

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

IN RE: SMITTY’S/CAM2 303 TRACTOR) MDL No. 2936
HYDRAULIC FLUID MARKETING, SALES)
PRACTICES, AND PRODUCTS LIABILITY) Master Case No. 4:20-MD-02936-SRB
LITIGATION)
) Related to Case No. 21-CV-00072

NATIONWIDE AGRIBUSINESS)
INSURANCE COMPANY,)
)
Plaintiff,)
)
v.) Case No. 21-CV-00072
)
SMITTY’S SUPPLY, INC, CAM2) **JURY TRIAL DEMANDED**
INTERNATIONAL, LLC, ED SMITH and)
CHAD TATE,)
)
Defendants.)

SECOND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

NOW COMES Plaintiff, Nationwide Agribusiness Insurance Company (“Nationwide”), by and through its attorneys, and for its Second Amended Complaint for Declaratory Judgment pursuant to [28 U.S.C. § 2201](#) against Defendants, Smitty’s Supply, Inc. (“Smitty’s”), CAM2 International, LLC (“Cam2”), Ed Smith (“Smith”) and Chad Tate (“Tate”) (collectively “Defendants”), states as follows:

INTRODUCTION

1. In this Declaratory Judgment Action, Nationwide contends it owes no obligation for claims arising from Defendants’ misrepresentations and breaches of warranties involving the sale of alleged defective 303 tractor hydraulic fluid.

2. Nationwide seeks a declaration as to its rights and obligations under certain insurance policies issued to two Louisiana insureds with respect to the following lawsuits:

- a. *In re Smitty's/Cam2 303 Tractor Hydraulic Fluid Marketing Sales Practices, and Products Liability Litigation*, MDL No. 2936, No. 4:20-md-02936 – SRB (W.D. Mo.) (“MDL Action”);
- b. *Zornes, et al. v. Smitty's Supply, Inc., et al.*, No. 19-cv-2257-JAR-TJJ (D. Kan.) (“Zornes Action”);
- c. *Wurth, et al. v. Smitty's Supply, Inc., et al.*, No. 19-cv-00092-TBR (W.D. Kent.) (“Wurth Action”);
- d. *Buford v. Smitty's Supply, Inc., et al.*, No. 1:19-cv-00082-BRW (E.D. Ark.) (“Buford Action”);
- e. *Mabie v. Smitty's Supply, Inc., et al.*, No. 4:19-cv-03308 (S.D. Tex.) (“Mabie Action”);
- f. *Blackmore, et al. v. Smitty's Supply, Inc., et al.*, No. 5:19-cv-04052 (N.D. Iowa) (“Blackmore Action”);
- g. *Fosdick, et al. v. Smitty's Supply, Inc., et al.*, No. 2:19-cv-01850-MCE-DMC (E.D. Cal.) (“Fosdick Action”);
- h. *Klingenberg v. Smitty's Supply, Inc., et al.*, No. 19-cv-2684-ECT/ECW (D. Minn.) (“Klingenberg Action”);
- i. *Graves, et al. v. Smitty's Supply, Inc., et al.*, No. 4:19-cv-05089-SRB (W.D.Mo.) (“Graves Action”);
- j. *Feldkamp, et al. v. Smitty's Supply, Inc., et al.*, No. 2:20-cv-02177-CSB-EIL (C.D. Ill.) (“Feldkamp Action”);

(collectively “Underlying Lawsuits”).

3. Nationwide seeks a declaration that: (1) it owes no duty to defend or indemnify Smitty's under certain insurance policies issued to Cam2; (2) it owes no duty to defend or indemnify Cam2 under the insurance policies issued to Smitty's from April 30, 2014 to April 30, 2018; (3) it owes no duty to defend or indemnify Smitty's or Cam2 under the primary policies issued to Smitty's and from April 30, 2014 to April 30, 2020; (4) it owes no duty to indemnify Cam2 and Smitty's under umbrella policies issued to them.

4. Through this Action, Nationwide further seeks a declaration that it owes no duty to indemnify the Defendants with respect to any settlement or judgment related to Counts V – LV of the MDL Action, nor any corresponding counts asserted in the remaining Underlying Lawsuits.

5. Nationwide also seeks a declaration that it owes no duty to indemnify Smitty’s or Cam2 for any settlement or judgment in the Underlying Lawsuits.

6. Nationwide also seeks a declaration that it is entitled to reimbursement from Smitty’s and Cam2 for the defense costs incurred under policies for which Smitty’s and Cam2 are not insureds, and/or defense costs incurred for noncovered damages and or non-covered claims in the Underlying Lawsuits.

PARTIES

7. Plaintiff Nationwide is an Iowa corporation with its principal place of business in Iowa.

8. Defendant Smitty’s is a Louisiana corporation with its principal place of business in Roseland, Louisiana.

9. Defendant Cam2 is a Louisiana limited liability company with its principal place of business in Roseland, Louisiana.

10. Defendant Ed Smith (“Smith”) is an individual who is a citizen and resident of Louisiana and is an officer of Smitty’s.

11. Defendant Chad Tate (“Tate”) is an individual who is a citizen and resident of Louisiana and is an officer of Smitty’s.

JURISDICTION AND VENUE

12. A real and justiciable controversy exists between Nationwide and the Defendants concerning Nationwide's respective rights and obligations under the Nationwide Policies.

13. This Court has jurisdiction over this matter pursuant to [28 U.S.C. § 1332](#) because Plaintiff and Defendants are citizens of different states and the amount in controversy exceeds \$75,000 exclusive of interest and costs.

14. This Court has jurisdiction over the Defendants in this matter as Smitty's and Cam2 maintain their principal place of business in Louisiana, Smith and Tate reside in Louisiana, the products at issue in the Underlying Lawsuits were manufactured in the Eastern District of Louisiana and delivered from the Eastern District of Louisiana, and the insurance policies at issue were all issued in the Eastern District of Louisiana to insureds, Smitty's and Cam2, that reside in the Eastern District of Louisiana.

15. Venue is proper in this District pursuant to [28 U.S.C. § 1391\(b\)](#) in that (1) all Defendants reside in the Eastern District of Louisiana, and/or (2) a substantial part of property that is the subject of the action is situated in the Eastern District of Louisiana as this matter involves the issuance of various insurance policies that were issued to insureds located in this judicial district.

FACTUAL AND PROCEDURAL BACKGROUND

16. The Underlying Plaintiffs filed the Underlying Lawsuits seeking damages allegedly arising out of the manufacture, marketing, and sale of 303 tractor hydraulic fluid ("303 Products").

17. On September 1, 2020, a Consolidated Amended Complaint was filed in the MDL Action ("CAC") to address the claims filed in all of the Underlying Lawsuits.

18. On January 29, 2021, a First Amended Consolidated Complaint (“FACC”) was filed in the MDL Action to address the claims filed in all of the Underlying Lawsuits.

19. On June 25, 2021, a Second Amended Consolidated Complaint (“SACC”) was filed in the MDL Action to address the claims filed in all of the Underlying Lawsuits.

20. On August 4, 2021, a Third Amended Consolidated Complaint (“TACC”) was filed in the MDL Action to address the claims filed in all of the Underlying Lawsuits. (*See* TACC attached hereto as [Exhibit A](#)).

21. The TACC names William Anderson, Joe Asfeld, John Bartus, Jr., Pat Beaver, Roger Bias, Terry Blackmore, Samuel Blakeney, George Bollin, Robert Boone, Harry Boynton, Thomas James Brett, Sean Buford, Steve Burgdorf, Todd Carusillo, Ed Chauncey, Eddie Chavis, Douglas Clough, Brett Creger, Clinton Curry, Christopher Curtis, Michael Dahlke, Sawyer Dean, Daniel Denton, Alden Dill, Will Dobson, Craig Dow, Kirk Egner, Mark Engdahl, Josh Farley, Cody Farner, Russell Faubion, Kyle Feldkamp, Cosimo Ferrante, Norman Fohne, Cline (Tommy) Fricks, Michael Gallegos, Clyde Garduno, Patrick Gisi, Gary Goodson, Robert Gosche, Arno Graves, Joseph Griffiths, Tim Grissom, Jim Guire, Michael Hamm, Rick Hardin, Alan Hargraves, Jeffery Harrison, Brian Hayes, Mark Hazeltine, Curtis Hoff, Joe Jackson, Jeff Jacobson, Frank James, Earnest Jenkins, Tom Karnatz, Jack Kimmich, George Kirven, Jason Klingenberg, Larry Lempka, Justin Lemonds, Josh Lesko, Larry Wyatt Loeffler, Gerald Lunkwitz, Jacob Mabie, Jess Metzger, John Miller, Kyle Minich, Cal Moore, Vonda Moreland, Robert Shane Morgan, Ron Nash, Bryan Nelms, Matt Ortner, Donald Ouelette, Joe Pate, Mike Ping, Ter Puskarich, John Raburn, Stanley Richardson, Brian Riessland, Pete Rumore, Wayne Rupe, Leonard Saathoff, Kenneth Seever, Adam Sevy, Anthony Shaw, Rusty Shaw, Matthew Sickelton, Dan Smith, Robert Stanton, Howard Stembridge, James Still, Charles Strickland, Tim

Sullivan, Tracy Sullivan, Jerry Terry, Tim Towle, Simon Vicknair, Lawrence Wachholder, Ross Waterman, Wayne Wells, Dale Wendt, William White, Susan Whitehead, Charles “Bubba” Woods, Dwayne Wurth, and Terry Zornes, as plaintiffs and asserts that they seek recovery on behalf of themselves as well as all others similarly situated (“Underlying Plaintiffs”).

22. The TACC names Smitty’s, Cam2, Tractor Supply, Orscheln Farm and Home, LLC d/b/a Orscheln Farm and Home (“Orscheln”), Rural King Administration, Inc., Rural King Distribution & Management, Inc., Rural King Holding Co. (collectively “Rural King”), Atwood Distributing, LP (“Atwood”), Smith and Tate as defendants (“Underlying Defendants”).

23. The TACC alleges that the Underlying Plaintiffs bring this action “to redress the negligent, wrongful, unlawful, unfair, unconscionable and/or deceptive practices, acts, and/or omissions of Defendants in connection with their manufacturing, marketing, and/or sale of Smitty’s/Cam2 303 Tractor Hydraulic Fluid.” ([Exhibit A ¶ 5](#)).

24. The TACC alleges that the Underlying Defendants “deceptively and misleadingly labeled, marketed and sold tractor hydraulic fluid as ‘303’ fluid meeting ‘303’ specifications when, in fact, the ‘303’ designation is obsolete and 303 specifications have not been available for over forty (40) years. Defendants have also deceptively and misleadingly labeled, marketed and sold tractor hydraulic fluid as meeting certain manufacturer specifications and providing certain anti-wear and protective benefits when, in fact, Defendants knew, or should have known, the fluid they are selling does not meet all listed manufacturer specifications and does not contain the anti-wear and protective properties required in Tractor Hydraulic Fluid. Instead, the “303” fluid is a fluid mixed from line wash and other lubricant products (including some used products) that are not suitable for use as ingredients in a tractor hydraulic fluid.” ([Exhibit A ¶ 8](#)).

25. The TACC alleges that the Underlying Defendants manufactured and sold Cam2 Promax 303 Tractor Hydraulic Oil, Super S 303 Tractor Hydraulic Fluid, Super S Super Trac 303 Tractor Hydraulic Fluid, and Cam2 303 Tractor Hydraulic Oil products, which are all the same fluids. ([Exhibit A ¶ 15](#)).

26. The TACC alleges that “Defendants’ 303 THF Products not only lacked the required lubricant and protective benefits offered to purchasers, the fluids actually exposed purchasers’ equipment to increased wear and risk of damage to the spiral gear, excessive wear in the planetaries, improper and poor shifting, seal leakage, and improper operation of the wet brakes.” ([Exhibit A ¶ 16](#)).

27. The TACC alleges that “[i]n November 2017, because of the deceptive nature of the 303 THF Products, the failures of the 303 THF Products to meet any published specification, and the damage the products could cause to consumers’ equipment, the State of Missouri’s Department of Agriculture [(“MDA”)]. . . banned Defendants and all other manufacturers and sellers from offering these type of ‘303’ tractor hydraulic fluid products for sale in Missouri. The states of Georgia and North Carolina followed suit. ([Exhibit A ¶ 17](#)).

28. The TACC alleges that despite the ban of 303 Products in several states and increased scrutiny throughout the country, the Underlying Defendants continued to sell their 303 Products. ([Exhibit A ¶ 18](#)).

29. The TACC alleges that in late 2017, Smitty’s and Cam2 modified certain product labels because the photos of the equipment on the label were deceptive and misleading by removing pictures of modern equipment. ([Exhibit A ¶ 21](#)).

30. The TACC alleges that “no other changes were made to the labels despite the fact that management employees at Smitty’s and Cam2 knew of the deceptive and misleading

representations about the physical and performance properties of the fluid, the representations about the testing that was purportedly performed on the fluid, and the list of equipment manufacturers' names contained on the Super S 303 and Cam2 303 labels. Incredibly, [Smitty's and Cam2] continued to sell the 303 THF Products in all states in which it had not been banned, with those misrepresentations knowingly being made to purchasers like Plaintiffs." ([Exhibit A ¶ 22](#)).

31. The TACC alleges that in October 2017, the MDA publicly stated that it had performed testing on the 303 Products and that the testing revealed that the products did not meet any manufacturers' current specifications and were underperforming to the point damage was likely to result from use. ([Exhibit A ¶ 24](#)).

32. The TACC alleges that "Defendants continued to sell their products and concealed any internal test data and the truth about the 303 THF products at all relevant times." ([Exhibit A ¶ 23](#)).

33. The TACC alleges that "Defendants falsely and deceptively labeled, marketed and offered for sale the 303 THF Products, including (1) as meeting manufacturer specifications and being acceptable for use as hydraulic fluid, transmission fluid, and gear oil in older tractors and other equipment; (2) as a substitute for and satisfying John Deere's JD-303 and J20A specifications; (3) as a fluid that provides extreme pressure and anti-wear protection for tractor transmission, axles and hydraulic pumps; (4) as a fluid that protects against rust and corrosion; and (5) as a fluid designed for use in equipment manufactured by Allis-Chalmers, Massey Ferguson, Deutz, JI Case/David Brown, Allison, International Harvester, White, Kubota, John Deere, Oliver, Ford and Caterpillar." ([Exhibit A ¶ 160](#)).

34. The TACC alleges that the John Deere “303” designation had been obsolete for many years because certain ingredients of the original John Deere 303 fluid had been banned since the 1970’s, and thus, manufacturers have not been able to make or sell true “303” fluid for over forty years and there are no longer any specifications for 303 fluid. ([Exhibit A ¶ 171](#)).

35. The TACC alleges that the Underlying Defendants knew or should have known that at the time they were marketing and selling the 303 Products, there were no specifications available for “303” tractor hydraulic fluid, and therefore, claims that the 303 Products met “303” specifications could not possibly be true and Underlying Defendants had no way to ensure the accuracy of representations that their 303 Products were in compliance with any known specifications and in fact knew their 303 Products did not meet the J20A specifications. ([Exhibit A ¶ 171](#)).

36. The TACC alleges that in October 2017, the MDA notified the Underlying Defendants, by letter of its findings regarding the 303 Products and that it concluded the 303 products were mislabeled, misbranded, that the labels were deceptive and misleading and that the products were exposing equipment to increased wear and damage. ([Exhibit A ¶ 185](#)).

37. The TACC alleges that “[i]n 2018, in stark contrast to the quality represented to purchasers, Smitty’s knew and discussed internally that the 303 THF Products did not provide adequate wear protection and that the products could lead to excess deposit buildup inside transmissions and other parts of equipment.” ([Exhibit A ¶ 191](#)).

38. The TACC seeks certification for state-specific classes of persons. ([Exhibit A ¶ 282](#)).

39. The TACC alleges that the Underlying Plaintiffs each assert on behalf of themselves and thee putative class members the following: Count I – Negligence; Count II –

Breach of Express Warranty; Count III – Breach of Implied Warranty of Merchantability; Count IV – Breach of Implied Warranty of Fitness for Particular Purpose; Count V – Unjust Enrichment; Count VI – Fraud/Misrepresentation; Count VII – Negligent Misrepresentation; Counts VIII-LIV – State Statutory Violations; Count LV – Individual Liability of Smith and Tate. ([Exhibit A ¶ 294](#)).

40. Count I asserts a cause of action for negligence. Plaintiffs allege in this count Defendants breached duties of ordinary care in (1) using misleading labeling information, (2) failing to adequately warn and instruct purchasers about the true nature of the Products, (3) using low quality base oil, inadequate additive content, flush oil, line wash, used transformer oil, used turbine oil, and/or other waste oil products containing motor oil components and other additives and contaminants that are never appropriate for use in a tractor hydraulic fluid, (4) selling mixtures of flush oil, line wash, used transformer oil, used turbine oil, and/or other waste oil products containing motor oil components and other additives and contaminants as a tractor hydraulic fluid and (5) instituting and/or allowing careless and ineffective product manufacturing protocols. Plaintiffs allege Defendants “concealed an internal test data and the truth about [the Products]” during the class period. Plaintiffs further allege Defendants’ conduct was grossly negligent and “showed a complete indifference or conscious disregard of the rights of others, including Plaintiffs” and seek the imposition of punitive damages against Defendants.

41. Count II asserts a cause of action against Defendants for breach of express warranty. Plaintiffs allege Defendants made statements of facts regarding quality and use in the name and label on the 303 THF Products to induce Plaintiffs to purchase the products and became a basis for the benefit of the bargain and an express warranty. Plaintiffs allege the 303 THF Products did not conform to the statements and Plaintiffs did not receive the goods as

warranted, and Plaintiffs timely notified Defendants of these defects and the defects caused Plaintiffs injury and damage.

42. Count III asserts a cause of action against Defendants for breach of implied warranty of merchantability. Plaintiffs allege the Products were not fit for the ordinary purposes for which they were marketed and purchased. Plaintiffs further allege they timely notified Defendants of these defects and the defects caused Plaintiffs injury and damage.

43. Count IV asserts a cause of action against the Defendants for breach of implied warranty of fitness for particular purpose. Plaintiffs allege the Products were not fit for the particular purposes for use as universal hydraulic fluid for tractors and/or other equipment. It is further alleged Defendants knew or should have known of the uses for which the Products were purchased, Plaintiffs reasonably relied on Defendants' judgment that the Products were fit for the specific purpose, Plaintiffs timely notified Defendants of these defects and the defects caused Plaintiffs injury and damage.

44. Count V asserts a claim against Defendants for unjust enrichment for Defendants' "deceptive, fraudulent and misleading naming, labeling, advertising and sales of [the Products]." Count V seeks disgorgement of all of Defendants' monies, profits, and gains, which benefits the Defendants obtained "under false pretenses because of defendants' concealments, misrepresentations and other deceptive, misleading and unfair conduct relating to [the Products]."

45. Count VI asserts a claim against Defendants for fraudulent misrepresentation. Plaintiffs allege that the representations made by Defendants regarding the Products were false and made knowingly by Defendants and thus, constitute fraud and were illegal. Plaintiffs seek punitive damages against Defendants.

46. Count VII asserts a claim against Defendants for negligent misrepresentation. Plaintiffs allege Defendants made false representations about the Products and failed to use ordinary care and were negligent in making and/or allowing the representations. It is further alleged Defendants concealed internal test data and the truth about the Products, which conduct was “intentional and/or in reckless disregard for the rights of Plaintiffs.” As a result, Plaintiffs also seek the imposition of punitive damages.

47. Counts VIII to LIV assert state-specific causes of action on behalf of state-specific classes of purchasers of the Products. The state-specific causes of action assert violations of state-specific consumer protection and products liability statutes on behalf of purchasers of the Products in the specific state. The consumer protection causes of action generally allege Defendants were “deceptive and misleading” in the manufacturing, labeling and sale of the Products and that their conduct “constitutes deceptive and unconscionable business practices in violation of consumer protection laws.” Plaintiffs allege that Defendants’ actions were done knowingly and intentionally. Plaintiffs seek wide ranging damages under these counts, including treble damages, punitive damages, and attorneys’ fees.

48. Count LV alleges a claim for individual liability against Smith and Tate for all counts in the TACC as the “owners and controlling officers of [Smitty’s] who intentionally and knowingly engaged in some or all of the alleged wrongful acts alleged [in the TACC] for personal profit and benefit.” Plaintiffs allege Smith and Tate were “directly involved in developing and sanctioning Smitty’s deceptive and illegal activities described [in the TACC] and they each participated in decisions to mislead purchases and the public about [the Products].” It is alleged that Smith and Tate “knew and directed that line flush, used oils and other waste oil be disposed of by defendants’ using those materials in the manufacturing of [the Products].” Smith

and Tate are alleged to have known the true nature of the Products and each “directed that such nature be concealed and not disclosed on [the Products’] labels.” Count LV also alleges that Defendants’ “deliberate actions to mislead purchasers and the public about how [the Products] were/are manufactured using large percentages of line flush and used oils, and defendants’ deliberate actions to mislead purchasers and the public about the true nature and contents of [the Products] (i.e., that the products were not tractor hydraulic fluids, met no OEM specifications, and did not provide the benefits listed on the label) were orchestrated, directed and ratified by Ed Smith and Chad Tate since at least December of 2013.” Plaintiffs seek to trace and return all monies paid to Smith and Tate from 2013 to the present and seeks the imposition of punitive damages against both for their allegedly wrongful conduct.

49. The TACC also alleges the following counts on behalf of certain specifically named Underlying Plaintiffs and Classes: Alabama (Counts I through VII and LV); Arizona (Counts I through VII and LV, Count XXXIV – Arizona Consumer Fraud Act, Ariz. Rev. Stat. 44-1533); Arkansas (Counts I through VII and LV and Count VIII – Arkansas Deceptive Trade Practices Act, § 4-88-101); California (Counts I through VII and LV; Count IX – California Unfair Competition Law, [California Civil Code §17200 et seq.](#)); Count X – False and Misleading Advertising in Violation of [California Business & Professions Code §17500 et seq.](#); and Count XI – California Consumers Legal Remedies Act, [California Civil Code §1750 et seq.](#)); Colorado (Counts I through VII and LV, Count XII – Colorado’s Consumer Protection Act, Colo. Rev. Stat. § 6-1-101, *et seq.*); Connecticut (Counts I through VII and LV; Count XIII – Connecticut Consumer Protection Act, [Conn. Gen. Stat. § 42-110g, et seq.](#); and Count XXXVIII – Conn. Product Liability Act, [Conn. Gen. Stat. §52-572m, et seq.](#); Florida (Counts I through VII and LV; Count XIV – Florida Deceptive and Unfair Trade Practices Act, [Fla. Stat. § 501.201 et seq.](#));

Count XV – Florida Misleading Advertising Law, [Fla. Stat. § 817.41](#)); Georgia (Counts I through VII and LV); Illinois (Counts I through VII and LV and Count XVI – Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.*); Indiana (Counts I through VII and LV and Count XVII – Indiana Consumer Protection Act, [Ind. Code § 24-5-0.5-5](#); Count XXXIV – Indiana Product Liability Act, Design Defect; Count XXXV – Indiana Product Liability Act, Failure to Warn; Iowa (Counts I through VII and LV); Kansas (Counts I through VII and LV and Count XVIII – Kansas Consumer Protection Act, [K.S.A. § 50-623](#) *et seq.*); Count XXXVI – Kansas Product Liability Act – Design Defect; Count XXXVII -- Kansas Product Liability Act – Failure to Warn); Kentucky (Counts I through VII and LV and Count XIX – Kentucky Consumer Protection Act, Ky. Rev. Stat. §367.170 (2015); Maine (Counts I through VII and LV and Count XXXV – Me. Stat. tit. 5, § 213(1), (2)); Michigan (Counts I through VII and LV and Count XX – Michigan Consumer Protection Act, [MCL 445.901](#) *et seq.*); Minnesota (Counts I through VII and LV and Count XXI – Minnesota Consumer Fraud Act, Minnesota statute § [325F.67](#) *et seq.*; Missouri (Counts I through VII and LV and Count XXII – Missouri Merchandising Practices Act, [Mo. Rev. Stat. §407.010](#); Nebraska (Counts I through VII and LV and Count XXIII – Nebraska Consumer Protection Act, Neb. Rev. St. §§59- 1601; Count XXIV – Nebraska’s Uniform Deceptive Trade Practices Act, Neb. Rev. St. §§ 87-301 *et seq.*); New York (Counts I through VII and LV and Count XXV – New York Consumer Protection Law, N.Y.C.P.L.R. § 214, *et seq.*); New Mexico (Counts I through VII and LV and Count XXXVI – N.M. Stat. Ann. § 57-12-10.B); North Carolina (Counts I through VII and LV and Count XXVI – North Carolina Consumer Protection Act, [N.C.G.S. § 75-1.1](#) *et seq.*); North Dakota (Counts I through VII and LV and Count XXXVII – N.D. Cent. Code Ann. § 51-15-09); Ohio (Counts I through VII and LV and Count XXVII – Ohio Consumer Sales Practices Act

(“OCSPA”), R.C. 1345.01); Count XXXXVIII – Strict Liability – Design Defect; Count XXXXIX – Strict Liability – Manufacturing Defect; Count L – Strict Liability – Defect Due to Nonconformance with Representation); Oklahoma (Counts I through VII and LV and Count XXVIII – Oklahoma Consumer Protection Statute); Pennsylvania (Counts I through VII and LV and Count XXIX – Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et. seq.*); South Carolina (Counts I through VII and LV); South Dakota (Counts I through VII and LV and Count XXX – South Dakota Consumer Protection Statute); Tennessee (Counts I through VII and LV and LI – Tennessee Products Liability Act); Texas (Counts I through VII and LV and Count XXXI – Texas Deceptive Trade Practices, Texas Business and Commerce Code § 17.41 *et seq.*); West Virginia (Counts I through VII and LV and Count XXXII – West Virginia Consumer Protection Statute, W. Va. Code Ann. § 55-2-12, *et seq.*); Virginia (Counts I through VII and LV) and Wisconsin (Counts I through VII and LV and Count XXXIII – Wisconsin Deceptive Trade Practices Act, Wis. Stat. § 100.18); Wyoming (Counts I through VII and LV and Count XXXXII – Wyo. Stat. Ann. § 40-12-109). (Exhibit A ¶¶ 295 – 335).

50. The TACC alleges that the Individually Named Underlying Plaintiffs and Class members:

- (a) paid a sum of money for a product that was not as represented; (b) received a lesser product than labeled, advertised and marketed; (c) were deprived of the benefit of the bargain because the 303 THF Products were different than what Defendants represented; (d) were deprived of the benefit of the bargain because the 303 THF Products had less value than what was represented; (e) did not receive a product that measured up to their expectations as created by Defendants; and/or (f) suffered increased and excessive wear and/or damage to their equipment, including damages to gears, seals and hydraulic systems.

(Exhibit A ¶ 269).

51. The TACC seeks recovery of treble damages, statutory damages, injunctive relief, actual damages, punitive damages, restitution, disgorgement, attorney's fees and costs.

52. On or about May 7, 2021, the Underlying Plaintiffs entered into a settlement agreement with Tractor Supply, Orscheln, Rural King, and Atwood, together with each of their affiliates, divisions, subsidiaries, and assigns (collectively referred to as "Retailer Defendants") to resolve all claims against the Retailer Defendants in the above-captioned multi-district litigation ("Retailer Settlement").

53. On or about May 7, 2021, Nationwide entered into an agreement with Smitty's, Cam2, Tractor Supply, Orscheln relating to the Retailer Class Settlement Agreement wherein Tractor Supply and Orscheln agreed to release Nationwide from claims arising from or related to the MDL Litigation and Smitty's and Cam2 agreed to release Nationwide with respect to any claim for reimbursement for the consideration Smitty's and Cam2 paid under that agreement with respect to the Retailer Settlement.

NATIONWIDE POLICIES

I. NATIONWIDE PRIMARY POLICIES

54. Nationwide issued the following commercial general liability policies to Cam2:

- a. CPP136574A, effective April 30, 2014 to April 30, 2015, which is subject to a \$1,000,000 Each Occurrence limit, a \$2,000,000 Products/Completed Operations Aggregate, and a \$2,000,000 General Aggregate ("14-15 Cam2 Primary Policy"). (A true and correct copy of the 14-15 Cam2 Primary Policy with premium information redacted is attached as [Exhibit B](#)).
- b. CPP136574A, effective April 30, 2015 to April 30, 2016, which is subject to a \$1,000,000 Each Occurrence limit, a \$2,000,000 Products/Completed

- Operations Aggregate, and a \$2,000,000 General Aggregate (“15-16 Cam2 Primary Policy”). (A true and correct copy of the 15-16 Cam2 Primary Policy with premium information redacted is attached as [Exhibit C](#)).
- c. CPP136574A, effective April 30, 2016 to April 30, 2017, which is subject to a \$1,000,000 Each Occurrence limit, a \$2,000,000 Products/Completed Operations Aggregate, and a \$2,000,000 General Aggregate (“16-17 Cam2 Primary Policy”). (A true and correct copy of the 16-17 Cam2 Primary Policy with premium information redacted is attached as [Exhibit D](#)).
- d. CPP136574A, effective April 30, 2017 to April 30, 2018, which is subject to a \$1,000,000 Each Occurrence limit, a \$2,000,000 Products/Completed Operations Aggregate, and a \$2,000,000 General Aggregate (“17-18 Cam2 Primary Policy”). (A true and correct copy of the 17-18 Cam2 Primary Policy with premium information redacted is attached as [Exhibit E](#)).
55. Nationwide issued the following commercial general liability policies to Smitty’s:
- a. CPP126853A, effective April 30, 2014 to April 30, 2015, which is subject to a \$1,000,000 Each Occurrence limit, a \$2,000,000 Products/Completed Operations Aggregate, and a \$2,000,000 General Aggregate (“14-15 Smitty’s Primary Policy”). (A true and correct copy of the 14-15 Smitty’s Primary Policy with premium information redacted is attached as [Exhibit F](#)).
- b. CPP126853A, effective April 30, 2015 to April 30, 2016, which is subject to a \$1,000,000 Each Occurrence limit, a \$2,000,000 Products/Completed Operations Aggregate, and a \$2,000,000 General Aggregate (“15-16 Smitty’s

Primary Policy”). (A true and correct copy of the 15-16 Smitty’s Primary Policy with premium information redacted is attached as [Exhibit G](#)).

- c. CPP126853A, effective April 30, 2016 to April 30, 2017, which is subject to a \$1,000,000 Each Occurrence limit, a \$2,000,000 Products/Completed Operations Aggregate, and a \$2,000,000 General Aggregate (“16-17 Smitty’s Primary Policy”). (A true and correct copy of the 16-17 Smitty’s Primary Policy with premium information redacted is attached as [Exhibit H](#)).
- d. CPP126853A, effective April 30, 2017 to April 30, 2018, which is subject to a \$1,000,000 Each Occurrence limit, a \$2,000,000 Products/Completed Operations Aggregate, and a \$2,000,000 General Aggregate (“17-18 Smitty’s Primary Policy”). (A true and correct copy of the 17-18 Smitty’s Primary Policy with premium information redacted is attached as [Exhibit I](#)).
- e. CPP126853A, effective April 30, 2018 to April 30, 2019, which is subject to a \$1,000,000 Each Occurrence limit, a \$2,000,000 Products/Completed Operations Aggregate, and a \$2,000,000 General Aggregate (“18-19 Smitty’s Primary Policy”). (A true and correct copy of the 18-19 Smitty’s Primary Policy with premium information redacted is attached as [Exhibit J](#)).
- f. CPP126853A, effective April 30, 2019 to April 30, 2020, which is subject to a \$1,000,000 Each Occurrence limit, a \$2,000,000 Products/Completed Operations Aggregate, and a \$2,000,000 General Aggregate (“19-20 Smitty’s Primary Policy”). (A true and correct copy of the 19-20 Smitty’s Primary Policy with premium information redacted is attached as [Exhibit K](#)).

56. The Smitty's and Cam2 Primary Policies are collectively referred to herein as "Primary Policies."

57. By endorsement, Cam2 is also listed as a named insured on the 18-20 Smitty's Primary Policies.

58. Subject to all their terms, conditions, limitations, definitions, endorsements and exclusions, the Primary Policies provide "bodily injury" liability coverage, "property damage" liability coverage, and "personal injury" or "advertising injury" liability coverage.

59. Upon information and belief, the parties hereto do not dispute that Nationwide owes no obligation to the Defendants under the "bodily injury" and "personal and advertising injury" coverages of the Primary Policies.

60. By endorsement, the "property damage" liability coverage of the Primary Policies provides, in part, as follows:

SECTION I – COVERAGES

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 . . .

* * *

61. The Primary Policies further provide:

* * *

- 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.

- (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. 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.
- c. “Bodily injury” or “property damage” which occurs during the policy period and was not, prior to the policy period, known to have occurred by 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, includes any continuation, change or resumption of that “bodily injury” or “property damage” after the end of 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.

* * *

SECTION III – LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
 - a. Insureds;
 - b. Claims made or “suits” brought; or
 - c. Persons or organizations making claims or bringing “suits”.
2. The General Aggregate Limit is the most we will pay for the sum of:
 - a. Medical expenses under Coverage C;
 - b. Damages under Coverage A, except damages because of “bodily injury” or “property damage” included in the “products-completed operations hazard”; and
 - c. Damages under Coverage B.

3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of “bodily injury” and “property damage” included in the “products-completed operations hazard”.

* * *

5. Subject to Paragraph 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:
 - a. Damages under Coverage A; and
 - b. Medical expenses under Coverage C because of all “bodily injury” and “property damage” arising out of any one “occurrence”.

* * *

62. The Primary Policies are, in part, subject to the following definitions:

SECTION V – DEFINITIONS

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.

9. “Insured contract” means:

* * *

- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

* * *

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

* * *

16. “Products-completed operations hazard”:

- a. Includes all “bodily injury” and “property damage” occurring away from premises you own or rent and arising out of “your product” or “your work” except:

(1) Products that are still in your physical possession; or

* * *

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.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

* * *

63. The Primary Policies are subject to a “Who Is An Insured” provision that provides, in part, as follows:

SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:

* * *

- c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

- d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your “executive officers” and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

* * *

64. The Primary Policies are, in part, subject to the following exclusions:

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect persons or property.

k. Damage To Your Product

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

* * *

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.

* * *

II. NATIONWIDE UMBRELLA POLICIES

65. Nationwide issued the following commercial umbrella liability policies to Cam2:
- a. CU136574A, effective April 30, 2014 to April 30, 2015, which is subject to a \$2,000,000 Each Occurrence limit, and a \$2,000,000 Aggregate (“14-15 Cam2 Umbrella Policy”). (A true and correct copy of the 14-15 Cam2 Umbrella Policy with premium information redacted is attached as [Exhibit L](#)).
 - b. CU136574A, effective April 30, 2015 to April 30, 2016, which is subject to a \$2,000,000 Each Occurrence limit, and a \$2,000,000 Aggregate (“15-16 Cam2 Umbrella Policy”). (A true and correct copy of the 15-16 Cam2 Umbrella Policy with premium information redacted is attached as [Exhibit M](#)).
 - c. CU136574A, effective April 30, 2016 to April 30, 2017, which is subject to a \$2,000,000 Each Occurrence limit, and a \$2,000,000 Aggregate (“16-17 Cam2 Umbrella Policy”). (A true and correct copy of the 16-17 Cam2 Umbrella Policy with premium information redacted is attached as [Exhibit N](#)).
 - d. CU136574A, effective April 30, 2017 to April 30, 2018, which is subject to a \$2,000,000 Each Occurrence limit, and a \$2,000,000 Aggregate (“17-18 Cam2 Umbrella Policy”). (A true and correct copy of the 17-18 Cam2 Umbrella Policy with premium information redacted is attached as [Exhibit O](#)).

66. Nationwide issued the following commercial umbrella liability policies to Smitty’s:

- a. CU126853A, effective April 30, 2014 to April 30, 2015, which is subject to a \$2,000,000 Each Occurrence limit, and a \$2,000,000 Aggregate (“14-15 Smitty’s Umbrella Policy”). (A true and correct copy of the 14-15 Smitty’s Umbrella Policy with premium information redacted is attached as [Exhibit P](#)).
- b. CU126853A, effective April 30, 2015 to April 30, 2016, which is subject to a \$2,000,000 Each Occurrence limit, and a \$2,000,000 Aggregate (“15-16 Smitty’s Umbrella Policy”). (A true and correct copy of the 15-16 Smitty’s Umbrella Policy with premium information redacted is attached as [Exhibit Q](#)).
- c. CU126853A, effective April 30, 2016 to April 30, 2017, which is subject to a \$2,000,000 Each Occurrence limit, and a \$2,000,000 Aggregate (“16-17 Smitty’s Umbrella Policy”). (A true and correct copy of the 16-17 Smitty’s Umbrella Policy with premium information redacted is attached as [Exhibit R](#)).
- d. CU126853A, effective April 30, 2017 to April 30, 2018, which is subject to a \$2,000,000 Each Occurrence limit, and a \$2,000,000 Aggregate (“17-18 Smitty’s Umbrella Policy”). (A true and correct copy of the 17-18 Smitty’s Umbrella Policy with premium information redacted is attached as [Exhibit S](#)).

67. The Cam2 and Smitty’s Umbrella Policies are collectively referred to herein as “Umbrella Policies.”

68. Upon information and belief, the Defendants do not dispute that Nationwide owes no obligation under the “bodily injury” and “personal and advertising injury” coverages of the Umbrella Policies.

69. The “property damage” liability coverage afforded under the Umbrella Policies provide, in part, as follows:

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a. We will pay on behalf of the insured the “ultimate net loss” in excess of the “retained limit” 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 damages for such “bodily injury” or “property damage” when the “underlying insurance” does not provide coverage or the limits of “underlying insurance” have been exhausted. We will have the right to defend, or to participate in the defense of, the insured against any other “suit” seeking damages to which this insurance may apply. At our discretion, we may investigate any “occurrence” that may involve this insurance and settle any resultant claim or “suit” for which we have the duty to defend.

70. The Umbrella Policies further provide as follows:

* * *

- c. 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; and
 - (3) Prior to the policy period, no insured listed under Paragraph 1.a. 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. 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” which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1.a. of Section II – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim, includes any continuation, change or resumption of that “bodily injury” or “property damage” after the end of the policy period.

* * *

71. The Umbrella Policies are subject to a “Who Is An Insured” provision that provides, in part, as follows:

SECTION II – WHO IS AN INSURED

* * *

3. Any additional insured under any policy of “underlying insurance” will automatically be an insured under this insurance.

Subject to Section **III** – Limits Of Insurance, if coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

- a. Required by the contract or agreement, less any amounts payable by any “underlying insurance”; or
- b. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

72. The Umbrella Policies are subject to the following definitions:

SECTION V – DEFINITIONS

* * *

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.

* * *

18. "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.
19. "Retained limit" means the available limits of "underlying insurance" scheduled in the Declarations or the "self-insured retention", whichever applies.

* * *

23. "Ultimate net loss" means the total sum, after reduction for recoveries or salvages collectible, that the insured becomes legally obligated to pay as damages by reason of settlement or judgments or any arbitration or other alternate dispute method entered into with our consent or the "underlying insurer's" consent.
24. "Underlying insurance" means any policies of insurance listed in the Declarations under the Schedule of "underlying insurance."

* * *

27. "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.
 - c. Does not include vending machines or other property rented to or located for the use of others but not sold.

* * *

73. The Umbrella Policies are subject to the following exclusions:

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect persons or property.

* * *

n. Damage To Your Product

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

* * *

p. 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.

q. 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.

* * *

COUNT I
DECLARATORY RELIEF

Cam2 Does Not Qualify as an Insured Under the 14-18 Smitty's Primary Policies

74. Nationwide incorporates and restates the allegations of paragraph 1 through 73 above as if fully set forth herein.

75. Cam2 is not listed as a named insured on the 14-18 Smitty's Primary Policies.

76. The 14-18 Smitty's Primary Policies are subject to a "Who Is an Insured Provision" that states, in part, as follows:

SECTION II WHO IS AN INSURED

1. If you are designated in the Declarations as:

* * *

- c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
- d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

* * *

77. Cam2 is not an "executive officer", director, or stockholder of Smitty's.

78. Thus, Cam2 does not qualify as an insured under the 14-18 Smitty's Primary Policies.

79. Accordingly, Nationwide does not owe any obligation to defend or indemnify Cam2 under the 14-18 Smitty's Primary Policies.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that Cam2 does not qualify as an insured under the 14-18 Smitty's Primary Policies;

- b. Declaring that Nationwide owes no duty to defend or indemnify Cam under the 14-18 Smitty's Primary Policies; and
- c. Awarding any other relief this Court deems just and proper.

COUNT II
DECLARATORY RELIEF

Smitty's Does Not Qualify as an Insured Under the Cam2 Primary Policies

80. Nationwide incorporates and restates the allegations of paragraph 1 through 73 above as if fully set forth herein.

81. The Cam2 Primary Policies are subject to a "Who Is an Insured Provision" that states, in part, as follows:

SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:

* * *

- c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

* * *

- 82. Smitty's is not a member or manager of Cam2.
- 83. Smitty's does not qualify as an insured under the Cam2 Primary Policies.
- 84. Nationwide does not owe any obligation to defend or indemnify Smitty's under the Cam2 Primary Policies.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that Smitty's does not qualify as an insured under the Cam2 Primary Policies;

- b. Declaring that Nationwide owes no duty to defend or indemnify Smitty's under the Cam2 Primary Policies; and
- c. Awarding any other relief this Court deems just and proper.

COUNT III
DECLARATORY RELIEF

Smith and Tate Do Not Qualify as Insureds Under the Smitty's Primary Policies

85. Nationwide incorporates and restates the allegations of paragraph 1 through 73 above as if fully set forth herein.

86. Neither Smith nor Tate are listed as named insured on the declarations page of the Smitty's Primary Policies.

87. The Smitty's Primary Policies are subject to a "Who is An Insured" provision that provides, in part, as follows:

SECTION II - WHO IS AN INSURED

1. If you are designated in the Declarations as:

* * *

- c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
- d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

* * *

88. Smitty's, a corporation, is listed as a named insured on the Smitty's Primary Policies.

89. Cam2, a limited liability company, is listed as a named insured on the 18-20 Smitty's Primary Policies.

90. Smith and Tate only qualify as an insured under the 14-18 Smitty's Primary Policies in their capacity as directors or "executive officers" of Smitty's and only with respect to their duties as directors or "executive officers."

91. Smith and Tate only qualify as an insured under the 18-20 Smitty's Primary Policies in their capacity as directors or "executive officers" of Smitty's and only with respect to their duties as directors or "executive officers" or in their capacity as members or managers of Cam2, but only with respect to the conduct of Cam2's business or with respect to their duties as managers of Cam2.

92. The TACC alleges that "Defendants", including Smith and Tate, intentionally and knowingly engaged in some or all of the wrongful acts, including "illegal acts."

93. The TACC also seeks to hold Smith and Tate liable in their personal capacity.

94. Count LV of the TACC also solely seeks to hold Smith and Tate liable in their personal capacity.

95. Nationwide owes no obligation to indemnify Smith or Tate for any damages awarded under Count LV.

96. Nationwide does not owe any obligation to defend or indemnify Smith or Tate to the extent that they do not qualify as insureds under the Smitty's Primary Policies and/or while acting outside the scope of their duties as "executive officers" or managers.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that Smith and Tate do not qualify as insureds under the Smitty's Primary Policies;

- b. Declaring that Nationwide owes no duty to defend or indemnify Smith and Tate under the Smitty's Primary Policies; and
- c. Awarding any other relief this Court deems just and proper.

COUNT IV
DECLARATORY RELIEF

Smith and Tate Do Not Qualify as Insureds Under the Cam2 Primary Policies

97. Nationwide incorporates and restates the allegations of paragraph 1 through 73 above as if fully set forth herein.

98. Neither Smith nor Tate are listed as named insured on the declarations page of the Cam2 Primary Policies.

99. The Cam2 Primary Policies are subject to a "Who is An Insured" provision that provides, in part, as follows:

SECTION II - WHO IS AN INSURED

1. If you are designated in the Declarations as:

* * *

- c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
- d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

* * *

100. Cam2, a limited liability company, is listed as a named insured on the Cam2 Primary Policies.

101. Smith and Tate only qualify as an insured under the Cam2 Primary Policies in their capacity as members or managers of Cam2, but only with respect to the conduct of Cam2's business or with respect to their duties as managers of Cam2.

102. The TACC alleges that "Defendants", including Smith and Tate, intentionally and knowingly engaged in some or all of the wrongful acts, including "illegal acts."

103. The TACC also seeks to hold Smith and Tate liable in their personal capacity.

104. Count LV of the TACC also solely seeks to hold Smith and Tate liable in their personal capacity.

105. Nationwide owes no obligation to indemnify Smith or Tate for any damages awarded under Count LV.

106. Nationwide does not owe any obligation to defend or indemnify Smith or Tate to the extent that they do not qualify as insureds under the Cam2 Primary Policies and/or while acting outside the scope of their duties managers.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that Smith and Tate do not qualify as insureds under the Cam2 Primary Policies;
- b. Declaring that Nationwide owes no duty to defend or indemnify Smith and Tate under the Cam2 Primary Policies; and
- c. Awarding any other relief this Court deems just and proper.

COUNT V
DECLARATORY RELIEF

Cam2, Smith and Tate Do Not Qualify as Insureds under the Smitty's Umbrella Policies

107. Nationwide incorporates and restates the allegations of paragraph 1 through 73 above as if fully set forth herein.

108. The Smitty's Umbrella Policies are subject to a "Who Is An Insured" provision that provides, in part, as follows:

SECTION II – WHO IS AN INSURED

* * *

3. Any additional insured under any policy of "underlying insurance" will automatically be an insured under this insurance.

Subject to Section **III** – Limits Of Insurance, if coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

- a. Required by the contract or agreement, less any amounts payable by any "underlying insurance"; or
- b. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

* * *

109. Cam2 does not qualify as insureds under the 14-18 Smitty's Primary Policies and thus does not qualify as an insured under the Smitty's Umbrella Policies.

110. Nationwide owes no coverage to Cam2 under the Smitty's Umbrella Policies.

111. To the extent that Smith and Tate do not qualify as insureds under the 14-18 Smitty's Primary Policies, then they also do not qualify as insureds under the Smitty's Umbrella Policies.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that Cam2, Smith and Tate do not qualify as insureds under the Smitty's Umbrella Policies;
- b. Declaring that Nationwide owes no obligation to Cam2, Smith or Tate under the Smitty's Umbrella Policies;
- c. Awarding any other relief this Court deems just and proper.

COUNT VI
DECLARATORY RELIEF

Smitty's, Smith and Tate Do Not Qualify as Insureds Under the Cam2 Umbrella Policies

112. Nationwide incorporates and restates the allegations of paragraph 1 through 73 above as if fully set forth herein.

113. The Cam2 Umbrella Policies are subject to a "Who Is An Insured" provision that provides, in part, as follows:

SECTION II – WHO IS AN INSURED

* * *

3. Any additional insured under any policy of "underlying insurance" will automatically be an insured under this insurance.

Subject to Section **III** – Limits Of Insurance, if coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

- a. Required by the contract or agreement, less any amounts payable by any "underlying insurance"; or
- b. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

* * *

114. Smitty's does not qualify as an insured under the 14-18 Cam2 Primary Policies, and thus, does not qualify as insureds under the Cam2 Umbrella Policies.

115. Nationwide owes no obligation to Smitty's under the Cam2 Umbrella Policies.

116. To the extent that Smith and Tate do not qualify as insureds under the 14-18 Cam2 Primary Policies, then they also do not qualify as insureds under the Cam2 Umbrella Policies.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that Smitty's, Smith, and Tate do not qualify as insureds under the Cam2 Umbrella Policies;
- b. Declaring that Nationwide owes no obligation to Smitty's, Smith, Tate under the Cam2 Umbrella Policies;
- c. Awarding any other relief this Court deems just and proper.

COUNT VII

No Duty to Defend or Indemnify the Defendants is Owed Under the Smitty's Primary Policies Based on the Prior Knowledge Provisions

117. Nationwide incorporates and restates the allegations of paragraph 1 through 73 above as if fully set forth herein.

118. The Smitty's Primary Policies are subject to the following provisions:

- (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. 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.
- c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by 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, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of 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.

* * *

119. The TACC alleges that since at least December 2013 Smitty’s, Cam2 and others have unlawfully utilized used oils and line wash/line flush in the Products’ formulation and manufacturing processes and concealed information from regulators and the public as to the true nature of the Products.

120. In October 2017, the MDA announced that it performed testing on the 303 Products which revealed that the products did not meet any manufacturers’ current tractor hydraulic fluid specifications and were underperforming to the point damage was likely to result from use.

121. In October 2017, the MDA issued letters to the Defendants informing them of the results of their testing on the 303 Products and that it concluded that the 303 Products were mislabeled, misbranded, that the labels were deceptive and misleading and that the products were potentially exposing equipment to increased wear and damage.

122. In November 2017, the MDA issued a stop sale banning the sale of the 303 Products in the State of Missouri.

123. On August 12, 2018, a stop sale banning the sale of the 303 Products in the State of Georgia was issued.

124. On February 17, 2019, a stop sale banning the sale of the 303 Products in the State of North Carolina was issued.

125. The Defendants knew of the “property damage” complained of prior to the inception of the Primary Policies.

126. Nationwide owes no obligation to defend or indemnify the Defendants under the Smitty’s Primary Policies.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that the Knowledge Provisions apply to preclude coverage under the Smitty’s Primary Policies;
- b. Declaring that Nationwide owes no duty to defend or indemnify the Defendants under the Smitty’s Primary Policies; and
- c. Awarding any other relief this Court deems just and proper.

COUNT VIII

No Duty to Defend or Indemnify the Defendants is Owed Under the Smitty’s Primary Policies Based on Doctrines of Fortuity, Loss In Progress and Known Risk

127. Nationwide incorporates and restates the allegations of paragraph 1 through 73 above as if fully set forth herein.

128. The fortuity doctrine combines the principles of “known risk” and “loss in progress” and holds that insurance coverage is precluded where the insured is aware of an ongoing progressive or known risk at the time the policy is purchased.

129. The TACC alleges that since at least December 2013 Smitty’s, Cam2 and others have unlawfully utilized used oils and line wash/line flush in the Products’ formulation and manufacturing processes and concealed information from regulators and the public as to the true nature of the Products.

130. In October 2017, the MDA announced that it performed testing on the 303 Products, which revealed that the products were underperforming to the point damage was likely to result from use.

131. In October 2017, the MDA issued letters to the Defendants informing them of the results of their testing on the 303 Products and that it concluded that the 303 Products were mislabeled, misbranded, that the labels were deceptive and misleading and that the products were potentially exposing equipment to increased wear and damage.

132. In November 2017, the MDA issued a stop sale banning the sale of the 303 Products in the State of Missouri.

133. On August 12, 2018, a stop sale banning the sale of the 303 Products in the State of Georgia was issued.

134. On February 17, 2019, a stop sale banning the sale of the 303 Products in the State of North Carolina was issued.

135. The Defendants knew that the 303 Products were defective prior to the inception of the Smitty's Primary Policies.

136. Nationwide owes no obligation to defend or indemnify the Defendants under the Smitty's Primary Policies.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that the Known Risk, Fortuity and/or Loss in Progress doctrines apply to preclude coverage under the Smitty's Primary Policies;
- b. Declaring that Nationwide owes no duty to defend or indemnify the Defendants under the Smitty's Primary Policies; and
- c. Awarding any other relief this Court deems just and proper.

COUNT IX

No Duty to Indemnify the Defendants is Owed Under the Umbrella Policies Based on Doctrines of Fortuity, Loss In Progress and Known Risk

137. Nationwide incorporates and restates the allegations of paragraph 1 through 73 above as if fully set forth herein.

138. The fortuity doctrine combines the principals of “known risk” and “loss in progress” and holds that insurance coverage is precluded where the insured is aware of an ongoing progressive or known risk at the time the policy is purchased.

139. The TACC alleges that since at least December 2013 Smitty’s, Cam2 and others have unlawfully utilized used oils and line wash/line flush in the Products’ formulation and manufacturing processes and concealed information from regulators and the public as to the true nature of the Products.

140. Upon information and belief, Smitty’s knew that the 303 Products were defective and that such would result in “property damage” to consumers prior to the inception of the Smitty’s Umbrella Policies.

141. Upon information and belief, Cam2 knew that the 303 Products were defective and that such would result in “property damage” to consumers prior to the inception of the Cam2 Umbrella Policies.

142. Nationwide owes no obligation to indemnify the Defendants under the Umbrella Policies.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that the Known Risk, Fortuity and/or Loss in Progress doctrines apply to preclude coverage under the Umbrella Policies;

- b. Declaring that Nationwide owes no duty to indemnify the Defendants under the Umbrella Policies; and
- c. Awarding any other relief this Court deems just and proper.

COUNT X

Damages Attributable to Count V of the MDL Action Do Not Constitute Damages Because of “Property Damage”

143. Nationwide incorporates and restates the allegations of paragraph 1 through 73 above as if fully set forth herein.

144. The “property damage” liability coverage of the Primary Policies provides that Nationwide will pay those sums that the insured becomes legally obligated to pay as damages because of “property damage.”

145. The Primary Policies define “property damage” as follows:

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.

* * *

146. Count V of the MDL Action solely seeks recovery for economic damages, restitution and/or disgorgement of profits.

147. Economic damages, restitution and/or disgorgement of profits do not constitute damages because of “property damage.”

148. Nationwide does not owe any obligation to indemnify the Defendants under the Primary Policies for any damages attributable to Count V of the MDL Action, or any corresponding counts asserting the same cause of action in the remaining Underlying Lawsuits.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that the Count V of the MDL Action, or any corresponding counts asserting the same cause of action in the remaining Underlying Lawsuits, does not seek damages because of “property damage;”
- b. Declaring that Nationwide owes no duty to indemnify the Defendants under the Primary Policies for any damages attributable to Count V of the MDL Action, or any corresponding counts asserting the same cause of action in the remaining Underlying Lawsuits; and
- c. Awarding any other relief this Court deems just and proper.

COUNT XI

Damages Attributable to Count V of the MDL Do Not Constitute Damages Because of “Property Damage” as Defined Under Umbrella Policies

149. Nationwide incorporates and restates the allegations of paragraph 1 through 73 above as if fully set forth herein.

150. Coverage under the Umbrella Policies only applies to “ultimate net loss” in excess of the “retained limit” because of “property damage” caused by an “occurrence” during the policy period.

151. The Umbrella Policies define “property damage” as follows:

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.

* * *

152. Count V of the MDL Action solely seeks recovery for economic damages, restitution and/or disgorgement of profits.

153. Economic damages, restitution and/or disgorgement of profits do not constitute damages because of “property damage.”

154. Nationwide does not owe any obligation to indemnify the Defendants under the Umbrella Policies for any damages attributable to Count V of the MDL, or any corresponding counts asserting the same cause of action in the remaining Underlying Lawsuits.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that the Count V of the MDL Action, or any corresponding counts asserting the same cause of action in the remaining Underlying Lawsuits, does not seek damages because of “property damage”;
- b. Declaring that Nationwide owes no duty to indemnify the Defendants under the Umbrella Policies for any damages attributable to the Count V of the MDL Action, or any corresponding counts asserting the same cause of action in the remaining Underlying Lawsuits; and
- c. Awarding any other relief this Court deems just and proper.

COUNT XII

Damages Attributable to Counts V-LV Do Not Constitute Damages Because of “Property Damage” Caused by an “Occurrence” under the Primary Policies

155. Nationwide incorporates and restates the allegations of paragraph 1 through 73 above as if fully set forth herein.

156. The “property damage” liability coverage of the Primary Policies provides that Nationwide will pay those sums that the insured becomes legally obligated to pay as damages because of “property damage” caused by an “occurrence.”

157. The Primary Policies define “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

158. Count V of the MDL Action alleges that the Defendants obtained certain benefits under false pretenses because of the Defendants’ concealments, misrepresentations, and other deceptive, misleading and unfair conduct relating to the 303 Products.

159. Counts VIII through LV of the MDL Action allege that the Defendants violated various consumer protection statutes by engaging in acts of deception, false pretense, false promise, misrepresentations, suppression and/or concealment.

160. Counts V through LV of the MDL Action do not allege an accident.

161. Nationwide does not owe any obligation to indemnify the Defendants under the Primary Policies for any damages attributable to Counts V through LV of the MDL Action, or any corresponding counts asserting the same cause of action in the remaining Underlying Lawsuits.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that Counts V through LV of the MDL Action, or any corresponding counts asserting the same cause of action in the remaining Underlying Lawsuits, do not seek damages because of “property damage” caused by an “occurrence;”
- b. Declaring that Nationwide owes no duty to indemnify the Defendants for any damages attributable to Counts V through LV of the MDL Action, or any corresponding counts asserting the same cause of action in the remaining Underlying Lawsuits under the Primary Policies; and
- c. Awarding any other relief this Court deems just and proper.

COUNT XIII

Damages Attributable to Counts V-LV Do Not Constitute Damages Because of “Property Damage” Caused by an “Occurrence” Under the Umbrella Policies

162. Nationwide incorporates and restates the allegations of paragraph 1 through 73 above as if fully set forth herein.

163. Coverage under the Umbrella Policies only applies to “ultimate net loss” in excess of the “retained limit” because of “property damage” caused by an “occurrence” during the policy period.

164. The Umbrella Policies define “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

165. Count V of the MDL Action alleges that the Defendants obtained certain benefits under false pretenses because of the Defendants’ concealments, misrepresentations, and other deceptive, misleading and unfair conduct relating to the 303 Products.

166. Counts VIII through LV of the MDL Action allege that the Defendants violated various consumer protection statutes by engaging in acts of deception, false pretense, false promise, misrepresentations, suppression and/or concealment.

167. Counts V through LV of the MDL Action do not allege an accident.

168. Nationwide does not owe any obligation to indemnify the Defendants for any damages attributable to Counts V through LV of the MDL Action, or any corresponding counts asserting the same cause of action in the remaining Underlying Lawsuits under the Umbrella Policies.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that Counts V through LV of the MDL Action, or any corresponding counts asserting the same cause of action in the remaining Underlying Lawsuits, do not seek damages because of “property damage” caused by an “occurrence;”
- b. Declaring that Nationwide owes no duty to indemnify the Defendants under the Umbrella Policies for any damages attributable to Counts V through LV of the MDL Action, or any corresponding counts asserting the same cause of action in the remaining Underlying Lawsuits, and
- c. Awarding any other relief this Court deems just and proper.

COUNT XIV

No Obligation to Indemnify the Defendants under the Primary Policies Is Owed for Any Sums That Do Not Constitute Damages Because of “Property Damage” Caused By An “Occurrence” During the Policy Period of the Primary Policies

169. Nationwide incorporates and restates the allegations of paragraph 1 through 73 above as if fully set forth herein.

170. The “property damage” liability coverage of the Primary Policies provides that Nationwide will pay those sums that the insured becomes legally obligated to pay as damages because of “property damage” caused by an “occurrence” during the policy period.

171. The Primary Policies define “property damage” as follows:

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.

* * *

172. The Primary Policies define “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

173. Damages arising from reimbursement to consumers for a product that failed to meet its specifications do not qualify as “property damage”.

174. The alleged damages in the Underlying Lawsuits were not caused by an accident.

175. The Underlying Lawsuits arise from the sale of 303 Products from December 1, 2013 to Present.

176. The Primary Policies incepted on April 30, 2014 and ended on April 30, 2020.

177. Nationwide does not owe any obligation to indemnify the Defendants for any sums that do not constitute damages because of “property damage” caused by an “occurrence” during the policy period of the Primary Policies.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that sums paid to reimburse Underlying Plaintiffs for cost of 303 Products do not constitute damages of “property damage”;
- b. Declaring that Nationwide owes no duty to indemnify the Defendants for any damages that do not constitute damages because of “property damage” caused by an “occurrence” during the policy periods; and
- c. Awarding any other relief this Court deems just and proper.

COUNT XV
DECLARATORY RELIEF

No Obligation to Indemnify is Owed Under the Umbrella Policies for Any Sums That Does Not Seek Damages Because of “Property Damage” Caused by an “Occurrence” During Policy Period

178. Nationwide incorporates and restates the allegations of paragraph 1 through 73 above as if fully set forth herein.

179. Coverage under the Umbrella Policies only applies to “ultimate net loss” in excess of the “retained limit” because of “property damage” caused by an “occurrence” during the policy period.

180. “Retained limit” is defined to include the available limits of “underlying insurance” scheduled in the Declarations.

181. The 14-18 Smitty’s Primary Policies each constitute “underlying insurance” for the Smitty’s Umbrella Policy that possesses the same policy period.

182. The 14-18 Cam2 Primary Policies each constitute “underlying insurance” for the Cam2 Umbrella Policy that possesses the same policy period.

183. The limits of the 14-18 Primary Policies have not been exhausted.

184. The Umbrella Policies define “property damage” and “occurrence” as follows:

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

* * *

18. “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.

* * *

185. Damages arising from reimbursement to consumers for a product that failed to meet its specifications do not qualify as “property damage”.

186. The alleged damages in the Underlying Lawsuits were not caused by an accident.

187. The Underlying Lawsuit arises from the sale of the 303 Products from December 1, 2013 to Present.

188. Nationwide does not owe any obligation to indemnify the Defendants under the Umbrella Policies for any sums that do not constitute “ultimate net loss” in excess of the “retained limit” because of “property damage” caused by an “occurrence” during the policy period.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that sums paid to reimburse Underlying Plaintiffs for cost of 303 Products do not constitute damages of “property damage;”
- b. Declaring that Nationwide owes no duty to indemnify the Defendants for any damages that do not constitute damages because of “property damage” caused by an “occurrence” during the policy periods under the Umbrella Policies; and
- c. Awarding any other relief this Court deems just and proper.

COUNT XVI
DECLARATORY RELIEF

The Your Product, Impaired Property and Product Recall Exclusions Preclude Coverage Under the Primary Policies for Reimbursement of the Cost of the Defendants’ Products

189. Nationwide incorporates and restates the allegations of paragraph 1 through 73 above as if fully set forth herein.

190. The Primary Policies are subject to exclusions that provide, in part, as follows:

2. Exclusions

This insurance does not apply to:

* * *

k. Damage To Your Product

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

* * *

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.

* * *

191. The Underlying Lawsuits, in part, seek reimbursement of the price they paid for the defective 303 Products.

192. The Your Product, Impaired Property and Product Recall Exclusions preclude coverage for the reimbursement or replacement of the insured's defective product.

193. Nationwide owes no obligation to indemnify the Defendants under the Primary Policies for any sums that compensate the Underlying Plaintiffs for the reimbursement or replacement of the complained of 303 Products or for any other sums that fall within the scope of the Your Product, Impaired Property or Product Recall Exclusions.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that sums paid to reimburse Underlying Plaintiffs for cost of 303 Products are precluded from coverage under the Your Product, Impaired Property and/or Product Recall Exclusion;

- b. Declaring that Nationwide owes no duty to indemnify the Defendants for any sums paid to reimburse Underlying Plaintiffs for cost of 303 Products under the Primary Policies; and
- c. Awarding any other relief this Court deems just and proper.

COUNT XVII
DECLARATORY RELIEF

The Your Product, Impaired Property, and Product Recall Exclusions Preclude Coverage Under the Umbrella Policies for Any Sums Attributable to the Reimbursement of the Cost of the Defendants’ Products

194. Nationwide incorporates and restates the allegations of paragraph 1 through 73 above as if fully set forth herein.

195. The Umbrella Policies are subject to the following exclusions:

2. Exclusions

This insurance does not apply to:

* * *

n. Damage To Your Product

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

* * *

p. 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.

q. 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.

* * *

196. The Underlying Lawsuits, in part, seek reimbursement of the price they paid for the defective 303 Product.

197. The Your Product, Impaired Property and Product Recall Exclusions preclude coverage for the reimbursement or replacement of the insured’s defective product.

198. Nationwide owes no obligation to indemnify the Defendants under the Umbrella Policies for any sums that that compensates the Underlying Plaintiffs for the reimbursement or replacement of the complained of 303 Products or for any other sums that fall within the scope of the Your Product, Impaired Property or Product Recall Exclusions.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that sums paid to reimburse Underlying Plaintiffs for the purchase of 303 Products are precluded from coverage under the Umbrella Policies’ Your Product, Impaired Property and/or Product Recall Exclusions;
- b. Declaring that Nationwide owes no duty to indemnify the Defendants for any sums paid to reimburse Underlying Plaintiffs for the purchase of 303 Products under the Umbrella Policies; and
- c. Awarding any other relief this Court deems just and proper.

COUNT XVIII
DECLARATORY RELIEF

**The Expected or Intended Injury Exclusion Applies to Preclude Coverage
for Smitty's and Cam2 Under the Primary Policies**

199. Nationwide incorporates and restates the allegations of paragraph 1 through 73 above as if fully set forth herein.

200. The Primary Policies are subject to the following exclusion:

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect persons or property.

201. The TACC alleges that Defendants acted knowingly or intentionally.

202. The TACC alleges that Defendants knew their representations regarding the 303 THF Products were false, deceptive and misleading to consumers and others seeking to purchase tractor hydraulic fluid.

203. The TACC also alleges that in October 2017, the MDA stated publicly that it performed testing on the 303 THF Products, which revealed that the products were underperforming to the point damage was likely to result from use and that Defendants were allegedly notified of the same.

204. The TACC alleges that in November 2017, the MDA issued a stop-sale banning the sale of the 303 THF Products.

205. Upon information and belief, Smitty's knew that the 303 Products were defective and that such would result in “property damage” to consumers prior to the inception of the Smitty's Primary Policies.

206. Upon information and belief, Cam2 knew that the 303 Products were defective and that such would result in “property damage” to consumers prior to the inception of the Cam2 Primary Policies and the Smitty’s Primary Policies.

207. Counts V through LV are also solely based on allegations that the Defendants acted deceptively, knowingly and/or intentionally.

208. Accordingly, Nationwide does not owe any obligation to indemnify Smitty’s or Cam2 for the Underlying Lawsuits.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that Nationwide owes no duty to indemnify Smitty’s and Cam2 because the Expected or Intended Injury Exclusion applies to preclude coverage; and
- b. Awarding any other relief this Court deems just and proper.

COUNT XIX
DECLARATORY RELIEF
**The Expected or Intended Injury Exclusion Precludes Coverage
for Smitty’s and Cam2 Under the Umbrella Policies**

209. Nationwide incorporates and restates the allegations of paragraph 1 through 73 above as if fully set forth herein.

210. The Umbrella Policies are subject to the following exclusion:

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect persons or property.

* * *

211. The TACC alleges that Defendants acted knowingly or intentionally.

212. The TACC alleges that Defendants knew their representations regarding the 303 THF Products were false, deceptive and misleading to consumers and others seeking to purchase tractor hydraulic fluid.

213. The TACC also alleges that in October 2017, the MDA stated publicly that it performed testing on the 303 THF Products, which revealed that the products were underperforming to the point damage was likely to result from use and that Defendants were allegedly notified of the same.

214. The TACC alleges that in November 2017, the MDA issued a stop-sale banning the sale of the 303 THF Products.

215. Upon information and belief, Smitty's knew that the 303 Products were defective and that such would result in "property damage" to consumers prior to the inception of the Smitty's Umbrella Policies.

216. Upon information and belief, Cam2 knew that the 303 Products were defective and that such would result in "property damage" to consumers prior to the inception of the Cam2 Umbrella Policies.

217. Counts V through LV are also solely based on allegations that the Defendants acted deceptively, knowingly and/or intentionally.

218. Accordingly, Nationwide does not owe any obligation to indemnify Smitty's or Cam2 for the Underlying Lawsuits under the Umbrella Policies.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that Nationwide owes no duty to indemnify Smitty’s and Cam2 under the Umbrella Policies because the Expected or Intended Injury Exclusion applies to preclude coverage; and
- b. Awarding any other relief this Court deems just and proper.

COUNT XX
DECLARATORY RELIEF

Alternatively, the Underlying Lawsuits Only Involved a Single “Occurrence”

219. Nationwide incorporates and restates the allegations of paragraph 1 through 73 above as if fully set forth herein.

220. Alternatively, even if the Underlying Lawsuits involve damages, because of “property damage” caused by an “occurrence,” the Underlying Lawsuits only involve a single “occurrence” and only implicate one “occurrence” limit.

221. The Primary Policies define “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

222. The Primary Policies state as follows:

SECTION III --- LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
 - a. Insureds;
 - b. Claims made or “suits” brought; or
 - c. Persons or organizations making claims or bringing “suits”.
2. The General Aggregate Limit is the most we will pay for the sum of:
 - a. Medical expenses under Coverage C;
 - b. Damages under Coverage A, except damages because of “bodily injury” or “property damage” included in the “products-completed operations hazard”; and
 - c. Damages under Coverage B.
3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of “bodily injury” and “property damage” included in the “products-completed operations hazard”.

* * *

5. Subject to Paragraph 2. Or 3. Above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:
 - a. Damages under Coverage A; and
 - b. Medical expenses under Coverage C because of all “bodily injury” and “property damage” arising out of any one “occurrence”.

223. Upon information and belief, all of the 303 Products complained of in the Underlying Lawsuits were manufactured at the same facility.

224. All of the complained of damage was allegedly caused by Smitty’s and Cam2’s production of defective tractor hydraulic fluid.

225. Accordingly, the Underlying Lawsuits only involve a single “occurrence.”

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that the Underlying Lawsuits only involve a single “occurrence;”
- b. Declaring that only a single each “occurrence” limit applies; and
- c. Awarding any other relief this Court deems just and proper.

COUNT XXI
DECLARATORY RELIEF
Equitable Relief

226. Nationwide incorporates and restates the allegations of paragraph 1 through 73 above as if fully set forth herein.

227. The TACC seeks equitable/injunctive relief.

228. Nationwide owes no indemnity obligation for the costs of compliance with equitable relief, as such costs do not constitute sums that the insured is legally obligated to pay as damages because of “property damage”.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that Nationwide does not owe any obligation for any injunctive or equitable relief;
- c. Awarding any other relief this Court deems just and proper.

COUNT XXII
DECLARATORY RELIEF
No Coverage for Plaintiffs' Attorney's Fees

229. Nationwide incorporates and restates the allegations of paragraph 1 through 73 above as if fully set forth herein.

230. The TACC also seeks recovery of Plaintiffs' attorney's fees.

231. Nationwide owes no coverage for the attorney's fees claimed by Plaintiffs because such do not constitute damages because of "property damage".

232. Nationwide does not owe any obligation for the attorney's fee claimed by the Plaintiffs because such do not constituted damages because of "property damage" caused by an "occurrence."

233. The Supplementary Payments provision of the Nationwide Policies provides, in part, as follows:

SUPPLEMENTARY PAYMENTS – COVERAGES A AND B

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend

* * *

e. All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys expenses taxed against the insured.

* * *

234. As a result, Plaintiffs' attorney's fees are not payable as supplementary payments within the provision of the Nationwide Policies.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that the attorney's fees sought by the Plaintiffs do not constitute damages because of "property damage";
- b. Declaring that the attorney's fees sought by the Plaintiffs do not constitute damages because of "property damage" caused by an "occurrence";
- c. Declaring that the attorney's fees sought by the Plaintiffs do not constitute supplementary payments;
- d. Awarding any other relief this Court deems just and proper.

COUNT XXIII
DECLARATORY RELIEF
Nationwide is Entitled to Reimbursement of Defense Costs

235. Nationwide incorporates and restates the allegations of paragraph 1 through 234 above as if fully set forth herein.

236. Nationwide has been defending Smitty's, Cam2, and Tractor Supply in the MDL Action pursuant to a full reservation of rights.

237. Nationwide only owes an obligation to defend Smitty's, Cam2, and Tractor Supply under policies in which they qualify as an insured and only for covered claims.

238. In its reservation of rights letter Smitty's, and Cam2, Nationwide specifically reserved the right to seek reimbursement of costs incurred in the defense of claims for which Smitty's and Cam2 do not qualify as an insured and for non-covered claims.

239. In the event it is determined that no duty to defend the Underlying Lawsuits is owed, or no duty to defend specific counts or damages, or for specific policy years, Nationwide is entitled to reimbursement for the defense costs expended to defend Smitty's, and/or Cam2.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. Declaring that Nationwide is entitled to reimbursement from Smitty's, and Cam2 for the defense costs incurred under policies for which Smitty's, and Cam2 do not qualify as insureds;
- b. Declaring that Nationwide is entitled to reimbursement from Smitty's, and Cam2 for the defense costs incurred for damages and or non-covered claims in MDL Action; and
- c. Awarding any other relief this Court deems just and proper.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against the Defendants as follows:

- a. declaring Nationwide owes no duty to defend the Defendants in the Underlying Lawsuits;
- b. declaring Nationwide owes no duty to indemnify the Defendants in the Underlying Lawsuits;
- c. declaring that Cam2 does not qualify as an insured under the 14-18 Smitty's Primary Policies;
- d. declaring that Nationwide owes no duty to defend or indemnify Cam2 under the 14-18 Smitty's Primary Policies;
- e. declaring that Smitty's does not qualify as an insured under the Cam2 Primary Policies;
- f. declaring that Cam2 does not qualify as insureds under the Smitty's Umbrella Policies;

- g. declaring that Nationwide owes no obligation to Cam2 under the Smitty's Umbrella Policies;
- h. declaring that Smitty's does not qualify as an insured under the Cam2 Umbrella Policies;
- i. declaring that Nationwide owes no obligation to Smitty's under the Cam2 Umbrella Policies;
- j. declaring that Smith and Tate do not qualify as an insured under the Smitty's Primary Policies;
- i. declaring that Smith and Tate do not qualify as insureds under the Cam2 Primary Policies;
- k. declaring that Smith and Tate do not qualify as insureds under the Smitty's Umbrella Policies;
- l. declaring that Smith and Tate do not qualify as insureds under the Cam2 Umbrella Policies;
- m. awarding any other relief this Court deems just and proper.
- n. for reimbursement of defense expenses incurred;
- o. costs incurred in this action; and
- p. for all other relief this Court deems necessary and just.

