

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION**

PENN MILLERS INSURANCE CO.,)
) Civil Action No.:
)
Plaintiff,)
)

v.)

**COMPLAINT
(Declaratory Judgment)**

INTX Microbials, LLC, Meherrin)
Agricultural and Chemical Co., Inc., David)
Owens, Donald R. Fisher, Inc., Dupree)
Atkins d/b/a Atkinson Farms, Clinard)
Moore and Neal Moore d/b/a Moore)
Brothers Farms, Michael Poston, and Gregg)
Covington,)
)
Defendants.)

The Plaintiff, Penn Millers Insurance Company (“Penn Millers”), complaining of the Defendants INTX Microbials, LLC (“INTX”), Meherrin Agricultural and Chemical Co., David Owens, Donald R. Fisher, Inc.; Dupree Atkins d/b/a Atkinson Farms; Clinard Moore and Neal Moore d/b/a Moore Brothers Farms; Michael Poston; and Gregg Covington, respectfully shows onto this Court as follows:

I. PARTIES, JURISDICTION AND VENUE

1. Penn Millers is an insurance company organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal place of business in the Commonwealth of Pennsylvania. At all times relevant herein Penn Millers was authorized to issue policies of insurance which provided coverage in South Carolina.
2. INTX Microbials, LLC is a corporation organized and existing under the laws of the State of Indiana, with its principal place of business in the State of Indiana.

3. Meherrin Agricultural and Chemical Company, Inc., (“Meherrin”) is a corporation organized and existing under the laws of the State of North Carolina, with its principal place of business in the State of North Carolina.
4. Meherrin is a registered corporation under the laws of the State of South Carolina and transacts business within the state.
5. David Owens is a citizen and resident of the State of South Carolina, operating a business in and around Marion County.
6. Donald R. Fisher, Inc. is a corporation organized under the laws of the State of South Carolina, with its principal place of business in the State of South Carolina, which conducts business in Marion County.
7. Dupree Atkins d/b/a Atkinson Farms is a citizen and resident of the State of South Carolina, operating a business in and around Marion County.
8. Clinard Moore and Neal Moore d/b/a Moore Brothers Farms are citizens and residents of the State of South Carolina, operating a business in and around Marion County.
9. Michael Poston is a citizen and resident of the State of South Carolina, operating a business in and around Marion County.
10. Gregg Covington is a citizen and resident of the State of South Carolina, operating a business in and around Orangeburg County.
11. Subject matter of the Court is premised upon 28 U.S.C. § 1332 in that there is complete diversity of citizenship between Penn Millers and defendants, and the amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

12. Venue is premised upon 28 U.S.C. §1391 in that a substantial part of the events or omissions giving rise to the claim occurred in this judicial district, and a substantial part of property that is the subject of this action is situated in this district.

UNDERLYING CLAIM

13. Penn Millers repeats and realleges the preceding allegations of this Complaint as if fully set forth herein verbatim.
14. Penn Millers issued commercial general liability insurance policy, PAC 2603068-04, (“Policy”), to Meherrin. A copy of the Policy is attached hereto as Exhibit “A” and incorporated herein by reference.
15. The Policy provides coverage for the period August 1, 2007, to August 1, 2008.
16. The Policy’s insuring agreement provides, in relevant part:

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result.

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

- (i) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;
- (ii) The “bodily injury” or “property damage” occurs during the policy period;

17. The Policy defines “Occurrence” as follows:

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

18. The Policy defines “Property Damage” as:
- 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. The Policy contains the following “impaired property” exclusion:
- 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.
20. The Policy defines “impaired property” as follows:
- “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.
21. Penn Millers received notice of six separate lawsuits (collectively “Lawsuits” commenced in the South Carolina Court of Common Pleas for the Twelfth Circuit, Marion County, captioned:
- i. “*David Owens, Plaintiff v. INTX Microbials, LLC, Meherrin Agricultural and Chemical Co., and Meherrin Fertilizer, Inc., Defendants*”, Civil Action No. 11-CP-33-328, attached hereto as Exhibit “B”;

ii. *“Donald R. Fisher, Inc., Plaintiff v. INTX Microbials, LLC, Meherrin Agricultural and Chemical Co., and Meherrin Fertilizer, Inc., Defendants”*, Civil Action No. 11-CP-33-329, attached hereto as Exhibit “C”;

iii. *“Dupree Atkins d/b/a Atkinson Farms, Plaintiff, v. INTX Microbials, LLC, Meherrin Agricultural and Chemical Co., and Meherrin Fertilizer, Inc., Defendants”*, Civil Action No. 11-CP-33-327, attached hereto as Exhibit “D”;

iv. *“Clinard Moore and Neal Moore/Moore Brothers Farms, Plaintiffs v. INTX Microbials, LLC, Meherrin Agricultural and Chemical Co., and Meherrin Fertilizer, Inc., Defendants”*, Civil Action No. 11-CP-33-330, attached hereto as Exhibit “E”;

v. *Michael Poston, Plaintiff v. INTX Microbials, LLC, Meherrin Agricultural and Chemical Co., and Meherrin Fertilizer, Inc., Defendants”*, Civil Action No. 11-CP-33-415, attached hereto as Exhibit “F”; and

vi. *Gregg Covington, Plaintiff v. INTX Microbials, LLC, Meherrin Agricultural and Chemical Co., and Meherrin Fertilizer, Inc., Defendants”*, Civil Action No. 11-CP-33-754, attached hereto as Exhibit “G”;

22. The Complaints in the Lawsuits are essentially identical. They allege INTX manufactured a legume inoculant which Meherrin distributed to Plaintiffs who applied it to their respective peanut crops in 2008. Plaintiffs later determined that the Product was “inactive and/or failed to perform their function; that as a result of this failure, the Plaintiff was forced to apply additional fertilizers as well as suffered a significant reductions in his peanut production.”
23. Plaintiffs allege they suffered reductions in peanut production and increased production costs as a result of the inert Product. Plaintiffs have alleged that the sale of the Product constitutes a breach of express and implied warranties.
24. Meherrin notified Penn Millers of the Lawsuits and requested coverage under the Policy.
25. Penn Millers is defending Meherrin in the Lawsuits under a full reservation of rights.

FIRST CAUSE OF ACTION

26. Penn Millers repeats and realleges the preceding allegations of this Complaint as if fully set forth herein verbatim.
27. This action is brought by Penn Millers pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. An actual controversy exists between Penn Millers and the defendants that requires a declaration of the parties' rights by the Court.
28. The Policy does not provide coverage for the allegations of the Lawsuits as the Lawsuits do not allege "property damage".
29. The Policy does not provide coverage for damages based on increased production costs and a decreased production yield as such damages do not constitute "property damage."
30. The Policy contains an "impaired property" exclusion to "property damage" which applies to the claims set forth by Plaintiffs in the Lawsuits as to loss of use.
31. Upon information and belief, no coverage exists under the Policy for the acts and/or omissions complained of by the Plaintiffs in the Lawsuits, and Penn Millers therefore brings this action seeking a declaration from this Court that it is under no duty or obligation, pursuant to the Policy, to defend and/or indemnify Meherrin for the Lawsuits, or any judgment arising therefrom.
32. Upon information and belief, Penn Millers has provided a defense to the Insured pursuant to its reservation of rights under the Policy. Penn Millers now seeks to recover all attorneys' fees and costs incurred in the defense of the underlying case.

WHEREFORE, the Plaintiff, Penn Millers, having fully complained against the Defendants INTX Microbials, LLC ("INTX"), Meherrin Agricultural and Chemical Co., Inc., David Owens, Donald R. Fisher, Inc.; Dupree Atkins d/b/a Atkinson Farms; Clinard Moore and

Neal Moore d/b/a Moore Brothers Farms; Michael Poston; and Gregg Covington, respectfully requests that this Honorable Court issue an Order declaring that it is under no obligation or duty to defend and/or indemnify the Defendants named herein any manner regarding the Lawsuits, or any judgment arising therefrom, and for such other and further relief as this Honorable Court may deem just and proper.

Respectfully submitted,
COLLINS & LACY, P.C.

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Columbia, South Carolina
April 19, 2013