

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

GREAT AMERICAN ALLIANCE
INSURANCE COMPANY
310 East Fourth Street, 19S
Cincinnati, OH 45202

Plaintiff,

vs.

SUNLAND, INC.
42593 U.S. Rte. 70
Portales, NM 88130

Defendant.

: Case No.:

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: Judge:

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**COMPLAINT FOR DECLARATORY
JUDGMENT**

1. Plaintiff Great American Alliance Insurance Company (“Great American”) alleges as follows:

PARTIES

2. Great American is a corporation organized and existing under the laws of the State of Ohio, with its principal place of business in Cincinnati, Ohio.

3. Sunland, Inc. (“Sunland”) is a corporation organized and existing under the laws of the State of New Mexico, with its principal place of business in Portales, New Mexico.

JURISDICTION AND VENUE

4. Jurisdiction of this action is founded upon 28 U.S.C. § 1332, as the parties are citizens of different states, and the amount in controversy exceeds the sum of \$75,000, exclusive of interest and costs. An actual and justiciable controversy currently exists between Great American and Sunland subject to adjudication pursuant to 28 U.S.C. § 2201-02.

5. Venue is proper in the Southern District of Ohio pursuant to 28 U.S.C. § 1391(b)(2), in that a substantial part of the events giving rise to the claim occurred in this judicial district.

THE CONTROVERSY

6. Sunland is in the business of processing, manufacturing, and marketing nuts and nut butters. It sells its products directly to retailers as well as to food product manufacturers who then incorporate Sunland's products into their own to create new food products.

7. In September 2012, Sunland's products became the subject of a product recall due to suspected Salmonella contamination. Consequently, Sunland was forced to recall its peanut butter products, shelled and in-shell peanut products, and other nut butter products.

8. Prior to the recall, some Sunland customers had purchased Sunland products and sold them without incorporating them into other products. Other customers had incorporated Sunland products into other products.

9. Numerous Sunland customers have brought claims against Sunland for loss and damages as a result of the recalls. Sunland has sought defense and indemnity for these claims under insurance policies issued by Great American. At issue in this case is the extent to which these policies afford defense and indemnity coverage to Sunland for the claims against it associated with the recalls.

10. Great American issued Agribusiness Protection Policy No. AGB-315-24-24-00 to named insured Sunland for the policy period July 31, 2011 to July 31, 2012. The policy was renewed for the period July 31, 2012 to July 31, 2013, as Policy No. AGB-315-24-24-02. These policies (collectively referred to hereafter as the "Primary Policies") include commercial general liability insurance subject to limits of \$1,000,000 per occurrence, a products-completed operations aggregate limit of \$2,000,000, and a general aggregate limit (other than products-completed operations) of \$2,000,000.

11. Great American also issued two commercial umbrella liability policies to Sunland: Policy No. UMB 315-24-26-00, for the policy period July 31, 2011 to July 31, 2012, and Policy No. UMB 315-24-26-01 for the policy period July 31, 2012 to July 31, 2013 ("the Umbrella Policies").

12. The Primary Policies provide commercial general liability coverage pursuant to all of the terms, conditions, exclusions and limitations therein. Under Coverage A, Bodily Injury and Property Damage Liability, the Primary Policies provide in part:

**COVERAGE A BODILY INJURY AND PROPERTY DAMAGE
LIABILITY**

1. Insuring Agreement

- a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. 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” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result. But:
- (1)** the amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; 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 under Coverages **A** or **B** or medical expenses under Coverage **C**.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B**.

- b.** This insurance applies to “bodily injury” and “property damage” only if:
- (1)** the “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;
 - (2)** the “bodily injury” or “property damage” occurs during the policy period; . . .

* * *

2. Exclusions

This insurance does not apply to:

* * *

k. Damage to Your Product

“Property damage” to “your product” arising out of it or any part of it.

* * *

m. Damage to Impaired Property or Property Not Physically Injured

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

- (1) a defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or
- (2) a delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

n. Recall of Products, Work or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) “your product”;
- (2) “your work”; or
- (3) “impaired property”;

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

* * *

13. The Primary Policies define the terms “impaired property,” “occurrence,” “property damage,” and “your product” as follows:

8. **“Impaired property”** means tangible property, other than “your product” or “your work,” that cannot be used or is less useful because:

- a. it incorporates “your product” or “your work” that is known or thought to be defective, deficient, inadequate or dangerous; or
- b. you have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by the repair, replacement, adjustment or removal of “your product” or “your work” or your fulfilling the terms of the contract or agreement.

* * *

13. **“Occurrence”** means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

* * *

17. **“Property damage”** means:

- a. physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

* * *

21. **“Your product”:**

- a. Means:

- (1) any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
 - (a) you;
 - (b) others trading under your name; or
 - (c) a person or organization whose business or assets you have acquired; and
- (2) containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

- (1) warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your product”; and
- (2) the providing of or failure to provide warnings or instructions.

* * *

14. The insuring agreements, exclusions and definitions of the Umbrella Policies are substantially the same as those of the Primary Policies.

15. These policy sections, exclusions, and definitions apply to many of the claims for defense and indemnity being made by Sunland under the Great American policies.

16. Great American has reserved its rights to deny or limit coverage with respect to the claims submitted to it by Sunland to date.

FIRST CAUSE OF ACTION – DECLARATORY JUDGMENT: PROPERTY DAMAGE

17. Great American realleges, as if fully restated herein, each of the preceding paragraphs.

18. Great American contends that its duties to defend and/or indemnify Sunland for claims related to the Sunland recalls are limited, because not all of the claims asserted against Sunland are for damages because of “property damage” related to the Sunland recalls.

19. Great American is informed and believes that Sunland contends Great American is obligated to defend and indemnify it against all sums claimed by third parties for loss and damage in connection with the Sunland recalls, up to and including any or all policy limits provided in the Great American policies.

20. Great American therefore requests an order of the Court declaring the respective rights and duties of Great American and Sunland as to whether the third party claims related to the recall of Sunland products seek damages because of “property damage” as defined in the Great American policies.

SECOND CAUSE OF ACTION – DECLARATORY JUDGMENT:
DAMAGE TO YOUR PRODUCT

21. Great American realleges, as if fully restated herein, each of the preceding paragraphs.

22. Great American contends that its duties to defend and/or indemnify Sunland for claims related to the Sunland recalls are limited, by reason of the “Damage to Your Product” exclusion of the Primary Policies and Umbrella Policies.

23. Great American is informed and believes that Sunland contends Great American is obligated to defend and indemnify it against all sums claimed by third parties for loss and damage in connection with the Sunland recalls, up to and including any or all policy limits provided in the Great American policies.

24. Great American therefore requests an order of the Court declaring the respective rights and duties of Great American and Sunland as to the applicability of the “Damage to Your Product” exclusion to third party claims related to the recall of Sunland products.

THIRD CAUSE OF ACTION – DECLARATORY JUDGMENT: IMPAIRED PROPERTY

25. Great American realleges, as if fully restated herein, each of the preceding paragraphs.

26. Great American contends that its duties to defend and/or indemnify Sunland for claims related to the Sunland recalls are limited, by reason of the “Damage to Impaired Property or Property Not Physically Injured” exclusion of the Primary Policies and Umbrella Policies.

27. Great American is informed and believes that Sunland contends Great American is obligated to defend and indemnify it against all sums claimed by third parties for loss and damage in connection with the Sunland recalls, up to and including any or all policy limits provided in the Great American policies.

28. Great American therefore requests an order of the Court declaring the respective rights and duties of Great American and Sunland as to the applicability of the “Damage to Impaired Property or Property Not Physically Injured” exclusion to third party claims related to the recall of Sunland products.

FOURTH CAUSE OF ACTION – DECLARATORY JUDGMENT: RECALL OF PRODUCTS

29. Great American realleges, as if fully restated herein, each of the preceding paragraphs.

30. Great American contends that its duties to defend and/or indemnify Sunland for claims related to the Sunland recalls are limited, by reason of the “Recall of Products, Work or Impaired Property” exclusion of the Primary Policies and Umbrella Policies.

31. Great American is informed and believes that Sunland contends Great American is obligated to defend and indemnify it against all sums claimed by third parties for loss and damage in connection with the Sunland recalls, up to and including any or all policy limits provided in the Great American policies.

32. Great American therefore requests an order of the Court declaring the respective rights and duties of Great American and Sunland as to the applicability of the “Recall of Products, Work or Impaired Property” exclusion to third party claims related to the recall of Sunland products.

RELIEF REQUESTED

WHEREFORE, Great American prays for judgment and relief as follows:

- a. that this Court declare the respective rights and duties of Great American and Sunland in connection with third party claims related to the recall of Sunland products;
- b. that the Court award Great American its costs incurred herein; and
- c. that the Court award such other and further relief as the Court deems just and proper.

Dated: September 24, 2013

Respectfully submitted,

/s/ Gregory A. Harrison
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