

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

THE NATIONAL BANK OF
BLACKSBURG,

Plaintiff,

v.

EVEREST NATIONAL INSURANCE
COMPANY,

Defendant.

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CIVIL ACTION NO.
7:18-cv-00310-GEC

**ORIGINAL ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT
EVEREST NATIONAL INSURANCE COMPANY**

Defendant Everest National Insurance Company (“Everest”) files this it Original Answer and Affirmative Defenses in response to Plaintiff The National Bank of Blacksburg’s (“National Bank”) Complaint (the “Complaint”) and would respectfully show the Court as follows:

NATURE OF COMPLAINT

1. Answering paragraph 1 of the Complaint, Everest admits that National Bank seeks the relief requested therein, but denies that National Bank is entitled to any such relief.
2. Answering paragraph 2 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.
3. Answering paragraph 3 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.
4. Answering paragraph 4 of the Complaint, Everest admits that it paid National Bank’s claim under the Debit Card Rider of the Bond and that it denied coverage under the C&E Crime Rider of the Bond, but denies that National bank has accurately or fully explained the

basis the for Everest's coverage decision. Further answering paragraph 4 of the Complaint, Everest denies the remaining allegations contained therein.

5. Answering the first sentence of paragraph 5 of the Complaint, Everest admits that National Bank states that it will request leave from this Court to file its Proofs of Loss under seal, for *in camera* review, and admits that National Bank has filed a Motion to Seal, but denies that such motion should be granted. Answering the second sentence of paragraph 5 of the Complaint, Everest admits that the Proofs of Loss submitted by National Bank indicate that National Bank suffered a sophisticated computer system intrusion and hackings, but denies the remaining allegations contained therein. Further answering paragraph 5 of the Complaint, Everest denies all other allegations contained therein.

6. Answering paragraph 6 of the Complaint, Everest admits that National Bank seeks a declaratory judgment, but denies that it is entitled to a declaratory judgment in its favor.

7. Answering paragraph 7 of the Complaint, Everest admits that National Bank requests this Court to enter judgment awarding damages against Everest, but denies that Everest has breached its contract with National Bank, denies that it acted in bad faith, and denies that National Bank is entitled to any damages from Everest.

THE PARTIES

8. Answering paragraph 8 of the Complaint, Everest admits the allegations contained therein.

9. Answering paragraph 9 of the Complaint, Everest admits the allegations contained therein.

JURISDICTION AND VENUE

10. Answering paragraph 10 of the Complaint, Everest admits the allegations contained therein.

11. Answering paragraph 11 of the Complaint, Everest admits the allegations contained therein.

12. Answering paragraph 12 of the Complaint, Everest admits the allegations contained therein.

FACTUAL BACKGROUND

Facts Common to Both Computer System Intrusions

13. Answering the first sentence of paragraph 13 of the Complaint, Everest admits that both it and National Bank are parties to the Bond, but denies that the Bond attached to the Complaint as Exhibit A is a complete or true and accurate copy of the Bond. Answering the second sentence of paragraph 13 of the Complaint, Everest admits that the Bond provided certain insurance coverage to National Bank for the Bond Period November 1, 2014, to November 1, 2017, but denies that National Bank has accurately or fully characterized the terms of such coverage. Answering the third sentence of paragraph 13, Everest admits the allegations contained therein.

14. Answering paragraph 14 of the Complaint, Everest admits that the Bond includes the C&E Crime Rider, but denies that National Bank has accurately quoted from the C&E Crime Rider and further denies that National Bank has accurately or fully characterized the terms of such rider. Further answering paragraph 14 of the Complaint, Everest denies the remaining allegations contained therein.

15. Answering paragraph 15 of the Complaint, Everest admits that the Single Loss Limit of Liability for the C&E Crime Rider is \$8,000,000.00, and that the Single Loss Deductible of the C&E Crime Rider is \$125,000.00.

16. Answering paragraph 16 of the Complaint, Everest admits that the Bond includes a Debit Card Rider, admits that National Bank has accurately quoted a part of such rider, and

admits that such rider includes certain limitations and exclusions to coverage, but denies that National Bank has accurately or fully characterized the terms of the Debit Card Rider. Further answering paragraph 16 of the Complaint, Everest denies the remaining allegations contained therein.

17. Answering paragraph 17 of the Complaint, Everest admits that the Single Loss Limit of Liability for the Debit Card Rider is \$50,000.00, the Single Loss Deductible is \$25,000.00, and the Debit Card Aggregate Limit of Liability is \$250,000.00.

18. Answering paragraph 18 of the Complaint, Everest admits that the Bond contains certain exclusions, admits that Exclusions (k) and (l) are relevant because they exclude National Bank's claim from coverage, and admits that Everest relied upon these exclusions in denying coverage under the C&E Crime Rider, but denies that National Bank has cited all relevant exclusions and further denies that National Bank has accurately or fully characterized the terms of the Bond or the reasons for Everest's denial of coverage under the C&E Crime Rider.

19. Answering paragraph 19 of the Complaint, Everest denies that there is an "Exclusion K" of the Bond and denies that National Bank has accurately or fully quoted Exclusion (k) of the Bond.

20. Answering paragraph 20 of the Complaint, Everest denies that there is an "Exclusion L" of the Bond, admits that National Bank has accurately quoted a portion of Exclusion (l) of the Bond, but denies that National Bank has quoted all relevant provisions of Exclusion (l) of the Bond.

21. Answering paragraph 21 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

22. Answering paragraph 22 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

23. Answering paragraph 23 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

24. Answering paragraph 24 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

25. Answering paragraph 25 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

The 2016 Intrusion

26. Answering paragraph 26 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

27. Answering paragraph 27 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

28. Answering paragraph 28 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

29. Answering paragraph 29 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

30. Answering the first sentence of paragraph 30 of the Complaint, Everest admits that Forgenix prepared a PFI Incident Response Report – FINAL for National Bank dated June 2016, but Everest lacks knowledge or information to form a belief about the truth of the remaining allegations of the first sentence of paragraph 30 of the Complaint. Answering the second sentence of paragraph 30 of the Complaint, Everest admits that National Bank alleges that a true and accurate copy of the Forgenix Report will be offered for production under seal, for

in camera review by the Court, and further admits that it has now filed a Motion to Seal, but denies that the Motion to Seal should be granted.

31. Answering paragraph 31 of the Complaint, Everest admits that the Forgenix Report states that the intrusion most likely originated from a phishing email which allowed the installation of malware that permitted unauthorized access to Workstation One.

32. Answering paragraph 32 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

33. Answering paragraph 33 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

34. Answering paragraph 34 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

35. Answering paragraph 35 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

36. Answering paragraph 36 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

37. Answering paragraph 37 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

38. Answering paragraph 38 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

39. Answering paragraph 39 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

40. Answering paragraph 40 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

41. Answering paragraph 41 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

42. Answering paragraph 42 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

43. Answering paragraph 43 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

44. Answering the first sentence of paragraph 44 of the Complaint, Everest admits the allegations contained therein. Answering the second sentence of paragraph 44, Everest admits that National Bank alleges that a true and accurate copy of the 2016 Proof of Loss will be offered for production under seal, for *in camera* review by the Court, and further admits that it has now filed a Motion to Seal, but denies that the Motion to Seal should be granted.

45. Answering paragraph 45 of the Complaint, Everest denies the allegations contained therein.

46. Answering the first sentence of paragraph 46 of the Complaint, Everest admits that ABA Insurance Services, Inc. (“ABA”), its claims administrator, wrote a letter dated June 13, 2018 (“Coverage Determination”), explaining Everest’s coverage position concerning not only the 2016 Proof of Loss but also the 2017 Proof of Loss. Answering the second sentence of paragraph 46 of the Complaint, Everest admits that National Bank alleges that a true and accurate copy of the Coverage Determination will be offered for production under seal, for *in camera* review by the Court, and further admits that it has now filed a Motion to Seal, but denies that the Motion to Seal should be granted.

47. Answering paragraph 47 of the Complaint, Everest admits the allegations contained therein.

48. Answering paragraph 48 of the Complaint, Everest admits that, through ABA, it explained in the Coverage Determination that National Bank's loss was covered exclusively under the Debit Card Rider, but denies that National Bank has accurately or fully characterized the terms of the Coverage Determination.

49. Answering paragraph 49 of the Complaint, Everest admits that, through ABA, it explained in the Coverage Determination that the only coverage for National Bank's loss was under the Debit Card Rider, but denies that National Bank has accurately or fully characterized the terms of the Coverage Determination.

50. Answering paragraph 50 of the Complaint, Everest denies the allegations contained therein.

The 2017 Intrusion

51. Answering paragraph 51 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

52. Answering paragraph 52 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

53. Answering paragraph 53 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

54. Answering paragraph 54 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

55. Answering the first sentence of paragraph 55 of the Complaint, Everest admits that Verizon[✓] VTRAC prepared a Final PFI Report for National Bank dated July 13, 2017, but Everest lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of the first sentence of paragraph 55 of the Complaint. Answering the second sentence of paragraph 55 of the Complaint, Everest admits that National Bank alleges

that a true and accurate copy of the Verizon Report will be offered for production under seal, for *in camera* review by the Court, and further admits that it has now filed a Motion to Seal, but denies that the Motion to Seal should be granted.

56. Answering paragraph 56 of the Complaint, Everest admits the allegations contained therein.

57. Answering paragraph 57 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

58. Answering paragraph 58 of the Complaint, Everest admits the allegations contained therein.

59. Answering paragraph 59 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

60. Answering paragraph 60 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

61. Answering paragraph 61 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

62. Answering paragraph 62 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

63. Answering paragraph 63 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

64. Answering paragraph 64 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

65. Answering paragraph 65 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

66. Answering paragraph 66 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

67. Answering paragraph 67 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

68. Answering paragraph 68 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

69. Answering paragraph 69 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

70. Answering paragraph 70 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

71. Answering paragraph 71 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

72. Answering paragraph 72 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

73. Answering paragraph 73 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

74. Answering paragraph 74 of the Complaint, Everest lacks knowledge or information sufficient to form a belief about the truth of the allegations contained therein.

75. Answering the first sentence of paragraph 75 of the Complaint, Everest admits the allegations contained therein. Answering the second sentence of paragraph 75, Everest admits that National Bank alleges that a true and accurate copy of the 2017 Proof of Loss will be offered for production under seal, for *in camera* review by the Court, and further admits that it has now filed a Motion to Seal, but denies that the Motion to Seal should be granted.

76. Answering paragraph 76 of the Complaint, Everest admits that National Bank sought recovery of \$1,833,984.58 in the 2017 Proof of Loss, but denies that National Bank has accurately or fully characterized the terms of the 2017 Proof of Loss.

77. Answering the first sentence of paragraph 77 of the Complaint, Everest admits that, through ABA, its claims administrator, it explained in the Coverage Determination its coverage position concerning not only the 2017 Proof of Loss but also the 2016 Proof of Loss. Answering the second sentence of paragraph 77 of the Complaint, Everest admits that National Bank alleges that a true and accurate copy of the Coverage Determination will be offered for production under seal, for *in camera* review by the Court, and further admits that it has now filed a Motion to Seal, but denies that the Motion to Seal should be granted.

78. Answering paragraph 78 of the Complaint, Everest admits that in the Coverage Determination it was explained that the Debit Card Rider of the Bond provided coverage, subject to the Single Loss Limit of Liability and the Single Loss Deductible, for National Bank's loss, but denies that National Bank has accurately or fully characterized the terms of the Coverage Determination.

79. Answering paragraph 79 of the Complaint, Everest admits that, through ABA, it explained in the Coverage Determination that the only coverage for National Bank's loss was under the Debit Card Rider, but denies that National Bank has accurately or fully characterized the terms of the Coverage Determination.

80. Answering paragraph 80 of the Complaint, Everest admits that, in the Coverage Determination it explained through ABA that the 2016 Intrusion and the 2017 Intrusion constituted a "Single Loss" under the Bond and provided National Bank its draft number 62090 in the amount of \$50,000.00, representing the Debit Card Rider Single Loss Limit of Liability.

Further answering paragraph 80 of the Complaint, Everest denies the remaining allegations contained therein.

81. Answering paragraph 81 of the Complaint, Everest denies the allegations contained therein.

82. Answering paragraph 82 of the Complaint, Everest admits that, in the Coverage Determination, through ABA, it acknowledged that National Bank had established that the total loss for the unauthorized transactions was \$2,433,632.82, but denies that National Bank has accurately or fully characterized the terms of the Coverage Determination.

COUNT ONE – DECLARATORY JUDGMENT

83. Answering paragraph 83 of the Complaint, Everest incorporates herein by reference its answers to paragraph 1 through 82 of the Complaint.

84. Answering paragraph 84 of the Complaint, Everest denies the allegations contained therein.

85. Answering paragraph 85 of the Complaint, Everest denies the allegations contained therein.

86. Answering paragraph 86 of the Complaint, Everest admits that, in the Coverage Determination, through ABA, it explained that National Bank's losses were not covered under the C&E Crime Rider, it explained that certain exclusions of the Bond applied to National Bank's claim, and it explained that National Bank's losses were covered under the Debit Card Rider, but it denies that National Bank has accurately or fully characterized the Coverage Determination.

87. Answering paragraph 87 of the Complaint, Everest admits the allegations contained therein.

88. Answering paragraph 88 of the Complaint, Everest admits that National Bank has requested the relief sought therein, but denies that National Bank is entitled to any such relief. Further answering paragraph 88 of the Complaint, Everest denies the remaining allegations contained therein.

COUNT TWO – BREACH OF CONTRACT

89. Answering paragraph 89 of the Complaint, Everest incorporates herein by reference its answers to paragraph 1 through 88 of the Complaint.

90. Answering paragraph 90 of the Complaint, Everest admits the allegations contained therein.

91. Answering paragraph 91 of the Complaint, Everest denies the allegations contained therein.

92. Answering paragraph 92 of the Complaint, Everest denies the allegations contained therein.

93. Answering paragraph 93 of the Complaint, Everest denies the allegations contained therein.

COUNT THREE – STATUTORY ATTORNEY’S FEES

94. Answering paragraph 94 of the Complaint, Everest incorporates herein by reference its answers to paragraph 1 through 94 of the Complaint.

95. Answering paragraph 95 of the Complaint, Everest denies the allegations contained therein.

96. Answering paragraph 96 of the Complaint, Everest denies the allegations contained therein.

97. Answering paragraph 97 of the Complaint, Everest admits that, in the Coverage Determination, through ABA, it acknowledged that National Bank had established that the total

loss for the unauthorized transactions was \$2,433,632.82, but denies that National Bank has accurately or fully characterized the terms of the Coverage Determination.

98. Answering paragraph 98 of the Complaint, Everest denies the allegations contained therein.

99. Answering paragraph 99 of the Complaint, Everest admits National Bank seeks the relief stated therein, but denies that National Bank is entitled to any such relief. Further answering paragraph 99 of the Complaint, Everest denies all other allegations contained therein.

PRAYER FOR RELIEF

100. Answering the Prayer for Relief in the Complaint, including subparagraphs a. through d., Everest admits that National Bank has prayed for the relief stated therein, but denies that National Bank is entitled to any such relief.

DEMAND FOR JURY TRIAL

101. Answering the Demand for Jury Trial, Everest admits that National Bank has demanded a jury trial on all triable issues.

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102. Further answering the allegations of the Complaint, Everest denies all allegations contained therein not specifically admitted above.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE (Exclusion (k))

103. Exclusion (k) of the Bond provides that the Bond does not cover:

loss resulting directly or indirectly from the use, or purported use, of credit, debit, charge, access, convenience or other cards

(1) in obtaining credit or funds, or

- (2) in gaining access to automated mechanical devices which, on behalf of the Insured, disburse Money, accept deposits, cash checks, drafts or similar Written instruments or make credit card loans, or
- (3) in gaining access to point of sale terminals, customer-bank communication terminals, or similar electronic terminals of electronic funds transfer systems,

Whether such cards were issued, or purport to have been issued, by the Insured or by anyone other than the Insured, except when covered under Insuring Agreement (A);

104. National Bank's loss results directly or indirectly from the use, or purported use, of credit, debit, charge, access, convenience or other cards as set forth in Exclusion (k). National Bank's loss is not covered under Insuring Agreement (A) of the Bond. Therefore, National Bank's claims are barred by Exclusion (k) of the Bond.

**SECOND AFFIRMATIVE DEFENSE
(Exclusion (l))**

105. Exclusion (l) of the Bond provides that the Bond does not cover:

loss involving automated mechanical devices which, on behalf of the Insured, disburse Money, accept deposits, cash checks, drafts or similar Written instruments or make credit card loans, unless such automated mechanical devices are situated within an office of the Insured which is permanently staffed by an Employee whose duties are those usually assigned to a bank teller, even though public access is from outside the confines of such office, but in no event shall the Underwriter be liable for loss (including loss of Property)

- (1) as a result of damage to such automated mechanical devices perpetrated from outside such office, or
- (2) as a result of failure of such automated mechanical devices to function properly, or
- (3) through misplacement or mysterious unexplainable disappearance of Property located within any such automated mechanical devices, except when covered under Insuring Agreement (A);

106. National Bank's loss involves automated mechanical devices as set forth in Exclusion (l). National Bank's loss is not covered under Insuring Agreement (A) of the Bond. Therefore, National Bank's claims are barred by Exclusion (l) of the Bond.

**THIRD AFFIRMATIVE DEFENSE
(Exclusion (s))**

107. Exclusion (s) of the Bond provides that the Bond does not cover:

potential income, including but not limited to interest and dividends, not realized by the Insured;

108. To the extent National Bank seeks recovery of potential income, its claims are barred by Exclusion (s) of the Bond.

**FOURTH AFFIRMATIVE DEFENSE
(Exclusion (t))**

109. Exclusion (t) of the Bond provides that the Bond does not cover:

damages of any type for which the Insured is legally liable, unless the Insured establishes that the act or acts which gave rise to the damages involved conduct which would have caused a covered loss to the Insured in a similar amount in the absence of such damages;

110. To the extent National Bank seeks recovery of damages for which it is legally liable, such claims are barred by Exclusion (t) of the Bond.

**FIFTH AFFIRMATIVE DEFENSE
(Exclusion (u))**

111. Exclusion (u) of the Bond provides that the Bond does not cover:

all fees, costs and expenses incurred by the Insured

(1) in establishing the existence of or amount of loss covered under this bond, or

(2) as a party to any legal proceeding whether or not such legal proceeding exposes the Insured to loss covered by this bond;

112. National Bank's claim for attorney's fees, costs, and all other fees and expenses is barred by Exclusion (u) of the Bond.

**SIXTH AFFIRMATIVE DEFENSE
(Exclusion (v))**

113. Exclusion (v) of the Bond provides that the Bond does not cover:

indirect or consequential loss of any nature including, but not limited to, fines, penalties, multiple or punitive damages;

114. National Bank seeks recovery for an indirect or consequential loss. Therefore, its claims are barred by Exclusion (v) of the Bond.

**SEVENTH AFFIRMATIVE DEFENSE
(Exclusion (c) of the Computer & Electronic Crime Rider)**

115. Exclusion (c) of the Computer & Electronic Crime Rider provides that the Bond does not cover:

Loss resulting directly or indirectly from:

(1) mechanical failure, faulty construction, error in design, latent defect, fire, wear or tear, gradual deterioration, electrical disturbance or electrical surge which affects a Computer System, or

(2) failure or breakdown of electronic data processing media, or

(3) error or omission in programming or processing,

unless such loss is covered under the Computer Virus and Employee Sabotage Insuring Agreement above;

116. To the extent National Bank's loss results directly or indirectly from the matters set forth in Exclusion (c) of the Computer & Electronic Crime Rider of the Bond, its claims are barred from coverage.

**EIGHTH AFFIRMATIVE DEFENSE
(Exclusion (f) of the Computer & Electronic Crime Rider)**

117. Exclusion (f) of the Computer & Electronic Crime Rider provides that the Bond does not cover:

Loss resulting directly or indirectly from the fraud or dishonesty of a natural person, partnership or corporation performing services as a data processor of checks or other accounting records of the Insured or from the fraud or dishonesty of the partners, officers, or employees of such natural person, partnership or corporation.

118. To the extent National Bank's loss results directly or indirectly from the fraud or dishonesty of a natural person, partnership or corporation performing services as a data processor of checks or other accounting records of National Bank or from the fraud or dishonesty of the partners, officers, or employees of such natural person, partnership or corporation, its claims are barred by Exclusion (f) of the Computer & Electronic Crime Rider of the Bond.

**NINTH AFFIRMATIVE DEFENSE
(Waiver)**

119. National Bank's claims are barred by the doctrine of waiver.

**TENTH AFFIRMATIVE DEFENSE
(Estoppel)**

120. National Bank's claims are barred by the doctrine of estoppel.

**ELEVENTH AFFIRMATIVE DEFENSE
(Payment)**

121. National Bank's claims are barred by the doctrine of payment.

**TWELFTH AFFIRMATIVE DEFENSE
(Accord and Satisfaction)**

122. National Bank's claims are barred by the doctrine of accord and satisfaction.

**THIRTEENTH AFFIRMATIVE DEFENSE
(Failure to State a Claim)**

123. National Bank's claims are barred because its Complaint fails to state a claim upon which relief can be granted.

**FOURTEENTH AFFIRMATIVE DEFENSE
(Failure to Mitigate)**

124. National Bank's claims are barred by its failure to mitigate its damages.

**FIFTEENTH AFFIRMATIVE DEFENSE
(Avoidable Consequences)**

125. National Bank's claims are barred by the doctrine of avoidable consequences.

Wherefore, Defendant Everest National Insurance Company respectfully requests that Plaintiff take nothing by way of its Complaint, that the Court enter judgment declaring Everest has no liability for any of the claims asserted against it in this lawsuit, and that the Court grant Everest such other and further relief to which it is justly entitled.

Respectfully submitted,

/s/ King F. Tower

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**ATTORNEYS FOR EVEREST NATIONAL
INSURANCE COMPANY**

^[1] The Application is in the process of being filed.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by on all counsel of record this 20th day of July, 2018, via the Court's CM/ECF System.

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/s/ King F. Tower _____

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