

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

NATIONAL INDEMNITY COMPANY OF
THE SOUTH,

Plaintiff,

v.

Case No. 4:21-cv-10081-DLG

DISCOUNT ROCK & SAND, INC., CARLOS
MANSO BLANCO, RICARDO SANCHEZ,
Personal Representative of the ESTATE OF
TERESA SANCHEZ QUETGLAS, ELIA
BONFANTE, Personal Representative of
the ESTATE OF MARGARITA CORTES-
PARDO, JULIO LOPEZ-BERMEJO
ROSSELLO, Personal Representative of the
ESTATE OF MARIA LOPEZ-BERMEJO
ROSELLO, DANIEL PINKERTON and
KIMBERLY PINKERTON.

Defendants.

**DEFENDANT, DISCOUNT ROCK & SAND, INC.'S
ANSWER, DEFENSES, AND AFFIRMATIVE DEFENSES AND COUNTERCLAIM**

Defendant, Discount Rock & Sand, Inc's, hereby files its answer, defenses, and affirmative defenses to Plaintiff, National Indemnity Company of the South's Complaint for Declaratory Judgment, and states as follows:

PRELIMINARY STATEMENT

1. Admitted that Plaintiff seeks declaratory relief but denies it is entitled to it.
2. Admitted that Plaintiff seeks declaratory relief but denies it is entitled to it, otherwise denied.
3. Admitted that Plaintiff seeks declaratory relief but denies it is entitled to it, otherwise denied.

4. Admitted that Plaintiff seeks declaratory relief but denies it is entitled to it, otherwise denied.

PARTIES, JURISDICTION & VENUE

5. Admitted.

6. Defendant is without direct knowledge but does not deny the allegation.

7. Defendant is without direct knowledge but does not deny the allegation.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted.

13. Admitted.

14. Admitted.

15. Admitted.

16. Admitted.

17. Admitted.

18. Admitted.

19. Admitted as to claims for benefits made, otherwise denied.

20. Without knowledge, therefore denied.

21. Without knowledge, therefore denied.

22. Admitted.

23. Admitted that the policy speaks for itself, otherwise denied.

24. Admitted.

25. Admitted.

26. Defendant is without knowledge and demands strict proof thereof.

FACTUAL ALLEGATIONS

The Policy

27. Admitted.

28. Defendant admits that the Policy speaks for itself, otherwise denied.

29. Defendant admits that the Policy speaks for itself, otherwise denied.

30. Defendant admits that the Policy speaks for itself, otherwise denied.

31. Defendant admits that the Policy speaks for itself, otherwise denied.

32. Defendant admits that the Policy speaks for itself, otherwise denied.

33. Denied.

Underlying Claim

34. Admitted.

35. Admitted.

36. Admitted.

37. Admitted.

38. Admitted.

39. Admitted.

40. Admitted.

41. Admitted.

42. Admitted.

43. Admitted.

44. Admitted.

45. Admitted.

46. Admitted.

Pre-Suit Claim Handling

47. Admitted.

48. Defendant admits that it received a March 12, 2018 correspondence from Plaintiff and that the correspondence speaks for itself, otherwise denied.

49. Defendant admits that the correspondence speaks for itself, otherwise denied.

50. Defendant admits that the correspondence speaks for itself, otherwise denied.

51. Defendant is without direct knowledge but does not deny the allegation.

52. Defendant admits that the March 13, 2018 correspondence speaks for itself, otherwise denied.

53. Defendant admits that the March 13, 2018 correspondence speaks for itself, otherwise denied.

54. Without knowledge, therefore denied.

55. Without knowledge, therefore denied.

56. Defendant admits that the March 26, 2018 correspondence speaks for itself, otherwise denied.

57. Without knowledge, therefore denied.

58. Admitted.

59. Admitted.

60. Defendant admits that it received an April 12, 2018 correspondence from Plaintiff and that the correspondence speaks for itself, otherwise denied.

61. Admitted.

62. Without knowledge, therefore denied.

63. Defendant admits that the April 20, 2018 correspondence speaks for itself, otherwise denied.

64. Defendant admits that the April 20, 2018 correspondence speaks for itself, otherwise denied.

65. Defendant admits that the April 20, 2018 correspondence speaks for itself, otherwise denied.

66. Defendant admits that it received an April 20, 2018 correspondence from Plaintiff and that the correspondence speaks for itself, otherwise denied.

67. Without knowledge, therefore denied.

68. Defendant admits that counsel for Defendant sent correspondence to Plaintiff on April 23, 2018 and denies the remaining allegations.

69. Defendant admits that the April 23, 2018 letter speaks for itself, otherwise denied.

70. Defendant admits that it received an April 26, 2018 letter from Plaintiff with enclosure and that the correspondence speaks for itself, otherwise denied.

71. Defendant admits that the letter speaks for itself, otherwise denied.

72. Defendant admits that the letter speaks for itself, otherwise denied.

73. Defendant admits that the letter speaks for itself, otherwise denied.

74. Defendant admits that it received a May 3, 2018 correspondence and that the correspondence speaks for itself, otherwise denied.

75. Admitted.

76. Defendant admits that it received a May 11, 2018 correspondence from Plaintiff and that the correspondence speaks for itself, otherwise denied.

77. Defendant admits to the authenticity of the letter and that the letter speaks for itself, otherwise denied.

78. Admitted that a settlement conference took place, otherwise denied.

79. Admitted.

80. Denied.

81. Admitted that the insurance company received the information referenced, otherwise denied.

82. Without knowledge, therefore denied.

83. Denied.

84. Denied.

85. Denied.

Post-Suit Handling

86. Admitted.

87. Defendant admits to the authenticity of the letter and that the letter speaks for itself, otherwise denied.

88. Defendant admits that in September 2018 Ms. Cox requested to take over as defense counsel for Plaintiff and denies all other allegations.

89. Admitted.

90. Admitted.

91. Admitted.

92. Admitted.

93. Admitted that mediation took place, otherwise denied.

94. Admitted.

- 95. Admitted.
- 96. Admitted.
- 97. Admitted.
- 98. Without knowledge, therefore denied.
- 99. Without knowledge, therefore denied.
- 100. Admitted.
- 101. Admitted.
- 102. Admitted.
- 103. Without knowledge, therefore denied.
- 104. Admitted.
- 105. Admitted.
- 106. Admitted.
- 107. Admitted as to tender, otherwise denied.
- 108. Admitted.
- 109. Admitted.
- 110. Admitted that a mediation took place, otherwise denied.
- 111. Admitted.
- 112. Admitted.

COUNT I DECLARATORY RELIEF AS TO
GOOD FAITH CLAIM HANDLING

113. Defendant realleges and incorporates by reference its answers to the allegations in paragraphs 1 through 112 above.

- 114. Denied.
- 115. Denied.

116. Admitted.
117. Admitted as to the claims policy limits, otherwise denied.
118. Denied.
119. Denied.
120. Denied.
121. Denied.
122. Denied.
123. Denied.
124. Denied.
125. Denied.
126. Denied.
127. Denied.
128. Denied.
129. Denied.
130. Denied.
131. Denied.
132. Denied.
133. Denied.
134. Defendant admits that Plaintiff seeks relief but denies that Plaintiff is entitled to it.
135. Denied.
136. Denied.
137. Denied.
138. Admitted.

139. Denied.

In response to the WHEREFORE clause following Paragraph 139, Defendant denies the allegations contained therein and denies that Plaintiff is entitled to the relief it seeks.

**COUNT II – DECLARATORY RELIEF AS TO
DUTY TO DEFEND AND INDEMNITY**

140. Defendant realleges and incorporates by reference its answers to the allegations in paragraphs 1 through 112 above.

141. Defendant admits that Plaintiff claims to have exhausted the policy limits by resolving only claims made by the Estates against Blanco but denies that has done so.

142. Denied.

143. Denied.

144. Defendant admits that Plaintiff seeks relief but denies that Plaintiff is entitled to it.

145. Defendant admits that Plaintiff seeks relief but denies that Plaintiff is entitled to it.

146. Denied.

147. Denied.

148. Denied.

In response to the WHEREFORE clause following Paragraph 148, Defendant denies the allegations contained therein and denies that Plaintiff is entitled to the relief it seeks. Defendant denies all remaining allegations contained in the Complaint for Declaratory Judgment not specifically admitted herein.

DEFENSES AND AFFIRMATIVE DEFENSES

In addition to the specific responses to the numbered paragraphs in the Complaint, Defendant asserts the following defenses and affirmative defenses:

1. Unclean Hands: Plaintiff is not entitled to the relief it seeks because it engaged in bad faith in its handling of the claims that are the subject of this Underlying Actions. Specifically, rather than settling all claims and obtaining indemnity for Discount Rock, Plaintiff tendered the Policy limit of \$1,000,000 to the Estates, over Discount Rock's objections, to obtain a release solely for Discount Rock's employee, Defendant Blanco. At the time National Indemnity tendered the Policy limit on behalf of Blanco, individually, it was aware that Blanco was insolvent and unable to satisfy any potential judgment in litigation brought by the Estates. Nevertheless, looking out for its own interests rather than the interests of its insureds, National Indemnity settled with the Estates on behalf of Blanco for the full Policy limit, leaving Discount Rock to proceed to trial without a co-defendant and without any Policy funds to pursue further settlement negotiations. And, National Indemnity's bad faith settlement also did nothing to resolve claims brought against its insureds by a third party involved in the Pinkerton Action. The trial in the Estate Action resulted in a jury verdict against Discount Rock of \$11.8 million, and the Pinkerton Action remains pending. As a result of National Indemnity's bad faith actions, Discount Rock is now facing the shuttering of its business or bankruptcy, as well as whatever liability which may arise in the Pinkerton Action.

2. Failure to Perform: Plaintiff's claims are barred because Plaintiff failed to perform its obligations under the Policy, including, but not limited to, section CA 00 01 03 10, p. 2, Section II(A), which requires Plaintiff to "provide[] liability coverage for all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this

insurance applies, caused by an ‘accident’ and resulting from the ownership, maintenance or use of a covered ‘auto’”. National Indemnity’s bad faith actions have left Discount Rock without any liability coverage.

3. Failure to Perform Conditions Precedent: Plaintiff’s claims may be barred to the extent that it failed to perform all the obligations, covenants, and conditions precedent and subsequent required under the Policy.

WHEREFORE, Defendant/Counter-Plaintiff, Discount Rock & Sand, Inc., respectfully requests that this Court enter an order declaring that Plaintiff/Counter-Defendant, National Indemnity Company of the South has owed and continues to owe a duty to defend to Discount Rock & Sand, Inc., in the Underlying Lawsuits.

COUNTERCLAIM

Counter-Plaintiff, Discount Rock & Sand, Inc. (“Discount Rock”), hereby sues Counter-Defendant, National Indemnity Company of the South (“National Indemnity”) and states:

PRELIMINARY STATEMENT

1. This is an action for common law bad faith and breach of contract against National Indemnity arising from its failure to protect Discount Rock and for tendering \$1,000,000 of insurance proceeds on behalf of the covered, yet insolvent, employee of Discount Rock.¹ As a result of National Indemnity’s bad faith settlement, which exhausted the policy limits in exchange for a release of the employee by less than all of the claimants to the policy, Discount Rock has suffered significant damages and is on the verge of collapse.

¹ On September 16, 2021, Discount Rock filed a Civil Remedy Notice (“CRN”) against National Indemnity with the Florida Department of Economic Affairs. Should National Indemnity fail adequately to respond to the CRN within the statutory 60 day window, Discount Rock will seek to amend this Counterclaim to allege a claim against National Indemnity for statutory bad faith, pursuant to Section 625.144, Florida Statutes.

PARTIES, JURISDICTION, AND VENUE

2. Discount Rock is, and was at all times material hereto, a corporation organized under the laws of the State of Florida and conducting business in the State of Florida, with its principal place of business in Marathon, Florida.

3. National Indemnity is, and was at all times material hereto, a foreign corporation incorporated in the State of Iowa with its principal place of business in the State of Nebraska and is authorized to issue commercial auto insurance policies in Florida.

4. This Court has jurisdiction over the claims brought in this Counterclaim pursuant to 28 U.S.C. §1332(a)(1), and the claims are brought pursuant to Rule 13(1)(a), Federal Rules of Civil Procedure.

5. Complete diversity of citizenship exists in this matter.

6. The amount in controversy exceeds \$75,000.00, exclusive of costs, interest, and attorneys' fees.

7. Pursuant to 28 U.S.C. §1391, venue is proper in the Southern District of Florida, Key West Division, because the underlying incident, covered by the insurance policy issued by National Indemnity to Discount Rock as addressed below, took place in Monroe County, Florida.

8. One of the underlying actions, styled *Estate of Teresa Sanchez Quetglas, et. al. v. Discount Rock & Sand, Inc., et. al.*, Case No.: 4:18-cv-10097 ("Estate Action"), was filed in the United States District Court, Southern District of Florida, Key West Division. A second lawsuit stemming from the subject incident, styled *Daniel W. Pinkerton and Kimberly Pinkerton v. Carlos Manso Blanco and Discount Rock & Sand, Inc.*, Case No: 19-CA-000303-P ("Pinkerton Action"), is pending in the Circuit Court of the Sixteenth Judicial Circuit, in and for Monroe County, Florida. Together, the Estate Action and the Pinkerton Action are the "Underlying Actions".

9. All conditions precedent to the institution of this action have occurred, been performed, or have been waived.

FACTUAL ALLEGATIONS

10. National Indemnity issued a Business Auto Policy, number 74 APB 002326 (“Policy”), to Discount Rock for the policy period February 28, 2018 to February 28, 2019. Discount Rock attaches a copy of the Policy as **Exhibit A**.

11. Section CA 00 01 03 10, p. 2, Section II(A) of the Policy requires National Indemnity to “provide[] liability coverage for all sums an ‘insured’ legally must pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies, caused by an ‘accident’ and resulting from the ownership, maintenance or use of a covered ‘auto’”.

12. The Policy provides a liability coverage limit of \$1,000,000 per incident.

13. The Policy also provides that National Indemnity’s duty to defend or settle terminates when the liability coverage limit is exhausted by payment of settlements or judgments.

14. On March 5, 2018, Discount Rock’s employee, Carlos Manso Blanco (“Blanco”), was involved in an automobile accident while driving a Discount Rock vehicle (“Accident”). With respect to the Accident, both Discount Rock and Blanco are covered by the Policy.

15. The vehicle Blanco was driving struck a vehicle being driven by Margarita Cortes Pardo (“Pardo”) in which Maria Lopez Bermejo Rossello (“Rossello”), Teresa Sanchez Quetglas (“Sanchez”), and Ana Gaitan Diaz (“Gaitan”) were passengers.

16. After initial impact, the vehicle being driven by Pardo was struck by an RV owned and operated by Daniel Pinkerton in which Kimberly Pinkerton was a passenger (collectively, Daniel and Kimberly Pinkerton are the “Pinkertons”).

17. Pardo, Rossello, Sanchez, and Gaitan all perished at the scene due to injuries sustained in the accident.

18. The Pinkertons have claimed bodily injury, property damage, and loss of consortium.

19. On March 12, 2018, National Indemnity informed Discount Rock that it had received notice of the Accident. National Indemnity retained counsel to defend Discount Rock and Blanco.

20. In March 2018, National Indemnity received letters of representation and requests for policy disclosure both from counsel for the Estates and counsel for the Pinkertons, to which National Indemnity responded by providing copies of the Policy.

21. The parties engaged in pre-suit negotiation but were unable to settle the Estates' and the Pinkertons' claims.

22. On June 29, 2018, the Estate of Pardo, the Estate of Rossello, the Estate of Gaitan, and the Estate of Sanchez filed a complaint against Discount Rock and Blanco ("Estate Action").

23. On June 6, 2019, the Pinkertons filed a complaint against Discount Rock and Blanco ("Pinkerton Action").

24. The parties continued to engage in negotiations with the Estates but were unable to settle the Estate's claims.

25. On January 14, 2020, National Indemnity advised Discount Rock and Blanco that National Indemnity intended to tender the Policy limits to the Estates in exchange for release of Blanco only ("Blanco Settlement").

26. That same day, Discount Rock informed National Indemnity that it vehemently objected to the Blanco Settlement and to any settlement that would not include releases for both

insureds. Discount Rock explained to National Indemnity that a settlement offer that tendered the Policy limits in exchange for release only of Blanco was in bad faith, especially in light of the fact that counsel for Blanco informed National Indemnity that Blanco had no assets that could be used to satisfy any judgment obtained by the Estates and in effect was “judgment proof”.

27. On January 26, 2020, Discount Rock reiterated its strenuous objection to the Blanco Settlement, noting that the settlement did not even benefit Blanco, who would remain exposed to a potential claim for indemnification by Discount Rock, and thus the settlement only benefitted National Indemnity. Discount Rock informed National Indemnity that its tender of the Policy and exhaustion of its limits on the Blanco Settlement amounted to bad faith because the settlement provided no benefit to either insured, grievously harmed and disadvantaged Discount Rock at trial, and served only to benefit National Indemnity, who would be relieved of any further obligation under the Policy.

28. Ignoring Discount Rock’s clear and reasoned objections, on January 28, 2020, National Indemnity tendered the Policy limits to the Estates in exchange for a release of Blanco, and the Estates accepted the tender.

29. On February 10, 2020, National Indemnity paid the Policy limit of \$1,000,000 to the Estates’ counsel, and on March 3, 2020, the Estates delivered to National Indemnity fully executed releases of Blanco.

30. On July 19, 2021, the Estates’ trial against Discount Rock commenced. Although he was no longer a defendant in the action, Blanco testified at the trial.

31. On July 23, 2021, the jury returned a verdict in favor of the Estates for a total of \$11,800,000.

COUNT I – BREACH OF CONTRACT

32. Discount Rock realleges paragraphs 1-31.

33. Discount Rock and National Indemnity entered into the Business Auto Policy insurance agreement with policy number 74 APB 002326 (the “Agreement”).

34. Pursuant to Section CA 00 01 03 10, p. 2, Section II(A) of the Agreement, in exchange for Discount Rock’s premium payments, National Indemnity was required “provide[] liability coverage for all sums an ‘insured’ legally must pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies, caused by an ‘accident’ and resulting from the ownership, maintenance or use of a covered ‘auto’”.

35. Discount Rock paid its insurance premiums and otherwise complied with and performed as required by the Agreement.

36. National Indemnity breached the Agreement by tendering the Policy limit of \$1,000,000 and obtaining a release from the Estates only of Blanco, thereby seeking to relieve itself of its continuing obligation to defend Discount Rock.

37. Discount Rock suffered damages as a result of National Indemnity’s breaches of the Agreement.

WHEREFORE, Discount Rock requests judgment in its favor and against National Indemnity in the amount of \$11.8 million, together with costs and interest, and such other relief as the Court deems just.

COUNT II – COMMON LAW BAD FAITH

38. Discount Rock realleges paragraphs 1-37.

39. Discount Rock properly made a claim under the Policy for coverage related to claims made by third parties arising from the Accident, which National Indemnity acknowledged.

40. It was clear to all that Discount Rock's co-insured and co-defendant Blanco did not have any assets from which to pay any potential judgment on behalf of the Estates or the Pinkertons.

41. Nevertheless, and despite Discount Rock's objections, National Indemnity chose to tender the Policy limit of \$1,000,000 to the Estates in exchange for a release only of Blanco.

42. Such a settlement did not benefit Discount Rock or Blanco, who continued to face the claims brought by the Pinkertons and the possibility of an indemnification claim from Discount Rock, and served only the interests of National Indemnity, who, by exhausting the Policy limit, sought to no longer be responsible to defend or indemnify Discount Rock in the Underlying Actions.

43. Moreover, National Indemnity's bad faith settlement prejudiced Discount Rock at trial, ultimately culminating in an \$11.8 million verdict against Discount Rock.

44. Rather than acting fairly and honestly toward Discount Rock, National Indemnity's bad faith actions were taken solely to protect itself without due regard for Discount Rock's interests.

45. Discount Rock has suffered damages as a result of National Indemnity's bad faith actions.

WHEREFORE, Discount Rock requests judgment in its favor and against National Indemnity in the amount of \$11.8 million, together with costs and interest, and such other relief as the Court deems just.

Respectfully submitted,

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By: /s/Patricia Baloyra
Peter F. Valori
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Florida Bar No. 78270

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic transmission via this Court's CM/ECF filing system on September 24, 2021, on all counsel or parties who have appeared in the above-styled action.

/s/Patricia Baloyra
Patricia Baloyra