Fulton County Superior Court
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

DAVID DAGON, Plaintiff, vs. GEORGIA DEPARTMENT OF ADMINISTRATIVE SERVICES (DOAS), Defendant.	Civil Action No. 24CV001393 **JURY TRIAL DEMANDED**

COMPLAINT FOR BREACH OF CONTRACT
AND BAD FAITH REFUSAL TO SETTLE AN INSURANCE CLAIM

Plaintiff, David Dagon, by and through counsel, files this Complaint against Defendant, the Georgia Department of Administrative Services ("DOAS"), for breach of an insurance contract to reimburse Mr. Dagon, an employee of the Georgia Institute of Technology ("Georgia Tech"), for the reasonable expenses and attorney's fees associated with defending himself against a multi-year criminal investigation conducted by the United States Department of Justice ("DOJ") and the Federal Office of Special Counsel ("Durham" or "OSC"). Plaintiff also seeks damages for Defendant's bad faith refusal to pay Plaintiff's insurance claim and for Defendant's stubborn litigiousness. In support whereof, Plaintiff states as follows:

PRELIMINARY STATEMENT

1) This is a Complaint for breach of contract and bad faith refusal to pay an insurance claim arising out of a multi-year criminal investigation initiated by the United States Department of Justice, the Federal Bureau of Investigation ("FBI"), and later the Office of Special Counsel into the activities of cybersecurity researchers, including Mr. David Dagon and other world-renowned

researchers at Georgia Tech who, in the summer and fall of 2016, as part of their national security research into threats related to the U.S. infrastructure, discovered unusual patterns of activity related to the Executive Office of the President, the Democratic and Republican National Committees, and then-candidate Donald Trump. The suspicious communications were reported to the relevant U.S. government agencies for further investigation. This cyber analysis is similar to other "threat intelligence" or analysis of cybercriminal activities that Mr. Dagon and the other researchers provided to the U.S. government numerous times before as part of their work at Georgia Tech. As part of former U.S. Attorney General Bill Barr's efforts to "investigate the investigators" following the 2016 elections, the Department of Justice began a criminal investigation into the activities of the cybersecurity researchers, including Mr. Dagon, who discovered this information and those who reported it to the government.

2) The Georgia Department of Administrative Services provides insurance policies for employees of the State of Georgia, including Mr. Dagon. The insurance policy is a contract whereby DOAS agrees to reimburse Georgia government employees reasonable attorney's fees and costs if those were incurred in the successful defense of a criminal action suit, investigation, subpoena, warrant, request for documentation or property, or threat of such action and such criminal action, suit, subpoena, warrant, or request for documentation arising out of the employee's official duties.

3) As a result of his official duties, Mr. Dagon was subpoenaed to produce evidence to the federal grand jury and retained counsel in the criminal probe. He was advised by the prosecution that he was a "subject" of the criminal investigation, in that there was "evidence of his specific participation in a crime."[1] The specific crimes mentioned by the prosecutors were allegations that

[1] 28 C.F.R. § 50.15(a)(5) (defining a "subject" of an investigation).

Mr. Dagon and the other researchers, together with the source of the data analyzed by the researchers in some way "altered," "modified," and/or "cherry picked" the data they presented, and that they defrauded the United States by causing false information to be presented to federal law enforcement and intelligence agencies. Neither Mr. Dagon nor any of the Georgia Tech researchers (or indeed anyone else associated with the research) committed any such offenses or altered any such data. Georgia Tech prepared a statement for the New York Times in response to such allegations, stating, "All of the work done by GT researchers was done in strictly non-partisan way…It is important to point out that there is no suggestion in the indictment of any wrongdoing by anyone associated at GT."

4) The criminal probe was one of the most aggressive, politically charged, closely watched and extensive criminal investigations in the past 20 years. It resulted in one person pleading guilty to an offense first noted by the Department of Justice's Office of Inspector General ("OIG"), and criminal charges against a former DOJ lawyer, then working for a law firm representing: the Democratic National Committee ("DNC"); the Presidential campaign of Hillary Clinton; the communications company that provided domain name system data to cybersecurity researchers for their research; and a vice president of that company who interfaced with the cybersecurity research community. The grand jury indicted the former DOJ lawyer, Michael Sussmann, on charges that, when he presented documents, which included the Georgia Tech scientists' research to the FBI, the lawyer violated the "false statements" statute by telling the General Counsel of the FBI that he was providing this information "not on behalf of any client." The Special Counsel claimed that Mr. Sussmann actually provided the information on behalf of his client who provided the data to the cybersecurity researchers. Mr. Sussmann was acquitted of that charge.

5) Mr. Dagon was repeatedly threatened with criminal prosecution by the Durham team. When he refused to adopt a narrative that the Durham prosecutors wanted him to adopt, they threatened to prosecute him if he didn't provide their preferred narrative to the grand jury. When he informed the prosecutors that he could not legally produce Georgia Tech documents without authorization from Georgia Tech, the prosecutors threatened to shut down Georgia Tech's multi-million-dollar laboratory and computer servers. Mr. Dagon's counsel was able to obtain statutory immunity for Mr. Dagon under 18 U.S.C. §6001, *et seq*.

6) Mr. Dagon cooperated with the Special Counsel after receiving immunity and met with the prosecutor's team over the course of four days and testified for three days before the grand jury. Despite the fact that Mr. Dagon was a subject of the investigation, that he was repeatedly threatened with criminal prosecution by the Office of Special Counsel (Durham), and that every other subject of the investigation was forced to retain counsel as part of the investigation, DOAS denied his claim for reimbursement of legal fees related to a criminal matter under its General Liability Agreement because, *inter alia*, "[t]here can be no 'successful defense' in the event there is never the reasonable possibility of criminal liability," ignoring the repeated threats of the OSC to prosecute Mr. Dagon and attempting to graft onto the General Liability Agreement a proof requirement that simply does not exist.

7) On May 12, 2023, the Office of Special Counsel (Durham) released its final report related to the criminal investigation which involved the Georgia Tech researchers. That report indicated that the Office of Special Counsel was not recommending any criminal charges be brought against Mr. Dagon (Identified therein as University-1 Researcher-2). With the release of the final report under 28 C.F.R. §600.8(c), the work of the Special Counsel was concluded, and the Special Counsel lost jurisdiction to proceed. As a result, with this report, the expiration of the Statute of

Limitations of 5 years, and the grant of immunity under 18 U.S.C. §6001, *et seq.*, any possible case against David Dagon is clearly over.

8) Mr. Dagon has gone more than three years without having his reasonable legal fees and expenses reimbursed. As a result, Mr. Dagon, a respected member of the cybersecurity community who helped bring in approximately forty million dollars of research funds to Georgia Tech,[2] has suffered financial hardships and was effectively punished by the State of Georgia through its refusal to pay his legal fees. In fact, DOAS refused to reimburse his expenses associated with an aggressive, multi-year, politically sensitive investigation on the grounds that Mr. Dagon did nothing illegal.

Jurisdiction and Venue

9) Jurisdiction is proper in this Court pursuant to O.C.G.A. §15-6-8.

10) Venue is proper in this Court pursuant to O.C.G.A. §§50-21-1(b) and 50-21-28 and is based on the requirements of these statutes and the location in which the actions which give rise to the Complaint occurred.

11) Sovereign immunity has been waived as to Mr. Dagon's claims against DOAS, pursuant to O.C.G.A. §§50-21-1 and 50-21-23.

Parties

12) Plaintiff David Dagon is a world-renowned security researcher who at all times was acting within the scope of his employment and his official duties at Georgia Tech. He is a resident of Fulton County, Georgia. Together with co-authors like Wenke Lee, Manos Antonakakis, and Panagiotis Kintis of Georgia Tech, and Roberto Perdisci of the University of Georgia and Nick

[2] Indeed, DOAS indicated that one of the reasons it was denying Mr. Dagon's claim for reimbursement was the fact that his criminal defense was partly motivated by his desire to protect his research, his reputation, and the reputation of Georgia Tech and its continued funding. This, DOAS wrongly claimed, disqualified him from reimbursement.

Feamster of Princeton University, Mr. Dagon has authored and published more than three dozen seminal works on protecting critical cyber infrastructures, analyzing Domain Name System (DNS) data, protecting privacy, and cybersecurity metrics. Mr. Dagon holds multiple patents on technologies that are critical to protecting the nation's cyber infrastructure, including patents on various methods and systems for detecting compromised computers, for determining whether domain names are legitimate or malicious, for detecting and responding to attacking networks, developing a graphical user interface and web site evaluation tool for customizing web sites and others. Mr. Dagon assigned the rights to many of these patents to Georgia Tech. Mr. Dagon also developed much of the basic technology used to analyze DNS information and is considered one of the top DNS researchers in the world -- and a "go-to" expert on various aspects of cybersecurity and cybersecurity research. He is considered a "superstar" in DNS research and helped enhance the reputation of Georgia Tech in the area of cybersecurity research.

13) Defendant Georgia Department of Administrative Services ("DOAS") is an "insurer"[3] that entered into a written contract, the General Liability Agreement (the "Insurance Contract"), under which it is required to reimburse Mr. Dagon "(as specified in O.C.G.A. §45-9-1) for the reasonable legal fees and other expenses incurred in the successful defense of a criminal action directly related to the Covered Party's official duties." DOAS may be served with summons and Complaint upon its Executive Business Operations Manager, Gwen Middleton, at 200 Piedmont Ave., SE, West Tower, Suite 1804 Atlanta, GA 30334.

[3] “"Insurer" means any person engaged as indemnitor, surety, or contractor who issues insurance, annuity or endowment contracts, subscriber certificates, or other contracts of insurance by whatever name called. Burial associations, health care plans, and health maintenance organizations are insurers within the meaning of this title.” O.G.C.A. §33-1-2 (5).

14) At all times material hereto, as an employee of Georgia Tech, Mr. Dagon was covered by the General Liability Agreement held by DOAS, which references O.C.G.A. §45-9-1.

15) O.C.G.A. §45-9-1 covers the reimbursement of "legal fees and other expenses incurred in the successful defense of any criminal proceeding, including, but not limited to, any criminal cause of action, suit, investigation, subpoena, warrant, request for documentation or property, or threat of such action whether formal or informal where such action arises out of the performance of his or her official duties."

The DOJ Criminal Investigation

16) Beginning in early 2019, the FBI and DOJ began a broad criminal investigation into the FBI's handling of allegations of connections between then-Presidential candidate Donald J. Trump ("Trump") and various entities associated with Russia - so called, "investigating the investigators."

17) One focus of this investigation was on data analyzed by Mr. Dagon and various computer security researchers in the run-up to the 2016 Presidential election which related to the security of the U.S. election system and a hack into the Executive Office of the President and the Democratic National Committee.

18) In the summer of 2016, Mr. Dagon, as part of his work as a Term Research Engineer II at Georgia Tech, became involved in a project that involved analyzing domain name system (DNS) data and included working with a group of cybersecurity researchers at various research institutions looking at potential foreign interference with U.S. elections, including the 2016 U.S. presidential election. This work began in June of 2016 at the request of the U.S. Government and continued until early 2017. Beyond general national security concerns, Mr. Dagon, under the supervision of and with the assistance of his supervisor at Georgia Tech, Dr. Manos Antonakakis, was working to secure a multimillion-dollar government project from the Department of Defense

Advanced Research Projects Agency ("DARPA") for the benefit of Georgia Tech. This election project work enabled Mr. Dagon and Dr. Antonakakis to test their approach for their DARPA proposal using test DNS datasets.

19) In addition, Mr. Dagon, within the scope of his duties as a Term Research Engineer II at Georgia Tech, conducted research into the behavior and unique digital signatures of certain devices, including cellular/internet connected phones made by Russian manufacturer Yota ("the Yota phones"). In connection with this research, Mr. Dagon used a commercial entity he controls called Glomar, LLC to quickly and efficiently purchase supplies needed for his research projects at Georgia Tech. This included the purchase of a Yota phone, and he submitted the invoice to Georgia Tech for reimbursement. The purchase of the phone through Glomar was for the benefit of Georgia Tech and within the scope of Mr. Dagon's employment. The Glomar invoices were immediately submitted to Georgia Tech for reimbursement and paid.

20) In April 2020, Mr. Dagon was approached by an FBI agent who informed him that the FBI was conducting a criminal investigation into the research he had conducted for Georgia Tech. Mr. Dagon spoke briefly to the FBI agent, then referred the agent to the Georgia Tech general counsel. The Georgia Tech general counsel advised Mr. Dagon not to have any further communications with the criminal investigators, but to refer them to the Georgia Tech Chief of Police. All subsequent communications about the criminal investigation were then made between the FBI/DOJ and the Chief of Police.

21) In August 2020, Mr. Dagon received a subpoena *duces tecum* for Glomar Research from a federal grand jury convened by Durham in Washington, D.C. compelling him to produce documents and records related to Special Counsel's investigation, and compelling him, through

Glomar, to produce all records relating to the purchase of the Yota phone he had bought for his Georgia Tech research.

22) Prior to his being served with the subpoena, Mr. Dagon asked Georgia Tech's legal counsel for employment and litigation, Kate Wasch, about hiring an attorney since the FBI had been calling and emailing him and requesting meetings with him through Georgia Tech legal counsel. Ms. Wasch advised him to "wait and see what happens." She did not advise him of any internal policies regarding retention of counsel, or give him an ethical warning pursuant to *Upjohn Co. V. United States*, 449 U.S. 383 (1981) indicating that Georgia Tech counsel was not representing him. In response to the criminal subpoena, Mr. Dagon retained the legal services of Global Cyber Legal ("GCL"). GCL defended Mr. Dagon in connection with the criminal investigation and in connection with attempts to get reimbursed for his legal fees and expenses since then.

The DOJ Subject Warning

23) On October 19, 2020, John Durham was appointed by Attorney General William Barr to serve as the Special Counsel to conduct a criminal investigation into the initiation and conduct of the investigation of Russian interference in the 2016 presidential election campaigns. Special Counsel Durham was authorized to investigate whether any federal official, employee, or any other person or entity violated the law in connection with the intelligence, counterintelligence, or law-enforcement activities directed at the 2016 presidential campaigns and the individuals associated with those campaigns. As part of his remit, Special Counsel Durham also was, among other things, authorized to prosecute criminal charges and, as is typical for special counsel investigations, issue a comprehensive report.

24) On October 24, 2020, the Office of Special Counsel (Durham) formally sent Mr. Dagon's counsel an email stating that Mr. Dagon was a "subject" of their investigation and indicating that,

while they had not concluded that anyone had committed any crime, Mr. Dagon "is a subject of our investigation under the DOJ's broad definition of that term."[4]

25) The Office of Special Counsel and the grand jury were investigating the subject of Mr. Dagon's research at Georgia Tech, the manner in which it was conducted, the source of the data that was analyzed, the motive and political affiliations of the researchers themselves, the validity of the data, whether the data or analysis was modified, altered or "cherry picked" and whether the cybersecurity researchers or any other party worked with DARPA and Georgia Tech to create what the Special Counsel prosecutors called a "false narrative" about what the data showed. As a result,

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[4] Under the DOJ Guidance, a "subject" of a grand jury investigation is a person who has participated in the activities about which the grand jury is investigating. This distinguishes a "subject" from a "witness," with a "witness" being someone who merely has knowledge of some fact that may be relevant to the investigation. The Department's Justice Manual explains that "[a] 'target' is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative Defendant," and "[a] 'subject' . . . is a person whose conduct is within the scope of the grand jury's investigation." U.S. Dep't of Justice, Justice Manual § 9-11.151 (Jan. 2020). The DOJ Representation Guidelines also notes that "[a]n employee [of the government] is the subject of an investigation if, in addition to being circumstantially implicated by having the appropriate responsibilities at the appropriate time, <u>there is some evidence of his specific participation in a crime.</u>" 28 C.F.R. § 50.15(a)(5). 28 CFR § 50.16 also provides that, where federal employees are the subject of a federal criminal investigation, they are entitled to representation by private counsel reimbursed by the federal government after a determination of, "whether the employee's actions reasonably appear to have been performed within the scope of his employment and whether providing representation would be in the interest of the United States…" The applicable regulations indicated that, while DOJ attorneys may represent government employees who are "mere witnesses" in a grand jury investigation, if the government employee "is the subject of a federal criminal investigation concerning the act or acts for which he seeks representation" the DOJ lawyers are recused and the Department of Justice "may provide a private attorney to the employee at federal expense under the procedures of § 50.16, or provide reimbursement to employees for private attorney fees incurred in connection with such related civil, congressional, or state criminal proceeding, provided no decision has been made to seek an indictment or file an information against the employee." 28 CFR § 50.15(7) This represents a recognition at the federal level that government employees who are the "subject" of criminal investigations (and not mere witnesses) have sufficient criminal exposure to require the appointment of private counsel paid for by the government, but that they are not "mere witnesses" who can appear at the grand jury without private counsel.

Mr. Dagon faced substantial criminal exposure, despite the fact that neither he nor any of the researchers involved had committed any criminal offense or done anything improper.

26) Beyond the mere "subject" email, the prosecutors in the Office of Special Counsel repeatedly threatened to prosecute Mr. Dagon if he did not tell the grand jury the story that the prosecutors were seeking. OSC prosecutors threatened to prosecute Mr. Dagon so often and so vociferously that Jody Westby, counsel for Mr. Dagon, wrote to the Special Counsel and told him to "stop threatening my client" and noted that, "He is going to tell the truth, and your threats to charge him with perjury if he doesn't provide the answers you like or agree with are out of bounds. Full stop."

27) The investigation of Mr. Dagon and the Georgia Tech researchers continued until June of 2022, when a federal grand jury in Washington, D.C. acquitted Michael Sussmann, a former federal prosecutor and prominent D.C. attorney who was charged with misleading the FBI because he allegedly gave the FBI documents "on behalf of a client" about the Trump-Russia communications, including white papers authored by Mr. Dagon.[5]

28) Mr. Dagon was, until the expiration of the Statute of Limitations and the final verdict in the D.C. criminal trial, under constant threat of investigation and prosecution by the DOJ, OSC, FBI and others. He had a *bona fide* fear of being indicted and was repeatedly threatened by the prosecutors and investigators for prosecution.

[5] The Sussmann indictment alleged that the cybersecurity researchers and those who worked with them improperly (and unlawfully) used "non-public" DNS data for "opposition research" on candidate Trump, and that they were interested in creating a "narrative" of a connection between the Trump Organization and Alfa Bank to impress "VIP's."

The DOAS Insurance Contract

29) The General Liability Agreement notes that "[t]his is a contract issued by the Georgia Department of Administrative Services (DOAS) pursuant to the authority granted by O.C.G.A. Section 45-9-1 *et seq.*, to provide [insurance] coverage for the Covered Party as described herein under the terms described herein." (Agreement, Par. F(7))[6]

30) At all times relevant to these matters, Mr. Dagon was a "Covered Party" under the terms of the General Liability Agreement.

31) Where an insurer like DOAS seeks to deny coverage based on the language in an insurance contract, the burden lies with the insurer to demonstrate that the clear and unambiguous language of the contract compels the denial of coverage.[7]

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[6] The DOAS General Liability Agreement is treated as a contract for insurance such for the purposes of contractual interpretation. *Bd. of Regents of the Univ. Sys. v. Daniels,* 264 Ga. 328, 328, 446 S.E.2d 735, 735, 1994 Ga. LEXIS 450, *2, 94 Fulton County D. Rep. 1891 (referring to DOAS General Liability Agreement as "a policy issued by the Department of Administrative Services (DOAS). This policy plainly covered the full-time university employees…").

[7] See, e.g., O.C.G.A. § 13-2-2 (5). To determine the insurer's extent of liability under a policy of insurance, a consideration must be made of all those essential provisions which fix, create, limit, or enlarge liability. *Fisher v. American Cas. Co.,* 194 Ga. 157, 159 (21 S.E.2d 68) (1942). The insurer, in preparing the language of its policy, has the burden of using language that is clear and precise. *Travelers Indem. Co. v. Whalley Const. Co., Inc.,* 160 Ga. App. 438, 440 (287 S.E.2d 226) (1981). Where the terms and conditions of an insurance contract are clear and unambiguous, such terms must be given their literal meaning. *Adams v. Atlanta Cas. Co*., 235 Ga. App. 288, 289 (1) (509 S.E.2d 66) (1998). *Ga. Farm Bureau Mut. Ins. Co. v. Meyers*, 249 Ga. App. 322, 324, 548 S.E.2d 67, 69, 2001 Ga. App. LEXIS 497, *5-6, 2001 Fulton County D. Rep. 1504. As the Georgia Supreme Court noted, contracts of insurance must be:

> strictly construed against the insurer as the drafter of the policy and that, where possible, insurance contracts should be read in accordance with the reasonable expectations of the insured. "Thus, if an insurance contract is capable of being construed two ways, it will be construed against the insurance company and in favor of the insured." Claussen v. Aetna Cas. & Co., 259 Ga. 333, 334-335 (1) (380 S.E.2d 686) (1989). "Under Georgia law, the risk of any lack of clarity or ambiguity in an insurance contract must be borne by the insurer. "

32) The policy language in the Insurance Contract requires DOAS to reimburse a government employee's reasonable attorney's fees and costs if those were (a) incurred in the successful defense of a criminal action suit, investigation, subpoena, warrant, request for documentation or property, or threat of such action and (b) such criminal action, suit, subpoena, warrant, or request for documentation arose out of the employee's official duties.

33) The General Assembly made it clear that it intended DOAS' coverage to include coverage for state employees who find their activities subject to criminal investigation or demand for documents even "when they are investigated and a decision is made to not pursue charges."[8] The General Assembly noted their intention that the DOAS Insurance Contract "brings state coverage into line with coverage provided [to] directors and officers of private corporations."[9]

34) The General Assembly also made it clear that coverage is not simply for the defense of a criminal indictment or prosecution, but that DOAS must reimburse state employees for their

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Boardman Petroleum v. Federated Mut. Ins. Co., 269 Ga. 326, 332, 498 S.E.2d 492, 497, 1998 Ga. LEXIS 264, *16, 98 Fulton County D. Rep. 638.

[8] Georgia House Daily Report, 2008 Reg. Sess. No. 32.

[9] Private corporations are entitled to reimburse their Officers and Directors for the expenses associated with responding to subpoenas, producing documents, and defending themselves and the company in connection with criminal investigations irrespective of whether the corporate officer has actually committed any crime. Indeed, such corporations are legally obligated to reimburse their officers and directors for such costs. *Polychron v. Crum & Forster Ins. Cos.*, 916 F.2d 461, 463 (8th Cir. 1990) (a grand jury subpoena compelling the production of documents was a "claim" under D&O policy which must be reimbursed); *Oceans Healthcare, L.L.C. v. Illinois Union Ins. Co.,* 379 F. Supp. 3d 554, 563 (E.D. Tex. 2019) (a subpoena demanding the production of documents is a "claim," and the subpoena need not allege any wrongdoing to constitute a "claim"); *Astellas U.S. Holdings, Inc. v. Starr Indemnity and Liability Co.*, No. 17-cv-8220, 2018 WL 2431969, at *3 (N.D. Ill. May 30, 2018) (a subpoena was a "claim" because it demanded non-monetary relief, and it need not contain language asserting that the policyholder engaged in wrongful conduct to meet the policy's definition of a "wrongful act"); *Syracuse Univ. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 40 Misc. 3d 1205(A), 975 N.Y.S.2d 370 (Sup. Ct.), *aff'd*, 112 A.D.3d 1379 (2013) (grand jury subpoenas constitute a "claim").

reasonable costs incurred in *responding to criminal subpoenas, demands for documents or other investigations* -- irrespective of their status with respect to those investigations and irrespective of whether they are ever suspected of, or charged with, a crime. This represents the view of the legislature that State employees, acting within the scope of their employment, should not be forced to personally incur expenses related to responding to criminal investigations, subpoenas, or demands for documents, testimony, or records in the same way that Officers and Directors of private companies are indemnified for such costs.

DOAS's Bad Faith Refusal to Pay Mr. Dagon's Insurance Claim

35) Mr. Dagon's lawyers had been in discussion with counsel for Georgia Tech for reimbursement of their reasonable legal fees associated with both the criminal investigation and a related civil lawsuit in which Mr. Dagon was similarly subpoenaed. The discussions about payment for their employees' legal expenses began in or about September 2020 and the Attorney General approved payment of his fees and expenses in November 2020.

36) Mr. Dagon retained Samuel Olens of Dentons US LLP to assist in his efforts to get reimbursed for his criminal legal fees. On December 15, 2021, Mr. Dagon's attorneys again requested reimbursement of Mr. Dagon's reasonable legal fees, noting that Georgia Tech had reimbursed the legal fees of the other two Georgia Tech security researchers who were under investigation at rates more than double those charged by GCL. The letter also was sent to DOAS by Mr. Olens, but a claim had not yet been filed with DOAS.

37) On March 30, 2022, counsel for DOAS responded to the December 15, 2021 letter noting that, were such a claim to be filed, DOAS would not pay the claim. DOAS noted it would deny the claim of coverage because Mr. Dagon "has not established that he obtained a successful defense" because he "is not and has never been subject to indictment and was never a target of the

grand jury investigation." Of course, being "subject to indictment" or being a "target" of the grand jury are neither statutory nor contractual requirements for coverage. DOAS asserted, "[i]n order to achieve a successful defense, the individual employee must, at the very least, have some risk of criminal *liability*." They continued, "[t]his does not mean that an individual must be formally charged or indicted to be entitled to reimbursement, but there can be no 'successful defense' where Mr. Dagon concedes that he *is not and has never been the subject of a criminal investigation.*" (Letter from Logan Winkles, General Counsel, DOAS to Sam Olens, counsel for GCL, March 30, 2022).

38) On June 16, 2022, Mr. Dagon filed a claim with DOAS for reimbursement of his reasonable legal fees associated with the successful defense of the criminal action.

39) On July 26, 2022, DOAS General Counsel Logan Winkles formally denied Plaintiff's claim for reimbursement stating that "DOAS does not provide reimbursement for individuals who are essentially fact witnesses and face no threat of criminal liability" and that "[t]he fact that Mr. Dagon chose to obtain counsel when he was, in your words, 'never a target of the grand jury investigation' was a decision he made, but does not qualify him for reimbursement of those expenses" and further that "[t]here can be no 'successful defense' in the event there is never the reasonable possibility of criminal liability."

40) There is no requirement in either the law or the Insurance Contract that the insured demonstrate that there is a "reasonable possibility of criminal liability" as a precondition for reimbursement for the successful defense of a criminal matter, investigation, subpoena, demand for documents, etc. All that is required is that there be a "criminal action" or an "investigation, subpoena, demand for documents[,]" that the insured have expended reasonable expenses in the

defense of the investigation, and that this be "successful."[10] Clearly, the grand jury investigation was "criminal." Clearly, there was an "investigation." Clearly, there was a "subpoena" and "demand for documents." On the face of the contract then, DOAS is obliged to reimburse Mr. Dagon's legal expenses.

41) Additionally, it is absurd to conclude that, simply because Mr. Dagon had not done anything unlawful, there was no "reasonable possibility of criminal liability." The investigation focused on Mr. Dagon and his research. He was the only person at Georgia Tech who was compelled – under threat of prosecution – to testify multiple times before the grand jury. He was similarly compelled to meet with prosecutors and FBI agents. He was compelled to produce documents and records. He repeatedly and emphatically asserted his rights against self-incrimination to the agents and prosecutors and was ultimately granted limited immunity, which applied to the statements he made to the grand jury under 18 U.S.C. §6001, *et seq*.

42) The DOAS position is stated in bad faith. It creates a true Hobson's choice – which is no choice at all. DOAS's interpretation is an insurance entity's "heads I win, tails, you lose" proposition to avoid coverage under the plain language of the policy.

43) Even if such a requirement were to be grafted onto the statute – in clear abrogation of the wording and intent – Mr. Dagon repeatedly demonstrated that the prosecutors believed Mr. Dagon had criminal liability, and he was under constant threat of criminal prosecution – if not criminal liability.[11]

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[10] Accepting DOAS' additional language would obviate the terms "investigation, subpoena, demand for documents" and would require the insured who receives a subpoena to demonstrate that there was some criminal liability associated with the subpoena.

[11] DOAS focuses on the reasonable likelihood of "criminal liability" - meaning the reasonable likelihood of conviction for a crime, ignoring the fact that Mr. Dagon demonstrated a "reasonable likelihood" of criminal prosecution in the absence of any criminal liability.

44) Nothing in the Insurance Contract or the statute requires proof of "the reasonable possibility of criminal liability." The contract merely requires a "criminal action" and a "successful defense[,]" and the statute defines a "criminal action" as "any criminal cause of action, suit, investigation, subpoena, warrant, request for documentation or property, or threat of such action whether formal or informal where such action arises out of the performance of his or her official duties." O.C.G.A. 45-9-1.

45) DOAS has rejected the claim for reimbursement and has not reimbursed any of Mr. Dagon's legal fees or other expenses.

DOAS is Liable for "Bad Faith" Refusal to Settle an Insurance Claim

46) O.C.G.A. §33-4-6(a) provides in relevant part, "[i]n the event of a loss which is covered by a policy of insurance and the refusal of the insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding has been made that such refusal was in bad faith, the insurer shall be liable to pay such holder, in addition to the loss, not more than 50 percent of the liability of the insurer for the loss or $5,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution of the action against the insurer."

47) Under Georgia law, while the state enjoys sovereign immunity from being sued in many cases, there are exceptions, including where there exists a written contract or where the legislature has waived sovereign immunity by statute.[12] As an insurer under the law, DOAS has contractual liability under the statute not only for the underlying claim but also for failing to settle the claim in good faith. This liability arises as part of the Insurance Contract and includes the costs defined in the statute and attorney's fees.

[12] In *Georgia Dept. of Corrections v. Couch*, 295 Ga. 469 (2014), the Supreme Court rejected the government's argument that it was immune, because of sovereign immunity, from claims that its refusal to settle a dispute was made in "bad faith" under O.C.G.A. § 9-11-68(d).

COUNT I
BREACH OF CONTRACT

48) Plaintiff incorporates paragraphs 1-47 of this Complaint as if fully stated herein.

49) Defendant is an "insurer"[13] which entered into an express written contract of insurance, the General Liability Agreement, under which it is required to reimburse Mr. Dagon's legal bills incurred as a result of the successful defense of a criminal action, including "any criminal cause of action, suit, investigation, subpoena, warrant, request for documentation or property, or threat of such action whether formal or informal where such action arises out of the performance of his or her official duties."

50) Plaintiff is a "Covered Party" under the terms of the General Liability Agreement.

51) Plaintiff was subjected to a criminal investigation, served with a subpoena for production of documents and testimony subpoenas in a criminal investigation, and threatened with criminal prosecution.

52) The actions to which Plaintiff was subjected are all "criminal action[s,]" as defined in the General Liability Agreement, which arose out of the performance of his official duties.

53) Plaintiff incurred substantial legal fees and expenses as a result of the criminal investigation, subpoenas, and threats of prosecution.

54) Under the Insurance Contract, Defendant is obligated to reimburse Plaintiff the legal fees and expenses Plaintiff incurred as a result.

55) Defendant has refused to reimburse Plaintiff his legal fees and expenses incurred as a result of the criminal actions described herein.

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[13] ""Insurer" means any person engaged as indemnitor, surety, or contractor who issues insurance, annuity or endowment contracts, subscriber certificates, or other contracts of insurance by whatever name called. Burial associations, health care plans, and health maintenance organizations are insurers within the meaning of this title." O.G.C.A. § 33-1-2 (5).

56) Defendant's refusal to reimburse Plaintiff constitutes a breach of its contract of insurance.

57) As a result of Defendant's breach of contract, Plaintiff has suffered damages in the amount of the unreimbursed legal fees and expenses for which Defendant is liable to Plaintiff.

58) Plaintiff has performed or otherwise satisfied all conditions precedent to recover from Defendant the unreimbursed legal fees and expenses or those conditions precedent have been waived, occurred, or otherwise satisfied.

COUNT II
ACTION FOR INSURER'S BAD FAITH AND ATTORNEY'S FEES UNDER O.C.G.A. § 33-4-6

59) Plaintiff incorporates paragraphs 1-47 of this Complaint as if fully stated herein.

60) Under the contract of insurance between Plaintiff and Defendant, Defendant is obligated to reimburse Plaintiff the legal fees and expenses Plaintiff has incurred as a result of criminal actions.

61) Defendant has not attempted in good faith to effectuate a prompt, fair, and equitable settlement of the claim even though coverage is clear.

62) Defendant has denied coverage based upon a bad faith and unreasonable interpretation that is at odds with the clear language of both O.C.G.A. § 45-9-1 and the insurance policy.

63) Defendant has compelled Plaintiff to engage attorneys, incur legal costs, and institute suit to recover the amounts due under the insurance policy by refusing to make a reasonable payment or offer of payment.

64) On August 12, 2022, Plaintiff sent an additional demand to Defendant, pursuant to O.C.G.A. § 33-4-6, regarding Plaintiff's claims and demanding full payment of Plaintiff's claim.

65) The August 12, 2022 demand and Plaintiff's previous claim for reimbursement, sent on June 16, 2022, were sent to Defendant more than 60 days before this action was filed.

66) Plaintiff's June 16, 2022 and August 12, 2022 demands to Defendant were made at a time when immediate payment for the claim was due.

67) Plaintiff's' August 12, 2022 demand to Defendant made it clear that Defendant was facing a bad faith claim for its failure to pay Plaintiff for his legal fees incurred as a result of the criminal actions Plaintiff faced.

68) Defendant has continued to refuse payment of the amounts due under the insurance contract.

69) On March 29, 2023, Defendant filed an *ante litem* notice of claim pursuant to O.C.G.A. § 50-21-26.

70) Pursuant to O.C.G.A. § 33-4-6(a), given Defendant's bad faith refusal to pay the Plaintiff's legal fees and expenses, in addition to the loss amount due under the policy, Plaintiff is entitled to not more than 50 percent of the liability of Insurer for the loss or $5,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution of this action against Defendant.

71) Pursuant to O.C.G.A. § 33-4-6(b), Plaintiff, within 20 days of bringing this action, in addition to completing service of process, will also mail to the Commissioner of Insurance and the consumers' insurance advocate a copy of the demand and this Complaint by first-class mail.

72) Plaintiff has performed all conditions precedent to recover the amounts due and sought in this Count or those conditions precedent have been waived, occurred, or otherwise satisfied.

COUNT III
ATTORNEY'S FEES AND EXPENSES PURSUANT TO O.C.G.A. § 13-6-11

73) Plaintiff incorporates paragraphs 1-47 of this Complaint as if fully stated herein.

74) Defendant refused to properly pay Plaintiff in full for Plaintiff's claim for reimbursement of legal fees and expenses despite timely and proper claims being made under the policy of insurance.

75) Defendant is aware of the monies owed to Plaintiff for Plaintiff's legal fees and expenses and is aware the Plaintiff has had to engage additional legal counsel to advocate for reimbursement under the General Liability Policy but has knowingly and willfully failed to pay Plaintiff for the same.

76) Defendant's conduct by failing to pay monies which are clearly owed Plaintiff under the policy, constitutes, pursuant to O.C.G.A. § 13-6-11, bad faith and stubbornly litigious conduct and has caused Plaintiff unnecessary trouble and expenses in order to obtain payment of the monies owed to Plaintiff by Defendant under the policy.

77) In light of the conduct of Defendant which constitutes bad faith conduct, stubbornly litigious conduct, and conduct which has caused Plaintiff unnecessary trouble and expense to obtain the monies owed to Plaintiffs, Plaintiff is entitled to recover from Defendant his attorney's fees and expenses of litigation, pursuant to O.C.G.A. § 13-6-11.

78) Plaintiff has performed all conditions precedent to recover the damages sought in this Count or those conditions precedent have been waived, occurred, or otherwise satisfied.

WHEREFORE, Plaintiff demands a trial by jury and respectfully prays that the Court:

a. Assume jurisdiction over this action;

b. Enter judgment declaring that DOAS must pay Plaintiff's reasonable attorney's fees and expenses associated with the successful defense of the criminal action under the General Liability Agreement and O.C.G.A. § 45-9-1;

c. Enter judgment declaring that DOAS has, in bad faith, refused to pay a valid insurance claim under O.C.G.A. § 33-4-6 within sixty days, and is therefore liable to Plaintiff for an additional amount equal to fifty percent of the amount of the claim together with Plaintiff's attorney's fees and costs incurred in pursuing payment from Defendant of the funds due to

Plaintiff under the General Liability Agreement, including Plaintiff's attorney's fees and costs incurred in this action;

d. Enter judgment declaring that DOAS has acted in bad faith, been stubbornly litigious, and has caused Plaintiff unnecessary trouble and expense, pursuant to O.C.G.A. § 13-6-11, and is therefore liable to Plaintiff for his attorney's fees and costs incurred in pursuing payment from Defendant of the funds due to Plaintiff under the General Liability Agreement, including Plaintiff's attorney's fees and costs incurred in this action;

e. Award Plaintiff actual damages, expenses, and other economic losses suffered due to Defendant's breach of contract;

f. Award Plaintiff an additional amount equal to fifty percent of the liability of Defendant under the General Liability Agreement for its bad faith failure to pay a valid insurance claim, pursuant to O.C.G.A. § 33-4-6;

g. Award Plaintiff his attorneys' fees, costs, and expenses of litigation, pursuant to O.C.G.A. §§ 33-4-6, 13-6-11 and any other applicable law; and

h. Award Plaintiff such other and further relief as the Court deems just and proper.

Respectfully submitted this 1st day of February, 2024.

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