

**IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA**

MALIBU BOATS, LLC,)
)
 Plaintiff,)
)
 v.)
)
 FEDERAL INSURANCE COMPANY)
 AND STARR INDEMNITY &)
 LIABILITY COMPANY,)
)
 Defendants.)
)

Case No. 23A02962

MALIBU BOATS, LLC’S COMPLAINT

NOW COMES the Plaintiff Malibu Boats, LLC (“Malibu”), by its undersigned counsel, and states as follows for its Complaint against Defendants Federal Insurance Company (“Chubb”) and Starr Indemnity and Liability Company (“Starr” and together with Chubb, the “Insurers”).

NATURE OF THE CASE

1. This action arises from Chubb and Starr’s unreasonable failure to comply with their obligations to Malibu by refusing, negligently and in bad faith, to settle covered claims brought against Malibu.

2. As explained in further detail below, the Insurers’ wrongful failure to settle is the product of the Insurers’ repeated and unreasonable decisions in litigating, rather than settling, claims arising out of a boating accident involving the death of a child.

3. The Insurers had numerous, reasonable opportunities to settle claims arising out of this incident for amounts squarely within their \$26 million total policy limits over several years of litigation.

4. Malibu repeatedly demanded the Insurers fulfill their obligations to Malibu by taking advantage of these multiple, reasonable opportunities to settle the claims and protect Malibu against the risk of liability in excess of the policy limits. The Insurers refused to do so, instead (a)

failing to give at least equal consideration to Malibu's interests as they did to the Insurers' own interests of avoiding the expense of complying with their settlement obligations, and (b) consciously and willfully disregarding their obligation to refrain from doing anything which would frustrate the agreed-upon purposes of Policies (defined herein) or injure Malibu's right to receive the benefits of the Policies.

5. The Insurers knew or should have known that the claims at issue presented a significant risk of liability to Malibu, and an ordinarily prudent insurer in the Insurers' position would have determined that declining to settle the claims would unreasonably expose Malibu to a judgment in excess of the policy limits.

6. By the terms of the applicable insurance Policies, the Insurers had reserved for themselves the right to settle the underlying claims without regard to Malibu's wishes – meaning Malibu was entirely reliant on the Insurers to protect its interests.

7. Rather than protecting Malibu's interests, however, the Insurers failed to conduct a reasonable investigation of the claims and Malibu's potential liability. Further, the Insurers chose to ignore every warning sign that the claims were headed for a massive verdict, instead electing to gamble that Malibu's insurer-appointed and insurer-controlled defense could obtain a favorable verdict.

8. This negligence and bad faith started from the very first settlement offer the Insurers received, and continued throughout the time it was apparent to the Insurers that liability imposed on Malibu could be staggering and well beyond the policy limits. Even on the eve of trial, by which time a multitude of adverse rulings and negative factual developments for Malibu made it obvious that an excess verdict was coming, the Insurers continued to refuse reasonable settlement offers within policy limits.

9. In making these unreasonable decisions to gamble on a defense verdict and risk liability in excess of policy limits, the Insurers failed to act as an ordinarily prudent insurer would act and breached their contractual and legal duties to Malibu under the insurance Policies at issue and Georgia law.

10. As a direct and proximate result of the Insurers' improper conduct, the plaintiffs obtained a verdict against Malibu that amounted to \$140 million, plus mounting attorneys' fees, interest, and other costs.

11. As the appeal of the judgment was pending, the Insurers consented to Malibu directing the efforts to negotiate a settlement with the Plaintiffs, with Malibu reserving its rights to recover the full amount of any settlement from the Insurers. With full notice to, and with the express permission of, the Insurers, Malibu was able to mitigate this disastrous verdict by entering into a reasonable \$100 million settlement with the Batchelder Plaintiffs (defined herein) in exchange for the release of all claims. Had the Insurers not acted negligently and in bad faith, a settlement in excess of the policy limits would not have been necessary. The Insurers are therefore responsible for the full amount of settlement and related damages, costs and expenses.

12. Accordingly, Malibu brings this action against the Insurers to recover the \$100 million it was forced to pay to resolve the claims in settlement and other damages, including interest and its costs and fees in bringing this action.

THE PARTIES

13. Plaintiff Malibu is a limited liability company organized under the laws of Delaware with its principal place of business in Loudon, Tennessee. The members and submembers of Malibu are residents of, among other states, Texas, California and Tennessee.

14. Defendant Chubb is a corporation that is incorporated in Indiana and has its principal place of business in Whitehouse Station, New Jersey.

15. Defendant Starr is a corporation that is incorporated in Texas and has its principal place of business in New York City, New York.

JURISDICTION AND VENUE

16. This Court has personal jurisdiction pursuant to GA Code § 9-10-91, because Defendants committed the tortious acts or omissions described herein within this state, and the judgment against Malibu was entered in this state.

17. This Court has subject matter jurisdiction pursuant to GA Code § 15-6-8.

18. Venue is proper pursuant to GA Code § 33-4-1, because Defendants are insurance companies and each has an agent or a place of doing business in this county.

MALIBU'S INSURANCE POLICIES

19. Throughout the time period relevant to this action, Malibu held three insurance Policies from the Insurers that are at issue here.

20. Chubb issued to Malibu a primary liability policy, No. 79932803 (the "Primary Policy"), providing limits of \$1 million per occurrence and \$2 million aggregate. The Primary Policy covers the period from July 1, 2014 to July 1, 2015. A copy of the Primary Policy is attached hereto as **Exhibit 1**.

21. Pursuant to the Primary Policy, Chubb agreed to "pay damages that the insured becomes legally obligated to pay by reason of liability imposed by law; or assumed in an insured contract; for bodily injury." Ex. 1 at 183. Chubb further agreed that it had the "right and duty to defend [Malibu] against a suit" that alleges property damage or bodily injury during the Primary Policy period, and to reasonably settle such suits on Malibu's behalf at Chubb's discretion. *Id.* at 184.

22. Under the Primary Policy, Malibu was prohibited from making "any payment," assuming "any obligation," or incurring "any expense" in a covered lawsuit without Chubb's

consent. *Id.* These provisions have the practical effect of requiring that Malibu defer to Chubb with respect to the defense of a covered lawsuit, including whether to settle.

23. The Primary Policy included a “Supplementary Payments” provision that states that Chubb will pay the “costs taxed against the insured in the suit, except any: 1. attorney fees or litigation expenses; or 2. other loss, cost or expense; in connection with any injunction or other equitable relief,” “prejudgment interest awarded” against Malibu, and the “interest on the full amount of a judgment that accrues after entry of the judgment and before we have paid, offered to pay or deposited in court the part of the judgment that is within the applicable Limit Of Insurance.” *Id.* at 184-85. The Primary Policy provides that “[t]hese payments” – *i.e.*, the Supplementary Payments – “will not reduce the Limits of Insurance.” *Id.*

24. The Primary Policy included an implied covenant of good faith and fair dealing which obligated Chubb to accept reasonable settlement offers and contribute amounts within the limits of the Primary Policy to ensure such settlements were consummated.

25. Chubb also issued to Malibu a first-layer excess policy, No. 79932804 (the “Chubb Excess Policy,” and together with the Primary Policy, the “Chubb Policies”), providing limits of \$5 million in excess of \$1 million. The Excess Policy also covers the period from July 1, 2014 to July 1, 2015. A copy of the Chubb Excess Policy is attached hereto as **Exhibit 2**.

26. The Chubb Excess Policy provides that Chubb would and will have “the right to make any investigation and settlement of any claim, suit, proceeding or other loss circumstance.” *Ex. 2* at 27.

27. The Chubb Excess Policy included an implied covenant of good faith and fair dealing which obligated Chubb to accept reasonable settlement offers and contribute amounts within the limits of the Chubb Excess Policy to ensure such settlements were consummated.

28. Also during the time period relevant to this action, Starr issued to Malibu a second-layer excess policy, No. MASILSF00011514 (the “Starr Policy,” and collectively with the Chubb Policies, the “Policies”), providing limits of \$20 million in excess of \$6 million. The Starr Policy covers the period from July 1, 2014 to July 1, 2015. A copy of the Starr Policy is attached hereto as **Exhibit 3**.

29. The Starr Policy provides that Starr “shall have the right and shall be given the opportunity” to associate “in the defense and control of any claim, suit or proceeding which involves or appears to involve” Starr. Ex. 3 at 4.

30. The Starr Policy included an implied covenant of good faith and fair dealing which obligated Starr to accept reasonable settlement offers and contribute amounts within the limits of the Starr Policy to ensure such settlements were consummated.

31. Malibu is an insured under each Policy.

32. At all pertinent times, the required premiums were paid with respect to the Policies, and the Policies were in full force and effect. There are no outstanding premiums or deductibles due under the Policies. Malibu has complied with all conditions and covenants to be performed by it under the Policies.

THE BATCHELDER LITIGATION

33. On May 9, 2016, parents, siblings, and cousins of a young boy who was killed in a boating accident during the covered period filed a wrongful death lawsuit in the Superior Court of Georgia in Rabun County against Malibu and Malibu Boats West, Inc., captioned *Stephan Paul Batchelder and Margaret Mary Batchelder, Individually, as Administrators of the Estate of Ryan Paul Batchelder, deceased, v. Malibu Boats West, Inc. and Malibu Boats, LLC*, No. 2016-CV-0114-C (Ga. Super. Ct.) (the “Batchelder Litigation”). The plaintiffs in the Batchelder Litigation (the “Batchelder Plaintiffs”) were represented by a team of lawyers led by Drew Ashby of Ashby,

Thelen & Lowey, and Don Fountain of Clark, Fountain, LaVista, Prather, Littky-Rubin (together, “Batchelder Plaintiffs’ Counsel”).

34. The lawsuit alleged that Malibu was strictly liable for the accident because its boat was defectively designed and Malibu failed to warn of that defect. The complaint specifically alleged that Malibu and its purported predecessors were negligent and failed to design, fabricate, manufacture, assemble, market and/or sell a safe and non-defective boat.

35. The Batchelder Litigation alleged Malibu’s liability for bodily injury or personal injury within the coverage of the Policies.

36. Malibu has taken reasonable and appropriate responsive actions to the Batchelder Litigation, including attempting to work cooperatively with the Insurers in the defense and settlement of the claims. Malibu has incurred, and will continue to incur, significant costs and expenses in connection with the defense of the Batchelder Litigation.

37. Malibu promptly advised its broker, Belter Insurance, of the Batchelder Litigation. Belter, in turn, tendered the Batchelder Litigation to Chubb. Chubb accepted Malibu’s tender without reservation, acknowledging its duty to defend and indemnify Malibu against the claims asserted.

38. The Batchelder Litigation and related claims are covered under the Policies. Chubb had and has a duty to defend and indemnify Malibu against the claims asserted under the Primary Policy and a duty to indemnify Malibu under the Chubb Excess Policy. Starr has a duty to indemnify Malibu against the claims asserted under the Starr Policy.

39. Over the course of the Batchelder Litigation and as set forth more fully below, the Batchelder Plaintiffs extended at least eight reasonable opportunities to settle within policy limits. The Insurers unreasonably rejected each offer.

40. Pursuant to its duty to defend and its right to control the defense of a covered claim, Chubb initially appointed the law firm of Gordon Rees Scully Mansukhani, LLP (“Gordon Rees”) to represent Malibu in the Litigation.

41. In July 2016, Gordon Rees undertook an initial case assessment. Gordon Rees assessed that the possible damages in the case “are difficult to quantify, but could be staggering.” Gordon Rees recounted a number of aspects of the injuries suffered by the decedent such that “a jury could award significant damages for pain and suffering,” including that “our expert and others have said that these are the worst injuries in a case they have ever seen.” Gordon Rees also observed that there may be exposure to punitive damages, and that “we can expect a jury to be sympathetic to Plaintiffs and potentially award significant damages.”

42. Gordon Rees evaluated multiple potentially comparable jury verdicts, including a “highly-publicized” product liability case “which involved the death of a four year old boy,” resulting in “a rural Georgia jury award[ing] \$150 million dollars” to the plaintiff.

43. Based on its analysis, Gordon Rees recommended to the Insurers that “settlement should be considered once more facts are known through discovery.”

July 22, 2016 Settlement Demand (Plaintiff Offer #1)

44. The Batchelder Plaintiffs made their first settlement offer via written demand to Tawana B. Johnson and Parks Stone, Insurer-appointed counsel from Gordon Rees, by letter dated July 22, 2016. They demanded \$18 million in exchange for a release of all claims. The offer stated that it expired on December 1, 2016. The Batchelder Plaintiffs also offered for Malibu to meet or take the depositions of the Batchelder Plaintiffs and/or to participate in informal or formal mediation. The demand stated that it was an offer pursuant to Ga. Code § 51-12-14 (a demand for

unliquidated damages), in order to trigger prejudgment interest. A copy of the demand is attached hereto as **Exhibit 4**.

45. Plaintiff Offer #1 was capable of acceptance.

46. Plaintiff Offer #1 was a reasonable opportunity to settle the claims against Malibu for an amount within policy limits.

47. Gordon Rees conveyed the offer to Chubb with a recommendation to “give an early mediation some serious consideration” because “the damages in this case are significant given that it involves the gruesome death/mutilation of a child in front of his family.” The firm added that there were “likely some liability issues for Malibu here.” Gordon Rees concluded that the Batchelder Plaintiffs would likely settle “in the range of \$7-10 million.” Such a settlement would have been within the Insurers’ combined limits.

48. Shortly thereafter, Maria Nigro of Chubb called Robert Shannon (then at Hall Booth Smith, P.C.) to replace Gordon Rees as defense counsel in the Batchelder Litigation.

49. In January 2017, one month before a mediation scheduled for February 2017, Batchelder Plaintiffs’ Counsel expressly requested from Shannon that “Malibu make its initial offer.” He clarified that the Batchelder Plaintiffs’ offer of \$18 million was still live and was a “joint offer to settle all claims.”

50. The Batchelder Plaintiffs and Chubb then attended mediation with the Honorable Gino Brogdon, Sr. on February 13, 2017. At the February 13, 2017 mediation, the Insurers had reasonable opportunities to settle the claims against Malibu within the combined policy limits.

51. In response to the Batchelder Plaintiffs’ \$16.9 million demand at the close of mediation, Chubb offered only \$1 million—far below Chubb’s limits and the Insurers’ combined

limits. Starr did not commit any amount toward settlement, even if conditioned on Chubb first tendering its limits. As a result, the February 13, 2017 mediation did not result in settlement.

July 10, 2019 Settlement Demand (Plaintiff Offer #2)

52. On July 10, 2019, the Batchelder Plaintiffs sent a letter to the Insurers via Shannon, advising that they would be willing to return to mediation and restart negotiations with the same settlement demand previously extended at the close of mediation over two years earlier: \$16.9 million to resolve all claims on behalf of all Batchelder Plaintiffs. A copy of the demand is attached hereto as **Exhibit 5**.

53. Plaintiff Offer #2 was capable of acceptance.

54. Plaintiff Offer #2 was a reasonable opportunity to settle within policy limits.

55. The Insurers rejected the July 10 settlement demand. Chubb did not offer any amount in response to the Batchelder Plaintiffs' demand. Starr also did not commit any amount toward settlement, even if conditioned on Chubb first tendering its limits.

December 10, 2019 Settlement Demand (Plaintiff Offer #3)

56. On November 15, 2019, Shannon sent Chubb and Starr a memorandum stating that the issue "most likely to lead to an adverse verdict against the Malibu defendants is the fact that none of the individuals who participated in designing the subject boat had any engineering training or education," which could "enflame a jury based on Malibu's carelessness." He also informed Chubb and Starr that pictures from the accident would be admitted into evidence, which had the potential to further enflame the jury and reduce Malibu's chances of succeeding at trial.

57. On December 10, 2019, the Batchelder Plaintiffs' Counsel sent another settlement demand letter to the Insurers via Shannon, reiterating a willingness to settle for \$16.9 million. The letter stated that if Chubb had an immediate interest in resolving the case, the Batchelder Plaintiffs

would leave the demand at the current number; however, if the case progressed into expert discovery and the new year, the Batchelder Plaintiffs would raise the demand to a level more in line with the Insurers' combined policy limits of \$26 million. A copy of the demand is attached hereto as **Exhibit 6**.

58. Shannon provided the demand to Chubb, and Chubb shared the demand with Starr. The Insurers discussed concerns that “[t]he graphic nature of the case . . . could devastate Malibu on liability.”

59. Plaintiff Offer #3 was capable of acceptance.

60. Plaintiff Offer #3 was a reasonable opportunity to settle within policy limits.

61. However, the Insurers did not respond to the \$16.9 million settlement demand before the end of the year as the Batchelder Plaintiffs' Counsel requested. Chubb did not offer any amount in response to the Batchelder Plaintiffs' demand. Starr did not commit any amount toward settlement, even if conditioned on Chubb first tendering its limits.

62. Fact discovery was completed on December 31, 2019.

April 17, 2020 Settlement Demand (Plaintiff Offer #4)

63. On March 16, 2020, Starr expressed “great concern” regarding the Batchelder Litigation. Chubb echoed Starr's concerns, stating that “it is clear that that the judge does not favor Malibu in this matter.”

64. Shortly thereafter, on April 17, 2020, the Batchelder Plaintiffs served on Malibu's Insurer-appointed defense counsel an offer to settle pursuant to GA Code § 9-11-68. This offer of settlement included a demand of \$16.9 million in exchange for a full resolution of all claims against Malibu and provided a 30-day deadline to respond. The offer reiterated that the amount demanded was the same as that demanded during the February 2017 mediation, the July 10, 2019 settlement

demand letter, and the December 10, 2019 settlement demand letter. The Batchelder Plaintiffs also stated that multiple informal settlement attempts, like the July 10 and December 10 settlement demand letters, had been ignored. A copy of the offer is attached hereto as **Exhibit 7**.

65. Plaintiff Offer #4 was capable of acceptance.

66. Plaintiff Offer #4 was a reasonable opportunity to settle within policy limits.

67. Despite Starr and Chubb's significant concerns that would have prompted any reasonable insurer to move promptly to settle within policy limits as demanded, Starr and Chubb neglected to even convey an offer to the Batchelder Plaintiffs. Chubb did not offer any amount in response to the Batchelder Plaintiffs' demand and Starr did not commit any amount toward settlement, even conditioned on Chubb first tendering its limits.

July 14, 2020 Settlement Demand (Plaintiff Offer #5)

68. The parties were scheduled to mediate on July 16, 2020. By this time, the parties had taken 49 depositions, discovery had concluded, all deposition designations and counter designations had been filed, and all motions *in limine*, *Daubert* motions, and dispositive motions had been fully briefed.

69. Also by this time, multiple motions *in limine* had already been decided in favor of the Batchelder Plaintiffs and against Malibu, including motions (1) to exclude evidence that the subject boat was used without incident before and after the accident, (2) to exclude evidence of the investigating officer's reports and Georgia Department of Natural Resources' determination that the subject boat was safe, (3) to exclude evidence that the Batchelder Plaintiffs (and others) never reported to regulators or trade associations that the subject boat was unsafe, and (4) to exclude any evidence of alcohol consumption or any suggestion that alcohol contributed to the death.

70. One week prior to mediation, Malibu advised Chubb's appointed defense counsel that "we should let the insurers know they should settle within the policy limits."

71. On July 14, 2020, Batchelder Plaintiffs' Counsel sent yet another letter to the Insurers. In light of the upcoming mediation, Batchelder Plaintiffs' Counsel wrote that the Insurers had a "clear opportunity to fully and completely resolve these claims and fully protect Malibu's assets from any exposure beyond its . . . insurance limits." Batchelder Plaintiffs' Counsel warned that if the Insurers failed to settle, "Malibu will have a bad-faith claim against Chubb and Starr for failing to resolve this matter when they had dozens of opportunities to do so; especially when confronted with reasonable settlement demands." A copy of the demand is attached hereto as **Exhibit 8**.

72. As with previous settlement demands, the July 14 letter also plainly set forth the evidence that would be presented at trial, including the gruesome manner of the child's death. Batchelder Plaintiffs' Counsel provided a comparative jury verdict, explaining that a jury had awarded \$30 million for a four-year-old's sixty seconds of pain and suffering in an automobile accident.

73. The July 14 letter painted a stark picture of the upcoming trial, highlighting the deposition testimony of fourteen Malibu employees and documentary evidence allegedly demonstrating that Malibu was aware of swamping hazards in its product but did not do any safety analyses or include warnings in its product brochures or labels.

74. The letter also recounted unfavorable developments in the case, including the court's striking of several of Malibu's expert witnesses and defenses.

75. Batchelder Plaintiffs' Counsel concluded his letter with a warning: "If Chubb and Starr want to play games with Malibu's money, then they should get ready for a significant excess

verdict, additional fees, costs, and interest on top of the verdict, punitive damages, and a negligent failure to settle case by Malibu As to Chubb and Starr, you have had enough time to evaluate this case. Over four years.”

76. Plaintiff Offer #5 was capable of acceptance.

77. Plaintiff Offer #5 was a reasonable opportunity to settle within policy limits.

78. The parties mediated for a second time on July 16, 2020. Prior to the mediation, Malibu reiterated its demand that Chubb and Starr settle within the \$26 million combined policy limits.

79. On information and belief, Vivian Harrington (Chubb) and Markus McMillin (Starr) attended the mediation along with Shannon.

80. Chubb offered \$2 million in response to Plaintiffs’ \$16.9 million demand, far below Chubb’s limits and the combined policy limits. Starr did not commit any amount toward settlement, even if conditioned on Chubb first tendering its limits.

81. At the July 16, 2020 mediation, the Insurers had reasonable opportunities to settle the claims against Malibu within the combined policy limits.

82. The July 16, 2020 mediation did not result in settlement.

July 23, 2020 Settlement Demand (Plaintiff Offer #6)

83. On July 23, 2020, Batchelder Plaintiffs’ Counsel wrote to Shannon confirming an extension of the Batchelder Plaintiffs’ settlement demand of \$16.9 million. He noted that the demand had been held open for more than three years “even though the evidence of Malibu’s culpability and the Courts [*sic*] rulings have resulted in the [Batchelder] Plaintiffs’ claims strengthening over time.” He further emphasized that the Insurers “never expressed or demonstrated any genuine interest or desire to participate in good faith settlement discussions

based on the facts and evidence.” Batchelder Plaintiffs’ Counsel closed the letter by stating that the current demand would remain “open and available for acceptance” until July 31, 2020, after which the demand would increase to \$20 million. A copy of the demand is attached hereto as

Exhibit 9.

84. Plaintiff Offer #6 was capable of acceptance.

85. Plaintiff Offer #6 was a reasonable opportunity to settle within policy limits.

86. Both Chubb and Starr failed to respond to this settlement demand in any manner.

Chubb did not offer any amount in response to the Batchelder Plaintiffs’ demand and Starr did not commit any amount toward settlement, even if conditioned on Chubb first tendering its limits.

87. In October 2020, Batchelder Plaintiffs’ Counsel emailed Starr regarding the July 14 letter, which Starr had never responded to. Batchelder Plaintiffs’ Counsel characterized the July 14 letter as “a letter outlining this case, and your insured’s excess exposure, in detail.” Batchelder Plaintiffs’ Counsel stated that the email “shall serve as confirmation that,” among other things, “You have requested detailed reporting from your defense counsel about these issues,” “You are on notice of the excess exposure of your insured,” “You are on notice of Starr’s bad-faith exposure, independent of Malibu’s decisions,” and “You are on notice of Starr’s clear and explicit duties under Georgia law to protect its insured, irrespective of the actions or inactions of the primary carrier.”

88. December 2020 also brought several unfavorable rulings against Malibu: the court denied Malibu’s motion for summary judgment in its entirety, denied Malibu’s motion to exclude certain expert testimony, denied Malibu’s motions to preclude punitive damages and to sever and trifurcate trial, and denied Malibu’s motion to exclude any references to its alleged failure to check Boating Accident Report Database records.

89. The court also made a number of rulings in favor of the Batchelder Plaintiffs in December 2020, granting their motions (1) to exclude evidence related to the boat driver's failure to watch a mandatory boat safety video, (2) to prevent all three of Malibu's proposed expert witnesses from opining that the inclusion of additional warnings would not have influenced the driver's operation of the boat, and (3) to prevent Malibu's expert from testifying about his testing of a similar model of boat, about modifications to the subject boat that may have contributed to the accident, about whether the boat driver's actions indicated that he intended to take on water, or about the timeline of events.

90. Malibu's uphill battle became even steeper in January 2021, as the court (1) denied Malibu's motion to exclude references to a different case, *Bell v. MasterCraft*, and the use of that case as evidence regarding why Malibu took certain actions, and (2) denied Malibu's motion to exclude the testimony of the Batchelder Plaintiffs' economist expert who testified regarding the valuation of the deceased's life.

91. Malibu did not take these rulings lightly. Given the Insurers' refusal to settle the Batchelder Litigation despite the increasingly negative developments for Malibu's Insurer-controlled defense, in February 2021 Malibu had no choice but to hire its own coverage counsel ("Coverage Counsel") to demand that the Insurers immediately take the steps necessary to fully protect Malibu's interests in accordance with the Insurers' duties under the Policies.

92. Malibu's chances of prevailing at trial continued to dwindle. After a series of rulings on motions *in limine* that were almost entirely in favor of the Batchelder Plaintiffs and against Malibu throughout January, February, and March, Coverage Counsel wrote to the Insurers on April 8, 2021 to protest their "failure to amicably resolve the claims filed on behalf of the Batchelder family." Coverage Counsel expressly invoked the Insurers' duty of good faith and fair

dealing and their duty to reasonably settle, demanding that the Insurers “undertake every effort to effectuate a prompt settlement” of the case within policy limits.

April 21, 2021 Settlement Demand (Plaintiff Offer #7)

93. The Insurers had another chance to settle the case that same month. On April 21, 2021, Batchelder Plaintiffs’ Counsel sent a letter to the Insurers, reminding them that they had given the Insurers “numerous opportunities to settle this matter” yet had been “completely ignored.” The letter recounted the two mediations with the Insurers’ chosen mediator, neither of which involved the Insurers offering even Chubb’s \$6 million coverage limits, much less the combined limits of the Policies. Starr did not commit any amounts during these settlement negotiations, even conditioned on Chubb first tendering its limits. A copy of the demand is attached hereto as **Exhibit 10**.

94. The letter also stated the obvious result of the multitude of negative rulings for Malibu: the case was “now firmly outside of Malibu’s policy limits” due to the Insurers’ “desire to keep pushing forward at all cost, in an attempt to avoid paying fair value to settle this case. Should they continue to choose that path, Malibu will soon be facing an excess verdict (which will include a jury finding that your product is defective).” Batchelder Plaintiffs’ Counsel reiterated that the Batchelder Plaintiffs were willing to discuss “a settlement inside of the policy limits that will not expose Malibu to a substantial verdict and the reputational damage that such a verdict can cause.” The demand set a response deadline of June 11, 2021.

95. Plaintiff Offer #7 was capable of acceptance.

96. Plaintiff Offer #7 was a reasonable opportunity to settle within policy limits.

97. The Insurers never responded to Plaintiff Offer #7.

98. At the same time, the court continued to rule against Malibu. On April 30, 2021, the court denied Malibu's motion for reconsideration regarding the court's prior denials of Malibu's motions on the issues of design defect claims, punitive damages, and whether the claims at issue related to an open and obvious danger.

99. But the Insurers still did nothing to resolve the claims against their insured. Their unreasonable and inexplicable inaction led Coverage Counsel to again write to the Insurers on May 17, 2021, demanding that the Insurers "exercise utmost good faith and undertake the necessary and immediate action to amicably resolve the pending claims within the policy limits before the time limit expires." Coverage Counsel expressly placed the Insurers on notice that their failure to effectuate settlement was potentially exposing Malibu to a verdict in excess of the policy limits and that the interests of the Insurers had been prioritized to the detriment of the insured, Malibu. Coverage Counsel concluded his letter again imploring the Insurers to take action on behalf of Malibu to settle the action. The Insurers both unreasonably refused.

100. On May 25, 2021, Starr responded to Coverage Counsel by disclaiming any duty to Malibu until all primary and underlying insurance had been exhausted. Starr stated that it required Chubb to present a tender of Chubb's primary and excess limits before Starr would take any action in response to the Batchelder Plaintiffs' numerous settlement demands. Notably, Starr did not commit any amount toward settlement, even if conditioned on Chubb first tendering its limits.

101. Chubb responded on June 7, 2021 to insist that Chubb was aware of its duty of good faith and fair dealing. Chubb expressed unreasonable and unfounded confidence in the outcome of the case. Chubb recognized that the court had "made some unfavorable rulings on motions, the admissibility of certain evidence, and the recoverable damages available to the Batchelder children

on the boat,” but Chubb unreasonably discounted these numerous negative developments. Tellingly, Chubb believed that these adverse rulings could be addressed on appeal, recognizing their negative impact on the jury trial – yet refused to factor them into its evaluation of the case. Chubb notably refused to commit its full policy limits toward a settlement. In fact, Chubb did not offer any amount in response to the Batchelder Plaintiffs’ latest demand. Instead, Chubb expressed the view that the Batchelder Plaintiffs were “relying solely on anticipated sympathy factors rather than facts to support the high demand.”

102. Coverage Counsel responded to both Insurers on June 8, 2021. The response addressed a number of factors applicable to the Batchelder action that would drive a large verdict, based on an article shared by Starr. The very “anticipated sympathy factors” that Chubb disparaged in discounting the Batchelder Plaintiffs’ settlement demands were identified in the article shared by Starr as driving “nuclear cases” with “large verdicts.” Coverage Counsel concluded that “[g]iven these concerns, combined with the continuing adverse court rulings, it is high time for Starr and [Chubb] to act as reasonable insurers and implement immediate action on behalf of the insureds to resolve the Batchelder claims.”

July 5, 2021 Settlement Demand (Plaintiff Offer #8)

103. On July 5, 2021, the Batchelder Plaintiffs issued yet another demand with trial rapidly approaching, this time seeking the entirety of Malibu’s \$26 million policy limits in exchange for a full release. The demand was held open until July 19, 2021. A copy of the demand is attached hereto as **Exhibit 11**.

104. Malibu swiftly took action, writing the Insurers on July 12, 2021, demanding that they “exercise the utmost good faith and undertake the necessary and immediate action to amicably resolve the pending claims within the policy limits before the time limit expires.” The letter again

put the Insurers on notice that “the insurers’ failure to effectuate a settlement is unnecessarily exposing Malibu to a verdict in excess of the policy limits, an award of punitive damages, and the resulting judgment may adversely affect” Malibu.

105. The July 12 letter also warned that “[i]t is evident from our review of the Court’s orders on issues such as design defect claims, punitive damages, open and obvious danger, award of fees and costs, severance, and limitations on defense experts that the defense theories and contentions advanced in this action have been soundly rejected by the Court.” In sum, “the Court has consistently rejected the defense theories advanced on behalf of Malibu in this action and the Plaintiffs’ claims for all damages, including punitive damages, will be presented to a jury.”

106. Plaintiff Offer #8 was capable of acceptance.

107. Plaintiff Offer #8 was a reasonable opportunity to settle within policy limits.

108. Instead of acting as reasonable insurers would when faced with these circumstances, the Insurers did nothing, improperly put their interests above Malibu’s interests, and chose to let the Batchelder Plaintiffs’ policy-limits demand expire. Chubb did not offer any amount in response to the Batchelder Plaintiffs’ demand and Starr did not commit any amount toward settlement, even if conditioned on Chubb first tendering its limits.

109. Throughout all of these exchanges, Malibu was barred from settling with the Batchelder Plaintiffs on its own by operation of the applicable terms in the Policies. As a result, Malibu was at the mercy of the Insurers in obtaining a settlement that would protect its interests and protect it from an excess verdict. But the Insurers, negligently and in bad faith, failed to settle within policy limits when it was obvious that Malibu was at a significant risk of an excess verdict. This risk far outweighed any chance of a verdict below policy limits.

The Batchelder Verdict

110. After the Insurers refused to act on each of the above-described settlement opportunities, the Batchelder Litigation went to trial on August 17, 2021. Just prior to trial, the decedent's sibling and cousins were dismissed from the suit without prejudice.

111. On information and belief, no representatives of the Insurers attended the trial, other than Insurer-appointed defense counsel.

112. Consistent with nearly every other development in the Batchelder Litigation, the trial went poorly for Malibu. On August 28, 2021, the jury returned a massive \$140 million verdict against Malibu. The jury found that Malibu Boats West, Inc. and Malibu Boats, LLC negligently failed to warn of a hazard posed by its boat and that the conduct was the proximate cause of the death of the victim. The jury also concluded that the Batchelder Plaintiffs were entitled to recover punitive damages against both Malibu entities.

113. The jury apportioned 10% of fault to Malibu West, 15% to Malibu Boats, LLC, and 75% to the driver of the boat. The jury awarded \$5 million for the life of Ryan Batchelder, and \$75 million for the pain and suffering he endured. In addition to the \$8 million share of compensatory damages apportioned to Malibu West and \$12 million apportioned to Malibu Boats, LLC, the jury awarded punitive damages of \$40 million against Malibu West and \$80 million against Malibu Boats, LLC. Because the jury made a factual finding that Malibu Boats, LLC was a "mere successor" of Malibu West and responsible for its liabilities, Malibu Boats, LLC was held jointly liable for the entirety of the \$140 million judgment issued against the defendants.

114. In sum, Malibu was exposed to a \$140 million judgment as a result of the Insurers' bad faith and/or negligent failure to settle the Batchelder Litigation.

115. Moreover, Malibu has been exposed to millions of dollars of additional liability consisting of pre-judgment interest, post-judgment interest, and the Batchelder Plaintiffs' attorneys' fees for the same reason. Chubb was and is responsible for all such costs under the Supplementary Payments provisions of the Primary Policy.

116. This terrible result could have been avoided if Chubb and Starr had honored their duties to Malibu and contributed the amounts necessary to consummate a settlement within policy limits under the terms demanded by the Batchelder Plaintiffs.

117. As noted herein, Insurers had at least eight opportunities to settle with the Batchelder Plaintiffs within policy limits, avoiding unnecessary gambling with Malibu's funds and reputation. The Insurers unreasonably rejected each one.

118. Chubb did not even respond to six of the eight offers. Chubb's last response to any settlement offer from the Batchelder Plaintiffs came in July 2020, prior to the court's denial of Malibu's motion for summary judgment and a litany of adverse rulings that negated the factual and legal defenses Chubb and its appointed defense counsel had hoped to rely on at trial.

119. Chubb never offered anything close to its policy limits throughout years of negotiations prior to the verdict and judgment, putting at most \$2 million on the table. Any reasonable insurer would have offered its policy limits in order to avoid exposing Malibu to unreasonable risk, and Chubb's failure to do so was negligent, in bad faith, and with the specific intent to harm Malibu.

120. Starr never offered a penny in response to any of the Batchelder Plaintiffs' numerous settlements demands prior to the verdict and judgment, whether conditioned on Chubb first tendering its limits or not. Starr unreasonably and negligently refused to contribute, even though it was obvious from all of the adverse rulings for Malibu that Starr's refusal to do so

exposed Malibu to unreasonable risk. Starr's failure to settle was negligent, in bad faith, and with the specific intent to harm Malibu.

The Post-Verdict Settlement

121. Shortly before trial, the decedent's sibling and cousins were dismissed from the main Batchelder Litigation. On February 9, 2022, these individuals re-initiated their own suit against Malibu for emotional distress, in an action captioned *Stephan Paul Batchelder and Margaret Mary Batchelder, as Natural Guardians of Josh Patrick Batchelder, a minor; Darin Batchelder, individually and as Natural Guardian of Zack Batchelder, a minor; and Kayla Batchelder v. Malibu Boats, LLC*, No. 2022-cv-0034 (Ga. Super. Ct., Rabun Cty.) (the "Renewal Action").

122. As the appeal of the Batchelder Litigation judgment was pending, the Insurers tendered control over any settlement negotiations with Plaintiffs to Malibu, with the understanding that Malibu fully reserved its rights to recover any resulting settlement from the Insurers. When the Insurers stepped aside, Malibu was finally able to limit the damage from the Insurers' egregious conduct. With full notice to, and with express permission from, the Insurers, Malibu was able to mitigate this disastrous verdict by entering into a \$100 million settlement with the Batchelder Plaintiffs in exchange for the release of all claims, including those asserted in both the Batchelder Litigation and the Renewal Action.

123. The settlement is plainly reasonable, including in light of assessments performed by Insurer-appointed defense and appellate counsel regarding Malibu's liability.

124. Chubb confirmed in writing that it consented to Malibu entering the settlement, and acknowledged that Malibu complied with all relevant conditions under the Chubb Policies before doing so.

125. Prior to Malibu reaching the settlement with the Batchelder Plaintiffs, Starr stated in writing that Malibu is not obligated by the Starr Policy to obtain Starr's consent to any settlement.

126. Had the Insurers not acted negligently and in bad faith, a settlement in excess of the policy limits would not have been necessary. The Insurers are therefore responsible for the full amount of settlement.

COUNT ONE
BAD FAITH FAILURE TO SETTLE AGAINST ALL DEFENDANTS

127. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 126, inclusive, of this Complaint, as if fully restated herein.

128. The Insurers had full knowledge that the risk of an excess judgment against Malibu in the Batchelder Litigation was likely.

129. Each Insurer had a covenant and duty of good faith and fair dealing that required it to accept reasonable settlement offers and contribute amounts within its policy limits to ensure such settlements were consummated.

130. Each Insurer had a duty to refrain from actions or omissions that would frustrate the agreed-upon purposes of the Policies or injure Malibu's rights to receive the benefits of the Policies.

131. Pursuant to the Policies and common law, the Insurers had a duty to settle the Batchelder Litigation when the Batchelder Plaintiffs presented multiple valid offers to settle within the Policies' limits.

132. The Insurers breached their duties. The Insurers failed to give equal consideration to Malibu's interests as to their own interests, instead attempting to protect themselves by seeking to pay less than the Policies' limits and by putting Malibu at unreasonable risk. The Insurers failed

to respond or to accept the multiple settlement demand letters throughout the course of the Batchelder Litigation, any one of which would have resolved the Batchelder Litigation for less than the combined policy limits and protected Malibu in accordance with the Insurers' duties. By deciding to try the case rather than settle it, the Insurers gambled with Malibu's money and reputation.

133. As alleged herein, the Insurers acted unreasonably in failing to settle the Batchelder Litigation even as the risk that Malibu would be exposed to an excess verdict grew as a result of multiple adverse trial court rulings.

134. The Insurers' failure to settle the Batchelder Litigation proximately caused Malibu to face a verdict and suffer damages that were in excess of the Policies' limits, and proximately caused Malibu to incur damages in the amount of \$100 million to reasonably settle with the Batchelder Plaintiffs following the verdict and judgment.

135. The Insurers consented to the settlement with the Batchelder Plaintiffs and the settlement breaches no provisions of any of the Policies.

136. As a result of the Insurers' breaches, the Insurers are liable to Malibu for the full amount of the settlement or, in the alternative, the full amount of the judgment, and for any interest, attorneys' fees and other costs or damages in connection with the judgment including any appeal.

COUNT TWO
NEGLIGENT FAILURE TO SETTLE AGAINST ALL DEFENDANTS

137. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 136, inclusive, of this Complaint, as if fully restated herein.

138. Each Insurer had full knowledge that the risk of an excess judgment against Malibu in the Batchelder Litigation was likely.

139. Each Insurer had a covenant and duty of good faith and fair dealing that required it to accept reasonable settlement offers and contribute amounts within its policy limits to ensure such settlements were consummated. Each Insurer had a duty to refrain from actions or omissions that would frustrate the agreed-upon purposes of the Policies or injure Malibu's rights to receive the benefits of the Policies.

140. Pursuant to the Policies and common law, Insurers owed a duty to Malibu to exercise due care in investigating, negotiating the settlement of, and responding to the multiple valid offers to settle the Batchelder Litigation, as judged by the standard of an ordinarily prudent insurer.

141. As alleged herein, the Insurers breached that duty by failing to reasonably evaluate Malibu's potential liability and unreasonably failing to accept any of the valid settlement offers within the combined policy limits at times when an ordinarily prudent insurer would have considered choosing to try the case as creating an unreasonable risk.

142. The Insurers' failure to settle the Batchelder Litigation proximately caused Malibu to face a verdict and suffer damages that were in excess of the Policies' limits, and proximately caused Malibu to incur damages in the amount of \$100 million to reasonably settle with the Batchelder Plaintiffs following the verdict and judgment.

143. The Insurers consented to the settlement with the Batchelder Plaintiffs and the settlement breaches no provisions of any of the Policies.

144. As a result of the Insurers' breaches, the Insurers are liable to Malibu for the full amount of the settlement or, in the alternative, the full amount of the judgment, and for any interest, attorneys' fees and other costs or damages in connection with the judgment including any appeal.

COUNT THREE
EXPENSES OF LITIGATION UNDER GA CODE § 13-6-11 AGAINST ALL DEFENDANTS

145. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 144, inclusive, of this Complaint, as if fully restated herein.

146. The Insurers' refusal to settle the Batchelder Litigation constituted bad faith as described above. The Insurers persisted in this bad faith conduct, refusing to make Malibu whole after exposing Malibu to the massive adverse verdict in the Batchelder verdict, necessitating the instant action.

147. Each Insurer has therefore acted in bad faith, been stubbornly litigious, and/or has caused Malibu unnecessary trouble and expense such that the jury may award Malibu its expenses of the instant litigation, including attorneys' fees, pursuant to GA Code § 13-6-11.

COUNT FOUR
CLAIM FOR PUNITIVE DAMAGES AGAINST ALL DEFENDANTS

148. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 147, inclusive, of this Complaint, as if fully restated herein.

149. The Insurers' actions show willful misconduct, wantonness, and that entire want of care which would raise the presumption of conscious indifference to the consequences to their insured.

150. The conduct of the Insurers was deliberate and intentional and was the conscious and calculated result of the Insurers' decision to give greater importance to their own interests rather than to the interests of their insured.

151. The Insurers' willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences

with the specific intent to cause harm, entitles Malibu to damages, including punitive damages within the meaning of GA Code § 51-12-5.1.

152. By reason of the foregoing, Malibu is entitled to an award of punitive damages pursuant to GA Code § 51-12-5.1 against the Insurers in such amount to be determined by the enlightened conscience of a fair and impartial jury so as to penalize, punish or deter the Insurers from repeating such conduct.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Honorable Court award it the following relief:

A. Awarding Malibu damages, including the full amount of the settlement with the Batchelder Plaintiffs, as well as all of Malibu's other compensatory damages;

B. Awarding Malibu its attorneys' fees and costs, pursuant to GA Code § 13-6-11 or otherwise, to the extent not included in the Court's award of compensatory damages;

C. Awarding Malibu uncapped punitive damages, pursuant to GA Code § 51-12-5.1 or otherwise, in such amount that the jury deems adequate to punish and deter the Insurers in light of the aggravated nature of their conduct, their financial circumstances, and their intent to cause harm;

D. Awarding Malibu pre- and post-judgment interest; and

E. Granting such other and further relief as this Court deems appropriate and just under the circumstances.

JURY DEMAND

Plaintiff demands trial by jury on all issues triable by a jury.

Dated: July 3, 2023

Respectfully submitted,

/s/Richard E. Dolder

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