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THE UPPER DECK COMPANY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THE UPPER DECK COMPANY, a
Nevada corporation,

Plaintiff,

vs.

LIBERTY MUTUAL FIRE
INSURANCE CO., a Wisconsin
corporation,

Defendant.

Case No.: '19CV0752 L JLB

COMPLAINT FOR:

- (1) DECLARATORY RELIEF ON DEFENDANT'S DUTY TO DEFEND**
- (2) BREACH OF CONTRACT**
- (3) BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING**

JURY TRIAL DEMANDED

1 In this insurance coverage suit, Plaintiff The Upper Deck Company (“Upper
2 Deck” or “Plaintiff”), seeks: (i) a judicial declaration that Defendant Liberty Mutual
3 Fire Insurance Co. (“Liberty Mutual”) has a duty to defend Plaintiff in the underlying
4 action styled as *Leaf Trading Cards, LLC v. The Upper Deck Co.*, United States
5 District Court, Northern District of Texas, Case No. 3:17-cv-3200 (the “*Leaf Action*”);
6 (ii) a judicial declaration that Liberty Mutual must reimburse Upper Deck for all
7 reasonable defense expenses it has incurred and will incur in the *Leaf Action*, plus
8 prejudgment interest at the applicable rate from the date of invoice. Plaintiff also seeks
9 damages from Liberty Mutual for (iii) its breach of contract and (iv) its breach of the
10 covenant of good faith and fair dealing.

11 THE PARTIES

12 1. Plaintiff Upper Deck is a Nevada corporation with its principal place of
13 business in Carlsbad, California.

14 2. On information and belief, Defendant Liberty Mutual Fire Insurance Co.
15 is a Wisconsin corporation with its principal place of business in Boston,
16 Massachusetts.

17 JURISDICTION

18 3. This is an action for declaratory relief pursuant to 28 U.S.C. § 2201.

19 4. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332
20 in that complete diversity exists between the parties, as the Plaintiff is a citizen of
21 California and Nevada and the Defendant is a citizen of Wisconsin and Massachusetts,
22 for purposes of diversity jurisdiction.

23 5. This Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a)
24 over the contract and covenant of good faith and fair dealing claims.

25 6. The amount in controversy exceeds the sum or value of \$75,000
26 exclusive of interest and costs. In addition to other and further relief, declaratory
27 relief is sought.
28

VENUE

1
2 7. Venue is proper in the United States District Court for the Southern
3 District of California pursuant to 28 U.S.C. § 1391 because a substantial part of the
4 events or omissions giving rise to the claim alleged herein occurred in this District.

5 8. This complaint concerns a contract for liability insurance sold by Liberty
6 Mutual, which contract was sold and delivered in the Southern District of California.

7 9. On information and belief, Liberty Mutual is an insurance company
8 licensed to sell and actively selling insurance policies in California, including the
9 Southern District of California.

10 10. The issuing office for the Liberty Mutual policy is San Diego, California.

11 11. Liberty Mutual sold the insurance policy at issue in this case to Upper
12 Deck, a business located in the Southern District of California where the policy was
13 received.

14 12. The Liberty Mutual policy at issue was intended to cover Upper Deck’s
15 business operations throughout California, including the Southern District of
16 California, as well as throughout the United States.

17 13. The alleged wrongful conduct described in the pleadings in the *Leaf*
18 *Action* purportedly occurred within the Southern District of California.

19 14. Part of the performance required under the Liberty Mutual policy at
20 issue, including, without limitation, the payment of attorneys’ defense fees, occurred
21 within the Southern District of California, as part of the insured’s defense team is
22 located in San Diego, California.

THE LIBERTY MUTUAL POLICY

23
24 15. Liberty Mutual sold Commercial General Liability Policies No. TB2-
25 Z91-463401-024, TB7-Z91-463401-025, TB7-Z91-463401-026, TB2-Z91-463401-
26 027 (the “Policy”) to the Named Insured, Upper Deck, for the Policy Periods between
27 December 10, 2015 through December 10, 2018. A copy of the most recent Policy No.
28 TB2-Z91-463401-027 for December 10, 2017 through December 10, 2018 is attached

1 here as **Exhibit “1”**.

2 16. The Policy’s Insuring Agreement provides, in pertinent part, as follows:

3 [Liberty Mutual] will pay those sums that the insured
4 becomes legally obligated to pay as damages because of
5 “personal and advertising injury” to which this insurance
6 applies. [Liberty Mutual] will have the right and duty to
7 defend the insured against any “suit” seeking those damages.
8 However, [Liberty Mutual] will have no duty to defend the
9 insured against any “suit” seeking damages for “personal
10 and advertising injury” to which this insurance does not
11 apply.

12 ...

13 (2) [Liberty Mutual’s] right and duty to defend end when
14 [the insurer] ha[s] used up the applicable limit of insurance
15 in the payment of judgments or settlements under Coverages
16 A or B[.]

17 [**Exhibit “1”** § I.B.1].

18 17. The Policy’s applicable limit of insurance for the “Personal &
19 Advertising Injury Limit” is \$1,000,000 [Policy §§ Declarations, III.4 (as amended by
20 Endorsement Form No. LC 29 06 08 08 § A)].

21 18. The Policy’s “Who Is An Insured” provision provides:

22 1. If you are designated in the Declarations as:

23 ...

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

...

2. Each of the following is also an insured:

a. Your “volunteer workers” only while performing duties
related to the conduct of your business, or your
“employees”, other than either your “executive officers” (if
you are an organization other than a partnership, joint
venture or limited liability company) ... but only for acts
within the scope of their employment by you or while
performing duties related to the conduct of your business. ...

[**Exhibit “1”** §§ II.1.a, II.2.a].

1 19. The Policy includes the following pertinent Definitions:

2 “Advertisement” means a paid announcement that is
3 broadcast or published in the print, broadcast or electronic
4 media to the general public or specific market segments
5 about your goods, products or services for the purposes of
6 attracting customers or supporters. For the purposes of this
7 definition:

8 a. Announcements that are published include material placed
9 on the Internet or on similar electronic means of
10 communication; and

11 b. Regarding web-sites, only that part of a web-site that is
12 about your goods, products or services for the purposes of
13 attracting customers or supporters is considered an
14 advertisement.

15 * * *

16 “Coverage territory” means:

17 a. The United States of America (including its territories and
18 possessions), Puerto Rico and Canada;

19 ...

20 c. All other parts of the world if the injury or damage arises
21 out of:

22 ...

23 (3) “Personal and advertising injury” offenses that take place
24 through the Internet or similar electronic means of
25 communication[.]

26 * * *

27 “Employee” includes a “leased worker”. “Employee” does
28 not include a “temporary worker”.

“Executive officer” means a person holding any of the
officer positions created by your charter, constitution,
bylaws or any other similar governing document.

* * *

“Personal and advertising injury” means injury, including
consequential “bodily injury”, arising out of one or more of
the following offenses:

...

d. Oral or written “publication” directly to the public at large
of material that slanders or libels a person or organization or
disparages a person’s or organization’s goods, products or

1 services.

2 e. (1) Oral or written “publication” directly to the public at
3 large of material that violates a person’s right of privacy;

4 (2) Oral or written “publication” of material that violates a
5 person’s right of privacy by misappropriation of that
6 person’s name or likeness;

7 f. The use of another’s advertising idea in your
8 “advertisement”; or

9 g. Infringing upon another’s copyright, trade dress or slogan
10 in our “advertisement”.

11 * * *

12 “Publication” means an insured’s act of disseminating or
13 broadcasting material or information. Publication does not
14 include the wrongful appropriation, interception or retrieval
15 of material or information by a third party or the insured’s
16 dissemination or broadcasting of material or information to a
17 person who is the subject of the material or the information.

18 “Suit” means a civil proceeding in which damages because
19 of “bodily injury”, “property damage” or “personal and
20 advertising injury” to which this insurance applies are
21 alleged.

22 [Exhibit “1” §§ V.1 (as amended by Endorsement Form No. LC 29 08 10 11),
23 V.4-6, V.14 (as amended by Endorsement Form No. LC 29 04 08 08), V.18-19].

24 20. The Policy includes the following pertinent exclusions (as identified by
25 Liberty Mutual):

26 This insurance does not apply to:

27 a. Knowing Violation Of Rights Of Another

28 “Personal and advertising injury” caused by or at the
direction of the insured with the knowledge that the act
would violate the rights of another and would inflict
“personal and advertising injury”.

b. Material Published With Knowledge Of Falsity

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

c. Material Published Prior to Policy Period

“Personal and advertising injury” arising out of oral or
written publication, in any manner, of material whose first

1 publication took place before the beginning of the policy
2 period.

3 ...

4 k. Electronic Chatrooms Or Bulletin Boards

5 “Personal and advertising injury” arising out of an electronic
6 chatroom or bulletin board the insured hosts, owns, or over
7 which the insured exercises control.

8 **[Exhibit “1” § I.B.2].**

9 21. The Policy’s “Other Insurance” provide, in pertinent part, as follows:

10 If other valid and collectible insurance is available to the
11 insured for a loss [Liberty Mutual] cover[s] under Coverages
12 A or B of this Coverage Part, [Liberty Mutual’s] obligations
13 are limited as follows:

14 a. Primary Insurance

15 This insurance is primary except when Paragraph b. below
16 applies. If this insurance is primary, [Liberty Mutual’s]
17 obligations are not affected unless any of the other insurance
18 is also primary. Then, [Liberty Mutual] will share with all
19 that other insurance by the method described in Paragraph c.
20 below.

21 b. Excess Insurance

22 (1) This insurance is excess over:

23 (a) Any of the other insurance, whether primary, excess,
24 contingent or on any other basis:

25 (i) That is Fire, Extended Coverage, Builder’s Risk,
26 Installation Risk or similar coverage for “your work”;

27 (ii) That is Fire Insurance ...

28 (iii) That insurance purchased by you to cover your liability
as a tenant ...

(iv) If the loss arises out of the maintenance or use of
aircraft, “autos” or watercraft ...

(b) Any other primary insurance available to you covering
liability for damages arising out of the premises or
operations, or the products and completed operations, for
which you have been added as an additional insured.

[Exhibit “1” § IV.4].

1 **THE UNDERLYING LEAF ACTION**

2 22. On November 22, 2017, claimant Leaf Trading Cards, LLC (“Leaf”)
3 filed its complaint (“Leaf Complaint”) against Plaintiff Upper Deck in the action
4 styled as *Leaf Trading Cards, LLC v. The Upper Deck Co.*, United States District
5 Court for the Northern District of Texas, Case No. 3:17-cv-3200 (the “*Leaf Action*”).
6 A copy of the Leaf Complaint is incorporated herein and attached as **Exhibit “2”**.

7 23. Pertinent allegations from the Leaf Complaint establish “personal and
8 advertising injury” that create a potential for coverage under the Liberty Mutual
9 Policies triggering its defense obligation:

10 13. Also on information and belief, Leaf understands that
11 Upper Deck employees have (a) used confidential or false
12 internet personas to erroneously and maliciously spread
13 misinformation and negative reviews of Leaf products, (b)
14 compensated dealers and consumers to erroneously and
maliciously spread misinformation and negative reviews of
Leaf products, and (c) compensated dealers to discontinue
carrying Leaf products, all in an effort to harm Leaf and to
restrain trade and eliminate competition.

15 [**Exhibit “2”** ¶ 13].

16 24. On August 17, 2018, Leaf filed a First Amended Complaint (“Leaf
17 FAC”). A copy of the Leaf FAC is attached as **Exhibit “3”**.

18 25. Pertinent allegations from the Leaf FAC establish “personal and
19 advertising injury” that create a potential for coverage under the Liberty Mutual
20 Policies triggering its defense obligation:

21 12. ... Upper Deck has told retail sellers of its hockey player
22 trading cards that if they were to carry potentially competing
23 Leaf products, those retailers could face retribution in the
24 form of lost status and purchasing benefits. This problem is
25 compounded by the terms of the non-disclosure covenants
26 insisted on by Upper Deck with its Exclusive Distributors
27 who are prohibited from telling retailers why those major
28 distributors do not carry Leaf products, leading to a
perception by retailers that Leaf products are not sold by the
Exclusive Distributors because Leaf products are inferior.

13. In more detail, distributors were forced to email Upper
Deck with any and all solicitations for Leaf products and
receive confirmation that such products did not violate the
Exclusive Distributor contracts. In some responses, Upper
Deck provided that the distributor should check with the

1 manufacture to see if they intend to include any content in
2 violation of the Exclusive Distributor contract – *i.e.*, Leaf
3 products. If the distributors did not and/or was in possession
4 of a Leaf product, they would receive a letter from Upper
5 Deck that served as a notice of breach of distributor
6 agreement.

7
8 14. In other words, Upper Deck told distributors that Leaf
9 was selling infringing and illegal products and that if
10 distributors considered selling any of Leaf’s products, they
11 would not only be in breach of contract but also be in similar
12 violation of the law and exposed to direct liability.

13
14 15. This accomplished two things. First, it disparaged Leaf’s
15 business, suggesting to distributors (without evidence) that
16 Leaf was a corrupt company. Upper Deck’s references in
17 public filings that Leaf engages in “vulturine activity”
18 showcases this point. Second, Upper Deck’s disparagement
19 of Leaf’s products provided another way in which it was
20 able to foreclose Leaf’s sales outlets.

21 * * *

22
23 18. Also on information and belief, Leaf understands that
24 Upper Deck employees have (a) used confidential or false
25 internet persons to erroneously and maliciously spread
26 misinformation and negative reviews of Leaf products, (b)
27 compensated dealers and consumers to erroneously and
28 maliciously spread misinformation and negative reviews of
Leaf products, and (c) compensated dealers to discontinue
carrying Leaf products, all in an effort to harm Leaf and to
restrain trade and eliminate competition.

* * *

34. Upper Deck published disparaging words about Leaf’s
economic interests to distributors and others. For example,
the words, among other things, caused doubt about the
quality of Leaf’s products.

[**Exhibit “3”** ¶¶ 12-15, 18, 34].

26. On January 25, 2019, Leaf filed a Second Amended Complaint (“Leaf
SAC”). A copy of the Leaf SAC is attached here as **Exhibit “4”**.

27. Pertinent allegations from the Leaf SAC establish “personal and
advertising injury” ” that create a potential for coverage under the Liberty Mutual
Policies triggering its defense obligation:

4. In sum, through the exclusive contracts with the NHL and
NHLPA, illegal exclusive dealing arrangements with
distributors, disparagement of Leaf and its products based on
the knowingly false statement that Leaf peddles in illegal

1 products, and interference with Leaf's contracts, upper Deck
2 has managed to throttle competition in the market for
3 hockey player trading cards. Upper Deck's stranglehold on
4 this market has excluded any potential competitor –
5 including Leaf – from access to the necessary player images
6 and distributors to achieve the scale and efficiencies to
7 compete in the market for hockey player trading cards. Leaf
8 therefore seeks injunctive relief and monetary damages from
9 Upper Deck based on its anticompetitive conduct, among
10 other things.

11 * * *

12 17. In addition, Upper Deck has told retail sellers of its
13 hockey player trading cards that if they were to carry
14 potentially competing Leaf products, those retailers could
15 face retribution in the form of lost status and purchasing
16 benefits. This problem is compounded by the terms of the
17 non-disclosure covenants insisted on by Upper Deck with its
18 Exclusive Distributors who are prohibited from telling
19 retailers why those major distributors do not carry Leaf
20 products, leading to a perception by retailers that Leaf
21 products are not sold by the Exclusive Distributors because
22 Leaf products are inferior.

23 18. In more detail, distributors were forced to email Upper
24 Deck with any and all solicitations for Leaf products and
25 receive confirmation that such products do not violate the
26 Exclusive Distributor contracts. In some responses, Upper
27 Deck provided that the distributors should check with the
28 manufacture to see if they intend to include any content in
violation of the Exclusive Distributor contract – *i.e.*, Leaf
products. If the distributor was in possession of a Leaf
product, he would receive a letter from upper Deck that
served as a notice of breach of the distributor agreement.

19 19. In other words, Upper Deck has told distributors that
20 Leaf was selling infringing and illegal products and that if
21 distributors considered selling any of Leaf's products, they
22 would not only be in breach of contract but also be in similar
23 violation of the law and exposed to direct liability.

24 20. This accomplished two things. First, it disparaged Leaf's
25 business, suggesting to distributors (without evidence) that
26 Leaf was a corrupt company. Second, there was a reasonable
27 probability that Leaf would have entered into a business
28 relationship with, among others, Universal Distribution,
Grosnor Distribution, GTS Distribution, Southern Hobby
Distribution, and Magazine Exchange, Inc., as prior to the
Exclusive Distributor contracts, Leaf had continuing
business relations with these distributors. Upper Deck,
however, tortuously interfered with those prospective
business relations of Leaf.

21. In addition, on or about May 31, 2016, Leaf entered an
agreement with Serena Williams – Statement of Authenticity

1 and Agreement – that granted Leaf the right to reproduce
2 and distribute Ms. Williams likeness, statistics, biographical
3 information, etc. for the purpose of producing and
4 prompting trading cards, among other things. Upper Deck,
5 however, has interfered with Leaf’s relationship with Ms.
6 Williams. In fact, Upper Deck filed a motion for preliminary
7 injunction against Leaf claiming, among other things, that
8 Leaf profiteers off of the names and likenesses of athletes
9 like Patrick Roy and Serena Williams, without their consent
10 and without compensation for the use of their valuable and
11 hard-earned reputation as stars on and off their respective
12 fields of play.

13 * * *

14 44. Upper Deck published disparaging words about Leaf’s
15 economic interests to distributors and others. For example,
16 the words, among other things, caused doubt about the
17 quality of Leaf’s products.

18 * * *

19 58. Leaf had a valid contract with Serena Williams (i.e., the
20 Statement of Authenticity and Agreement) to which Upper
21 Deck is a stranger. Leaf had a valid contract with Patrick
22 Roy (i.e, the Statement of Authenticity and Agreement) to
23 which Upper Deck is a stranger.

24 59. Upper Deck willfully and intentionally interfered with
25 these contracts, as Upper Deck was aware of the contract, as
26 discussed above. Nonetheless, Upper Deck filed a motion
27 for preliminary injunction to “enjoin[] Leaf from any further
28 manufacture or sale of trading cards [sic] that bear the
29 personality rights of [Mr. Roy and Ms. Williams] . . . and . .
30 . requiring seizure of [such] counterfeit goods.” In addition,
31 Upper Deck has made the performance impossible or more
32 burdensome, difficult, or expensive.

33 * * *

34 WHEREFORE, Leaf Trading Cards, LLC, prays that final
35 judgment be entered against The Upper Deck Company
36 declaring, ordering, and adjudging that:

37 ...

38 e. Upper Deck disparaged Leaf[.]

39 **[Exhibit “4” ¶¶ 4, 17-21, 44, 58-59, Prayer for Relief].**

40 28. Leaf seeks and has sought monetary damages from Upper Deck for the
41 various allegedly wrongful acts.

42 29. The Leaf SAC alleged six (6) causes of action: (1) Violation of the

1 Sherman Act (15 U.S.C. § 1); (2) Violation of the Sherman Act (15 U.S.C. § 2); (3)
2 Violation of the Clayton Act (15 U.S.C. § 14); (4) Business Disparagement; (5)
3 Tortious Interference with Prospective Business Relations; (6) Tortious Interference
4 with Existing Contract.

5 **TENDER TO LIBERTY MUTUAL AND ITS ACKNOWLEDGMENT**
6 **OF POTENTIAL COVERAGE REQUIRING DEFENSE**

7 30. Upper Deck requested a defense of the *Leaf Action* from Liberty Mutual
8 on or about November 29, 2017.

9 31. Liberty Mutual acknowledged receipt of the request for defense of the
10 *Leaf Action* on November 29, 2017. A copy of the acknowledgment email sent by
11 Liberty Mutual to Upper Deck is attached as **Exhibit “5”**.

12 32. Liberty Mutual acknowledged its duty to defend the *Leaf Action* subject
13 to a reservation of rights on March 23, 2018. A copy of that letter is attached as
14 **Exhibit “6”**.

15 33. Liberty Mutual agreed in the March 23, 2018 reservation of rights letter
16 that coverage under the Liberty Mutual Policy’s “Disparagement Offense” is triggered
17 at least by Leaf’s allegation that “Upper Deck employees have used confidential or
18 false internet personas and compensated dealers and consumers to erroneously and
19 maliciously spread misinformation and negative reviews of Leaf products” “on the
20 Internet during the period of the [Policy].” [**Exhibit “6”** p. 16].

21 34. Liberty Mutual alleged in the March 23, 2018 reservation of rights letter
22 that it is reserving rights to disclaim coverage based on “during the policy period”,
23 “Material Published Prior To Policy Period” exclusion, “publication” definition, and
24 the exclusions for “Knowing Violation Of Rights Of Another”, “Material Published
25 With Knowledge Of Falsity”, or “Electronic Chatrooms Or Bulletin Boards”. [**Exhibit**
26 **“6”** p. 16].

27 35. Liberty Mutual did not allege in the March 23, 2018 reservation of rights
28 letter that its reserved rights are implicated and provided no analysis that would justify

1 a failure to meet its obligation to defend. Instead Liberty Mutual promised to defend
2 the *Leaf Action*.

3 **LIBERTY MUTUAL CONCEDED UPPER DECK’S RIGHT TO**
4 **INDEPENDENT DEFENSE COUNSEL**

5 36. Liberty Mutual agreed in the March 23, 2018 reservation of rights letter
6 that its reservation of rights created a conflict of interest that “entitles Upper Deck to
7 select a qualified attorney to defend it at our expense under California Civil Code
8 section 2860.” [Exhibit “6” p. 17].

9 37. Liberty Mutual acknowledged in the March 23, 2018 reservation of rights
10 letter that Upper Deck had “retained the services of the law firms of Jackson Walker
11 LLP and Nicholas & Tomasevic LLP in connection with the [Leaf Action]” as its
12 independent defense counsel. [Exhibit “6” p. 17].

13 **LIBERTY MUTUAL’S BREACH –**
14 **FAILURE TO PAY FOR JACKSON WALKER’S DEFENSE FEES**

15 38. Upper Deck had retained the services of Nicholas & Tomasevic LLP
16 (“N&T”) because N&T has strong business litigation experience and is familiar with
17 Upper Deck, Upper Deck’s industry, and Upper Deck’s dispute with Leaf prior to the
18 Leaf SAC. N&T had filed an initial action against Leaf in the Southern District of
19 California.

20 39. Leaf obtained a transfer of Upper Deck’s suit from the Southern District
21 of California to the Northern District of Texas where it was consolidated with the *Leaf*
22 *Action* filed in that district.

23 40. Upper Deck had also retained the services of Jackson Walker LLP
24 (“JW”) because of Leaf’s claims in the Northern District of Texas. JW could act as
25 local counsel in Dallas, Texas in response to Leaf’s claims. In addition, JW has
26 specialized antitrust experience to assist Upper Deck in defending against Leaf’s
27 antitrust claims made against Upper Deck.

28 41. Liberty Mutual made a meritless assertion in its March 23, 2018

1 reservation of rights letter that “Liberty Mutual’s obligations under Section 2860 are
2 limited to the payment of fees charged by one law firm selected by Upper Deck.”
3 [Exhibit “6” p. 17].

4 42. California Civil Code Section 2860 provides:

5 When the insured has selected independent counsel to
6 represent him or her, the insurer may exercise its right to
7 require that the counsel selected by the insured possess
8 certain minimum qualifications which may include that the
9 selected counsel have (1) at least five years of civil litigation
10 practice which includes substantial defense experience in the
11 subject at issue in the litigation, and (2) errors and omissions
coverage. The insurer's obligation to pay fees to the
independent counsel selected by the insured is limited to the
rates which are actually paid by the insurer to attorneys
retained by it in the ordinary course of business in the
defense of similar actions in the community where the claim
arose or is being defended.

12 Cal. Civ. Code § 2860(c).

13 43. Cal. Civ. Code Section 2860 does not provide that Liberty Mutual may
14 limit its payment of fees to those charged by a single law firm, and no Policy
15 provision restricts Liberty Mutual’s obligation to pay for whatever and however many
16 lawyers are reasonably necessary to defend a potentially covered lawsuit.

17 44. Liberty Mutual has entirely refused to pay for any of JW’s fees
18 necessarily incurred in the defense of Upper Deck in the *Leaf Action* since the date of
19 the tender of defense.

20 **LIBERTY MUTUAL’S BREACH –**

21 **FAILURE TO PAY FOR N&T’S DEFENSE FEES**

22 45. At first, Liberty Mutual partially paid defense invoices of N&T.

23 46. Liberty Mutual made seven payments in response to seven defense
24 invoices of N&T. Those payments only partially paid for defense expenses reflected
25 on the N&T invoices for the defense work done in November 2017 through March
26 2018. But then Liberty Mutual entirely stopped making any defense payments.

27 47. Although Liberty Mutual has purported to conduct some audits on N&T
28 invoices past April 2018, Liberty Mutual has made no defense payments since then.

1 Liberty Mutual has refused, without good cause, to make any defense payments for
2 the past year before this suit was filed.

3 48. Although Upper Deck has repeatedly asked for payment of defense
4 expenses incurred in the defense of the *Leaf Action* and although Liberty Mutual has
5 claimed that it is “defending” the *Leaf Action*, Liberty Mutual has failed and refused
6 to resume payments of defense expenses as it has repeatedly promised to do. It has not
7 defended Upper Deck at all for a year. Before it stopped paying any defense expenses,
8 Liberty Mutual had only partially defended its insured by paying only part of its
9 reasonable defense expenses.

10
11 **FIRST CAUSE OF ACTION**

12 **Declaratory Relief – Duty to Defend**

13 49. Plaintiff, by this reference, incorporates each and every allegation set
14 forth in the above paragraphs of this Complaint as though fully alleged herein.

15 50. A valid contract exists between Upper Deck and Liberty Mutual, namely,
16 the Policy.

17 51. Upper Deck has fully performed all of the obligations and conditions to
18 be performed by it under the Policy and has paid premiums owed under the Policy
19 each month the Policy has been in force.

20 52. By issuing and delivering the Policy and taking payments from Upper
21 Deck, Liberty Mutual agreed to provide a defense for suit seeking damages for
22 “personal and advertising injury” offenses as defined in the Policy, which include,
23 among other things, claims for disparagement.

24 53. The *Leaf Action* alleges facts implicating coverage under the Policy as
25 “personal and advertising injury”, thereby triggering Liberty Mutual’s obligation to
26 defend its insured, Upper Deck, in the *Leaf Action*.

27 54. No exclusions would bar Liberty Mutual from defending Upper Deck in
28 the *Leaf Action*.

1 55. Liberty Mutual has acknowledged the potential for coverage in its
2 reservation of rights letter and also expressly acknowledged that it has an obligation to
3 defend Upper Deck in the *Leaf Action*.

4 56. Liberty Mutual is obligated under the Policy to pay attorneys' fees, costs,
5 and other expenses that its insured, Upper Deck, incurs in the defense of the *Leaf*
6 *Action*.

7 57. Liberty Mutual's duty and obligation to defend Upper Deck in the *Leaf*
8 *Action* further includes the duty to reimburse Plaintiff for all the defense expenses
9 they incur in the *Leaf Action*.

10 58. Liberty Mutual has only partially paid some of N&T's defense invoices
11 through April 2018 and has not paid any of N&T's defense invoices since then nor
12 any of JW's defense invoices since the date of tender.

13 59. An actual bona fide controversy exists between Upper Deck and Liberty
14 Mutual that requires judicial declaration by this Court of the parties' rights and duties
15 regarding the Liberty Mutual's duty to defend Upper Deck in the *Leaf Action*, the
16 amount of defense expenses owed by Upper Deck, and Upper Deck's duty to timely
17 pay defense fees and costs.

18 **SECOND CAUSE OF ACTION**

19 **Breach Of Contract**

20 60. Plaintiff, by this reference, incorporates each and every allegation set
21 forth in the above paragraphs of this Complaint as though fully alleged herein.

22 61. A valid contract exists between Upper Deck and Liberty Mutual, namely,
23 the Policy.

24 62. Upper Deck has fully performed all of the obligations and conditions to
25 be performed by it under the Policy and has paid premiums owed under the Policy
26 each month the Policy has been in force.

27 63. By issuing and delivering the Policy and taking payments from Upper
28 Deck, Liberty Mutual agreed to provide a defense for suit seeking damages for

1 “personal and advertising injury” offenses as defined in the Policy, which include,
2 among other things, claims for disparagement.

3 64. The *Leaf Action* alleges facts implicating coverage under the Policy as
4 “personal and advertising injury”, thereby triggering Liberty Mutual’s obligation to
5 defend its insured, Upper Deck, in the *Leaf Action*.

6 65. No exclusions would bar Liberty Mutual from defending Upper Deck in
7 the *Leaf Action*.

8 66. Liberty Mutual has acknowledged the potential for coverage and that it
9 has an obligation to defend Upper Deck in the *Leaf Action*.

10 67. Liberty Mutual is obligated under the Policy to pay attorneys’ fees, costs,
11 and other expenses that its insured, Upper Deck, incurs in the defense of the *Leaf*
12 *Action*.

13 68. Liberty Mutual has only partially paid N&T’s defense invoices through
14 April 2018 and has not paid any of N&T’s defense invoices since then nor any of
15 JW’s defense invoices since the date of tender.

16 69. Liberty Mutual has failed to provide and pay for the defense in the *Leaf*
17 *Action*.

18 70. Despite repeated requests for defense in the *Leaf Action*, Liberty Mutual
19 has failed to provide the contracted duty of defense to Upper Deck.

20 71. Liberty Mutual has breached its duty to defend the Plaintiffs in the *Leaf*
21 *Action*.

22 72. As a result of the breach, Upper Deck incurred and continues to incur
23 defense expenses in defending against Leaf’s allegations in the *Leaf Action* and other
24 damages.

25 **THIRD CAUSE OF ACTION**

26 **BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING**

27 73. Plaintiff, by this reference, incorporates each and every allegation set
28 forth in the above paragraphs of this Complaint as though fully alleged herein.

1 74. A valid contract exists between Upper Deck and Liberty Mutual, namely,
2 the Policy.

3 75. By issuing and delivering the Policy and taking payments from Upper
4 Deck, Liberty Mutual agreed to provide a defense for suit seeking damages for
5 “personal and advertising injury” offenses as defined in the Policy, which include,
6 among other things, claims for disparagement.

7 76. The *Leaf Action* alleges facts implicating coverage under the Policy as
8 “personal and advertising injury”, thereby triggering Liberty Mutual’s obligation to
9 defend its insured, Upper Deck, in the *Leaf Action*.

10 77. No exclusions would bar Liberty Mutual from defending Upper Deck in
11 the *Leaf Action*.

12 78. Liberty Mutual has acknowledged the potential for coverage and that it
13 has an obligation to defend Upper Deck in the *Leaf Action*.

14 79. Liberty Mutual is obligated under the Policy to pay attorneys’ fees, costs,
15 and other expenses that its insured, Upper Deck, incurs in the defense of the *Leaf*
16 *Action*.

17 80. An implied duty of good faith and fair dealing is implicit in every
18 contract, including insurance contracts.

19 81. Liberty Mutual unreasonably asserted that it would only pay for one law
20 firm despite neither Civil Code Section 2860 nor the Policy granting it the ability to
21 assert this limitation.

22 82. Liberty Mutual unreasonably refused to pay for any of JW’s defense
23 invoices.

24 83. Liberty Mutual has unreasonably refused without good cause to pay for a
25 year’s worth of N&T’s defense invoices.

26 84. Liberty Mutual, despite repeated requests from Upper Deck to resume its
27 defense payments and providing copious information regarding its breach, has
28 continued failing to make defense payments.

1 85. Since then, Liberty Mutual has unreasonably refused to respond to Upper
2 Deck's communications regarding Liberty Mutual's duty to defend.

3 86. Liberty Mutual's actions have been unreasonable and a breach of its
4 implied covenant of good faith and fair dealing with its insured.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Plaintiff The Upper Deck Company prays for judgment against
7 Defendant Liberty Mutual Fire Insurance Company as follows:

8 1. A judicial declaration that Defendant Liberty Mutual has a duty to defend
9 Upper Deck in the underlying action styled as *Leaf Trading Cards, LLC v. The Upper*
10 *Deck Co.*, United States District Court for the Northern District of Texas, Case No.
11 3:17-cv-3200;

12 2. A judicial declaration that Liberty Mutual must reimburse Upper Deck
13 for all the reasonable defense expenses incurred and will incur in the defense of the
14 *Leaf Action* paid on a monthly basis plus prejudgment interest from the date of each
15 invoice at the statutory interest rate;

16 3. A determination that Liberty Mutual has breached its contract obligation
17 to defend its insured, Upper Deck, in the *Leaf Action*;

18 4. An award of damages against Liberty Mutual for its breach of the Policy
19 contract;

20 5. A determination that Liberty Mutual has breached its implied covenant of
21 good faith and fair dealing;

22 6. An award of damages against Liberty Mutual for its breach of its
23 covenant of good faith and fair dealing;

24 7. An award of Upper Deck's reasonable attorneys' fees incurred in this
25 lawsuit;

26 8. An award of the costs of this suit; and

27 9. For such other and further relief as this Court may deem just and proper.
28

