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CIVIL ACTION NO. _____

JEFFERSON CIRCUIT COURT

DIVISION _____

JUDGE _____

NAUTILUS INSURANCE COMPANY

PLAINTIFF

v.

NINA COLVIN, AS PARENT AND
STATUTORY GUARDIAN OF W.M.C, MINOR;
OUTER LOOP CHILD CARE, INC.;
and RAMIAH BERRI DOUGLAS

DEFENDANTS

COMPLAINT FOR DECLARATORY JUDGMENT

Now comes Plaintiff, Nautilus Insurance Company (“Nautilus”), by and through its undersigned attorneys, and for its Complaint for Declaratory Judgment¹ against Defendants, Nina Colvin, as parent and statutory guardian on behalf of W.M.C., minor (“Colvin”); Outer Loop Child Care, Inc. (“Outer Loop”); and Ramiah Berri Douglas (“Douglas”), states as follows:

THE PARTIES

1. Nautilus Insurance Company (“Nautilus”) is, and at all relevant times has been, a corporation organized under the laws of Arizona with its principal place of business in Scottsdale, Arizona. At all relevant times hereto, Nautilus was a surplus lines insurer whose policies may be sold in Kentucky.

2. At all times relevant hereto, Colvin was a citizen of the Commonwealth of Kentucky.

¹ This lawsuit was originally filed on May 20, 2022 in the United States District Court for the Western District of Kentucky, where it pended under Case Number 3:22-cv-00274. On August 19, 2022, Judge Charles R. Simpson III entered an order declining to exercise discretionary jurisdiction over the action pursuant to the *Brillhart* Doctrine, holding that state court is the preferable venue for which this matter should proceed.

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3. At all times relevant hereto, Outer Loop was a corporation organized under the laws of the Commonwealth of Kentucky and with its principal place of business in ^{WDRB} Louisville, Kentucky.

4. At all times relevant hereto, Douglas was a citizen of the Commonwealth of Kentucky.

JURISDICTION AND VENUE

5. This Court has personal jurisdiction over Outer Loop as Outer Loop is a corporation whose principal place of business is in Jefferson County, Kentucky.

6. This Court has personal jurisdiction over Colvin as Colvin filed the underlying lawsuit giving rise to this insurance coverage in the Circuit Court of Jefferson County, Kentucky, where it remains pending.

7. This Court has personal jurisdiction over Douglas as Douglas was at all relevant times a citizen of Jefferson County, Kentucky and because the events resulting in this lawsuit occurred in Jefferson County, Kentucky.

8. This lawsuit meets this Court's amount in controversy threshold as it involves an insurance policy with a limit exceeding this Court's amount in controversy requirement and an underlying lawsuit seeking damages in excess of this Court's amount in controversy requirement.

9. Venue is proper because a substantial part of the events giving rise to this litigation occurred in this judicial district.

THE UNDERLYING LAWSUIT

10. On or about November 22, 2021, Colvin filed a Complaint against Outer Loop and Douglas in the Jefferson, Kentucky Circuit Court under Case Number 21-CI-006638 ("*Colvin* Lawsuit"). (A true and correct copy of the *Colvin* Lawsuit is attached hereto as **Exhibit A** and incorporated herein by reference).

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11. The *Colvin* Lawsuit alleges that Outer Loop is a licensed childcare service. (Ex. A, ¶ 2.)
12. Douglas was allegedly employed by Outer Loop as a childcare provider. (Ex. A, ¶ 4.)
13. The *Colvin* Lawsuit alleges that, on April 1, 2021, W.M.C. was one of the children under the supervision of Outer Loop and Douglas. (Ex. A, ¶ 5).
14. The *Colvin* Lawsuit alleges that, on April 1, 2021, W.M.C. was physically restrained and bound by Douglas with blue painter's tape around her wrists for approximately 40 minutes in an attempt to force W.M.C. to take a nap. (Ex. A, ¶ 5).
15. The *Colvin* Lawsuit further alleges that the Louisville Metro Police Department Crimes Against Children Unit was alerted and proceeded to investigate. (Ex. A, ¶ 6).
16. The *Colvin* Lawsuit alleges that Douglas' actions were also caught on surveillance video. (Ex. A, ¶ 7).
17. The *Colvin* Lawsuit alleges that at all relevant times, Douglas was acting within the scope of her employment in furtherance of the business of Outer Loop. (Ex. A, ¶ 8).
18. Count I of the *Colvin* Lawsuit asserts a claim for tortious assault and battery against Douglas. (Ex. A, ¶¶ 11-14).
19. Specifically, Count I of the *Colvin* Lawsuit alleges that Douglas, while under the supervision of Outer Loop, physically bound and restrained W.M.C. because she would not take a nap. (Ex. A, ¶ 12).
20. Count II of the *Colvin* Lawsuit asserts a claim for premises liability against Outer Loop. (Ex. A, ¶¶ 15-20).

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06/01/2023 05:04:03

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21. Specifically, Count II of the *Colvin* Lawsuit alleges that Outer Loop had a legal duty to care for W.M.C. (Ex. A, ¶ 17).

22. The *Colvin* Lawsuit alleges that Outer Loop “breached that duty as evidenced by the tortious assault and battery of W.M.C., Minor, on the premises of Outer Loop...during the ordinary course of business during normal operating hours when W.M.C. was a business invitee...” (Ex. A, ¶ 18).

23. Count III of the *Colvin* Lawsuit asserts a claim for negligence/gross negligence against Douglas and Outer Loop. (Ex. A, ¶¶ 21-27).

24. Specifically, Count III of the *Colvin* Lawsuit alleges that Outer Loop “is fully liable pursuant to the doctrine of *respondeat superior*, agency, express or implied, and ostensible agency for all injuries to Plaintiff caused by the negligent acts and omissions of its employee Defendant Douglas.” (Ex. A, ¶ 22).

25. Count IV of the *Colvin* Lawsuit asserts a claim for failure to train and supervise against Outer Loop. (Ex. A, ¶¶ 28-33).

26. Specifically, Count IV of the *Colvin* Lawsuit alleges that Outer Loop breached its duty to properly train and supervise day care personnel by failing to properly supervise and train Douglas concerning the improper restraint of children. (Ex. A, ¶ 30).

27. Count V of the *Colvin* Lawsuit asserts a claim for false imprisonment against Douglas. (Ex. A, ¶¶ 34-37).

28. Specifically, Count V of the *Colvin* Lawsuit alleges that Douglas improperly utilized blue painter’s tape to detain and falsely imprison W.M.C. when W.M.C. would not take a nap. (Ex. A, ¶ 35).

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29. Count VI of the *Colvin* Lawsuit asserts a claim for punitive damages, arguing that “Defendants’ conduct, individually and collectively, as set forth herein constitutes gross negligence, oppression, fraud, malice or common law bad faith, with willful and wanton disregard for the life, health and rights of the Plaintiffs and was such an extreme departure from ordinary care, as to entitled Plaintiffs to an award of punitive damages...” (Ex. A, ¶¶ 38-39).

THE NAUTILUS POLICY

30. Nautilus issued a multi-peril commercial lines insurance policy to Outer Loop through policy number NN1211882 for the policy period of December 31, 2020 to December 31, 2021 (“Nautilus Policy”). (A copy of the Nautilus Policy is attached hereto as **Exhibit B** and incorporated herein by reference).

31. The Nautilus Policy generally provides, among other things, commercial general liability coverage subject to a \$1,000,000 limit of liability per occurrence, a general aggregate limit of \$2,000,000. (Ex. B).

32. However, with respect to claims involving abuse or molestation, the Nautilus Policy’s \$1 million per occurrence limit is reduced to a sublimit of \$100,000 per event. (Ex. B).

OUTER LOOP’S TENDER TO NAUTILUS, AND NAUTILUS’ DEFENSE OF OUTER LOOP AND DOUGLAS

33. Outer Loop tendered the *Colvin* Lawsuit to Nautilus for defense and/or indemnity under the terms of the Nautilus Policy.

34. Nautilus agreed to defend both Outer Loop and Douglas in the *Colvin* Lawsuit subject to a full and complete reservation of rights. (A true and correct copy of the Nautilus’ reservation of rights letter to Outer Loop is attached hereto as **Exhibit C**. A true and correct copy of Nautilus’ reservation of rights letter to Douglas is attached hereto as **Exhibit D**).

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06/01/2023 05:04:03

35. Nautilus has at all times defended, and continues to defend, Outer Loop and Douglas in the *Colvin* Lawsuit.

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COLVIN'S DEMANDS AND NAUTILUS' RESPONSES THERETO

36. On or about March 16, 2022, counsel for Colvin transmitted what he termed as a “policy limits demand” to defense counsel for Outer Loop.

37. On or about March 30, 2022, counsel for Nautilus responded to the correspondence from counsel for Colvin.

38. In the March 30, 2022 correspondence, Nautilus requested information concerning how Colvin’s damage computations were reached.

39. The March 30, 2022 correspondence also sought clarification that Colvin’s understanding of “policy limits” (as referenced in the previous letter) referred to the applicable \$100,000 per event “abuse or molestation” sublimit as set forth in the Nautilus Policy.

40. In an April 1, 2022 letter, counsel for Colvin claimed that the Nautilus Policy provided a limit of \$100,000 for Douglas *and* a separate \$1,000,000 for Outer Loop, purportedly resulting in a \$1,100,000 limit of available coverage under the Nautilus Policy.

41. The April 1, 2022 letter also contended that the Nautilus Policy’s Punitive Damages Exclusion “is void as against the stated public policy...”

42. Finally, in his April 1, 2022 letter to Nautilus, Colvin’s counsel threatened an “unfair claims settlement practice claim” and a “bad faith” claim against Nautilus if Nautilus refused to resolve the matter for \$1,100,000.

43. On May 11, 2022, counsel for Nautilus transmitted correspondence to counsel for Colvin.

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06/01/2023 05:04:03

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44. In the May 11, 2022 correspondence, counsel for Nautilus again explained that the Nautilus Policy incorporated an “abuse or molestation” sublimit of \$100,000 for Outer Loop and Douglas, combined. **WDRB**

45. Consistent with Nautilus’ interpretation of the Nautilus Policy, Nautilus, in its May 11, 2022 correspondence, conveyed a settlement offer to Colvin of \$100,000 (which constitutes the full limits of the Nautilus Policy for claims relating to abuse or molestation) in exchange for a full and complete release of any and all claims against Outer Loop and Douglas.

46. In a May 11, 2022 email, counsel for Colvin rejected Nautilus’ offer to settle for policy limits.

47. In the May 11, 2022 email, counsel for Colvin reiterated his position that the applicable policy limit was \$1,100,000 and again demanded payment of same.

48. The May 11, 2022 email also again threatened a suit against Nautilus for “unfair claims settlement practice” claim and a “bad faith” claim if Nautilus refused to resolve the matter for \$1,100,000.

49. On May 14, 2022, counsel for Colvin followed up with an additional letter, again reiterating his incorrect position that the applicable policy limit was \$1,100,000 and again threatening a suit for “unfair claims settlement practice” claim and a “bad faith” claim against Nautilus if Nautilus refused to resolve the matter for \$1,100,000.

50. On May 15, 2022, counsel for Colvin followed up with yet another email correspondence, again reiterating his erroneous position that the applicable policy limit was \$1,100,000 and again threatening a suit for “unfair claims settlement practice” claim and a “bad faith” claim against Nautilus if Nautilus refused to resolve the matter for \$1,100,000.

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06/01/2023 05:04:03

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51. Based on the above-referenced communications from counsel for Colvin, Nautilus' understanding is that Colvin intends to file a third-party bad faith and/or unfair claims settlement practice claim against Nautilus based on Nautilus' position that the Nautilus Policy's "abuse or molestation" sublimit of \$100,000 is the only applicable policy limit for the claims asserted in the *Colvin* Lawsuit.

52. Nautilus, Outer Loop, Douglas, and Colvin require a judicial determination of the applicable policy limit of the Nautilus Policy as it relates to the claims asserted in the *Colvin* Lawsuit.

COUNT I

THE NAUTILUS POLICY'S ABUSE OR MOLESTATION SUBLIMIT CONSTITUTES THE MAXIMUM INDEMNIFICATION AVAILABLE UNDER THE NAUTILUS POLICY FOR THE CLAIMS ASSERTED IN THE COLVIN LAWSUIT

53. Nautilus adopts and realleges the allegations in paragraphs 1 through 52 of its Complaint for Declaratory Judgment as paragraph 53 of Count I of its Complaint for Declaratory Judgment as if fully set forth herein.

54. The Nautilus Policy incorporates an Abuse or Molestation Limited Liability Coverage Endorsement (Form L111), which provides, in pertinent part, the following with respect to the coverage afforded therein:

ABUSE OR MOLESTATION LIMITED LIABILITY COVERAGE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

LIMITS OF INSURANCE

Abuse Or Molestation Liability Each Event Limit	\$100,000
Abuse Or Molestation Liability Aggregate Limit	\$300,000

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- A. Except as provided by this endorsement, the following is **added to 2. Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability, Coverage B – Personal and Advertising Injury Liability, and Coverage C – Medical Payments:**

This insurance does not apply to “bodily injury”, “property damage”, “personal and advertising injury” or medical payments arising out of “abuse or molestation”.

- B. In return for the payment of the premium shown in the Schedule and subject to all the terms and conditions of this Coverage Part, we will provide you insurance for “abuse or molestation”, but only as indicated on this endorsement and subject to the Limits of Insurance and provisions set forth in this endorsement. The Limits of Insurance shown in the Schedule are the only Limits of Insurance available to any insured under this Coverage Part, to which this insurance applies.
- C. The following is **added to 1.a. Insuring Agreement of Section I – Coverage A – Bodily Injury And Property Damage Liability:**

We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” arising out of “abuse or molestation” that takes place in the “coverage territory” and occurs during the policy period. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” to which this insurance does not apply. We may, at our discretion, investigate any “event” and settle any claim or “suit” that may result, but:

1. The amount we will pay for damages is limited as described in **H.** and **I.** below; and
2. Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements of any claim or “suit” against any insured.

* * *

- H. The following is **added to Section III – Limits Of Insurance:**

1. **Abuse or Molestation Liability Each Event Limit**

- a. Subject to the Abuse or Molestation Liability Aggregate Limit shown in the Schedule, the Abuse or Molestation Liability Each Event Limit shown in the Schedule is the most

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we will pay for the sum of all “bodily injury” because of “abuse or molestation” arising out of any one “event”.

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- b. Regardless of the number of acts of “abuse or molestation”, or the period of time over which such acts take place, or the number of persons upon whom such acts of “abuse or molestation” are inflicted, all “bodily injury” arising out of such acts of “abuse or molestation” committed by one person, or two or more persons acting together or in concert, will be considered one “event”, subject to the Abuse Or Molestation Liability Each Event Limit shown in the Schedule.

* * *

2. Abuse or Molestation Liability Aggregate Limit

The Abuse or Molestation Liability Aggregate Limit shown in the Schedule is the most we will pay for all “bodily injury” because of “abuse or molestation.”

(Ex. B, hereinafter the “Abuse or Molestation Endorsement”).

55. The Abuse or Molestation Endorsement defines the terms “abuse or molestation” and “event” as follows:

K. The following definitions are **added** to the **Definitions** section:

1. “Abuse or molestation” means “bodily injury” to any person while in the care, custody or control of any insured, arising out of actual or threatened abusive behavior, conduct, or verbal or nonverbal communication whether such “bodily injury” is:
 - a. For sexual gratification, discrimination, intimidation, coercion, or for any other purpose; or
 - b. Results in emotional or psychological injury or harm of any person(s).

“Abuse or molestation” includes the negligent:

- a. Employment;
- b. Supervision;

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06/01/2023 05:04:03

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- c. Investigation;
- d. Reporting to the proper authorities or failure to so report; or
- e. Retention;

of a person whose behavior, conduct or verbal or nonverbal communication results in “abuse or molestation.”

* * *

3. “Event” means one or more acts of “abuse or molestation” committed by one person, or two or more persons acting together or in concert, against one or more persons, taking place over a period of time. The “event” commences on the date the first act of “abuse or molestation” is committed and ends on the date the last act of “abuse or molestation” is committed.

(Ex. B.).

56. By its plain terms, the Nautilus Policy’s Abuse or Molestation Endorsement generally excludes coverage for any “bodily injury” arising out of “abuse or molestation”. (Ex. B).

57. The Abuse or Molestation Endorsement, however, provides that the Nautilus Policy makes available limited “abuse or molestation” coverage subject to the \$100,000 per event sublimit set forth in the endorsement. (Ex. B).

58. For the purposes of the Abuse or Molestation Endorsement, “abuse or molestation” includes both the actual abuse or molestation, as well as negligent employment, supervision, investigation, reporting, and/or retention of a person whose behavior, conduct or verbal or nonverbal communication results in “abuse or molestation. (Ex. B).

59. Additionally, the Abuse or Molestation Endorsement’s \$100,000 sublimit applies to “each event.” (Ex. B).

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06/01/2023 05:04:03

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60. The Abuse or Molestation Endorsement defines the term “Event” as “one or more acts of ‘abuse or molestation’ committed by one person, or two or more persons acting together or in concert, against one or more persons, taking place over a period of time. The ‘event’ commences on the date the first act of ‘abuse or molestation’ is committed and ends on the date the last act of ‘abuse or molestation’ is committed.” (Ex. B).

61. In this case, the claims set forth in the *Colvin* Lawsuit represent a single “event” of “abuse or molestation.” (Ex. A).

62. Accordingly, based on the claims asserted in the *Colvin* Lawsuit, the maximum indemnification payment to which Colvin could be entitled under the terms of the Nautilus Policy is the \$100,000 abuse or molestation sublimit.

63. Colvin has repeatedly contended that a \$1,100,000 limit applies and has repeatedly threatened unfair claims practices and/or bad faith litigation against Nautilus on that basis.

64. Accordingly, an actual controversy exists between Nautilus, Colvin, Outer Loop, and Douglas, concerning the limit of insurance available under the Nautilus Policy for the claims asserted in the *Colvin* Lawsuit, and this Court is vested with the authority to declare the rights and liabilities of the parties hereto and to grant such further and other relief as may be necessary.

WHEREFORE, Plaintiff, Nautilus, respectfully prays that this Honorable Court:

- a. Determine and adjudicate the rights and liabilities of the parties hereto with respect to the Nautilus Policy;
- b. Find and declare that the “Abuse or Molestation Endorsement” sublimit represents the maximum limit of coverage available under the Nautilus Policy for all of the claims asserted in the *Colvin* Lawsuit; and
- c. Grant Nautilus such other and further relief that the Court deems proper under the facts and circumstances.

COUNT II

**THE NAUTILUS POLICY'S "PUNITIVE DAMAGES" EXCLUSION BARS
COVERAGE FOR ANY PUNITIVE AND/OR EXEMPLARY DAMAGES
ULTIMATELY AWARDED IN THE COLVIN LAWSUIT**

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65. Nautilus adopts and realleges the allegations in paragraphs 1 through 64 of its Complaint for Declaratory Judgment as paragraph 65 of Count II of its Complaint for Declaratory Judgment as if fully set forth herein.

66. The Nautilus Policy also incorporates the following exclusion relating to Punitive or Exemplary Damages:

EXCLUSION – PUNITIVE OR EXEMPLARY DAMAGES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

* * *

The following exclusion is **added** to **2. Exclusions of Section I:**

This insurance does not apply to punitive or exemplary damages, including but not limited to those damages that may be imposed to punish a wrongdoer or to deter others from engaging in a similar behavior.

* * *

(Ex. B, hereinafter, the "Punitive Damages Exclusion").

67. The *Colvin* Lawsuit expressly asserts a claim for punitive damages. (Ex. A, ¶¶ 38-39).

68. The Punitive Damages Exclusion bars coverage for any punitive damages awarded in the *Colvin* Lawsuit.

69. Colvin, through counsel, has taken the position that the Nautilus Policy's Punitive Damages exclusion is unenforceable as a matter of law.

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06/01/2023 05:04:03

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70. Accordingly, an actual controversy exists between Nautilus, Colvin, Outer Loop, and Douglas, and this Court is vested with the authority to declare the rights and liabilities of the parties hereto and to grant such further and other relief as may be necessary.

WHEREFORE, Plaintiff, Nautilus, respectfully prays that this Honorable Court:

- a. Determine and adjudicate the rights and liabilities of the parties hereto with respect to the Nautilus Policy;
- b. Find and declare that the Punitive Damages Exclusion bars coverage under the Nautilus Policy for any punitive damages that may be awarded in the *Colvin* Lawsuit;
- c. Find and declare that Nautilus has and had no duty under the Nautilus Policy to indemnify any party or parties for any punitive damages awarded in the *Colvin* Lawsuit; and
- d. Grant Nautilus such other and further relief that the Court deems proper under the facts and circumstances.

Respectfully submitted,

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