

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

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<b>AMI ENTERTAINMENT NETWORK, INC.</b>  <b>Plaintiff,</b>  <b>v.</b>  <b>ZURICH AMERICAN INSURANCE COMPANY</b>  <b>AND</b>  <b>WESTCHESTER SURPLUS LINES INSURANCE COMPANY</b>  <b>Defendants.</b>	<b>Case No.:</b>  <b>Judge:</b>  <b>Magistrate:</b>  <b><u>COMPLAINT AND JURY DEMAND</u></b>
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**COMPLAINT**

Plaintiff, AMI Entertainment Network, Inc. (“AMI”), for its Complaint for damages and declaratory judgment against Zurich American Insurance Company (“Zurich”) and declaratory judgment against Westchester Surplus Lines Insurance Company (“Westchester”) alleges as follows:

**NATURE OF THE ACTION**

1. This is an insurance coverage action. AMI is insured under a primary general liability insurance policy, no. GLO 9137432-01, sold by Zurich for the policy period May 1, 2007 to May 1, 2008 (the “Primary Policy”). Pursuant to the Primary Policy, Zurich promised to provide a defense of any suit seeking damages because of “personal and advertising injury” to which the Primary Policy applies.

2. AMI also is insured under an umbrella insurance policy, no. G2203487A002, sold by Westchester for the policy period May 1, 2007 to May 1, 2008 (the “Umbrella Policy”), which lists the Zurich Primary Policy as “Underlying Insurance.” Pursuant to the Umbrella Policy, Westchester promised to provide defense and indemnity coverage when the Primary Policy is either exhausted by payment or does not provide coverage.

3. AMI was sued in a lawsuit filed on or about July 2, 2010 in Michigan state court captioned *RDI of Michigan, LLC v. Merit Industries, Inc. et al.* (No. 10-111562-CK) and currently pending in the Circuit Court of the County of Oakland (the “Underlying Action”).

4. AMI subsequently provided notice of the lawsuit to Zurich and Westchester. Zurich then agreed prospectively to provide AMI with a defense in that action.

5. Zurich has breached its duty to provide a defense, however, by failing to pay for AMI’s ongoing defense, despite its agreement to do so.

6. AMI therefore seeks damages in the amount of its reasonable defense costs incurred since notice to Zurich and a declaratory judgment that Zurich is obligated to provide AMI with a defense and coverage for any settlement or judgment in the Underlying Action. AMI likewise seeks a declaratory judgment regarding Westchester’s duty to provide coverage to AMI for the Underlying Action if the Umbrella Policy is implicated.

**PARTIES**

7. Plaintiff AMI is a Delaware corporation having its principal place of business at 155 Rittenhouse Circle, Bristol, Pennsylvania 19007. AMI was formerly known as Merit Industries, Inc., and is the successor by merger to Rowe International Corporation.

8. Defendant Zurich is a New York corporation having its principal place of business at 1400 American Lane, Schaumburg, Illinois 60196. On information and belief, Zurich is licensed to do and has done business in Michigan.

9. Defendant Westchester is a Georgia corporation having its principal place of business at either 500 Colonial Center Parkway, Suite 200, Roswell, Georgia 30076 or 11575 Great Oaks Way, Suite 200, Alpharetta, Georgia 30022. On information and belief, Westchester is licensed to do and has done business in Michigan.

**JURISDICTION AND VENUE**

10. Subject matter jurisdiction exists in this action under 28 U.S.C. § 1332 based on complete diversity of the parties and an amount in controversy exceeding \$75,000.

11. Personal jurisdiction is proper over Zurich and Westchester in this action under the Michigan Long Arm Statute, Mich. Comp. Laws § 600.705, because, *inter alia*, Zurich and Westchester contracted to insure a person, property, or risk located within this state at the time of contracting.

12. Venue is proper pursuant to 28 U.S.C. § 1391(2) because “a substantial part of the events or omissions giving rise to the claim occurred” in this district, which encompasses the county in which the underlying lawsuit for which AMI has incurred the defense costs that it seeks in this action was filed and remains pending.

## **FACTUAL BACKGROUND**

### **The Zurich Primary Policy**

13. Zurich sold the Primary Policy to Harbour Group Ltd (“Harbour Group”) for the benefit of Harbour Group’s “portfolio companies,” including AMI.

14. AMI is an “insured” under the Primary Policy.

15. Among other provisions, the Primary Policy requires Zurich to provide a defense of any suit against AMI seeking damages because of “personal and advertising injury” to which the Primary Policy applies.

16. In the event AMI incurs liability, the Primary Policy also obligates Zurich to “pay those sums that the insured becomes legally obligated to pay as damages because of ‘personal and advertising injury’ to which this insurance applies.”

17. “Personal and advertising injury,” in turn, is defined to include, among other items, “[o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person’s or organization’s goods products or services.”

### **The Westchester Umbrella Policy**

18. Westchester sold the Umbrella Policy to Harbour Group Ltd for the benefit of Harbour Group’s “portfolio companies,” including AMI.

19. AMI is an “insured” under the Umbrella Policy.

20. The Umbrella Policy lists the Zurich Primary Policy as the “Underlying Insurance” applicable to most insureds in the Harbour Group program, including AMI.

21. Among other provisions, the Umbrella Policy requires Westchester to provide a defense of any suit against AMI seeking damages because of “personal injury” or “advertising injury” where either (1) damages are sought for “personal injury”, or ‘advertising injury’ which

are not covered by the Underlying Insurance” or (2) “the applicable limits of insurance of the underlying insurance. . . have been exhausted by payments.”

22. In the event AMI incurs liability that implicates the Umbrella Policy, the Umbrella Policy also obligates Westchester to “pay on behalf of the ‘Insured’ those sums in excess of the ‘Retained Limit’ which the ‘Insured’, by reason of liability imposed by law, or assumed by the ‘Insured’ under contract prior to the ‘Occurrence’, shall become legally obligated to pay as damages for: . . . (b) ‘Personal Injury’ caused by an offense committed during the ‘Policy Period’; or (c) ‘Advertising Injury’ caused by an act committed during the ‘Policy Period’.”

23. The “Retained Limit” under the Umbrella Policy is defined to mean either (1) a \$10,000 self-insured retention, where coverage is not provided by the Primary Policy; or (2) the applicable limits of the Underlying Insurance, i.e. the Zurich Primary Policy, where coverage is provided by the Primary Policy.

### **The Underlying Action**

24. AMI is a defendant in the Underlying Action.

25. Among other allegations, the Complaint in the Underlying Action alleged that AMI’s “publication of false, unethical and/or [sic] statements. . . served as a catalyst to induce or terminate RDIM’s prospective and realized business relationships. . . [and] that induced RDIM’s customers to terminate their lease and licensing agreements with RDIM.”

26. AMI has sustained substantial defense costs in the Underlying Action.

27. The amount of damages sought by the plaintiff in the Underlying Action would implicate the Umbrella Policy.

### **Zurich's Agreement to Provide a Prospective Defense**

28. AMI provided notice of the Underlying Action to Zurich on November 1, 2011, and to Westchester on or before November 2, 2011.

29. By letter dated December 20, 2011 (the "December 2011 Letter"), Zurich acknowledged its duty to provide a defense of the Underlying Action prospectively pursuant to the Primary Policy, and specifically under the "Personal and Advertising Injury" coverage.

30. Although recognizing a prospective duty to provide for the defense of the Underlying Action, Zurich offered in the December 2011 Letter to pay defense costs only at the rates of "\$150 per hour for partner" and "\$145 per hour for associate" serving as defense counsel. These rates were far lower than the already discounted rates which AMI was being billed by its defense counsel, and far below the rates charged in the geographic area for similar work.

### **Zurich Accepts AMI's Defense, Then Breaches Its Agreement**

31. After agreeing to defend AMI in the Underlying Action in the December 2011 Letter, Zurich informed AMI in a letter dated March 2, 2012, that "Zurich would accept the current rates that were being paid by Merit Industries, Inc. to their assigned defense counsel."

32. AMI had previously informed Zurich that its defense team for the Underlying Action included Silver & Van Essen, P.C., of Grand Rapids, Michigan, and Kodner Watkins Kloecker, L.C., of St. Louis, Missouri, and of the current rates being charged by each.

33. On May 23, 2012, at Zurich's request, AMI submitted invoices for its defense costs incurred since notice to Zurich on November 1, 2011, which totaled \$167,801.30.

34. On September 7, 2012, AMI submitted an additional \$30,441.77 in defense costs incurred since notice to Zurich, bringing the total submitted to Zurich to \$198,243.07.

35. On November 12, 2012, AMI submitted an additional \$76,013.99 in defense costs incurred since notice to Zurich, bringing the total submitted to Zurich to \$274,257.06.

36. Instead of reimbursing the submitted invoices, Zurich has refused to and failed to pay any of AMI's defense costs.

### **FIRST CAUSE OF ACTION**

#### **Breach of Contract (Against Zurich)**

37. Plaintiff AMI repeats and realleges the allegations of paragraphs 1 through 36 above as if fully set forth herein.

38. Zurich is obligated under the Primary Policy, and agreed in the December 2011 Letter, to provide AMI a full defense in the Underlying Action.

39. Zurich has breached its duty to provide a full defense of the Underlying Action by refusing to pay for any of AMI's defense costs incurred since notice and by failing to provide for AMI's ongoing defense.

40. AMI has satisfied all necessary terms and conditions of the Primary Policy.

41. AMI is entitled to recover all damages proximately caused by Zurich's breach of contract, including, *inter alia*, the full amount of reasonable attorney's fees and costs incurred by AMI for its defense in the Underlying Action since notice to Zurich and prejudgment interest.

### **SECOND CAUSE OF ACTION**

#### **Declaratory Judgment (Against Zurich)**

42. Plaintiff AMI repeats and realleges the allegations of paragraphs 1 through 41 above as if fully set forth herein.

43. Zurich is obligated under the Primary Policy, and agreed in the December 2011 Letter, to provide AMI a full defense in the Underlying Action.

44. Zurich has breached its duty to provide a full defense of the Underlying Action by refusing to pay for AMI's defense costs incurred since notice and by failing to provide for AMI's ongoing defense.

45. Zurich has not agreed to pay AMI's legal liability, if any, for the Underlying Action.

46. AMI has satisfied all necessary terms and conditions of the Primary Policy.

47. As a result of the foregoing, an actual and justiciable controversy exists between AMI and Zurich regarding Zurich's obligations to provide full and unconditional defense and indemnity coverage to AMI in connection with the Underlying Action.

48. Pursuant to 28 U.S.C. §§ 2201 and 2202, AMI is entitled to a declaration by the Court of the extent of Zurich's obligation to defend AMI in connection with the Underlying Action.

### **THIRD CAUSE OF ACTION**

#### **Declaratory Judgment (Against Westchester)**

49. Plaintiff AMI repeats and realleges the allegations of paragraphs 1 through 48 above as if fully set forth herein.

50. Westchester is obligated under the Umbrella Policy to provide AMI a defense of any suit seeking damages because of "personal injury" or "advertising injury" where either (1) damages are sought for "'personal injury', or 'advertising injury' which are not covered by the Underlying Insurance'" or (2) "the applicable limits of insurance of the underlying insurance. . . have been exhausted by payments."

51. In the event AMI incurs liability, the Umbrella Policy also obligates Westchester to “pay on behalf of the ‘Insured’ those sums in excess of the ‘Retained Limit’ which the ‘Insured’, by reason of liability imposed by law, or assumed by the ‘Insured’ under contract prior to the ‘Occurrence’, shall become legally obligated to pay as damages for: . . . (b) ‘Personal Injury’ caused by an offense committed during the ‘Policy Period’; or (c) ‘Advertising Injury’ caused by an act committed during the ‘Policy Period’.”

52. The Underlying Action may result in exhaustion of the Zurich Primary Policy or otherwise require Westchester to provide defense or indemnity coverage under the Umbrella Policy.

53. Westchester has not yet recognized its coverage obligations under the Umbrella Policy for the Underlying Action.

54. AMI has satisfied all necessary terms and conditions of the Umbrella Policy.

55. As a result of the foregoing, an actual and justiciable controversy exists between AMI and Westchester regarding Westchester’s obligations to provide defense and indemnity coverage to AMI in connection with the Underlying Action.

56. Pursuant to 28 U.S.C. §§ 2201 and 2202, AMI is entitled to a declaration by the Court of the extent of Westchester’s obligation to defend AMI in connection with the Underlying Action.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that this Court grant a judgment:

- (a) For damages against Zurich according to proof for breach of contract;
- (b) For a declaratory judgment that Zurich has an ongoing duty to defend AMI in the Underlying Action;

- (c) For a declaratory judgment regarding Westchester's duty to defend AMI in the event the Zurich Primary Policy either does not provide coverage or is exhausted by payment of covered amounts;
- (d) For a declaratory judgment regarding Zurich and Westchester's duty to indemnify AMI in the event the Underlying Action is resolved by settlement or judgment, subject to the limits of the Primary Policy and Umbrella Policy;
- (e) For reasonable attorney's fees, costs, and expenses incurred in bringing this action to the extent permitted by law;
- (f) For pre-judgment interest in an amount to be proved at time of trial;
- (g) For such other and further relief as this Court deems just and appropriate under these circumstances.

**JURY DEMAND**

Plaintiff AMI demands a jury on all claims set forth in this Complaint that are triable by jury.

Respectfully submitted,

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Dated: November 27, 2012

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