

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE**

LIBERTY MUTUAL FIRE INSURANCE	:	
COMPANY AND LIBERTY INSURANCE	:	
CORPORATION,	:	
	:	Case No:
Plaintiffs,	:	
v.	:	
	:	DECLARATORY JUDGMENT
SOCLEAN, INC.,	:	COMPLAINT
	:	
Defendant.	:	

Plaintiffs Liberty Mutual Fire Insurance Company and Liberty Insurance Corporation (collectively “Liberty”), by and through its undersigned counsel, for its Complaint against SoClean, Inc. (“SoClean”) alleges as follows:

NATURE OF ACTION

1. This is an insurance coverage action seeking declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202. Liberty seeks a determination that it has no obligation to defend or indemnify SoClean under insurance policies issued by Liberty (the “Liberty Policies”) in regard to multiple statewide class action lawsuits against SoClean (the “Underlying Lawsuits”) alleging misrepresentations, fraudulent omissions, breach of contract and breaches of state consumer protection laws in connection with the company’s manufacture, marketing, and sale of CPAP cleaning devices.¹

2. Liberty’s determination that no defense or indemnity obligation exists under its policies is based on a multitude of factors, including that the claims and damages alleged in the Underlying Lawsuits (1) fail to satisfy the Liberty Policies’ “occurrence”, “bodily injury”, “property damage”, and/or “personal and advertising injury” definitions, (2) were known by

¹ CPAP (Continuous Positive Airway Pressure) devices are used to treat obstructive sleep apnea and other respiratory conditions by blowing air into the user’s airways, usually at night while asleep. As generally alleged, SoClean’s devices work by generating ozone to sterilize and deodorize CPAP machines at concentrations greater than what can be safely tolerated by users and at levels destructive to the CPAP equipment itself.

SoClean to have occurred or to have begun to occur prior to the June 4, 2018 inception date of Liberty's coverage and are therefore uncovered, and (3) are otherwise barred by the Policies' pollution exclusions, including provisions applying the exclusion "regardless of whether ... such **pollutant** [here, ozone] has any function in [SoClean's] business."²

I. THE PARTIES

3. Plaintiff Liberty Mutual Fire Insurance Company is an insurance company organized and existing under the laws of the State of Wisconsin, with its principal place of business in Boston, Massachusetts.

4. Plaintiff Liberty Insurance Corporation is a company organized under the laws of the State of Illinois, with its principal place of business in Boston Massachusetts.

5. Defendant SoClean, Inc. ("SoClean") is a Delaware corporation with its principal place of business in Peterborough, New Hampshire.

II. JURISDICTION AND VENUE

6. This declaratory judgment action is brought pursuant to 28 U.S.C. §§ 2201 and 2202, and Rule 57 of the Federal Rules of Civil Procedure.

7. An actual justiciable controversy exists between Liberty and SoClean within the meaning of 28 U.S.C. § 2201 regarding whether Liberty has an obligation to defend and indemnify SoClean under the Liberty Policies.

8. This Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) because the amount in controversy exceeds the sum or value of \$75,000.00, exclusive of any deductible obligations, interest and costs, and the suit is between citizens of different states.

² Because no defense or indemnity obligation exists under its policies, Liberty also seeks an order requiring the reimbursement by SoClean of defense costs paid or incurred by Liberty on SoClean's behalf from the filing date of this action forward.

9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a).

10. This action is timely brought pursuant to New Hampshire’s declaratory judgment statute, NH Rev Stat § 491:22 and is within 6 months of the September 3, 2021 filing date of the initial complaints giving rise to the coverage dispute at issue.³

III. UNDERLYING LAWSUITS

11. This action addresses insurance coverage for twenty-six class action lawsuits brought against SoClean to date (collectively the “Underlying Lawsuits”), consisting of:

(a) Seventeen class action lawsuits in ten states containing similar allegations of bodily injury (the “BI Lawsuits”), a schedule of which is attached hereto as Exhibit A; and

(b) Nine class action lawsuits in nine states containing similar allegations of property damage (the “PD Lawsuits”), a schedule of which is attached hereto as Exhibit B.

12. Liberty currently is providing a defense to SoClean in the BI and PD Lawsuits pursuant to reservation of rights letters dated January 13, 2022, copies of which are attached hereto as Exhibits C and D. A representative BI Lawsuit complaint (the “*Sakalarios* Compl.”) is attached for reference as Exhibit E and a sample PD Lawsuit complaint (the “*Blissett* Compl.”) as Exhibit F.⁴

General Allegations

³ Two class actions were commenced on September 3, 2021: *Sakalarios v. SoClean, Inc.*, filed in the United States District Court for the Southern District of Mississippi (Case No.: 2:21-cv-114-HSO-JCG), and *Hebert v. SoClean*, filed in the United States District Court for the Western District of Louisiana (Case No.: 6:21-cv-03225).

⁴ Liberty’s description of the Underlying Lawsuits is for summary purposes only and the Court respectfully is referred to the underlying class action complaints for their complete allegations and claims.

13. Included generally in the Underlying Lawsuits are allegations that SoClean's devices sanitize CPAP machines by generating ozone, described as a "harsh chemical" and "an unstable toxic gas" and circulating it throughout the user's CPAP equipment. *Sakalarious Compl.* at ¶s 1 - 2, Ex. E.

14. While the claims for relief vary among the BI and PD Lawsuits, the underlying plaintiffs commonly allege that since approximately 2012 SoClean has used false and misleading representations about its devices to market its products by, among other things:

- a. Failing to disclose that its devices emit ozone;
- b. Falsely representing that its devices use "activated oxygen" to clean CPAP machines;
- c. Using the phrase "activated oxygen" to "mislead consumers into believing that [SoClean's products] use a benign form of oxygen to clean CPAP machines rather than a harsh gas that is generally only suitable for commercial sanitization under highly controlled conditions";
- d. Falsely marketing its devices as "safe" and "healthy" when they instead "generate toxic ozone gas at levels that substantially exceed federal regulations";
- e. Falsely representing that its devices use "no water or chemicals" or "no harsh chemicals ... despite using ozone gas – a harsh chemical that causes respiratory problems in humans"; and
- f. Falsely representing "that its devices are 'sealed' such that 'activated oxygen' (*i.e.* ozone) does not escape the devices."⁵

15. Plaintiffs allege that many of the claimed false and misleading statements and omissions occurred in the 2014 to 2017 time period and thus pre-date Liberty's coverage.

Specifically, plaintiffs allege that:

- a. "Since at least 2015 SoClean has used a promotional brochure advertising the SoClean devices that does not mention ozone and states:

⁵ See generally *Sakalarious Compl.* (Ex. E hereto) at ¶ 2, 97, 98, 99, 100, 115; *Blisset Compl.* (Ex. F hereto) at ¶ 23, 25, 30, 32.

“SoClean’s activated oxygen completely sanitizes your mask, hose, and reservoir without any water or chemicals.”

- b. “The 2014 and 2017 online versions of the SoClean 2 User Guide never mentions ozone and state that SoClean disinfects with ‘activated oxygen.’”
- c. “Since at least March 28, 2016, SoClean’s website homepage has read: ‘SoClean kills 99.9% of CPAP germs and bacteria in your mask, hose and reservoir with no disassembly, water, and no chemicals...’”.
- d. “SoClean has aired the television commercial ‘CPAP Cleaner and Sanitizer’ at least 22,058 times nationwide since 2016 representing that the SoClean devices use ‘no harsh chemicals’ to clean CPAP machines.”
- e. “A brochure advertising the SoClean and SoClean 2 Go [products] used since 2015 reads: ‘The SoClean makes it easy for any CPAP user to safely and naturally clean and sanitize their equipment on a daily basis.’”
- f. “The 2017 online version of the SoClean 2 User Guide states: ‘Additionally, any excess activated oxygen passes through a filter which converts it back to regular oxygen before release.’”
- g. The 2014 online version of the SoClean 2 User Guide states [in response to a the question ‘[i]s the SoClean harmful to be or the environment?’] “No. The activated oxygen generator is always kept at a safe level and never reaches the outside environment.”

See Sakalarios Compl. at ¶s 104, 116, 120, 138.

BI Lawsuit Claims

16. Plaintiffs in the BI Lawsuits allege that SoClean’s products “did not conform to these advertisements ... representations and omissions,” that SoClean’s products “are not safe, healthy, and appropriate for human use,” that plaintiffs relied on these representations and omissions when purchasing their SoClean devices, and that had they known of the “risk posed by SoClean devices generating unsafe levels of toxic gas, which is then pumped into their CPAP machines and their bedrooms” this would have been “material to their purchasing decisions.”

Sakalarios Compl. at ¶ 3, 146, 171.

17. As alleged, SoClean’s “false advertising,” including the above-referenced pre-2018 examples, led consumers “to purchase SoClean’s products when they would not otherwise do so” and “have actually deceived and harmed consumers.” *Sakalarios* Compl. at ¶ 144, 150.

18. Plaintiffs allege that “SoClean was aware, [or] should have been aware, of the dangerous health effects of its products” when marketing and selling them to consumers, but did not “warn [plaintiffs] that they were at risk of developing adverse health effects as a result of the dangerous ozone generated by, and used in, SoClean’s products.” *Sakalarios* Compl. at ¶ 173.

19. Plaintiff’s further allege that in its capacity as a manufacturer, marketer and advertiser of its SoClean products, “SoClean had exclusive knowledge and notice of the fact that its products did not conform to the affirmations of facts and promises” regarding their safety and healthful benefits. *Sakalarios* Compl. at ¶176.

PD Lawsuit Claims

20. Plaintiffs in the PD Lawsuits allege that they too relied upon these and similar false and misleading representations and omissions when purchasing the SoClean devices, claiming that the ozone generated together with the device’s manner of use have damaged the component parts of their CPAP machines, rendering the equipment “essentially worthless.” *Blisset* Compl. at ¶31.

Ozone’s “Release” and/or “Escape” to the Environment

21. Included generally in the Underlying Lawsuits are allegations that during and after a cleaning cycle, ozone generated by the SoClean device is “released” and/or “escapes” in two ways: First, because CPAP machines are not airtight, the ozone generated as a function of the SoClean device’s use “can freely escape through the CPAP’s air-intake opening” into areas where the device is located, including the user’s bedroom. Second, ozone remains in the CPAP mask,

hose, and tank after a cleaning cycle, causing “the user to inhale this leftover gas through the face mask as air from the CPAP machine flows into the mask. *Sakalarios* Compl. ¶¶ 74 – 76.

22. Statements confirming that the ozone gas’s release and/or escape from the SoClean device is central to the Underlying Lawsuits’ claims, include allegations:

- a. That “the SoClean devices circulate ozone through the CPAP machine which is then released into the ambient air or breathed by the CPAP user.”
- b. That “[a] device that releases toxic gas into a user’s bedroom at levels exceeding federal regulations is not ‘safe’ or ‘healthy’;
- c. That “[a]nyone in proximity to the devices can inhale the escaped ozone”;
- d. That in still air at room temperature, once released into the atmosphere it can take up to twenty-five ours for ozone levels to reduce by half, and ozone continues to break down at this rate until it dissipates;
- e. That the SoClean “filter does not prevent ozone from being emitted into the environment” and “does not prevent ozone from escaping into the environment;” and
- f. That “the foregoing false claims deceive consumers into believing that the SoClean devices ... do not release ozone into the atmosphere ...”.
See e.g. Sakalarios Compl. ¶¶ 41, 78, 119, 130 - 131, 137, 142.

Pre-Coverage Consumer Complaints

23. Included generally in the BI Lawsuits are allegations quoting from the FDA’s Maude database of consumer complaints about SoClean products and reporting on the adverse effects of ozone exposure, with entries dating from September 2016 onward. These include data base entries on September 10, 2016, May 1, 2017 and March 12, 2018, all of which pre-date the June 4, 2018 effective date of Liberty’s coverage. *See e.g. Sakalarios* Compl. at ¶¶ 93 a., b., c. and d.

24. As alleged, the particulars of these adverse incident reports “attributable to the adverse effects of unwitting ozone exposure” occurring prior to the inception date of Liberty’s policies, includes entries:

- a. **On September 10, 2016** that after cleaning the CPAP machine as directed, the complainant “slept with the cleaned machine. The smell of ozone was strong. The mfr calls ozone activated oxygen. After about 6 hours, I experienced a severe asthma attack which I have never had before.” *Sakalarios Compl.* ¶ 93 a.
- b. **On May 1, 2017** that “there was ozone residue left in my cpap after using the soclean, and that ozone residue burned my sinuses and lungs. This product is hazardous to people’s respiratory (sic) systems and it causes pain. It caused me severe pain.” *Sakalarios Compl.* ¶ 93 d.
- c. **On March 12, 2018** that “upon using machine a strong odor was noted on mask ... like the ocean smell ... I then found out that they used ozone to sanitize the cpap machine ... I ended up in an urgent care center today for [an] asthma attack.” *Sakalarios Compl.* ¶ 93 b.
- d. **On March 12, 2018** that “after approximately 3 months of using soclean 2 cpap cleaner I noticed I was getting sick, started having chest pains for short periods of time each day and felt tired all the time. After research of the product, found it uses ozone to disinfect and found I had most of the symptoms of excess ozone in my system.” *Sakalarios Compl.* ¶ 93 c.

25. Upon information and belief, these entries (and potentially other publicly available complaints alluded to by plaintiffs), establish that bodily injuries caused by SoClean’s devices had either occurred or had begun to occur before the earliest date of Liberty’s coverage on June 4, 2018.

Summary of Legal Theories Alleged

26. While the Counts against SoClean vary slightly among the BI Lawsuits, they include claims for economic damage based on breach of express warranty, breach of implied warranty of merchantability, fraudulent misrepresentation, fraud by omission, negligent misrepresentation, unjust enrichment, failure to warn and medical monitoring claims.

27. The PD Lawsuits contain similar allegations relating to SoClean’s false and misleading representations in the marketing of its CPAP cleaning devices, claiming that the devices damaged the component parts of their CPAP machines, rendering them useless.

28. While the Counts against SoClean vary slightly among the PD Lawsuits, they include claims for economic damage based on breach of contract, breach of warranty, unjust enrichment, and fraudulent misrepresentation. *See Blisset Compl* at ¶¶ 52, 57, 62, 74.

IV. INSURANCE POLICIES

A. The Primary Policies

29. Liberty Mutual Fire Insurance Company issued Commercial General Liability Policy Number TB2-Z11-B85631-028 to SoClean, Inc. for the policy period June 4, 2018 to June 4, 2019 (the “18-19 Primary Policy”). Liberty Mutual Fire Insurance Company also issued Commercial General Liability Policy Number TB7-Z11-B85661-029 for the policy period June 4, 2019 to June 4, 2020 (the “19-20 Primary Policy”) (collectively, with the 18-19 Primary Policy, the “Primary Policies”). The Primary Policies, copies of which are attached hereto as Exhibits G and H, each have limits of \$1 million each occurrence, \$2 million in the general aggregate.

30. In relevant part, the insuring agreement of the Primary Policies provides with respect to Coverage A (bodily injury and property damage):

- 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 damage. 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. . . .
- b. This insurance applies to “bodily injury” and “property damage” only if:

1. The “bodily injury” or “property damage” is caused by an “occurrence”⁶ that takes place in the “coverage territory”;
 2. The “bodily injury” or “property damage” occurs during the policy period; and
 3. Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no “employee” authorized by you to give or receive notice of an “occurrence” or claim, knew that “bodily injury” or “property damage” had occurred, in whole or in part. If such a listed insured or authorized “employee” knew, prior to the policy period, that the “bodily injury” or “property damage” occurred, then any continuation, change, or resumption of such “bodily injury” or “property damage” during or after the policy period will be deemed to have been known prior to the policy period.
...
- d. “Bodily injury” or “property damage” will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is an Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim:
1. Reports all, or any part, of the “bodily injury” or “property damage” to us or any other insurer;
 2. Receives a written or verbal demand or claim for damages because of the “bodily injury” or “property damage”; or
 3. Becomes aware by any other means that “bodily injury” or “property damage” has occurred or has begun to occur.

31. In connection with Coverage Part A, the Primary Policies (as modified by a Total Pollution Exclusion Endorsement) contain a pollution exclusion that provides:

This insurance does not apply to:

f. Pollution

1. “Bodily injury” or “property damage” which would not have occurred in whole or in part but for the actual, alleged, or threatened

⁶ Both of the Primary Policies define “occurrence” to mean:

- a. With respect to “bodily injury” or “property damage”, an accident, including continuous or repeated exposure to substantially the same general harmful conditions; or
- b. With respect to “personal and advertising injury”, an offense or series of related offenses.

discharge, dispersal, seepage, migration, release or escape of ‘pollutants’⁷ at any time.

32. With respect to Coverage Part B (personal and advertising injury liability) the Primary Policies’ insuring agreement provides, in relevant part:

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “personal and advertising injury”⁸ 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 “personal and advertising injury” to which this insurance does not apply. . . .
- b. This insurance applies to “personal and advertising injury” caused by an offense arising out of your business, but only if the offense was committed in the “coverage territory” during the policy period.

33. In connection with Coverage Part B, the Primary Policies contain exclusions that provide in relevant part:

2. Exclusions

This insurance does not apply to:

b. Material Published with Knowledge of Falsity

⁷ Both of the Primary Policies define “pollutants” to mean “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste. Waste includes materials to be recycled, reconditioned or reclaimed.”

⁸ Both of the Primary Policies define “personal and advertising injury” (as modified by the Personal and Advertising Injury Redefined – Definition of Publication Endorsement) to mean “injury, including consequential ‘bodily injury’ arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral or written ‘publication’ directly to the public at large of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services;
- e. (1) Oral or written ‘publication’ directly to the public at large of material that violates a person’s right of privacy; (2) Oral or written ‘publication’ of material that violates a person’s right of privacy by misappropriation of that person’s name or likeness.
- f. The use of another’s advertising idea in your ‘advertisement’; or
- g. Infringing upon another’s copyright, trade dress or slogan in your ‘advertisement.’”

“Personal and advertising injury” arising out of oral or written publication, in any manner, of material, if done by or at the direction of the insured with knowledge of its falsity.

c. Material Published Prior to Policy Period

“Personal and advertising injury” arising out of oral or written publication, in any manner, of material whose first publication took place before the beginning of the policy period.

g. Quality of Performance of Goods – Failure to Conform to Statements

“Personal and advertising injury” arising out the failure of goods, products, or services to conform with any statement of quality or performance made in your “advertisement”.

m. Pollution

“Personal and advertising injury” arising out of the actual or alleged or threatened discharge, dispersal, seepage, migration, release or escape of “pollutants” at any time.

34. Additionally, the Non-Cumulation of Liability (Same Occurrence) Endorsement in the Primary Policies provides, in relevant part:

1. The following is added to Paragraph **5.** of Section **III** – Limits of Insurance:

If one “occurrence” causes “bodily injury” and/or “property damage” during the policy period and during the policy period of one or more prior and/or future liability policy(ies) issued to you by us, then this policy’s Each Occurrence Limit will be reduced by the amount of each payment made by us under the other policy(ies) because of such “occurrence”.

B. The Umbrella Policies

35. Liberty Insurance Corporation issued Commercial Umbrella Liability Policy Number TH7-Z11-B85631-068 to SoClean, Inc. for the policy period June 4, 2018 to June 4, 2019 (the “18-19 Umbrella Policy”). Liberty Insurance Corporation also issued Commercial Umbrella Liability Policy Number TH7-Z11-B85631-069 for the policy period June 4, 2019 to June 4, 2020 (the “19-20 Umbrella Policy”) (collectively, with the 18-19 Umbrella Policy, the “Umbrella

Policies”). The Umbrella Policies, copies of which are attached hereto as Exhibits I and J, each have limits of \$20 million each occurrence, \$20 million in the general aggregate, and are subject to a \$10,000 self-insured retention.

36. The insuring agreement of the 18-19 Umbrella Policy⁹ provides, in relevant part:

a. We will pay those damages in excess of the “retained limit” that the insured becomes legally obligated to pay as damages because of:

- (1) “Bodily injury”;
- (2) “Property damage”; or
- (3) “Personal and advertising injury”;¹⁰

To which this insurance applies. The amount we will pay for damages is limited as described in **SECTION III – LIMITS OF INSURANCE. . . .**

c. This insurance applies only if:

- (1) The “bodily injury” or “property damage” occurs during the policy period or the “personal and advertising injury” is caused by an offense arising out of your business during the policy period;
- (2) The “bodily injury” or “property damage” or “personal and advertising injury” is caused by an “occurrence”¹¹ that takes place anywhere in the world. . . .

⁹ The insuring agreement of the 19-20 Umbrella Policy is formatted differently, but contains the same material provisions as the 18-19 Umbrella Policy. The Court respectfully is referred to the 19-20 Umbrella Policy for a complete statement of its contents.

¹⁰ The 18-19 Umbrella Policy contains the same definition of “personal and advertising injury” as in the Primary Policies. The 19-20 Umbrella Policy contains a similar definition, except that the offenses defined in subparagraphs (d) and (e) are modified in ways not material here.

¹¹ In the 18-19 Umbrella Policy, “occurrence” is defined to mean:

- a. With respect to “bodily injury” or “property damage”, an accident, including continuous or repeated exposure to substantially the same general harmful conditions; or
- b. With respect to “personal and advertising injury”, an offense or series of related offenses.

In the 19-20 Umbrella Policy, occurrence is defined in relevant part to mean, with respect to:

- a. **Bodily injury** or **property damage**, an accident, including continuous or repeated exposure to substantially the same general harmful conditions. All such exposure to substantially the same general harmful conditions will be deemed to arise out of one **occurrence**;
- b. **Personal and advertising injury**, an offense or series of offenses. All damages that arise from the same act, publication or general conditions are considered to arise out of the same **occurrence**,

- (3) Prior to the policy period, no insured listed under Paragraph 1. of SECTION II – WHO IS AN INSURED and no “employee” authorized by you to give or receive notice of an “occurrence” or claim, knew that the “bodily injury” or “property damage” had occurred, in whole or in part.
- d. “Bodily injury” or “property damage” will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. Of SECTION II – WHO IS AN INSURED or any “employee” authorized by you to give or receive notice of an “occurrence” or claim:
- (1) Reports all, or any part of, such “bodily injury” or “property damage” to us or any other insurer;
 - (2) Receives a written or oral demand or claim for damages because of such “bodily injury” or “property damage”; or
 - (3) Becomes aware by any other means that “bodily injury” or “property damage” has occurred or has begun to occur.

If such a listed insured or authorized “employee” knew, prior to the policy period, that the “bodily injury” or “property damage” had occurred, then any continuation, change or resumption of such “bodily injury” or “property damage” during or after the policy period will be deemed to have been known prior to the policy period.

37. As to exclusions, the Umbrella Policies provide, in relevant part:

2. Exclusions

This insurance does not apply to:

i. Pollution (as modified by the Total Pollution Exclusion Endorsement)

- (1) “Bodily injury” “property damage” or “personal and advertising injury” which would not have occurred in whole or in part but for the actual, alleged, potential or threatened discharge, dispersal, seepage, migration, release or escape of “pollutants”¹², at any time, whether included in a product or otherwise.
- (2) “Pollution cost or expense”.

regardless of the frequency or repetition thereof, the number or kind of media used, or the number of claimants; . . .

¹² The definition of “Pollutants” is the same in both Umbrella Policies. It is defined to mean “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes material to be recycled reconditioned or reclaimed.

This exclusion **1**. Applies regardless of whether such discharge, dispersal, seepage, migration, release or escape occurs inside or outside a building or whether such ‘pollutant’ has any function in your business, operations, premises, site or location.

Damages First Occurring Prior to Policy Period Exclusion (as modified via endorsement)

This insurance does not apply to “bodily injury” or “property damage” within the “products-completed operations hazard” if the injury or damage first occurred prior to the effective date of this policy.

q. Personal and Advertising Injury

“Personal and advertising injury”:

- (2) Arising out of the oral or written “publication” of material, if done by or at the direction of the insured with knowledge of its falsity;
- (3) Arising out of the oral or written “publication” of material whose content, in the same or substantially the same form, was published, in any medium, before the beginning of the policy period;
- (7)¹³ Arising out of:
 - (d) False advertising, false marketing, false designation or origin or authenticity. . . .

38. Additionally, the Non-Cumulation of Liability (Same Occurrence) Endorsement in the Umbrella Policies provides, in relevant part:

- 1. The following is added to Paragraph **4**. of Section **III** – Limits of

Insurance:

If one **occurrence** causes **bodily injury** and/or **property damage** during the policy period and during the policy period of one or more prior and/or future umbrella or excess liability policy(ies) issued to you by us, then this policy’s Each Occurrence Limit will be reduced by the amount of each payment made by us under the other policy(ies) because of such **occurrence**. This paragraph will not apply to insurance specifically written as excess over this policy.

¹³Sub-paragraph (7) of this exclusion only exists in the 18-19 Umbrella Policy.

COUNT 1

DECLARATORY JUDGMENT – UNDERLYING LAWSUITS

39. Liberty hereby incorporates and re-alleges the allegations of paragraphs 1-38 as if fully set forth herein.

40. There exists a genuine and bona fide dispute, and an actual controversy and disagreement, between Liberty and SoClean with regard to whether Liberty has an obligation under the Liberty Policies to defend or indemnify SoClean in the Underlying Lawsuits.

41. Pursuant to the Uniform Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, Liberty in good faith requests that the Court declare the following as to the Underlying Lawsuits under the Liberty Policies:

A. The BI Lawsuits

That the Court declare:

42. That Liberty has no obligation under the Primary Policies Coverage A to defend or indemnify SoClean because the definition of “bodily injury” have not been met, and to the extent the definition is met, there is no coverage for any “bodily injury” that did not occur during the applicable Policy period to which this insurance applies.

43. That to the extent notice of any “bodily injury” was reported, received or known by SoClean prior to the June 4, 2018 inception of Liberty’s coverage, any continuation, change or resumption of such “bodily injury” during or after the applicable Policy period was known prior to such Policy period and is excluded.

44. That Liberty has no obligation under the Primary Policies Coverage A to defend or indemnify SoClean with respect to Counts in the BI Lawsuit complaints alleging Breach of Express Warranty, Breach Of Implied Warranty Of Merchantability, Fraudulent Representation,

Fraud By Omission, Negligent Misrepresentation, Failure to Warn, and/or Unjust Enrichment, because there is no alleged “bodily injury” in these Counts to which this insurance applies.

45. That Liberty has no obligation under the Primary Policies Coverage A to defend or indemnify SoClean with respect to Counts in the BI Lawsuit complaints alleging Breach of Express Warranty, Breach Of Implied Warranty Of Merchantability, Fraudulent Representation, Fraud By Omission, Negligent Misrepresentation, Failure to Warn, and/or Unjust Enrichment, because there is no alleged “occurrence” to which this insurance applies with respect to any of them.

46. That pursuant to the Primary Policies “Non-Cumulation Of Liability Endorsement” any payment made under the Primary Policies because of an “occurrence” that causes “bodily injury” and/or “property damage” shall be reduced by any similar payment by Liberty under any other policy.

47. That Liberty has no obligation under the Primary Policies to defend or indemnify SoClean because coverage is excluded by the Policies’ “Pollution” exclusion.

48. That Liberty has no obligation under the Primary Policies Coverage B to defend or indemnify SoClean because there is no alleged damages sought in the BI Lawsuits to which this insurance applies.

49. That Liberty has no obligation under the Primary Policies Coverage B to defend or indemnify SoClean because there is no alleged “personal injury” in the BI Lawsuits to which this insurance applies.

50. If the Court finds any obligation under the Primary Policies Coverage B to defend or indemnify SoClean on account of a finding that “personal injury” has been alleged or otherwise has “occurred”, that Liberty has no obligation under Primary Policies Coverage B to defend or

indemnify SoClean because coverage is excluded by the Primary Policies Coverage B “Material Published with Knowledge of Falsity”, “Material Published Prior to Policy Period”, “Quality of Performance of Goods – Failure to Conform to Statements”, and “Pollution” exclusions.

51. That Liberty has no obligation under the Umbrella Policies to defend or indemnify SoClean because the definition of “bodily injury” has not been met, and to the extent the definition is met, there is no coverage for any “bodily injury” that did not occur during the applicable Policy period to which this umbrella insurance applies.

52. That to the extent notice of any “bodily injury” was reported, received or known by any insured prior to June 4, 2016, any continuation, change or resumption of such “bodily injury” during or after the applicable Policy period was known prior to such Policy period and is excluded.

53. That Liberty has no obligation under the Umbrella Policies to defend or indemnify SoClean with respect to any of the Counts in the BI Lawsuit complaints alleging Breach of Express Warranty, Breach Of Implied Warranty Of Merchantability, Fraudulent Representation, Fraud By Omission, Negligent Misrepresentation, Failure to Warn, and/or Unjust Enrichment, because there is no alleged “bodily injury” in these Counts to which this umbrella insurance applies.

54. That Liberty has no obligation under the Umbrella Policies to defend or indemnify SoClean with respect to Counts in the BI Lawsuit complaints alleging Breach of Express Warranty, Breach Of Implied Warranty Of Merchantability, Fraudulent Representation, Fraud By Omission, Negligent Misrepresentation, and/or Unjust Enrichment, because there is no alleged “occurrence” to which this umbrella insurance applies with respect to any of them.

55. That pursuant to the Umbrella Policies “Non-Cumulation Of Liability Endorsement” any payment made under the Umbrella Policies because of an “occurrence” that

causes “bodily injury” and/or “property damage” shall be reduced by any similar payment by Liberty under any other policy.

56. That Liberty has no obligation under the Umbrella Policies to defend or indemnify SoClean because coverage is excluded by the Umbrella Policies’ “Pollution” exclusion.

57. That Liberty has no obligation under the Umbrella Policies Coverage B to defend or indemnify SoClean because there is no alleged damages sought in the BI Lawsuits to which this insurance applies.

58. That Liberty has no obligation under the Umbrella Policies Coverage B to defend or indemnify SoClean because there is no alleged “personal injury” in the BI Lawsuits to which this insurance applies.

59. If the Court finds any obligation under the Umbrella Policies Coverage B to defend or indemnify SoClean on account of a finding that “personal injury” has been alleged or otherwise has “occurred”, that Liberty has no obligation under Umbrella Policies Coverage B to defend or indemnify SoClean because coverage is excluded by the Umbrella Policies Coverage B “oral or written ‘publication’ of material, if done by or at the direction of the insured with knowledge of its falsity”, “oral or written ‘publication’ of material whose content, in the same or substantially the same form, was published, in any medium, before the beginning of the policy period”, “false advertising” and “false marketing” exclusions.

60. That Liberty has no obligation under the Liberty Policies to defend or indemnify SoClean, to the extent that the relief sought in the BI Lawsuits is injunctive relief, including temporary and permanent injunctions, rescission of contract, specific performance of obligations under contract, and/or disgorgement of profits to which this insurance does not apply.

B. The PD Lawsuits

As to the PD Lawsuits:

61. That to the extent notice of any “property damage” was reported, received or known by any insured prior to June 4, 2016, any continuation, change or resumption of such “bodily injury” or “property damage” during or after the applicable Policy period was known prior to such Policy period and is excluded.

62. That Liberty has no obligation under the Primary Policies Coverage A to defend or indemnify SoClean with respect to any of the Counts in the PD Lawsuit complaints seeking damages for: Breach of Contract, Unjust Enrichment, Breach of Warranty, Fraudulent Misrepresentation, and/or Violation of Consumer Protection Acts, because there is no alleged “occurrence” to which this insurance applies with respect to any of them.

63. That pursuant to the Primary Policies “Non-Cumulation Of Liability Endorsement” any payment made under the Primary Policies because of an “occurrence” that causes “bodily injury” and/or “property damage” shall be reduced by any similar payment by Liberty under any other policy.

64. That Liberty has no obligation under the Primary Policies to defend or indemnify SoClean because coverage is excluded by the Primary Policies’ “Pollution” exclusion.

65. That Liberty has no obligation under the Primary Policies Coverage B to defend or indemnify SoClean because there are no alleged damages sought in the PD Lawsuits to which this insurance applies.

66. That Liberty has no obligation under the Primary Policies Coverage B to defend or indemnify SoClean because there is no alleged “personal injury” in the PD Lawsuits to which this insurance applies.

67. That Liberty has no obligation under the Umbrella Policies Coverage A to defend or indemnify SoClean because the definition of “property damage” has not been met, and to the extent the definition is met, there is no coverage for any “property damage” that did not occur during the applicable Policy period to which this insurance applies.

68. That to the extent notice of any “property damage” was reported, received or known by any insured prior to June 4, 2016, any continuation, change or resumption of such “property damage” during or after the applicable Policy period was known prior to such Policy period and is excluded.

69. That Liberty has no obligation under the Umbrella Policies to defend or indemnify SoClean with respect to any of the Counts in the PD Lawsuit complaints seeking damages for: Breach of Contract, Unjust Enrichment, Breach of Warranty, Fraudulent Misrepresentation, and/or Violation of Consumer Protection Acts, because there is no alleged “occurrence” to which this insurance applies with respect to any of them.

70. That pursuant to the Umbrella Policies “Non-Cumulation Of Liability Endorsement” any payment made under the Umbrella Policies because of an “occurrence” that causes “bodily injury” and/or “property damage” shall be reduced by any similar payment by Liberty under any other policy.

71. That Liberty has no obligation under the Umbrella Policies to defend or indemnify SoClean because coverage is excluded by the Umbrella Policies’ “Pollution” exclusion.

72. That Liberty has no obligation under the Umbrella Policies Coverage B to defend or indemnify SoClean because there is no alleged damages sought in the PD Lawsuits to which this insurance applies.

73. That Liberty has no obligation under the Umbrella Policies Coverage B to defend or indemnify SoClean because there is no alleged “personal injury” in the PD Lawsuits to which this insurance applies.

74. That Liberty has no obligation under the Liberty Policies to defend or indemnify SoClean, to the extent that the relief sought in the PD Lawsuits is injunctive relief, including temporary and permanent injunctions, rescission of contract, specific performance of obligations under contract, and/or disgorgement of profits to which this insurance does not apply.

PRAYER FOR RELIEF

WHEREFORE, Liberty prays as follows:

1. For a declaration as to the Liberty Policies, and each of them, that Liberty has no obligation to defend SoClean, with respect to the Underlying Lawsuits, as attached hereto, including the claims for alleged Breach of Express Warranty, Breach Of Implied Warranty Of Merchantability, Fraudulent Representation, Fraud By Omission, Negligent Misrepresentation, Medical Monitoring, Breach of Consumer Protection Act(s) and/or Unjust Enrichment;

2. For a declaration as to the Liberty Policies, and each of them, that Liberty has no obligation to indemnify SoClean, with respect to the Underlying Lawsuits, as attached hereto, including the claims for alleged Breach of Express Warranty, Breach Of Implied Warranty Of Merchantability, Fraudulent Representation, Fraud By Omission, Negligent Misrepresentation, Medical Monitoring, Breach of Consumer Protection Act(s) and/or Unjust Enrichment;

3. That in the event of a finding that no obligation to defend SoClean, with respect to the Underlying Lawsuits exists under the Liberty Policies, that an order issue requiring SoClean to reimburse Liberty for any defense costs paid or incurred by Liberty on account of Liberty’s defense of Underlying Lawsuits from the date of the filing of this action forward; and

4. For such other and further relief this Court may deem just and proper.

REQUEST FOR JURY TRIAL

Liberty hereby requests a trial by jury on all claims for which it is available.

DATED March 2, 2022

Respectfully submitted,

By: /s/ Doreen F. Connor
Doreen F. Connor, #421
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