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A Limited Liability Law Partnership

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Attorneys for Plaintiff
ALOHA PETROLEUM, LTD.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ALOHA PETROLEUM, LTD.,
Plaintiff,

v.

NATIONAL UNION FIRE
INSURANCE COMPANY OF
PITTSBURGH, PA, and AMERICAN
HOME ASSURANCE COMPANY,
Defendants.

CIVIL NO. 1:22-cv-00372-JAO-WRP
(Contract)

**FIRST AMENDED COMPLAINT;
EXHIBITS “A”-“C”; DEMAND
FOR JURY TRIAL;
CERTIFICATE OF SERVICE**

FIRST AMENDED COMPLAINT

1. Plaintiff Aloha Petroleum, Ltd. (“Aloha”), by its undersigned counsel, brings this action against Defendants, National Union Fire Insurance Company of Pittsburgh, PA (“National Union”), and American Home Assurance Company (“American Home”) (collectively, “Defendants”), and alleges as follows:

INTRODUCTION

2. Aloha brings this action for breach of contract, declaratory relief and breach of the duty of good faith arising out of Defendants’ failure to honor their contractual obligations to defend and/or indemnify Aloha in connection with underlying climate-change-related lawsuits brought against Aloha by the City and County of Honolulu and Honolulu Board of Water Supply (“Honolulu Action”), and by the County of Maui (“Maui Action”).

PARTIES

3. Aloha, currently a subsidiary of Sunoco, LP, is incorporated in the State of Hawai‘i, with its principal place of business in Honolulu, Hawai‘i.

4. Upon information and belief, National Union is an insurance company incorporated under the laws of Pennsylvania, with its principal place of business in New York, New York.

5. Upon information and belief, American Home is an insurance company incorporated under the laws of New York, with its principal place of business in New York, New York.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1332, because there is complete diversity of citizenship between Plaintiff and Defendants, and the amount in controversy exceeds \$75,000 exclusive of interest and costs.

7. Pursuant to 28 U.S.C. § 1391(b)(2), venue is proper in this district as the claims in this action arise in Hawai‘i.

BACKGROUND

The National Union General Liability Insurance Policies

8. Upon information and belief, Defendant National Union is a member company of American International Group, Inc. (“AIG”), which, via subsidiaries or affiliates, handles policyholder coverage claims for National Union and other AIG member companies.

9. Defendant National Union issued to Aloha’s then-parent E-Z Serve, Inc., a general liability insurance policy no. GLA 1169215, with a policy period of February 1, 1984 to February 1, 1985 (the “first 1984 National Union General Liability Policy”).

10. Upon information and belief, Defendant National Union issued to Aloha's then parent E-Z Serve, Inc., a general liability insurance policy no. BA 1152703, with a policy period of February 1, 1984 to February 1, 1985 (the "second 1984 National Union General Liability Policy").

11. Defendant National Union issued to Aloha's then-parent E-Z Serve, Inc., a general liability insurance policy no. GLA 1169253, with a policy period of February 1, 1985 to February 1, 1986 (the "1985 National Union General Liability Policy"). A partially redacted copy of that policy is attached and incorporated as Exhibit "A."

12. Defendant National Union issued to Aloha's then-parent E-Z Serve, Inc., a general liability insurance policy no. GLA 1169292, with a policy period of February 1, 1986 to February 1, 1987 (the "1986 National Union General Liability Policy").

13. Defendant National Union issued to Aloha's then-parent E-Z Serve, Inc., a general liability insurance policy no. GLA 1169326, with a policy period of February 1, 1987 to February 1, 1988 (the "1987 National Union General Liability Policy").

14. Defendant National Union issued to Aloha's then-parent E-Z Serve, Inc., a general liability insurance policy no. GL 1169365 RA, with a policy period

of February 1, 1988 to February 1, 1989 (the “first 1988 National Union General Liability Policy”).

15. Defendant National Union issued to Aloha’s then-parent E-Z Serve, Inc., a general liability insurance policy no. GL 1169366 RA, with a policy period of February 1, 1988 to February 1, 1989 (the “second 1988 National Union General Liability Policy”).

16. Defendant National Union issued to Aloha a general liability insurance policy no. GL 2803051, with a policy period of April 1, 2008 to April 1, 2009 (the “2008 National Union General Liability Policy”).

17. Defendant National Union issued to Aloha a general liability insurance policy no. GL 0935959, with a policy period of April 1, 2009 to April 1, 2010 (the “2009 National Union General Liability Policy”).

18. Upon information and belief, Defendant National Union has assumed by merger the obligations of Landmark Insurance Company, which issued to Aloha’s then-parent E-Z Serve, Inc., a general liability policy no. SMP 8000067, with a policy period of October 1, 1978 to October 1, 1980 (the “1978 Landmark General Liability Policy”).

19. Upon information and belief, Defendant National Union has assumed by merger the obligations of Landmark Insurance Company, which issued to Aloha’s then-parent E-Z Serve, Inc., a general liability insurance policy no. SMP 8000367,

with a policy period of October 1, 1980 to October 1, 1981 (the “1980 Landmark General Liability Policy”).

The American Home General Liability Insurance Policies

20. Upon information and belief, Defendant American Home is a member company of AIG, which, via subsidiaries or affiliates, handles policyholder coverage claims for American Home and other AIG member companies.

21. Defendant American Home issued to Aloha a general liability insurance policy no. GL 3602234, with a policy period of April 1, 2004 to April 1, 2005 (the “2004 American Home General Liability Policy”).

22. Defendant American Home issued to Aloha a general liability insurance policy no. GL 0714127, with a policy period of April 1, 2005 to April 1, 2006 (the “2005 American Home General Liability Policy”).

23. Defendant American Home issued to Aloha a general liability insurance policy no. GL 6432340, with a policy period of April 1, 2006 to April 1, 2007 (the “2006 American Home General Liability Policy”).

24. Defendant American Home issued to Aloha a general liability insurance policy no. GL 6455690, with a policy period of April 1, 2007 to April 1, 2008 (the “2007 American Home General Liability Policy”).

25. The above general liability policies issued by National Union and American Home and covering Aloha (the “AIG General Liability Policies”) obligate

National Union and American Home to defend and indemnify Aloha in connection with the Honolulu Action and Maui Action referenced above. Specifically, among other obligations, the AIG General Liability Policies impose on National Union and American Home, respectively, the duty to defend Aloha with respect to third-party liability claims and suits against Aloha seeking damages on account of property damage and bodily injury to which the policies apply.

The National Union Umbrella Liability Insurance Policies

26. Defendant National Union issued to Aloha an umbrella liability insurance policy no. BE 3578570, with a policy period of January 1, 1999 to January 1, 2000 (the “1999 National Union Umbrella Liability Policy”).

27. Defendant National Union issued to Aloha an umbrella liability insurance policy no. BE 7390277, with a policy period of January 1, 2000 to January 1, 2001 (the “2000 National Union Umbrella Liability Policy”).

28. Defendant National Union issued to Aloha an umbrella liability insurance policy no. BE 1391819, with a policy period of January 1, 2002 to January 1, 2003 (the “2002 National Union Umbrella Liability Policy”).

29. Defendant National Union issued to Aloha an umbrella liability insurance policy no. BE 1394506, with a policy period of January 1, 2003 to January 1, 2004 (the “2003 National Union Umbrella Liability Policy”).

30. Defendant National Union issued to Aloha an umbrella liability insurance policy no. BE 2988074, with a policy period of January 1, 2004 to April 1, 2004 (the “first 2004 National Union Umbrella Liability Policy”).

31. Defendant National Union issued to Aloha an umbrella liability insurance policy no. BE 2988095, with a policy period of April 1, 2004 to April 1, 2005 (the “second 2004 National Union Umbrella Liability Policy”).

32. Defendant National Union issued to Aloha an umbrella liability insurance policy no. BE 5683933, with a policy period of April 1, 2005 to April 1, 2006 (the “2005 National Union Umbrella Liability Policy”).

The Relevant Terms of the AIG General Liability Policies

33. As an example of the AIG General Liability Policies at issue, the 1985 National Union General Liability Policy provides coverage for “all sums which the insured shall become legally obligated to pay as damages because of A. bodily injury or B. property damage to which this insurance applies, caused by an occurrence” *See* 1985 National Union General Liability Policy, Ex. A, at § I, at p. EZSERVE000003.

34. Regarding the obligation to defend the policyholder against suits, the 1985 National Union General Liability Policy provides that “. . . ***the company shall have the right and duty to defend any suit against the insured seeking damages on***

account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent” Id. at § I (emphasis added).

35. “Bodily injury” is defined as “bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom.” *Id.* at “Definitions,” at p. EZSERVE000004.

36. The 1985 National Union General Liability Policy defines “property damage” as “(1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.” *Id.*

37. “Occurrence,” in turn, is defined as “an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.” *Id.*

38. The 1985 National Union General Liability Policy further provides for \$1 million in per occurrence and aggregate (where applicable) coverage for bodily injury liability and property damage liability for the February 1, 1985 to February 1, 1986 policy period. *See id.* at p. EZSERVE000014.

39. The 1985 National Union General Liability Policy obligates National Union to pay any covered claim or judgment or defend any covered suit until “the

applicable limit of the company's liability has been exhausted by payment of judgments or settlements.” *Id.* at EZSERVE00003, § I.

40. The 1985 National Union General Liability Policy specifically provides coverage for “products hazard” which includes bodily injury or property damage arising out of the named insured's products. *Id.* at EZSERVE00004.

41. Upon information and belief, the above-excerpted policy language in the 1985 National Union General Liability Policy is substantially similar to policy language in the other AIG General Liability Policies, including the 1986 National Union General Liability Policy and the 1987 National Union General Liability Policy. However, the language of the various pollution exclusions in the AIG General Liability Policies differs from year to year.

The Underlying Climate Change Lawsuits

42. This action concerns insurance coverage for two separate but related lawsuits filed against Aloha (and other defendants) by the City and County of Honolulu and Honolulu Board of Water Supply (filed March 9, 2020 in the First Circuit Court, State of Hawai‘i, Civil No. 1CCV-20-0000380 (LWC), amended March 22, 2021), and the County of Maui (filed October 12, 2020 in the Second Circuit Court, State of Hawai‘i, Civil No. 2CCV-20-0000283) (collectively, the “Climate Change Lawsuits”). Aloha brings this action because National Union and American Home have failed and/or refused to defend and indemnify Aloha under

any of the AIG General Liability Policies or above umbrella liability policies (collectively, the “AIG Policies”).

43. In their respective complaints in the Climate Change Lawsuits, the plaintiffs allege, *inter alia*, that fossil fuel products, when used in the ordinary course, have contributed to emissions of carbon dioxide, and other greenhouse gases – and that the use of those products by the public have contributed to global warming. Specifically, the plaintiffs assert various tort claims contending that the defendants are directly responsible for the damaging effects of global warming because of the defendants’ alleged failure to disclose or warn of the hazards of using the fossil fuel products that the defendants sold into the stream of commerce. Plaintiffs assert that these alleged failures to disclose or warn resulted in increased carbon dioxide emissions – and an increase in resulting injuries and damage from the use of fossil fuel products – during the period between 1965 and the present.

44. The plaintiffs further allege that, as a result of global warming and its attendant environmental impacts, they have suffered and will continue to suffer severe damage and injury, including but not limited to: the injury to or destruction of publicly-owned-or-operated facilities and assets, increased costs concerning planning and preparation, and injuries to public resources.

45. The plaintiffs assert various claims against Aloha (and other defendants), such as strict liability for failure to warn, negligent failure to warn, as well as claims of nuisance and trespass.

46. The plaintiffs seek an unspecified amount of compensatory monetary damages, as well as equitable relief and attorneys' fees and costs of litigation, among other damages.

47. Aloha disputes the plaintiffs' claims and has retained counsel to provide a defense with respect to the Climate Change Lawsuits.

48. To date, Aloha has incurred over \$1,400,000 in defense costs in connection with the Climate Change lawsuits, and Aloha expects that it will continue to incur significant additional defense costs, as the litigation progresses.

Initial Notice and Denial of Coverage

49. On or about February 2, 2021, Aloha provided National Union with notice of the Climate Change Lawsuits under the first 1984 National Union General Liability Policy, the 1985 National Union General Liability Policy, the 1986 National Union General Liability Policy, the 1987 National Union General Liability Policy, the first and second 1988 National Union General Liability Policies, the 1978 Landmark General Liability Policy, and the 1980 Landmark General Liability Policy, along with a request for defense and indemnity coverage under those policies.

50. By letter dated April 19, 2021, National Union expressed its inability to locate copies of the 1978 Landmark General Liability Policy, the 1980 Landmark General Liability Policy, and the first 1984 National Union General Liability Policy. The letter did not address the 1986, 1987 and 1988 National Union General Liability Policies. However, National Union did acknowledge the issuance of the 1985 National Union General Liability Policy and address its application to the Climate Change Lawsuits. A copy of that letter is attached and incorporated as Exhibit “B.”

51. In its April 19, 2021 letter, National Union denied coverage for the Climate Change Lawsuits under the 1985 National Union General Liability Policy.

52. Specifically, in its April 19, 2021 letter, National Union asserted the position that application of exclusion (f), the so-called “qualified pollution exclusion,” in the 1985 National Union General Liability Policy precludes all coverage – both defense and indemnity – for the Climate Change Lawsuits in light of the allegations in those lawsuits.

53. In its April 19, 2021 letter, National Union also advised Aloha “that additional provisions of the Policy may serve to limit or preclude coverage,” though National Union merely reserved rights to assert those provisions at a later time, and stated that these other provisions did not form the basis for National Union’s denial of coverage at that time.

54. Hence, by its April 19, 2021 letter, National Union clearly expressed that the sole reason it was denying Aloha's request for a defense of the Climate Change Lawsuits under the 1985 National Union General Liability Policy was the presence and application of the qualified pollution exclusion, and that no other term or condition of that policy was the basis for National Union denying its duty to defend the Climate Change Lawsuits.

55. Despite subsequent correspondence sent by Aloha to National Union explaining why National Union was wrong in denying coverage and refusing to defend the Climate Change Lawsuits based on the qualified pollution exclusion in the 1985 National Union General Liability Policy, National Union continued to deny its contractual obligation to defend Aloha with respect to the Climate Change Lawsuits based on the alleged application of the policy's pollution exclusion.

Subsequent Notice and Denial of Coverage

56. As a result of National Union's continued coverage denial and refusal to honor its duty to defend, Aloha filed suit against National Union on August 10, 2022. Subsequently, during the course of discovery in this case, National Union produced copies of several historical primary and umbrella insurance policies that it and other AIG member companies (including American Home) had issued to Aloha or which otherwise named Aloha as an additional insured.

57. On or about December 1, 2022, Aloha provided National Union and American Home with notice of, and a request for coverage with respect to the Climate Change Lawsuits under those newly-produced policies: namely, the 1999 National Union Umbrella Liability Policy, the 2000 National Union Umbrella Liability Policy, the 2002 National Union Umbrella Liability Policy, the 2003 National Union Umbrella Liability Policy, the first and second 2004 National Union Umbrella Liability Policies, the 2005 National Union Umbrella Liability Policy, the second 1984 National Union General Liability Policy, the 2004 American Home General Liability Policy, the 2005 American Home General Liability Policy, the 2006 American Home General Liability Policy, the 2007 American Home General Liability Policy, the 2008 National Union General Liability Policy, and the 2009 National Union General Liability Policy.

58. In its December 1, 2022 letter, Aloha also reiterated its request for coverage under the first 1984 National Union General Liability Policy, the 1985 National Union General Liability Policy, the 1986 National Union General Liability Policy, the 1987 National Union General Liability Policy, the first and second 1988 National Union General Liability Policies, the 1978 Landmark General Liability Policy, and the 1980 Landmark General Liability Policy.

59. In its December 1, 2022 letter, Aloha explained that at least two of the National Union General Liability Policies – the 1986 and 1987 National Union

General Liability Policies – contained forms of pollution exclusions that, by their express terms, only applied to premises liabilities, and not product liabilities; thus National Union could not reasonably assert those exclusions as a basis to deny its duty to defend Aloha with respect to the Climate Change Lawsuits, given that those lawsuits were asserting product liabilities against Aloha.

60. By response letter dated March 13, 2023, National Union and American Home denied coverage to Aloha under all of the AIG Policies for the Climate Change Lawsuits – including the duty to defend – based on terms in those policies other than the pollution exclusion, which terms National Union had not asserted in its prior April 19, 2021 letter (even though those other terms were contained in the 1985 National Union General Liability Policy). Specifically, in their March 13, 2023 letter, National Union and American Home asserted “four independent reasons” for refusing to defend Aloha under their policies, contending that: (1) the lawsuits do not allege damages caused by an “occurrence”; (2) the lawsuits do not allege “property damage” during the policy periods; (3) the lawsuits do not seek to hold Aloha liable for damages “because of” property damage; and (4) the lawsuits seek to hold Aloha liable for damage and injuries arising out of the discharge or release of pollutants, as barred by the AIG Policies’ various pollution exclusions. A copy of that letter is attached and incorporated as Exhibit “C.”

61. Significantly, in the March 13, 2023 letter, National Union reserved rights – but did not deny coverage – based on application of any pollution exclusion in the 1986 National Union General Liability Policy, the 1987 National Union General Liability Policy, and the first and second 1988 National Union General Liability Policies. Thus, although these four National Union General Liability Policies have very similar terms and conditions as the 1985 National Union General Liability Policy (other than their respective pollution exclusions) – and National Union had previously based its denial of a duty to defend under the 1985 National Union General Liability Policy solely on the basis of the pollution exclusion in that policy, National Union did not acknowledge a duty to defend under the similar general liability policies issued to Aloha in 1986, 1987 and 1988, which did not contain a similar pollution exclusion on which National Union could rely. Rather, for the 1986, 1987 and first and second 1988 National Union General Liability Policies, National Union asserted multiple policy-based grounds for refusing to defend Aloha that they had previously determined were not a sufficient basis to deny a defense under the 1985 National Union General Liability Policy containing substantially the same policy language. In so refusing to defend Aloha under the 1986, 1987 and first and second 1988 National Union General Liability Policies, National Union breached its duty of good faith and fair dealing owed to Aloha.

COUNT I

(Breach of Contract – Duty to Defend)
(v. National Union and American Home)

62. Aloha re-alleges paragraphs 1 through 61.

63. Aloha is defending itself in the Climate Change Lawsuits, and Aloha has incurred and continues to incur substantial defense costs in connection with the Climate Change Lawsuits.

64. Aloha is entitled to a defense under one or more of the AIG General Liability Policies with respect to the Climate Change Lawsuits.

65. All conditions precedent to obtaining a defense from National Union and/or American Home for the Climate Change Lawsuits under the AIG General Liability Policies have been satisfied, waived, or are otherwise inapplicable.

66. National Union and American Home refuse and/or have failed to defend Aloha with respect to the Climate Change Lawsuits.

67. National Union and American Home have acted in a manner inconsistent with the terms and conditions of the AIG General Liability Policies, and their actions constitute a breach of those policies.

68. As a direct and proximate result of National Union's and American Home's breach of their duty to defend under the AIG General Liability Policies, Aloha has sustained, and National Union and American Home are liable for, damages in an amount to be determined at trial.

COUNT II

(Declaratory Judgment – Duty to Defend)
(v. National Union and American Home)

69. Aloha re-alleges paragraphs 1 through 68.

70. Aloha's alleged liability arising out of the Climate Change Lawsuits, as well as the obligation of National Union and/or American Home to defend Aloha with respect to those lawsuits, are within the coverage provided by the AIG General Liability Policies.

71. With respect to Aloha's potential liability arising out of the Climate Change Lawsuits, an alleged occurrence and/or bodily injury, property damage, or other triggering event within the meaning of the AIG General Liability Policies is alleged to have taken place during the periods of these policies.

72. All conditions precedent to obtaining a defense from National Union and/or American Home for the Climate Change Lawsuits under the AIG General Liability Policies have been satisfied, waived, or are otherwise inapplicable.

73. An actual controversy exists between Aloha and National Union, and Aloha and American Home, regarding National Union's and American Home's duties to defend and other obligations under the AIG General Liability Policies, because Aloha contends that:

(a) To date, National Union and American Home have repudiated their duty to defend Aloha against the claims brought in the Climate

Change lawsuits, and National Union's and American Home's duty to defend does not terminate until the AIG General Liability Policies' applicable limits of liability have been exhausted;

74. A judicial declaration is necessary to resolve the controversy between the parties.

75. Under 28 U.S.C. § 2201 et seq., Aloha is entitled to a declaration by this Court of its rights and National Union's and American Home's duties with respect to the duty to defend Aloha with respect to the Climate Change Lawsuits.

COUNT III

(Breach of Contract – Duty to Indemnify)
(v. National Union and American Home)

76. Aloha re-alleges paragraphs 1 through 75.

77. Aloha is entitled to indemnity coverage under one or more of the AIG Policies with respect to the Climate Change Lawsuits.

78. All conditions precedent to recovery under the AIG Policies have been satisfied, waived, or are otherwise inapplicable because National Union and American Home have anticipatorily repudiated any future obligation to indemnify Aloha under any of the AIG Policies with respect to the Climate Change Lawsuits.

79. National Union and American Home have denied indemnity coverage under the AIG Policies.

80. National Union and American Home have acted in a manner inconsistent with the terms and conditions of the AIG Policies, and their actions constitute a breach and/or anticipatory breach of the AIG Policies.

81. As a direct and proximate result of National Union's and American Home's breach of the AIG Policies, Aloha has sustained, and National Union and American Home are liable for, damages in an amount to be determined at trial.

COUNT IV

(Declaratory Judgment – Duty to Indemnify)
(v. National Union and American Home)

82. Aloha re-alleges paragraphs 1 through 81.

83. Aloha's alleged liability arising out of the Climate Change Lawsuits, as well as Aloha's costs of defending against those lawsuits, are within the coverage provided by the AIG Policies.

84. With respect to Aloha's alleged liability arising out of the Climate Change Lawsuits, an alleged occurrence and/or bodily injury, property damage, or other triggering event within the meaning of the AIG Policies has taken place during the periods of these policies.

85. All conditions precedent to recovery under the AIG Policies have been satisfied, waived, or are otherwise inapplicable because National Union and American Home have anticipatorily repudiated any future obligation to indemnify Aloha under any of the AIG Policies with respect to the Climate Change Lawsuits.

86. An actual controversy exists between Aloha and National Union, and Aloha and American Home, regarding National Union's and American Home's duties and obligations under the AIG Policies, because Aloha contends that:

(a) To date, National Union and American Home have repudiated their duty to pay any and all sums with respect to any liabilities that Aloha may incur with respect to the Climate Change Lawsuits, subject to the applicable limits of the AIG Policies;

87. A judicial declaration is necessary to resolve the controversy between the parties.

88. Under 28 U.S.C. § 2201 et seq., Aloha is entitled to a declaration by this Court of its rights and National Union's and American Home's duties with respect to the insurance claims discussed in this complaint.

COUNT V

(Breach of the Duty of Good Faith and Fair Dealing)
(v. National Union)

89. Aloha re-alleges paragraphs 1 through 88.

90. In its April 19, 2021 letter, National Union premised its initial denial of coverage of the Climate Change Lawsuits under the 1985 National Union General Liability Policy – and in particular the refusal to defend Aloha –solely on alleged application of that policy's pollution exclusion, and for no other reason.

91. Despite subsequently acknowledging, in its March 13, 2023 letter, that the pollution exclusions in the 1986 National Union General Liability Policy, 1987 National Union General Liability Policy, and the first and second 1988 National Union General Liability Policies do not serve as a bar to coverage to Aloha for the Climate Change Lawsuits, National Union has recently refused to defend Aloha under those policies on grounds that it previously found insufficient on which to deny a defense when it issued its April 19, 2021 denial-of-coverage position letter.

92. Specifically, in issuing its April 19, 2021 letter, National Union apparently did not believe that any of the terms of the 1985 National Union General Liability Policy, other than the pollution exclusion, could serve as a basis to deny Aloha's request for a defense of the Climate Change lawsuits. However, now that National Union acknowledges that its 1986, 1987, and 1988 general liability policies do not contain a pollution exclusion that can serve as a basis to deny Aloha a defense, National Union contends that a defense duty under those policies is precluded under three newly-asserted defenses. National Union makes such contention even though it did not believe in 2021 that those defenses were appropriate grounds on which to deny Aloha a defense under the 1985 National Union General Liability Policy. In short, National Union has flip-flopped its position in an effort to find a basis to deny Aloha's request for a defense under the 1986 National Union General Liability

Policy, the 1987 National Union General Liability Policy, and the first and second 1988 National Union General Liability Policies.

93. The three new grounds on which National Union is denying its duty to defend Aloha for the Climate Change Lawsuits – namely, (1) “no occurrence;” (2) “no property damage during the policy periods;” and (3) “no damages because of property damage,” – were grounds on which National Union could have asserted as a basis to deny a defense under the 1985 National Union General Liability Policy if it truly believed those grounds were sufficient to deny a defense. But National Union did not do so, presumably because it recognized that there were sufficient factual allegations in the Climate Change Lawsuits such that these coverage defenses could not serve as a basis to deny a defense, given the broad duty-to-defend law of Hawai‘i requiring an insurer to defend a policyholder if there is any possibility that the allegations of an underlying liability complaint fall within the terms of coverage of the insurance policy. It was only after National Union realized that it could not rely on a pollution exclusion in the 1986, 1987 and 1988 general liability policies, that it began to assert grounds for denying a defense which it previously had acknowledged were insufficient.

94. In sum, National Union has no reasonable basis for refusing and/or failing to defend Aloha under the 1986 National Union General Liability Policy, 1987 National Union General Liability Policy, and the first and second 1988

National Union General Liability Policies with respect to the Climate Change Lawsuits.

95. As a direct and proximate result of National Union's breach of the duty of good faith and fair dealing, Aloha has sustained, and National Union is liable for, damages in an amount to be determined at trial.

WHEREFORE, in consideration of the foregoing Counts and causes of action, Aloha requests a judgment in its favor and against National Union and American Home as follows:

- (a) Finding National Union and American Home liable for breach of their contractual obligations to defend and/or indemnify Aloha with respect to the Climate Change Lawsuits;
- (b) Declaring that National Union and American Home have a duty to defend Aloha with respect to the Climate Change Lawsuits;
- (c) Declaring that National Union and American Home have a duty to indemnify Aloha for the Climate Change Lawsuits;
- (d) Entering a judgment enjoining National Union and American Home from failing to defend and indemnify Aloha for the Climate Change Lawsuits;

- (e) Finding that National Union has breached its duty of good faith and fair dealing by its refusal to defend Aloha under the 1986, 1987 and the first and second 1988 National Union General Liability Policies;
- (f) For money damages in an amount yet to be ascertained;
- (g) For reasonable and necessary attorneys' fees and costs; and
- (h) For other such relief as is just and proper, including interest.

DATED: Honolulu, Hawai'i, April 28, 2023.

CADES SCHUTTE
A Limited Liability Law Partnership

/s/ Michi Momose

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