits;
- c. Declare that the Plaintiffs do not owe defense or indemnity to the Defendants for the lawsuit involving the spectator injury at the Nationwide Arena in Columbus, Ohio;
- d. Declare that the Plaintiffs do not owe defense or indemnity to American Capital or its purported subsidiaries for lawsuits relating to the purported subsidiaries;
- e. Award to the Plaintiffs the attorneys' fees and costs incurred by Plaintiffs in connection with this action; and
- f. Award such other relief to the Plaintiffs as the Court deems proper and just.

Respectfully submitted this the 29th day of March 2011,

/s/ Paul Janaskie

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