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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

CLERK OF DISTRICT COURT
DEPUTY CLERK OF DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Upsher-Smith Laboratories, Inc.,
Plaintiff,

vs.

St. Paul Fire & Marine Insurance Company, and
Travelers Casualty and Surety Company of
America,

Defendants.

) Case Type: Declaratory Judgment;
) Breach of Contract

) Court File No.: _____

COMPLAINT

(Jury Trial Demanded)

Upsher-Smith Laboratories, Inc. ("Upsher-Smith"), for its Complaint against St. Paul Fire & Marine Insurance Company ("St. Paul"), and Travelers Casualty and Surety Company of America ("Travelers"), states and alleges as follows:

INTRODUCTION AND OVERVIEW

1. Upsher-Smith is in the business of developing and manufacturing innovative, therapeutic, and life-saving pharmaceutical products. The company is headquartered in Maple Grove, Minnesota, and employs about 550 persons. Like many companies, Upsher-Smith administers a profit-sharing plan as part of its employee benefit plans. About 650 current and former employees of Upsher-Smith participate in the plan.

2. In December 2008, Upsher-Smith was shocked to learn that Bernard Madoff and his firm (Bernard L. Madoff Investment Securities LLC) had stolen approximately \$50 billion from thousands of individuals and entities in what may be the largest Ponzi scheme in history. Upsher-Smith had invested all of its profit-sharing plan participants' money with Madoff and his

firm. Upsher-Smith had also invested millions of dollars of its own money in a separate account with Madoff and his firm. Madoff stole all of this money.

3. Upsher-Smith immediately met and communicated with its employees regarding Madoff's theft, and over the next months engaged in various efforts to address and mitigate the losses from its profit-sharing plan. During that time, in addition to other claims against Upsher-Smith described below, the U.S. Department of Labor ("DOL") commenced civil proceedings against Upsher-Smith pursuant to its statutory authority. Upsher-Smith cooperated fully with DOL in order to avoid court litigation, and continues to do so.

4. Unfortunately, Upsher-Smith's insurers have failed to engage in similar good-faith conduct. St. Paul, which sold \$13,000,000 in "Employee Benefit Plans Administration Liability" insurance to Upsher-Smith, has persistently repudiated any obligation to defend or indemnify Upsher-Smith against the very claims and potential liabilities its insurance was intended to cover. Likewise, St. Paul's affiliate, Travelers, has engaged in the same stonewalling tactics, denying any obligation to pay the crime loss that is clearly covered by the plain terms of its comprehensive Crime policy. Rather than rushing in to protect Upsher-Smith from the losses and potential liabilities associated with the devastating Madoff theft, St. Paul and Travelers have chosen to abandon Upsher-Smith and leave Upsher-Smith to fend for itself in its time of need. Upsher-Smith has thus been forced to commence this litigation.

PARTIES

5. Upsher-Smith Laboratories, Inc. is a Minnesota corporation with its principal place of business in Maple Grove, Minnesota.

6. St. Paul Fire & Marine Insurance Company is a Minnesota corporation with its principal place of business in St. Paul, Minnesota.

7. Travelers Casualty and Surety Company of America is a Connecticut corporation with its principal place of business in Hartford, Connecticut.

JURISDICTION AND VENUE

8. This Court has general jurisdiction over the subject matter of this action, as well as *in personam* jurisdiction. St. Paul and Travelers have been authorized to conduct their insurance business in Minnesota, and have conducted such business, at all times relevant to this action. The insurance policies at issue in this action were sold and issued by St. Paul and Travelers to Upsher-Smith in Minnesota.

9. Venue in this Court is proper under Minn. Stat. § 542.09.

FACTS

St. Paul's "Employee Benefit Plans Administration Liability" Insurance

10. For the period 1/1/2008-09 and the period 1/1/2009-10, St. Paul sold and issued its errors and omissions liability insurance policy no. TE06305043 ("Liability Policy") to Upsher-Smith. Included in that policy was St. Paul's "Employee Benefit Plans Administration Liability Protection" insurance, which, according to St. Paul, "provides liability protection for [Upsher-Smith's] business for the administration of [Upsher-Smith's] employee benefit plans." St. Paul's Liability Policy included both primary and excess errors and omissions liability insurance.

11. Under its Liability Policy's primary insurance, St. Paul promised to pay amounts Upsher-Smith is legally required to pay as damages for covered loss that results from the administration of Upsher-Smith's employee benefit plans, and is caused by a wrongful act committed any time before or during the policy period. St. Paul expressly defined "employee benefit plans" to include Upsher-Smith's profit-sharing plan. St. Paul defined "administration"

to mean, among other administrative functions: communicating benefits and costs for an employee benefit plan, or handling or processing of employee benefit plan records. St. Paul broadly defined “wrongful act” to mean “any negligent act, error, or omission.”

12. Under its Liability Policy’s primary insurance, St. Paul additionally promised to defend Upsher-Smith against a claim or suit for loss covered by its Liability Policy. St. Paul defined “claim” to mean “a demand which seeks damages.” St. Paul defined “suit” to mean “a civil proceeding which seeks damages.” St. Paul promised to consider a claim or suit for covered loss to be first made or brought on the earliest of the following dates: (a) the date that St. Paul or Upsher-Smith first receives written notice of such claim or suit; or (b) the date that St. Paul first receives a notice of a wrongful act from Upsher-Smith.

13. The primary insurance in St. Paul’s Liability Policy is subject to limits of \$1,000,000 per wrongful act (with a \$1,000 per wrongful act deductible), and \$3,000,000 in the aggregate. St. Paul promised to pay defense costs in addition to (*i.e.*, outside of) these limits.

14. Under its Liability Policy’s excess insurance, St. Paul promised to pay amounts Upsher-Smith is legally required to pay as damages for covered loss that results from a wrongful act that is committed in the conduct of Upsher-Smith’s business and is covered by the Liability’s Policy’s primary insurance. The excess insurance in St. Paul’s Liability Policy is subject to limits of \$10,000,000 per wrongful act and \$10,000,000 in the aggregate.

Travelers’ “Wrap+” Crime Insurance

15. For the period January 1, 2008 through January 1, 2009, Travelers sold and issued its “Wrap+” Crime Insurance policy no. 105052565 (“Crime Policy”) to Upsher-Smith. Among the multiple crime-loss coverages within Travelers’ comprehensive “Wrap+” protection, Travelers promised to pay Upsher-Smith for its “direct loss of [money] directly caused by

Computer Fraud.” Travelers broadly defined “Computer Fraud” to mean “the use of any computer to fraudulently cause a transfer of [money]” from inside Upsher-Smith’s or its bank’s premises to a person outside Upsher-Smith’s bank or its premises.

16. Travelers’ coverage is triggered by, among other things, Upsher-Smith’s discovery that losses of a type covered by Travelers’ Crime Policy have been or will be incurred, regardless of when the acts causing or contributing to such losses occurred.

17. Travelers’ broad Computer Fraud coverage is not subject to an aggregate limit. Travelers promised to pay \$1,000,000 per Single Loss subject to a \$25,000 per Single Loss retention. Travelers defined “Single Loss” to mean: “any act or series of related acts or events involving one or more persons; or . . . any act, acts or events involving a person or group of persons acting together; whether identified or not both during and before the Policy Period.”

Madoff’s Theft, and the Claims and Suit Against Upsher-Smith

18. Upsher-Smith administers a profit-sharing plan (“Plan”) as part of its employee benefit plans. Upsher-Smith contributes funds to each of the Plan participants’ accounts on an annual basis, and then invests those funds on behalf of the Plan participants. Each Plan participant owns the money in his or her account. Since 1995, Upsher-Smith invested all of the funds in the Plan with Bernard L. Madoff Investment Securities LLC, a New York firm owned and operated by Bernard Madoff (hereafter collectively “Madoff”). As of December 2008, Upsher-Smith had invested \$12 million with Madoff.

19. On December 11, 2008, Bernard Madoff was arrested after admitting that Madoff had stolen approximately \$50 billion from thousands of individuals, companies, foundations, and other entities which had transferred money to Madoff, and that Madoff had only \$200 to 300 million left in its bank account. Governmental investigations subsequently revealed that, for

more than two decades, Madoff had engaged in a massive Ponzi scheme involving more than 8,000 account holders.

20. Upsher-Smith immediately advised Plan participants of the Madoff theft, by meeting and otherwise communicating with participants on December 12 and 15. Within days, several participants submitted claims to Upsher-Smith for Plan distributions, seeking payment of money despite being informed that there was no money in the Plan and nothing could be distributed.

21. Around the same time, during the week of December 15, a former Upsher-Smith employee stated to Upsher-Smith's General Counsel that Upsher-Smith must address the loss of his funds from the Plan because he was counting on that money for his retirement. In a January 22 email to Upsher-Smith's President, the same individual stated that he looks forward to seeing Upsher-Smith's plans for "restitution."

22. By letter dated January 14, 2009, the U.S. Department of Labor initiated civil proceedings against Upsher-Smith pursuant to its statutory authority, by issuing a subpoena demanding documents from Upsher-Smith, on-site inspection of Upsher-Smith's records, and examination of Upsher-Smith employees, in connection with Madoff's theft and the losses from the Plan. See Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. 1134(a). Under ERISA, DOL has authority to find that Upsher-Smith committed errors and omissions with respect to the Plan, and to demand that Upsher-Smith pay for a remedial plan that will fully compensate Plan participants for losses from the Plan. If Upsher-Smith does not reasonably cooperate with DOL by developing and paying for a remedial plan, DOL is authorized to file a court action against Upsher-Smith for those damages, and to assess civil penalties. 29 U.S.C. §1132(l).

23. DOL's document and information requests associated with its January 2009 subpoena, its written follow-up questions, and its questions and comments during its April 13 - 15, 2009 inspection and employee interviews at Upsher-Smith, confirmed that: (a) DOL was investigating whether Upsher-Smith committed errors and omissions with respect to the Plan; and (b) the purpose of DOL's proceedings was to gather evidence to prove Upsher-Smith's liability to pay for a remedial plan that will compensate Plan participants for their losses. DOL requested documents and information relating to, among other things, Upsher-Smith's handling and processing of Plan records, and communication of Plan benefits and costs.

24. By letter to Upsher-Smith dated June 30, 2009, DOL alleged that Upsher-Smith committed errors and omissions in handling and processing Plan records, and in communicating Plan benefits and costs. For example:

a. DOL alleged Upsher-Smith erred in handling its written trading authorization agreement with Madoff, by omitting a record intended to ensure compliance with the Plan – a signed statement from Madoff acknowledging that it was: (1) a fiduciary with respect to the Plan; and (2) registered as an investment advisor under the Investment Advisors Act of 1940.

b. DOL also alleged Upsher-Smith erred in handling and processing records intended to properly monitor the Plan and communicate Plan benefits and costs. DOL alleged Upsher-Smith improperly omitted from the Plan the type of records it handled and processed under its 401(k) employee benefit plan – written quarterly performance reports, written quarterly investment reviews, information on costs associated with the Plan, and an Investment Policy.

25. DOL's June 30 letter demands that Upsher-Smith restore losses to the Plan. The letter advises that DOL will not bring a lawsuit if Upsher-Smith takes proper corrective action. The letter states that, should Upsher-Smith fail to take corrective action, DOL may refer the matter to the Office of the Solicitor of Labor for possible legal action. The letter further advises that DOL has discretion to assess a civil penalty against Upsher-Smith, but DOL may, in its sole discretion, agree to a waiver of the penalty in conjunction with DOL and Upsher-Smith entering into a settlement agreement.

26. DOL's June 30 letter demands that Upsher-Smith advise the agency, within 10 days, how Upsher-Smith proposes to restore losses to the Plan. Because DOL served the letter by Federal Express on July 7, Upsher-Smith and DOL are currently discussing a reasonable extension to respond. Upsher-Smith has developed, and intends to propose to DOL, a remedial plan designed to fairly compensate Plan participants for the losses they sustained. Upsher-Smith believes its remedial plan will resolve the DOL suit and individual claims described in the preceding paragraphs.

St. Paul's Repudiation and Denial of Its Duties to Defend and Indemnify Upsher-Smith

26. Upsher-Smith notified St. Paul of its claim for coverage under St. Paul's Liability Policy on or about December 23, 2008. Since then, Upsher-Smith has met and corresponded with St. Paul regarding the facts, the claims against Upsher-Smith, the DOL proceedings against Upsher-Smith, and the legal bases for Upsher-Smith's requests to St. Paul for defense and indemnity. Upsher-Smith has produced documents to St. Paul and responded to St. Paul's information requests. Upsher-Smith reported to St. Paul the results of DOL's April 13 - 15 on-site inspection and employee interviews, even though St. Paul refused to participate in or defend Upsher-Smith during those proceedings. Upsher-Smith advised St. Paul, on May 6, that DOL

likely would demand Upsher-Smith pay for a remedial plan that would compensate plan participants for their loss, and provided St. Paul with a draft of such a plan, as well as a potential settlement agreement with an independent fiduciary acting on behalf of Plan participants. Upsher-Smith asked St. Paul to advise whether it had any suggestions or objections regarding these drafts.

27. Nevertheless, St. Paul has persisted in repudiating and denying any obligation to defend or indemnify Upsher-Smith against the above-described claims, suit, and potential liabilities. St. Paul has sat on the sidelines, abandoning Upsher-Smith and leaving Upsher-Smith to defend itself.

28. Under its Liability Policy, St. Paul promised to pay amounts Upsher-Smith is legally required to pay as damages for covered loss that results from Upsher-Smith administration of its Plan, and is caused by a wrongful act committed any time before or during the policy period. St. Paul additionally promised to defend Upsher-Smith against claims or suits for loss covered by its Liability Policy. Under Minnesota law, St. Paul's duty to defend is broader than its duty to indemnify – St. Paul must defend if claims or suits against Upsher-Smith *arguably* fall within the scope of the Liability Policy's coverage.

29. St. Paul has a duty to defend Upsher-Smith because, under St. Paul's Liability Policy and Minnesota law, the DOL proceeding is a "suit" (*i.e.*, "a civil proceeding which seeks damages"), and each of the individual claims described in paragraphs 20 and 21 above is a "claim" (*i.e.*, "a demand which seeks damages"), for loss arguably covered by the Liability Policy. Upsher-Smith has a duty to indemnify Upsher-Smith against any settlements or judgments that resolve the DOL suit or the above-described individual claims because, in the event Upsher-Smith is found liable in litigation commenced by DOL or the individual claimants,

that liability would result in whole or in part from: (a) Upsher-Smith's "administration" of the plan, *e.g.*, handling or processing Plan records, or communicating Plan benefits or costs; and (b) DOL or the claimants proving that Plan losses were caused by any negligence, errors, or omissions (*i.e.*, "wrongful acts") committed by Upsher-Smith before or during St. Paul's policy period.

Travelers' Denial of Its Duty to Cover Upsher-Smith's Crime Loss

30. Upsher-Smith also invested its own funds with Madoff in an account separate from the Plan. As of December 2008, Upsher-Smith had transferred millions of dollars of its own money to Madoff. That money was stolen by Madoff.

31. Upsher-Smith notified Travelers of its claim for coverage of this crime loss under Travelers' Crime Policy on or about December 19, 2008. By letter dated April 3, 2009, Travelers denied any obligation to cover the crime loss.

32. Under its Wrap+ Crime Policy, Travelers promised to pay Upsher-Smith for direct loss of money directly caused by the use of any computer to fraudulently cause a transfer of money from Upsher-Smith or its bank account to a third party. Travelers has a duty to pay for Upsher-Smith's crime loss because it was directly caused by Madoff's use of computers to fraudulently cause the transfer of money from Upsher-Smith's bank account to Madoff.

33. Central to Madoff's Ponzi scheme were the trading slips and month-end account statements it provided to its account holders, including Upsher-Smith. Those records showed data on trading activity and results when, in fact, Madoff was stealing money and not trading at all. For Madoff's scheme to work, its trading slips and statements had to show purchase and sale price data within the correct price ranges in which thousands of securities were actually bought

and sold on any given day. This was necessary to satisfy Upsher-Smith and thousands of other account-holders that securities were actually being traded (when, in fact, they were not).

34. In Upsher-Smith's case, its auditors periodically verified a sampling of the price data in Madoff's trading slips and account statements against the trading prices of the respective securities on the pertinent days. Upsher-Smith would not have transferred money to Madoff if the price data in Madoff's trading slips and account statements were inaccurate.

35. Without the use of computers and software programs, Madoff could not have obtained and manipulated the massive amount of securities exchange data necessary to fabricate the trading slips and month-end account statements it provided to Upsher-Smith and more than 8,000 other account holders. Madoff's use of computers was essential to its ability to tie the data in its trading slips and account statements to the price ranges of securities on the dates trades were allegedly made, so as to avoid detection of fraud when efforts were made to verify the alleged trades.

36. Madoff's use of computers was a necessary, instrumental, and substantial part of its fraudulent scheme to cause Upsher-Smith to transfer money to Madoff. But for Madoff's use of a computer to obtain and manipulate data that made its trading slips and month-end account statements appear accurate, Upsher-Smith would not have transferred money to Madoff. Upsher-Smith's loss was therefore "directly caused" by Madoff's use of computers to fraudulently cause the transfer of money from Upsher-Smith's bank account to Madoff, and Travelers' Crime Policy therefore obligates the insurer to cover that loss.

COUNT ONE
(Declaratory Judgment – St. Paul)

37. Upsher-Smith incorporates and reasserts the statements and allegations in paragraphs 1 through 36 above.

38. St. Paul has repudiated and denied, and continues to repudiate and deny, its duty to defend Upsher-Smith against the claims and suit described in paragraphs 20 through 25 above.

39. St. Paul has repudiated and denied, and continues to repudiate and deny, its duty to indemnify Upsher-Smith against damages Upsher-Smith has or may become legally required to pay for loss resulting from Upsher-Smith's administration of the Plan, and caused by any alleged negligence, errors, or omissions on the part of Upsher-Smith.

40. An actual and justiciable controversy therefore exists between Upsher-Smith and St. Paul.

WHEREFORE, Upsher-Smith requests judgment against St. Paul declaring that:

a) St. Paul has been and continues to be obligated to fully defend Upsher-Smith against the claims and suit described in paragraphs 20 through 25 above, as well as against any future claims or suits relating to the Madoff theft that arguably fall within the scope of the Liability Policy's coverage;

b) St. Paul has been and continues to be obligated to pay all attorney fees and disbursements associated with defending Upsher-Smith against the claims and suits described in the preceding paragraph;

c) Subject to the \$13,000,000 aggregate limit of its Liability Policy, St. Paul is obligated to indemnify Upsher-Smith against the damages Upsher-Smith has or may become legally required to pay for loss resulting from Upsher-Smith's administration of the Plan, and caused by any alleged negligence, errors, or omissions on the part of Upsher-Smith, including the amounts Upsher-Smith has paid or will pay to settle or otherwise resolve its potential liabilities.

d) St. Paul is obligated to pay all attorney fees and disbursements incurred by Upsher-Smith in connection with the above-captioned coverage action;

e) St. Paul is obligated to pay all interest on the above-described amounts allowed by law;

f) St. Paul is obligated to provide Upsher-Smith with all other relief that this Court deems to be allowed by law or otherwise just, appropriate, necessary or proper.

COUNT TWO
(Breach of Contract – St. Paul)

41. Upsher-Smith incorporates and reasserts the statements and allegations in paragraphs 1 through 40 above.

42. St. Paul has repudiated and denied, and continues to repudiate and deny, its duty to defend Upsher-Smith against the claims and suit described in paragraphs 20 through 25 above.

43. St. Paul has repudiated and denied, and continues to repudiate and deny, its duty to indemnify Upsher-Smith against damages Upsher-Smith has or may become legally required to pay for loss resulting from Upsher-Smith's administration of the Plan, and caused by any alleged negligence, errors, or omissions on the part of Upsher-Smith.

44. St. Paul is therefore in breach of its contractual duties under the Liability Policy it sold and issued to Upsher-Smith. Upsher-Smith has incurred and will incur damages as a result of St. Paul's breaches of its contractual duties.

WHEREFORE, Upsher-Smith requests judgment against St. Paul, awarding to Upsher-Smith:

a) All damages allowed by law, including all consequential damages flowing from St. Paul's breaches of contract.

- b) All attorney fees and disbursements associated with the above-captioned coverage action that are allowed by law;
- c) All interest on the above-described amounts allowed by law; and
- d) All other relief that the Court deems to be allowed by law or otherwise just, appropriate, necessary or proper.

COUNT THREE
(Declaratory Judgment – Travelers)

45. Upsher-Smith incorporates and reasserts the statements and allegations in paragraphs 1 through 36 above.

46. Travelers has denied, and continues to deny, its duty to pay Upsher-Smith for the crime loss described in paragraphs 30 and 36 above.

47. An actual and justiciable controversy therefore exists between Upsher-Smith and Travelers.

WHEREFORE, Upsher-Smith requests judgment against Travelers declaring that:

- a) Travelers is obligated to pay Upsher-Smith for the crime loss described in paragraphs 30 and 36 above, subject to the Crime Policy's \$1,000,000 limit for each Single Loss.
- b) Travelers is obligated to pay all attorney fees, disbursements, and interest allowed by law;
- c) Travelers is obligated to provide Upsher-Smith with all other relief that this Court deems to be allowed by law or otherwise just, appropriate, necessary or proper.

COUNT FOUR
(Breach of Contract – Travelers)

48. Upsher-Smith incorporates and reasserts the statements and allegations in paragraphs 1 through 36, and paragraphs 45 through 47, above.

49. Travelers has denied, and continues to deny, its duty to pay Upsher-Smith for the crime loss described in paragraphs 30 and 36 above.

50. Travelers is therefore in breach of its contractual duties under the Crime Policy it sold and issued to Upsher-Smith. Upsher-Smith has incurred and will incur damages as a result of Travelers' breach of its contractual duties.

WHEREFORE, Upsher-Smith requests judgment against Travelers, awarding to Upsher-Smith:

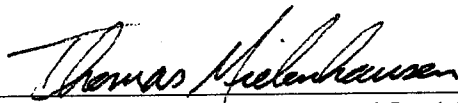
- a) All damages allowed by law, including all consequential damages flowing from Travelers' breach of contract.
- b) All attorney fees and disbursements associated with the above-captioned coverage action that are allowed by law;
- c) All interest on the above-described amounts allowed by law; and
- d) All other relief that the Court deems to be allowed by law or otherwise just, appropriate, necessary or proper.

JURY TRIAL DEMANDED

Plaintiff demands a trial by jury.

Dated: July 14, 2009

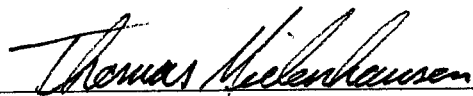
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ACKNOWLEDGMENT

The party to this pleading by its attorney acknowledges that sanctions may be imposed if warranted by Minn. Stat. § 549.211.


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