

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION
Case Number: 1:08-CV-0854

DUKE UNIVERSITY AND DUKE)
UNIVERSITY HEALTH SYSTEM,)
INC.,)
Plaintiff,)
v.) ANSWER, COUNTERCLAIM AND THIRD-
NATIONAL UNION FIRE) PARTY COMPLAINT OF DEFENDANT AND
INSURANCE COMPANY OF) THIRD-PARTY PLAINTIFF NATIONAL
PITTSBURGH, PA.,) UNION FIRE INSURANCE COMPANY OF
Defendant and Third-Party) PITTSBURGH, PA.
Plaintiff,)
v.)
UNITED EDUCATORS INSURANCE,)
A RECIPROCAL RISK RETENTION)
GROUP,)
Third-Party Defendant.)

Defendant and Third-Party Plaintiff National Union Fire Insurance

Company of Pittsburgh, Pa. (hereinafter “National Union”), responding to the Complaint of Plaintiffs Duke University (“Duke”) and Duke University Health System, Inc. (“DUHS”), alleges and says as follows:

ANSWER

1. In response to the allegations of Paragraph 1 of the Complaint, it is admitted that certain claims and lawsuits have been brought against Duke and certain of its directors, officers, and employees or agents by various individuals associated with the

Duke University 2005-2006 Men's Lacrosse Team (hereinafter "the Underlying Claims"). Except as specifically admitted herein, the remaining allegations of Paragraph 1 of the Complaint are denied.

2. The allegations of Paragraph 2 of the Complaint are denied.

3. In response to the allegations of Paragraph 3 of the Complaint, it is admitted that the Third and Fourth Claims for Relief in the Complaint each seek a declaratory judgment presumably pursuant to 28 U.S.C. § 2201, *et seq.* Except as specifically admitted, the remaining allegations of Paragraph 3 of the Complaint are denied.

4. The allegations of Paragraph 4 of the Complaint are denied.

5. The allegations of Paragraph 5 of the Complaint are denied.

6. The allegations of Paragraph 6 of the Complaint do not contemplate a response. In the event a response is necessary, the allegations of Paragraph 6 of the Complaint, and Plaintiffs' alleged entitlement to the remedies requested therein, are denied.

7. The allegations of Paragraph 7 of the Complaint are admitted.

8. In response to the allegations of Paragraph 8 of the Complaint, it is admitted that DUHS was listed as an "Affiliate" on Endorsement #12 to policies of insurance issued by National Union to Duke for the policy periods December 4, 2005 to December 4, 2006, and December 4, 2006 and December 4, 2007, respectively. It is further admitted that DUHS is a non-profit corporation organized under the State of North Carolina, with a principal place of business in Durham County, North Carolina.

Except as specifically admitted herein, the remaining allegations of Paragraph 8 of the Complaint are denied.

9. The allegations of Paragraph 9 of the Complaint are admitted.

10. In response to the allegations of Paragraph 10 of the Complaint, it is admitted that National Union was duly authorized to issue policies of insurance in the State of North Carolina from December 4, 2005 until the present.

11. In response to the allegations of Paragraph 11 of the Complaint, it is admitted that Duke and DUHS each seek from National Union an amount in excess of \$75,000.00. It is further admitted that the Plaintiffs and Defendant are diverse.

12. The allegations of Paragraph 12 of the Complaint state legal conclusions to which no response is required. In the event a response is necessary, it is admitted that Venue for this action is proper in the Middle District of North Carolina.

13. In response to the allegations of Paragraph 13 of the Complaint, it is admitted that National Union issued to Duke a policy of insurance for the policy period December 4, 2005 to December 4, 2006, bearing policy number 625-03-42 (“the 2006 Policy”), and a policy of insurance for the policy period December 4, 2006 to December 4, 2007, bearing policy number 965-76-25 (“the 2007 Policy”)(hereinafter the 2006 Policy and the 2007 Policy referred to collectively as “the Policies”). It is further admitted that as to the insureds under the policies, and the applicable coverages available, the Policies speak for themselves. Except as specifically admitted herein, the remaining allegations of Paragraph 13 of the Complaint are denied.

14. In response to the allegations of Paragraph 14 of the Complaint, it is admitted that National Union issued to Duke the 2006 Policy, and that as to the

contents and coverages provided, the 2006 Policy speaks for itself. Except as specifically admitted herein, the remaining allegations of Paragraph 14 of the Complaint are denied.

15. In response to the allegations of Paragraph 15 of the Complaint, it is admitted that National Union issued to Duke the 2007 Policy, and that as to the contents and coverages provided, the 2007 Policy speaks for itself. Except as specifically admitted herein, the remaining allegations of Paragraph 15 of the Complaint are denied.

16. In response to the allegations of Paragraph 16 of the Complaint, it is admitted that the Policies themselves are the best evidence of the contents therein, and that the contents speak for themselves. Except as specifically admitted herein, the remaining allegations of Paragraph 16 of the Complaint are denied.

17. In response to the allegations of Paragraph 17 of the Complaint, it is admitted that the Policies themselves are the best evidence of the contents therein, and that the contents speak for themselves. Except as specifically admitted herein, the remaining allegations of Paragraph 17 of the Complaint are denied.

18. In response to the allegations of Paragraph 18 of the Complaint, it is admitted that the Policies themselves are the best evidence of the contents therein, and that the contents speak for themselves. Except as specifically admitted herein, the remaining allegations of Paragraph 18 of the Complaint are denied.

19. In response to the allegations of Paragraph 19 of the Complaint, it is admitted that the Policies themselves are the best evidence of the contents therein, and that the contents speak for themselves. Except as specifically admitted herein, the remaining allegations of Paragraph 19 of the Complaint are denied.

20. In response to the allegations of Paragraph 20 of the Complaint, it is admitted that the Policies themselves are the best evidence of the contents therein, and that the contents speak for themselves. Except as specifically admitted herein, the remaining allegations of Paragraph 20 of the Complaint are denied.

21. In response to the allegations of Paragraph 21 of the Complaint, it is admitted that the Policies themselves are the best evidence of the contents therein, and that the contents speak for themselves. Except as specifically admitted herein, the remaining allegations of Paragraph 21 of the Complaint are denied.

22. The allegations of Paragraph 22 of the Complaint are admitted.

23. In response to the allegations of Paragraph 23 of the Complaint, it is admitted, upon information and belief, that at some point, three members of the Duke Lacrosse team who were indicted with criminal charges (hereinafter "the Duke Three") apparently informed Duke that they intended to bring a legal action against Duke. National Union lacks sufficient information or knowledge to form a belief as to when the Duke Three advised Duke that they intended to bring a legal action against Duke; therefore, this allegation is denied. All remaining allegations of Paragraph 23 of the Complaint are denied.

24. In response to the allegations of Paragraph 24 of the Complaint, it is admitted that in December 2007, Duke notified National Union that, Lawrence Lamade and Jerry Crotty, in February of 2007 verbally requested that Pam Bernard, the general counsel for Duke, agree to waive the statute of limitations with respect to any potential lawsuits that their children may ultimately bring against Duke. Except as specifically admitted herein, the allegations of Paragraph 24 of the Complaint are denied.

25. The allegations of Paragraph 25 of the Complaint are admitted.

26. Although National Union has never received a copy of the settlement agreement, the allegations of Paragraph 26 of the Complaint are admitted, upon information and belief.

27. In response to the allegations of Paragraph 27 of the Complaint, it is admitted that, upon information and belief, Duke was advised that members of the 2005-2006 Men's Lacrosse team intended to file suit against Duke. National Union lacks sufficient information or knowledge to form a belief as to the remaining allegations of Paragraph 27 of the Complaint; therefore, these allegations are denied.

28. In response to the allegations of Paragraph 28 of the Complaint, it is admitted that forty-one (41) members of the 2005-2006 Duke Men's Lacrosse team and certain of their parents filed suit against Duke. National Union lacks sufficient information or knowledge to form a belief as to the remaining allegations of Paragraph 28 of the Complaint; therefore, these allegations are denied.

29. The allegations of Paragraph 29 of the Complaint are admitted.

30. The allegations of Paragraph 30 of the Complaint are admitted.

31. The allegations of Paragraph 31 of the Complaint are admitted.

32. The allegations of Paragraph 32 of the Complaint are admitted.

33. National Union lacks sufficient information or knowledge to form a belief as to the truth of the allegations of Paragraph 33 of the Complaint; therefore, these allegations are denied.

34. The allegations of Paragraph 34 of the Complaint are admitted.

35. In response to the allegations of Paragraph 35 of the Complaint, it is admitted that on March 30, 2006, Duke faxed a letter and attached articles to National Union. A true copy of the articles sent by Duke on March 30, 2006, to National Union is attached hereto as Exhibit A. Except as specifically admitted herein, the allegations of Paragraph 35 of the Complaint are denied.

36. The allegations of Paragraph 36 of the Complaint are denied.

37. The allegations of Paragraph 37 of the Complaint are denied.

38. The allegations of Paragraph 38 of the Complaint are denied.

39. In response to the allegations of Paragraph 39 of the Complaint, it is admitted as follows:

a. On February 6, 2008, National Union, through AIG Domestic Claims, Inc., issued to Duke a letter, and that a redacted copy of that letter is attached hereto as Exhibit B.

It is further admitted that the February 6, 2008, letter is the best evidence of its contents, and that the contents of the February 6, 2008 letter speak for themselves. Except as specifically admitted herein, the allegations of Paragraph

39a. are denied;

b. On April 23, 2008, National Union, through AIG Domestic Claims Inc., issued to Duke a letter, and that a redacted copy of that letter is attached hereto as Exhibit C. It is further admitted that the April 23, 2008, letter is the best evidence of its contents, and that the contents of the April

23, 2008 letter speak for themselves. Except as specifically admitted herein, the allegations of Paragraph 39b. are denied;

- c. On April 8, 2008, National Union, through AIG Domestic Claims Inc., issued to Duke a letter, and that a redacted copy of that letter is attached hereto as Exhibit D. It is further admitted that the April 8, 2008, letter is the best evidence of its contents, and that the contents of the April 8, 2008 letter speak for themselves. Except as specifically admitted herein, the allegations of Paragraph 39c. are denied;
- d. On June 20, 2008, National Union, through AIG Domestic Claims Inc., issued to Duke a letter, and that a redacted copy of that letter is attached hereto as Exhibit E. It is further admitted that the June 20, 2008, letter is the best evidence of its contents, and that the contents of the June 20, 2008 letter speak for themselves. Except as specifically admitted herein, the allegations of Paragraph 39d. are denied;

40. In response to the allegations of Paragraph 40 of the Complaint, it is admitted that on April 23, 2008, National Union sent a letter to Duke, and that a redacted copy of the April 23, 2008 letter is attached hereto as Exhibit C. It is further admitted that the April 23, 2008 letter is the best evidence of its contents, and that the

contents of the April 23, 2008 letter speak for themselves. Except as specifically admitted herein, the allegations of Paragraph 40 of the Complaint are denied.

41. The allegations of Paragraph 41 of the Complaint are denied.

42. In response to the allegations of Paragraph 42 of the Complaint, National Union acknowledges that the following actions have been filed - *McFadyen, et al. v. Duke University, et al*, No. 1:07-CV-953 (M.D.N.C.) ("the *McFadyen Action*"); *Carrington, et al. v. Duke University, et al.*, No. 1:08-CV-119 (M.D.N.C.) ("the *Carrington Action*"); *Pressler v. Duke University, et al.*, Durham Superior Court, 07 CVS 5223 ("the *Pressler I Action*"); and *Pressler v. Duke University, et al.*, Durham Superior Court, 08 CVS 1311 (the "Pressler II Action"). (the *McFadyen Action*, the *Carrington Action*, the *Pressler I Action*, and the *Pressler II Action* shall be collectively referred to as "the Underlying Actions"). National Union further admits that it has acknowledged potential coverage, under a complete and full reservation of rights, for the *McFadyen*, *Carrington*, and *Pressler II* actions under the 2006 Policy. It is further admitted that National has not paid and has no obligation to pay any monies regarding the Duke Three matter because that matter was settled by Duke without National Union's written consent and National Union was not allowed to effectively associate in the defense and the negotiation of the Duke Three matter. Except as specifically admitted herein, the allegations of Paragraph 42 of the Complaint are denied.

43. In response to Paragraph 43 of the Complaint, National Union hereby incorporates and realleges its responses to the allegation contained in Paragraphs 1 through 42 of the Complaint.

44. In response to the allegations of Paragraph 44 of the Complaint, it is admitted that National Union issued the 2006 Policy and the 2007 Policy to Duke. It is further admitted that the Policies themselves are the best evidence of the contents therein, and that the contents speak for themselves. Except as specifically admitted herein, the remaining allegations of Paragraph 44 of the Complaint are denied.

45. The allegations of Paragraph 45 of the Complaint state a legal conclusion to which no response is necessary. In the event a response is required, it is admitted that it is the law of the State of North Carolina that an insurer's duty to defend under certain "duty to defend" insurance policies may be broader than its duty to indemnify its insured. Except as specifically admitted herein, the allegations of Paragraph 45 of the Complaint are denied.

46. The allegations of Paragraph 46 of the Complaint state a legal conclusion to which no response is required. In the event a response is necessary, the allegations of Paragraph 46 of the Complaint are denied.

47. In response to the allegations of Paragraph 47 of the Complaint, it is admitted that the Policies have applicable retentions and limits of liability. Except as specifically admitted herein, the allegations of Paragraph 47 of the Complaint are denied.

48. In response to the allegations of Paragraph 48 of the Complaint, it is admitted that National Union has acknowledged potential coverage subject to a full reservation of rights for the *McFadyen*, *Carrington*, and *Pressler II* claims under the 2006 Policy. Except as specifically admitted herein, the allegations of Paragraph 48 of the Complaint are denied.

49. The allegations of Paragraph 49 of the Complaint are denied.

50. The allegations of Paragraph 50 of the Complaint are denied.

51. In response to the allegations of Paragraph 51 of the Complaint, it is admitted that the Policies themselves are the best evidence of the contents therein, and that the contents speak for themselves. Except as specifically admitted herein, the allegations of Paragraph 51 of the Complaint are denied.

52. In response to the allegations of Paragraph 52 of the Complaint, it is admitted that complaints in the Underlying Actions set forth some allegations which may be construed as a “Wrongful Acts” under the 2006 Policy. Except as specifically admitted herein, the allegations of Paragraph 52 of the Complaint are denied.

53. The allegations of Paragraph 53 of the Complaint are denied.

54. The allegations of Paragraph 54 of the Complaint are denied.

55. National Union lacks sufficient information or knowledge to form a belief as to the allegations of Paragraph 55 of the Complaint; therefore, these allegations are denied.

56. The allegations of Paragraph 56 of the Complaint are denied.

57. The allegations of Paragraph 57 of the Complaint are denied.

58. The allegations of Paragraph 58 of the Complaint are denied.

59. The allegations of Paragraph 59 of the Complaint are denied

60. In response to Paragraph 60 of the Complaint, National Union hereby incorporates and realleges its responses to the allegations contained in Paragraphs 1 through 59 of the Complaint.

61. In response to the allegations of Paragraph 61 of the Complaint, it is admitted that National Union issued the 2006 Policy and the 2007 Policy to Duke. It is

further admitted that the Policies themselves are the best evidence of the contents therein, and that the contents speak for themselves. Except as specifically admitted herein, the allegations of Paragraph 61 of the Complaint are denied.

62. In response to the allegations of Paragraph 62 of the Complaint, it is admitted that National Union issued the 2006 Policy and the 2007 Policy to Duke. It is further admitted that the Policies themselves are the best evidence of the contents therein, and that the contents speak for themselves. Except as specifically admitted herein, the allegations of Paragraph 62 of the Complaint are denied.

63. The allegations of Paragraph 63 of the Complaint are denied.

64. The allegations of Paragraph 64 of the Complaint are denied.

65. The allegations of Paragraph 65 of the Complaint are denied.

66. The allegations of Paragraph 66 of the Complaint are denied.

67. In response to the allegations of Paragraph 67 of the Complaint, it is admitted that National Union is not obligated to indemnify Duke for its settlement with the Duke Three and that, as a consequence, National Union has not volunteered to indemnify Duke for its settlement with the Duke Three. Inasmuch as National Union has never been provided with a copy of the settlement agreement, National Union lacks sufficient information or knowledge to form a belief as to whether Duke alone has paid the full settlement amount to the Duke Three; therefore, these allegations are denied. Except as specifically admitted herein, the allegations of Paragraph 67 of the Complaint are denied.

68. The allegations of Paragraph 68 of the Complaint are denied.

69. The allegations of Paragraph 69 of the Complaint are denied.

70. The allegations of Paragraph 70 of the Complaint are denied.

71. In response to Paragraph 71 of the Complaint, National Union hereby incorporates and realleges its responses to the allegations contained in Paragraphs 1 through 70 of the Complaint.

72. The allegations of Paragraph 72 of the Complaint state a legal conclusion to which no response is required. In the event a response is necessary, the allegations of Paragraph 72 of the Complaint are denied.

73. In response to Paragraph 73 of the Complaint, it is admitted that National Union may be obligated to advance defense costs under the 2006 Policy at some point prior to the disposition of the *McFadyen*, *Carrington*, or *Pressler II* pending actions and that National Union has already done so. Except as specifically admitted herein, the allegations of Paragraph 73 of the Complaint are denied.

74. In response to the allegations of Paragraph 74 of the Complaint, it is admitted that National Union has acknowledged potential coverage for the *McFadyen*, *Carrington*, and *Pressler II* actions, subject to a full reservation of rights under the 2006 Policy. Except as specifically admitted herein, the allegations of Paragraph 74 of the Complaint are denied.

75. In response to the allegations of Paragraph 75 of the Complaint, it is admitted that National Union has acknowledged potential coverage for the *McFadyen*, *Carrington*, and *Pressler II* actions, subject to a full reservation of rights under the 2006 Policy. Except as specifically admitted herein, the allegations of Paragraph 75 of the Complaint are denied.

76. The allegations of Paragraph 76 of the Complaint are denied.

77. The allegations of Paragraph 77 of the Complaint are denied.
78. The allegations of Paragraph 78 of the Complaint are denied.
79. The allegations of Paragraph 79 of the Complaint are admitted.
80. In response to the allegations of Paragraph 80 of the Complaint, it

is admitted that National Union has acknowledged potential coverage for the *McFadyen*, *Carrington*, and *Pressler II* actions, subject to a full reservation of rights under the 2006 Policy. Except as specifically admitted herein, the allegations of Paragraph 80 of the Complaint are denied.

81. The allegations of Paragraph 81 of the Complaint are denied.
82. The allegations of Paragraph 82 of the Complaint are admitted.
83. In response to Paragraph 83 of the Complaint, National Union

hereby incorporates and realleges its responses to the allegations contained in Paragraphs 1 through 82 of the Complaint.

84. In response to the allegations of Paragraph 84 of the Complaint, it is admitted that National Union issued the 2006 Policy and the 2007 Policy to Duke. It is further admitted that the Policies themselves are the best evidence of the contents therein, and that the contents speak for themselves. Except as specifically admitted herein, the allegations of Paragraph 84 of the Complaint are denied.

85. In response to the allegations of Paragraph 85 of the Complaint, it is admitted that National Union issued the 2006 Policy and the 2007 Policy to Duke. It is further admitted that the Policies themselves are the best evidence of the contents therein, and that the contents speak for themselves. Except as specifically admitted herein, the allegations of Paragraph 85 of the Complaint are denied.

86. The allegations of Paragraph 86 of the Complaint are denied.

87. The allegations of Paragraph 87 of the Complaint are denied.

88. The allegations of Paragraph 88 of the Complaint are denied.

89. In response to the allegations of Paragraph 89 of the Complaint, it is admitted that National Union is not obligated to indemnify Duke for its settlement with the Duke Three, and that as a consequence, National Union has not volunteered to indemnify Duke for its settlement with the Duke Three. Inasmuch as National Union has never been provided with a copy of the settlement agreement, National Union lacks sufficient information or knowledge to form a belief as to whether Duke alone has paid the full settlement amount to the Duke Three; therefore, these allegations are denied.

Except as specifically admitted herein, the allegations of Paragraph 89 of the Complaint are denied.

90. In response to the allegations of Paragraph 90, it is admitted that Duke and DUHS remain parties in the *McFadyen* and *Carrington* actions. It is further admitted that Duke remains a party in the *Pressler II* action. National Union lacks sufficient information and knowledge to form a belief as to the remaining allegations of Paragraph 90 of the Complaint; therefore, these allegations are denied.

91. The allegations of Paragraph 91 of the Complaint are admitted.

92. In response to Paragraph 92 of the Complaint, National Union hereby incorporates and realleges its responses to allegations contained in Paragraphs 1 through 91 of the Complaint.

93. The allegations of Paragraph 93 of the Complaint are denied.

94. The allegations of Paragraph 94 of the Complaint, including subparts a. through d., are denied.

95. The allegations of Paragraph 95 of the Complaint are denied.

96. The allegations of Paragraph 96 of the Complaint are denied.

97. The allegations of Paragraph 97 of the Complaint are denied.

98. The allegations of Paragraph 98 of the Complaint are denied.

99. The allegations of Paragraph 99 of the Complaint are denied.

100. The allegations of Paragraph 100 of the Complaint are denied.

101. The allegations of Paragraph 101 of the Complaint are denied.

102. In response to Paragraph 102 of the Complaint, National Union hereby incorporates and realleges its responses to the allegations contained in Paragraphs 1 through 101 of the Complaint.

103. The allegations of Paragraph 103 of the Complaint, including subparts a. through j., are denied.

104. All allegations of the Complaint not specifically admitted or addressed herein are denied.

FIRST AFFIRMATIVE DEFENSE

The claims set forth in the *McFadyen, Carrington, Pressler I*, and *Pressler II* actions (collectively “the Actions”) arise out of circumstances reported to National Union by letter dated March 30, 2006, and as such, each of the Actions falls solely under the provisions of the 2006 Policy. The 2007 Policy does not apply to any of the Actions.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs' claims for coverage for the Actions under the 2007 Policy are precluded by Exclusion 4(c) of the 2007 Policy which provides that National Union shall not be liable to make any payment for Loss in connection with a Claim alleging or arising out of any circumstances of which notice has been given under a prior policy.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs' claims for coverage of legal fees pre-dating December 3, 2007, are barred by the Plaintiffs' failure to first obtain National Union's consent to incur such costs as provided by Section 8 of the 2006 Policy.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs' claims regarding the Duke Three settlement are barred because the Plaintiffs chose to enter into a settlement agreement without National Union's prior written consent.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs' claims regarding the Duke Three settlement are barred because Plaintiffs refused to allow National Union to effectively associate in the defense and negotiation of the settlement.

SIXTH AFFIRMATIVE DEFENSE

DUHS' claims for coverage under the 2006 Policy are barred by Exclusion 4(o), as modified by Endorsement #4.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims for coverage under the 2006 Policy are barred, in part, by Exclusion 4(b), as modified by Endorsement #19.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs' claims for coverage under the 2006 Policy are barred, in part, by Exclusion 4(h).

NINTH AFFIRMATIVE DEFENSE

Plaintiffs' claims for coverage under the 2006 Policy are barred, in part, by Exclusion 4(k), as modified by Endorsement #4.

TENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims for coverage under the Policies are barred, in whole or in part, by the definition of Loss which does not include "matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed."

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims for legal fees are barred to the extent such costs were incurred for allegations not covered by the Policies and to the extent such costs were incurred for the defense of persons and entities who were not Insureds as defined in the Policies.

TWELFTH AFFIRMATIVE DEFENSE

The claims asserted by Plaintiffs are barred, in whole or in part, by the application of the conditions, terms, exclusions and provisions of the Policies that are placed at issue herein.

THIRTEENTH AFFIRMATIVE DEFENSE

The claims asserted by Plaintiffs are barred, in whole or in part, by the doctrines of waiver and/or estoppel.

FOURTEENTH AFFIRMATIVE DEFENSE

The claims asserted by Plaintiffs are barred, in whole or in part, by the Plaintiffs failure to take reasonable steps to mitigate their claimed, yet specifically denied, damages. Defendant therefore relies upon the doctrine of avoidable consequences and/or failure to mitigate damages as a bar, in whole or in part, to the claims asserted against it.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiffs assumed the risk of their own conduct by failing to advise and/or properly notify Defendant in accordance with the 2006 Policy of the allegations set forth by the Duke Three and/or Plaintiffs' settlement with the Duke Three. Defendant therefore pleads the Plaintiffs' own assumption of the risk as a bar to the allegations asserted against Defendant in the Complaint.

SIXTEENTH AFFIRMATIVE DEFENSE

Any coverage afforded by the Policies is subject to retentions, limits of liability, and other terms and conditions as set forth in the Policies.

SEVENTEENTH AFFIRMATIVE DEFENSE

Defendant did not act in bad faith and Plaintiffs' punitive and any other damage claims should be barred by Defendant's respective good faith.

EIGHTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claim for punitive damages violates the Sixth and Fourteenth Amendments to the Constitution of the Untied States in numerous ways, including:

- (a) Plaintiffs' claim for punitive damages violates the Sixth and Fourteenth Amendments because such

damages may be imposed based upon the burden of proof applicable in civil cases, whereas punitive damages are a fine or penalty and are quasi-criminal in nature;

- (b) Plaintiffs' claim for punitive damages violates the due process and equal protection clauses of the Fourteenth Amendment for the following reasons:
 - (i) the standard for determining whether punitive damages should be imposed against a Defendant is void for vagueness;
 - (ii) there is, and was at the time of the alleged wrongful conduct, a lack of objective guidelines on which a fact finder might base its award and further, the guidelines which existed were arbitrary and void for vagueness;
 - (iii) insofar as punitive damages are not measured against actual injury to the Plaintiffs and are left wholly to the discretion of the jury, there is no objective standard that limits the amount of such damages that may be awarded, and the amount of punitive damages that may be

awarded is indeterminate at the time of the alleged wrongful conduct;

- (iv) evidence of the net worth of Defendant is admissible, and a jury is encouraged to award punitive damages based upon the affluence of a given Defendant or to award a substantial amount against one Defendant based on the financial status of another Defendant;

- (v) the tests or standards for the imposition of punitive damages differ from State to State, such that a specific act or omission of a given Defendant may or may not result in the imposition of punitive damages, or may result in differing amounts of punitive damages, depending upon the State in which suit is filed, such that the Defendant is denied equal protection of the law;

- (vi) There is no effective method for conducting a meaningful post-trial review of any award of punitive damages.

NINETEENTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to allege any facts which would support a claim for punitive damages against Defendant.

TWENTIETH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred to the extent that Plaintiffs' claims fail to fall under the terms of the applicable insuring agreements in the Policies necessary to invoke coverage.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Plaintiffs' claims against Defendant are barred based upon the provisions in Section 17 of the Policies which mandate that as a condition precedent for an action by either of the Plaintiffs against Defendant "the amount of the insureds' obligation to pay shall have been finally determined either by judgment against the Insureds after actual trial or by written agreement of the Insureds, the claimant and the Insurer." This condition precedent has not been satisfied and is pled in bar of Plaintiffs' claims in this action.

TWENTY-SECOND AFFIRMATIVE DEFENSE

Plaintiffs' allegations with respect to its settlement with the Three Duke Students (David Evans, Collin Finnerty, and Reade Seligmann), as identified in Paragraphs 22 through 26 of the Complaint, have been waived and are barred because a "Claim" as defined in the Policies was never asserted and was never reported by either of the Plaintiffs to Defendant. Plaintiffs settled with the Three Duke Students without ever notifying Defendant prior to the settlement and, upon information and belief, without ever even receiving a written claim by or on behalf of any of the Three Duke Students.

TWENTY-THIRD AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred under the doctrine of payment as Defendant has already paid all sums potentially owed under the Policies.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

In the alternative, Plaintiffs' claims are subject to set-off and/or recoupment.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

Plaintiffs' claims for certain of the Defense Costs under the Policies is barred because only the 2006 Policy may apply to said Defense Costs and the Defense Costs must be reasonable and necessary and consented in writing by Defendant prior to Plaintiffs' incurring such costs, which is inapplicable under the instant facts. Among other things, the Defense Costs claimed by Plaintiff appear to be excessive, unreasonable, and, upon information and belief, unnecessary.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

DUKE UNIVERSITY et al v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA Doc. 9
Plaintiffs' assertion that Defendant had a duty to defend the Plaintiffs pursuant to the Policies is barred since Plaintiffs never tendered the defense of any of the claims alleged in any of the Underlying Actions to Defendant.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims for coverage under the 2006 Policy are barred by Exclusion 4(a), as modified by Endorsement #19.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs' claims for coverage under the 2006 Policy are barred by Exclusion 4(e).

TWENTY-NINTH AFFIRMATIVE DEFENSE

Plaintiffs' claims for coverage under the 2006 Policy are barred by Exclusion 4(p), as modified by Endorsement #4.

THIRTIETH AFFIRMATIVE DEFENSE

Plaintiffs' claims for coverage under the 2006 Policy are barred by Exclusion 4(l).

RESERVATION AND NON-WAIVER

Defendant reserves the right to plead additional affirmative defenses which may be adduced through further investigation, discovery, or at trial.

COUNTERCLAIM

Pursuant to Fed. R. Civ. P., Rule 13(a)(1), Defendant National Union, counterclaiming against Plaintiffs, Duke and DUHS, alleges and says as follows:

1. National Union is a foreign liability insurer, operating in the State of North Carolina pursuant to a certificate of authorization issued by the North Carolina Department of Insurance.

2. Duke is a private non-profit educational institution chartered in the State of North Carolina with its principal place of business in Durham County, North Carolina.

3. DUHS is a private non-profit corporation organized under the State of North Carolina, with a principal place of business in Durham County, North Carolina.

4. For the period of December 4, 2005 until December 4, 2006, National Union issued to Duke a Not-For-Profit Individual and Organization Insurance Policy, bearing policy number 625-03-42 (hereinafter "the 2006 Policy"). A true copy of the 2006 Policy is attached hereto as Exhibit F.

5. Section 7(c) of the 2006 Policy provides as follows:

If during the Policy Period or during the Discovery period (if applicable) the Insureds shall become aware of any circumstances which may reasonably be expected to give rise to a Claim being made against the Insured and shall give written notice to the Insurer of the circumstances and reasons for anticipating such a claim, with full particulars as to the dates, persons, and entities involved, then any Claim which is subsequently made against the Insureds and reported to the Insurer alleging, arising out of, based upon or attributable to such circumstances or alleging any Wrongful Act which is the same as or related to any Wrongful Act alleged or contained in such circumstances, shall be considered made at the time such notice of such circumstances was given.

6. On March 14, 2006, a woman alleged that she had been sexually assaulted by certain members of the 2005-2006 Duke Men's Lacrosse Team ("the Lacrosse Team").

7. On March 30, 2006, Duke mailed a letter with attached articles to National Union ("the March 30, 2006 letter"). A true copy of the articles attached by Duke to the March 30, 2006 letter to National Union is attached hereto as Exhibit A. The March 30, 2006 letter references the 2006 Policy and states as follows:

Please accept this letter and attached documentation as notification of an incident only as required by the policy conditions under the referenced policy. No claim has been made against Duke at this time. Rather than repeat the alleged circumstances, I have attached

a number of newspaper articles that summarize all that is publicly known about the situation at this time.

8. On April 19, 2007, Duke advised National Union in writing that members of the Lacrosse Team had advised Duke that they were considering legal action against Duke and/or members of Duke's academic faculty "related to the incident" outlined in the March 30, 2006 letter. Duke also advised in the April 19, 2007 letter that it had retained the Wilmer Hale law firm to represent its interests.

9. In response to the April 19, 2007, letter, on April 23, 2007, National Union advised Duke that the content of the April 19, 2007 letter was not a "Claim" as defined under the 2006 Policy, but that National Union would treat the letter as a continuing Notice of Circumstance relating back to March 30, 2006. National Union also specifically advised that Duke should not "admit or assume any liability, enter into any settlement agreement, stipulate to any judgment, or incur any Defense Costs without the prior written consent of" National Union.

10. On June 18, 2007, Duke verbally advised National Union for the first time that it had entered into a settlement with the Duke Three - David Evans, Collin Finnerty, and Reade Seligmann (the three members of the Lacrosse Team that had been indicted on charges of sexual assault which charges were later dismissed) - to resolve any claims the Duke Three may have had against Duke, and its staff and faculty. On that same day, Duke University publicly issued a "STATEMENT OF THE BOARD OF TRUSTEES AND THE PRESIDENT OF DUKE UNIVERSITY" stating that "This has been an extraordinary year for Duke students David Evans, Collin Finnerty and Reade Seligmann, who were accused of serious crimes they did not commit. In April, after a thorough review, the North Carolina Attorney General declared that they were innocent

of all charges and that the charges never should have been brought. We welcomed their exoneration and deeply regret the difficult year they and their families have had to endure. . . . The Board of Trustees and the President have also determined that it is in the best interests of the Duke community to eliminate the possibility of future litigation and move forward. For these reasons, and after considerable deliberation, the trustees have agreed to a settlement with each student.”

11. After learning of Duke’s settlement with the Duke Three, National Union reminded Duke that only settlements, stipulated judgment and defense costs which had been consented to by National Union could be recoverable under the policy.

12. Duke subsequently advised National Union that Duke would not share information with National Union on its settlement with the Duke Three due to the confidentiality provisions of the settlement.

13. In August of 2007, Duke advised National Union that Duke had been in discussions with the parents of certain of the unindicted members of the Lacrosse Team since January of 2007, but that there had been no written demands for monetary relief.

14. Also in August of 2007, Duke advised National Union that it had been contacted by Robert Ekstrand, an attorney for three of the unindicted members of the Lacrosse Team, and their respective families.

15. On September 24, 2007, attorneys for Duke met with attorneys for thirty-seven of the unindicted members of the Lacrosse (“the *Carrington* Attorneys”). Duke advised National Union of the meeting between its attorneys and the *Carrington*

Attorneys by way of letter dated October 1, 2007, which letter also confirmed that no formal demand had been made.

16. In response to Duke's letter of October 1, 2007, National Union informed Duke by way of a letter dated October 2, 2007, that based upon the information provided by Duke the players had not asserted a Claim, as that term is defined under the 2006 Policy, and that National Union would continue to treat the information as a continuing Notice of Circumstance relating back to the March 30, 2006 letter.

17. On October 16, 2007, National Union informed Duke via letter that until such time as it was informed that a Claim was made against the 2006 Policy, there could be no coverage for Duke's legal fees under the 2006 Policy.

18. On December 3, 2007, Duke informed National Union in writing that, ten months earlier it had received a request on behalf of the unindicted members of the Lacrosse Team to consider waiving the statute of limitations so that discussions could continue ("the December 3, 2007 letter").

19. Later on the same day – December 3, 2007 - National Union sent an email to Duke confirming receipt of the December 3, 2007 letter, which set forth that the December 3, 2007 letter constituted Duke's initial reporting of a Claim based upon "any request to toll or waive any statute of limitations", that this "is the first time this request for a waiver of the statute of limitations was reported to National Union", that a detailed coverage analysis from National Union would follow shortly, and that "National Union must reserve all of its other Policy rights and coverage defenses" and "acknowledges that Duke reserves all of its Policy rights and coverage defenses as well."

20. On December 17, 2007, three unindicted members of the Lacrosse Team filed suit against Duke and DUHS and certain individuals employed by Duke and DUHS in an action styled *McFadyen, et al. v. Duke University, et al.*, No. 1:07-CV-953 (M.D.N.C.) (hereinafter “the *McFadyen Action*”).

21. On February 6, 2008, National Union sent a letter to Duke pertaining to the allegations made by members of the Lacrosse Team which, among other things, confirmed that the allegations arose out of the circumstances reported by Duke to National Union in the March 30, 2006 letter. A redacted copy of the February 6, 2008 letter is attached hereto as Exhibit B.

22. The February 6, 2008 letter disclaimed coverage for DUHS, Tara Levicy, and Theresa Arico based primarily on the fact that the allegations arose out of or were based upon medical or professional services not covered under the 2006 Policy. Subsequently, National Union also confirmed that coverage for Julie Manley was disclaimed on the same basis.

23. On February 21, 2008, thirty-eight other unindicted members of the Lacrosse Team, and several of their parents, filed suit against Duke, DUHS, and certain individuals employed by Duke and DUHS in an action styled *Carrington, et al. v. Duke University, et al.*, No. 1:08-CV-119 (M.D.N.C.) (hereinafter “the *Carrington Action*”).

24. On April 23, 2008, National Union sent Duke a letter, acknowledging potential coverage for Duke and several of its employees under the 2006 Policy, subject to a full reservation of rights for claims asserted against them in the *Carrington Action*.

25. In September 2007, the former head coach of the lacrosse team, Michael Pressler filed a lawsuit in Durham Superior Court seeking rescission of a settlement agreement which he previously entered into with Duke, in an action styled *Pressler v. Duke University, et al.*, bearing file number 07 CVS 5223 (hereinafter “*Pressler I Action*”).

26. In January of 2008, the *Pressler I Action* was voluntarily dismissed, and a new action was filed in Durham Superior Court solely for defamation, styled *Pressler v. Duke University, et al.*, and bearing file number 08 CVS 1311 (hereinafter “*Pressler II Action*”).

27. On April 8, 2008, National Union sent Duke a letter under a reservation of rights, acknowledging potential coverage for Duke and John F. Burness for the allegations in the *Pressler II Action* under the 2006 Policy. A copy of the April 8, 2008 letter (with names redacted) is attached hereto as Exhibit D.

28. In the *McFadyen Action*, the *Carrington Action*, *Pressler I*, and *Pressler II* (collectively “the Underlying Actions”), the plaintiffs’ allegations arise from the circumstances which were the subject of the March 30, 2006 letter.

29. In the *McFadyen Action* and the *Carrington Action* (collectively “the Player Actions”), the plaintiffs allege that Duke wrongfully blamed the plaintiffs for the alleged rape of March 14, 2006, in violation of their constitutional and other rights.

30. Under the Defense Provisions of the 2006 Policy, neither of the Plaintiffs ever tendered to Defendant the defense of any of the claims alleged in any of the Underlying Actions. As provided for in the 2006 Policy, Plaintiffs retained control of their defense and selected their own counsel to defend the Underlying Actions.

31. Despite written requests by National Union, Plaintiffs refused to submit to National Union any of the bills for defense costs for any of the Underlying Actions until June 2008 at which time they supplied a portion of the bills. Plaintiffs did not supply the majority of the bills for the defense costs for the Underlying Actions until less than 30 days prior to the institution of this action by Plaintiffs.

32. Pursuant to the 2006 Policy, Defendant has advanced and paid to Plaintiff Duke University as defense costs the full \$5,000,000.00 policy limit.

33. This action is commenced pursuant to 28 U.S.C. § 2201, *et seq*, seeking a declaration of the rights, status, and obligations of National Union, Duke, and DUHS pursuant to the 2006 Policy and the 2007 Policy with respect to the claims set forth in the Underlying Actions arising out of the false allegation of sexual assault made against members of the Lacrosse Team on March 14, 2006, and the immediate response to said allegations by Plaintiffs.

FIRST COUNTERCLAIM FOR RELIEF
(Applicability of 2007 Policy)

34. The allegations contained in Paragraphs 1 through 33 of this Counterclaim are realleged and incorporated herein by reference.

35. The 2006 Policy is a “claims-made” liability insurance policy which, subject to its terms and conditions, provides coverage for Claims which are first made against an insured under the policy during the policy period and reported to National Union pursuant to the terms of the 2006 Policy for any actual or alleged wrongful act.

36. The March 30, 2006 letter provided National Union with information regarding the alleged sexual assault of Crystal Mangum by members of the

Lacrosse Team, the aftermath of the allegation, including the adverse public statements concerning the Lacrosse Team, and the alleged violation of the constitutional rights and statements by DUHS personnel regarding the results of their examination of Crystal Mangum.

37. The March 30, 2006 letter is a Notice of Circumstance under the 2006 Policy, providing National Union with facts and information out of which arose the claims which were settled by the Duke Three with Duke, the Players Actions, the *Pressler I* Action, and the *Pressler II* Action.

38. National Union has acknowledged potential coverage, subject to a complete reservation of rights, for Duke under the 2006 Policy.

39. For the period of December 4, 2006 until December 4, 2007, National Union issued to Duke a Not-For-Profit Individual and Organization Insurance Policy, bearing policy number 965-76-25 (hereinafter “the 2007 Policy”). A true copy of the 2007 Policy is attached hereto as Exhibit G.

40. The 2007 Policy is a “claims-made” policy, providing coverage, subject to applicable exclusions, retentions, and limits of liability for claims arising from “wrongful acts” which are first made against an Insured in the policy term and first reported to National Union. During the 2007 Policy, the policy term was from December 4, 2006 until December 4, 2007.

41. The coverage provided by the 2007 Policy is subject to a self-liquidating aggregate Limit of Liability of \$10 million excess of a self-insured Retention of \$500,000 for Loss arising from Claims alleging the same Wrongful Act or related Wrongful Acts.

42. Included in the 2007 Policy is an Exclusion 4(c), which provides in pertinent part that National Union shall not be liable to make any payment for Loss in connection with a Claim alleging or arising out of any circumstances of which notice has been given under a prior policy.

43. The 2007 Policy excludes coverage for any Loss in connection with a Claim alleging or arising out of the March 30, 2006 Letter pursuant to Exclusion 4(c) of the 2007 Policy.

44. National Union is entitled to a Judgment declaring the following:

- a. The settlement with the Duke Three, the *McFadyen* Action, the *Carrington* Action, the *Pressler I* Action, and the *Pressler II* Action are only afforded potential coverage by the 2006 Policy, subject to the terms and conditions of the 2006 Policy, pursuant to the Notice of Circumstance provided in the March 30, 2006 Letter;
- b. There is no coverage under the 2007 Policy for the settlement with the Duke Three, the *McFadyen* Action, the *Carrington* Action, the *Pressler I* Action, and the *Pressler II* Action pursuant to Exclusion 4(c) of the 2007 Policy; and
- c. Defendant has satisfied any and all obligations owed to both of the Plaintiffs under the 2006 Policy.

SECOND COUNTERCLAIM FOR RELIEF
(Settlement with the Duke Three)

45. The allegations contained in Paragraphs 1 through 44 of this Counterclaim are realleged and incorporated herein by reference.

46. Duke never sought National Union's consent to enter into a settlement with attorneys for the Duke Three or the Duke Three.

47. National Union never provided written consent to Duke to enter into a settlement with the Duke Three or the attorneys for the Duke Three.

48. Duke has not even provided National Union with a copy of the settlement with the Duke Three.

49. According to Clause 8 of the 2006 Policy, National Union is not obligated to contribute or indemnify Duke for its settlement with the Duke Three, in that, upon information and belief, Duke may have admitted or assumed liability with the Duke Three, entered into a settlement agreement with the Duke Three, and incurred legal fees without effectively associating with, or seeking and obtaining the written consent of, National Union.

50. National Union is therefore entitled to a Judgment declaring that it is not obligated to contribute towards or indemnify Duke with respect to its settlement with the Duke Three.

THIRD COUNTERCLAIM FOR RELIEF
(Defense Costs incurred prior to December 3, 2007)

51. The allegations contained in Paragraphs 1 through 50 of this Counterclaim are realleged and incorporated herein by reference.

52. Under the 2006 Policy, Duke was first required to obtain the written consent of National Union prior to incurring Defense Costs.

53. The 2006 Policy provides coverage and reimbursement for defense costs only in the defense of a Claim.

54. Duke only provided National Union with information which arose to the level of a Claim, as defined by the 2006 Policy, by way of the December 3, 2007 letter from Duke to National Union.

55. National Union did not provide Duke with written consent for the incursion of defense costs until receipt of this December 3, 2007, letter.

56. National Union is entitled to a Judgment declaring that Duke is not entitled to recover its defense costs under the 2006 Policy from National Union for any costs incurred prior to December 3, 2007.

FOURTH COUNTERCLAIM FOR RELIEF
(No Coverage for DUHS, Levicy, Manley, or Arico under the 2006 Policy)

57. The allegations contained in Paragraphs 1 through 57 of this Counterclaim are realleged and incorporated herein by reference.

58. In the Player Actions, the plaintiffs name as defendants, among others, DUHS, Theresa Arico, Julie Manley, and Tara Levicy. Against DUHS, Arico, Manley, and Levicy, the plaintiffs in both actions allege claims for relief which arise out of the medical examination each conducted with respect to the accuser, Crystal Mangum, in violation of their collective responsibilities “to provide forensic medical evidence collection and analysis services in the investigation.”

59. In response to the plaintiffs’ Complaints in the Player Actions, DUHS, Arico, Manley, and Levicy have stated:

Plaintiffs assert that the Duke health care providers [DUHS, Arico, Levicy] owed them a duty to use due care in the “forensic and/or medical examinations of Mangum,” and that this duty included an obligation to use due care in assessing and reporting the results of that examination. (Compl. ¶ 505.) Plaintiffs further assert that the health care providers breached these duties by performing these clinical services in a subpar matter

* * *

Such claims are for medical malpractice, which is defined by North Carolina statute as an action that “aris[es] out of the furnishing [of] … professional services in the performance of medical … or other health care by a health care provider.” N.C. Gen. Stat. § 90-21.11.

60. Included in the 2006 Policy is an Exclusion 4(o), as modified by Endorsement #4, which provides that National Union shall not be liable to make payment for Loss in connection with a Claim made against an Insured:

Alleging, arising out of, based upon or attributable to the Insured’s performance or rendering of or failure to perform or render medical or other professional services or treatments for others …

61. The claims made against DUHS, Levicy, Manley, and Arico in the Players Actions arise out of the fact that DUHS was retained to provide medical and other professional services to the investigation of Crystal Mangum’s allegation of rape and sexual assault against members of the Lacrosse Team.

62. DUHS, Levicy, Manley, and Arico have asserted in their responses to the Players Actions that the Players Actions against them arise out of the furnishing of professional services and are properly characterized as a medical malpractice action.

63. Upon information and belief, Durham Casualty Company, Ltd. (“DCC”), provided to DUHS a policy of insurance (hereinafter “the DCC Policy”) which

specifically covers claims arising out of medical services. DCC is a captive insurance company that is wholly owned by Plaintiff Duke University.

64. National Union is entitled to a Judgment declaring that the 2006 Policy provides no coverage to DUHS, Levicy, Manley, or Arico for the claims made against them in the Players Actions.

FIFTH COUNTERCLAIM FOR RELIEF
(Attorneys Fees)

65. The allegations contained in Paragraphs 1 through 64 of this Counterclaim are realleged and incorporated herein by reference.

66. Plaintiffs' allegations in the Complaint that Defendant's conduct violated N.C.G.S. § 75-1.1 *et seq*, and constituted violations of the provisions N.C.G.S. §§ 58-63-10 and 58-63-15, are knowingly unfounded, malicious, frivolous, and in bad faith.

67. Defendant is entitled to recover its costs and its reasonable attorneys fees expended in this action pursuant to the provisions of N.C.G.S. § 75-16.1.

**THIRD-PARTY COMPLAINT AGAINST UNITED EDUCATORS INSURANCE,
A RECIPROCAL RISK RETENTION GROUP**

Pursuant to Fed. R. Civ. P., Rule 14, Third-Party Plaintiff National Union Fire Insurance Company of Pittsburgh, Pa., claiming against the Third-Party Defendant, United Educators Insurance, a Reciprocal Risk Retention Group, alleges and says as follows:

1. National Union Fire Insurance Company of Pittsburgh, Pa. (hereinafter "National Union") hereby incorporates and realleges its allegations in

response to the Plaintiffs' Complaint, its affirmative defenses, and its counterclaims alleged against Plaintiffs.

2. United Educators Insurance, a Reciprocal Risk Retention Group ("UE") is a foreign insurance company in the business of offering policies of insurance in the State of North Carolina, with due authorization from the North Carolina Department of Insurance. UE's principal place of business is in the State of Maryland.

3. From January 1, 2006, to January 1, 2007, UE had in effect a general liability policy of insurance bearing policy number GLX20060004400 which was issued to Plaintiff Duke University (hereinafter "the UE Policy"). From January 1, 2007, to January 1, 2008, UE had in effect a subsequent general liability policy of insurance bearing policy number GLX20070004400 which was also issued to Plaintiff Duke University.

4. The applicable liability limit for the UE Policy is \$25 million.

5. From December 4, 2005, to December 4, 2006, UE also had in effect a directors and officers liability policy bearing policy number ELA200500044000 which provided a \$5 million limit of liability.

6. Upon information and belief, UE has acknowledged potential coverage for the allegations alleged in the Players Actions under the UE Policy.

7. The 2006 Policy issued by National Union contains an "other insurance" clause which provides:

Such insurance as is provided by this policy shall apply only as excess over any valid and collectible insurance. This policy shall be specifically excess of any other policy pursuant to which any other has a duty to defend a Claim for which this policy may be obligated to pay Loss.

8. The UE Policy contains an “other insurance” clause which provides:

This Policy shall at all times be excess over the greater of the Underlying Limit Retention amount, or the amount of any other insurance (including any insurance naming the Insured as “additional insured”) available to the Insured covering an Occurrence covered by this Policy (other than insurance that is expressly and specifically excess of the limits of this Policy or quota-share in the same layer as this Policy), and nothing in this Policy or in any other policy shall be construed to require this Policy to contribute with, or subject this Policy to the conditions, conditions or limits of, such other insurance.

FIRST THIRD-PARTY CLAIM FOR RELIEF
(Pro-rata Contribution to National Union from UE)

9. The allegations contained in Paragraphs 1 through 8 of this Counterclaim are realleged and incorporated herein by reference.

10. Both the 2006 Policy and the UE Policy afford potential coverage to Duke and its employees for the allegations set forth in the Underlying Actions.

11. The “other insurance” clauses in the UE Policy and the 2006 Policy are of identical effect and are inconsistent and mutually repugnant.

12. Neither the “other insurance” clause of the UE Policy or the 2006 Policy can be given full effect according to its terms.

13. The UE Policy was delivered to Plaintiff Duke University in the State of North Carolina

14. According to North Carolina law, neither the “other insurance” clause of the UE Policy nor the 2006 Policy can be given effect, and in such instances, UE and National Union are required to contribute *pro rata* according to their respective policy limits towards the costs of defense and settlement of Plaintiffs with the claimants

in the Underlying Actions, subject to the remaining terms and conditions of the 2006 Policy and the UE Policy.

15. The applicable limits of the UE Policy are five times greater than the applicable limits of the 2006 Policy, and thus, the relative *pro rata* contribution between UE and National Union are one-sixth (16.7%) to National Union of the fair and reasonable legal fees incurred on behalf of Duke, and five-sixths (83.3%) to UE of the fair and reasonable legal fees incurred on behalf of Duke, subject to the terms, limits and obligations of the 2006 Policy and the UE Policy.

16. National Union is responsible for only one-sixth (16.7%) of the fair and reasonable legal fees incurred on behalf of Duke in the Underlying Actions, subject to the terms, limits and obligations of the 2006 Policy and UE is responsible for five-sixth (83.3%) of the fair and reasonable legal fees incurred on behalf of Duke in the Underlying Actions, subject to the terms, limits and obligations of the UE Policy.

17. National Union is entitled to recover from UE any amount it has paid in excess of its 1/6 share of Plaintiffs' covered loss.

SECOND THIRD-PARTY CLAIM FOR RELIEF
(Equitable Subrogation for National Union from UE)

18. The allegations contained in Paragraphs 1 through 17 of this Counterclaim are realleged and incorporated herein by reference.

19. National Union, under a reservation of rights and pursuant to the 2006 Policy, has advanced to Duke the \$5 million policy limits of the 2006 Policy.

20. The policy limits advanced to Duke under the 2006 Policy cover Plaintiffs' defense costs as a result of the Underlying Actions.

21. Pursuant to the terms of the UE Policy, has a duty to pay on behalf of Duke defense costs incurred in connection with the Underlying Actions up to its limit of liability. UE has thus far refused, upon information and belief, to pay such defense costs.

22. National Union is thus entitled to recover by equitable subrogation from UE according to the liability limits of the UE Policy in an amount to be determined at trial.

THIRD THIRD-PARTY CLAIM FOR RELIEF
(Declaratory Judgment)

23. The allegations contained in Paragraphs 1 through 22 of this Counterclaim are realleged and incorporated herein by reference.

24. This action is commenced pursuant to 28 U.S.C. § 2201, *et seq.*, seeking a declaration of the rights, status, and obligations of National Union and UE under the applicable insurance policies with respect to Plaintiffs' claims for defense costs and indemnification arising out of the Underlying Actions.

25. National Union is entitled to a declaratory judgment stating that:

- a. The UE Policy is applicable with respect to certain of the Underlying Action allegations and the defense costs incurred in the Underlying Actions and the "other insurance" clauses in the 2006 Policy and UE Policy are inconsistent, mutually repugnant and cannot be reconciled .
- b. National Union is responsible for only one-sixth (16.7%) of the fair and reasonable legal fees incurred on behalf of

Plaintiffs in the Underlying Actions, subject to the terms, limits and obligations of the 2006 Policy; and

c. UE is responsible for five-sixths (83.3%) of the fair and reasonable legal fees incurred on behalf of Plaintiffs in the Underlying Actions, subject to the terms, limits and obligations of the UE Policy.

WHEREFORE, National Union respectfully prays the Court that:

1. Plaintiffs' claims for relief against National Union be denied in their entirety;
2. It enter a Declaratory Judgment pursuant to 28 U.S.C. § 2201, *et seq.*, adjudging, decreeing and declaring that:
 - a. There is no coverage under the 2007 Policy for Plaintiffs in the Underlying Actions;
 - b. There is no coverage under the 2006 Policy for Plaintiffs for Duke's settlement with the Duke Three;
 - c. There is no coverage under the 2006 Policy for Plaintiffs for defense costs incurred by Plaintiffs prior to December 3, 2007;
 - d. There is no coverage for DUHS, Levicy, Manley, or Arico under the 2006 Policy;
 - e. Defendant has complied with all obligations owed to Plaintiffs under both the 2006 Policy and the 2007 Policy; and

f. The “other insurance” clauses in the 2006 Policy and UE Policy are inconsistent, mutually repugnant and cannot be reconciled.

3. National Union recover equitable subrogation from UE in an amount to be determined at trial arising from UE’s refusal to pay defense costs in the Underlying Actions;

4. The costs of this action be taxed against some party other than National Union;

5. National Union recover its attorneys fees and other costs from Plaintiff; and

6. National Union have and recover such other relief as the Court may deem just and proper.

This the 16th day of January, 2009.

BAILEY & DIXON, LLP

By: /s/ David S. Coats

David S. Coats, N.C. State Bar No. 16162
dcoats@bdixon.com

By: /s/ Dayatra T. King

Dayatra T. King, N.C. State Bar No. 24355
dking@bdixon.com

By: /s/ J.T. Crook

J.T. Crook, N.C.S.B. 35232
jcrook@bdixon.com

Attorneys for Defendant
Post Office Box 1351
Raleigh, North Carolina 27602
Telephone: (919) 828-0731
Facsimile: (919) 828-6592

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January, 2009, I electronically filed the foregoing Answer, Counterclaim, and Third-Party Complaint with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Gregg E. McDougal
Betsy Cooke
Kilpatrick Stockton, LLP
3737 Glenwood Ave, Suite 400
Raleigh, NC 27612
gmc dougal@kilpatrickstockton.com
bcooke@kilpatrickstockton.com

Jerold Oshinsky
Jonathan M. Cohen
Ariel Shapiro
1100 New York Ave, N.W., Suite 700
Washington, D.C. 20005
Oshinskyj@gotofirm.com
cohenj@gotofirm.com
shapiroa@gotofirm.com

This the 16th day of January, 2009.

/s/ David S. Coats

David S. Coats