

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

SELECT INSURANCE COMPANY,

Plaintiff,

vs.

**RENEWABLE ENVIRONMENTAL SOLUTIONS,
LLC and DONALD SANDERS,**

Defendants.

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) **Case No. 08-5013-CV-SW-JCE**
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COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff, Select Insurance Company (“Select”), by and through its undersigned counsel, brings this Complaint for Declaratory Judgment and alleges as follows:

NATURE OF THE ACTION

1. This is an action for declaratory judgment pursuant to 28 U.S.C. § 2201 for the purposes of determining questions of actual controversy between Select and Renewable Environmental Solutions, LLC (“RES”) and construing the rights and legal relations arising from certain contracts of liability insurance that were issued to RES (the “Select Policies”).
2. RES has demanded that Select defend and indemnify it and Donald Sanders (“Sanders”) under the Select Policies with regard to claims asserted against them in a purported class action lawsuit entitled Cynthia Sundy, a Missouri resident on behalf of herself and all others similarly situated, v. Renewable Environmental Solutions, LLC, et al., Case No. 07AP-CC00089, pending in the Circuit Court of Jasper County, Missouri at Carthage (the “Underlying Suit”).
3. Select disputes that it has any obligation to defend or indemnify RES or Sanders under the Select Policies with respect to the Underlying Suit.

JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this declaratory judgment action pursuant to 28 U.S.C. § 1332(a), as this matter is between citizens of different states and the amount in controversy exceeds the sum or value of \$75,000.00.

5. Venue is proper before this Court pursuant to 28 U.S.C. § 1391(a)(1), as RES's principal place of business is located in this judicial district, and Sanders resides in this district. In addition, venue is proper before this Court pursuant to 28 U.S.C. § 1391(a)(2), as a substantial part of the of the events giving rise to Select's claims occurred in this judicial district, and RES's principal place of business, which is the subject of this action, is situated in this judicial district.

PARTIES

6. Select is a corporation incorporated under the laws of the State of Texas and has its principal place of business in New York, New York. Select is a surplus lines approved carrier in Missouri.

7. Upon information and belief, RES is a limited liability company created under the laws of the State of Delaware and has its principal place of business in Carthage, Missouri. Upon information and belief, RES is admitted to transact business in Missouri.

8. Upon information and belief, Sanders is a resident of Carthage, Missouri and serves as the Plant Manager of RES's plant in Carthage, Missouri.

THE SELECT POLICIES

9. Select issued the following commercial general liability policies to RES:

| <u>POLICY NUMBER</u> | <u>POLICY PERIOD</u> |
|-----------------------------|-----------------------------|
| GS002805256 | 11/01/2002 to 11/01/2003 |
| GS003072524 | 11/01/2003 to 11/01/2004 |

Copies of the Select Policies are attached hereto as Exhibit A.

FACTUAL ALLEGATIONS

10. Upon information and belief, RES operates a rendering plant on the northern boundary of Carthage, Missouri (the “Plant”). Upon information and belief, RES has conducted operations at the Plant since April of 2003.

11. Upon information and belief, the Plant employs the Thermal Conversion Process (the “TCP”) to turn agricultural waste into oil and gas. Upon information and belief, most of the agricultural waste is comprised of unused turkey parts from ConAgra Foods, Inc.’s Butterball Turkey Plant (the “Butterball Plant”), which is located adjacent to RES’s Plant. Upon information and belief, the Plant receives between 200 and 500 tons of agricultural waste from the Butterball Plant on a daily basis.

12. Upon information and belief, the TCP begins with the waste being transported by a conveyer belt into a grinder, which grinds the waste into a slurry (paste-like material). Upon information and belief, the slurry then is superheated and pressurized so that it breaks the molecular chains apart. Upon information and belief, the slurry then is exposed to lower air pressure, in order to vaporize some of the water, and thereafter, the remaining slurry again is superheated and placed into fermentation tanks and centrifuges, which separate and sort the organic material into oil and gas.

13. It is alleged in the Underlying Suit that TCP generates harmful, offensive and noxious odors, which are emitted into the air at and around the Plant.

14. Upon information and belief, the Missouri Department of Natural Resources (“DNR”) has received hundreds of complaints from neighboring landowners with respect to the air pollution emanating from the Plant.

15. Upon information and belief, on or about March 31, 2005, April 15, 2005, April 20, 2005, June 10, 2005, July 22, 2005 and August 5, 2005, the DNR and/or Missouri Air Conservation Commission cited the Plant for violating certain of Missouri's air pollution laws.

16. Upon information and belief, on or about December 29, 2005, the Plant was shut down pursuant to an order from the Governor of Missouri due to its continued air pollution. Upon information and belief, the Plant was permitted to reopen, provided that it operated under special conditions designed to reduce the air pollution emanating therefrom.

17. Upon information and belief, in or about 2005, the State of Missouri and the City of Carthage filed a lawsuit against RES in the Circuit Court of Jasper County, Missouri at Carthage seeking penalties from RES with respect to the air pollution emanating from the Plant. Upon information and belief, in or about June of 2006, the State of Missouri, the City of Carthage and RES entered into a Consent Order pursuant to which RES agreed to pay \$175,000 in civil penalties for violating Missouri's air pollution laws. Upon information and belief, \$100,000 in penalties was due immediately, and \$75,000 was suspended and deferred unless the Plant was charged with additional violations of Missouri's air pollution laws. Upon information and belief, RES also agreed to pay \$25,000 for any future violations over the next two years. Upon information and belief, the penalties levied against RES were the largest ever assessed for violations of Missouri's air pollution laws.

18. Upon information and belief, in or about April of 2005, the State of Missouri and the City of Carthage filed a public nuisance lawsuit against RES in the Circuit Court of Jasper County, Missouri at Carthage seeking abatement of the public nuisance created by the air pollution emanating from the Plant. Upon information and belief, the public nuisance lawsuit was dismissed without prejudice when RES agreed to make improvements to the Plant purportedly designed to reduce the air pollution emanating therefrom.

19. Upon information and belief, on or about June 5, 2007, Cynthia Sundy, on behalf of herself and all others similarly situated, filed the Underlying Suit. Upon information and belief, the Underlying Suit has been filed on behalf of approximately 6,375 persons who own or occupy residential property in Carthage, Missouri that allegedly has been affected by the air pollution emanating from the Plant, and seeks relief for injury and/or damage allegedly sustained as a result of the air pollution emanating from the Plant. Upon information and belief, in addition to naming RES and Sanders as Defendants, the Underlying Suit names unknown defendants that “in any way caused, contributed to or were responsible for the contamination” of the plaintiffs’ properties and/or the surrounding areas.

20. RES has demanded that Select defend and indemnify it and Sanders under one or more of the Select Policies with respect to the Underlying Suit.

21. Select disputes that it has any obligation to defend or indemnify RES or Sanders with respect to the Underlying Suit, under the terms, provisions, conditions and exclusions of the Select Policies.

COUNT I
DECLARATION OF NO COVERAGE UNDER THE SELECT POLICIES

22. Select reasserts and incorporates by reference Paragraphs 1 through 21 of this Complaint as if fully set forth herein.

23. Select is under no obligation to defend or indemnify RES or Sanders in connection with the Underlying Suit pursuant to the terms, conditions, provisions and exclusions of the Select Policies as follows:

a. Coverage is barred under the Select Policies to the extent RES or Sanders have failed to perform all of their obligations under the Select Policies.

b. Coverage is barred under the Select Policies on the grounds that the Select Policies exclude coverage for “bodily injury” or “property damage” which would not have

occurred in whole or in part but for the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of “pollutants” (as defined in the Select Policies) at any time.

c. Coverage is barred under the Select Policies on the grounds that the Select Policies exclude coverage for “personal and advertising injury” arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of “pollutants” (as defined in the Select Policies) at any time.

d. Coverage is barred under the Select Policies on the grounds that the Select Policies exclude coverage for any loss, cost or expense arising out of any: (i) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of “pollutants” (as defined in the Select Policies); or (ii) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of “pollutants” (as defined in the Select Policies).

e. Coverage is barred under the Select Policies to the extent covered “bodily injury” or “property damage” did not take place during the respective policy periods of the Select Policies.

f. Coverage is barred under the Select Policies to the extent any “personal and advertising injury” was not caused by an enumerated offense that was committed during the respective policy periods of the Select Policies.

g. Coverage is barred under the Select Policies to the extent the Underlying Suit does not allege, involve or otherwise constitute “bodily injury,” “property damage” or “personal and advertising injury” as defined in the Select Policies.

h. Coverage is barred under the Select Policies to the extent RES or Sanders seek recovery for liabilities arising out of the acts or omissions of any individual or organization other than those individuals or organizations declared or described as a named insured or insured in the Select Policies.

i. Coverage is barred under the Select Policies to the extent RES or Sanders failed to provide Select with notice of an “occurrence” as soon as practicable, which notice included: (i) How, when and where the “occurrence” or offense took place; (ii) The names and addresses of any injured persons and witnesses; and (iii) The nature and location of any injury or damage arising out of the “occurrence” or offense.

j. Coverage is barred under the Select Policies to the extent RES or Sanders failed to provide Select with written notice of the Underlying Suit as soon as practicable, and/or to the extent RES or Sanders failed to immediately send Select copies of any demands, notices, summonses or other legal papers received in connection with the Underlying Suit.

k. Coverage is barred under the Select Policies to the extent RES or Sanders failed to cooperate with Select in accordance with the terms of the Select Policies, and/or to the extent RES or Sanders voluntarily made a payment, assumed any obligation or incurred any expense, other than for first aid, without Select’s consent.

l. Coverage is barred under the Select Policies for claims arising out of the liability of others that has been assumed by contract or agreement other than as specified in the Select Policies.

m. Coverage is barred under the Select Policies to the extent any “bodily injury” or “property damage” was expected or intended from the standpoint of RES or Sanders.

n. Coverage is barred under the Select Policies to the extent any “personal and advertising injury” was caused by or at the direction of RES or Sanders with the knowledge that the act would violate the rights of another and would inflict “personal and advertising injury.”

o. Coverage is barred under the Select Policies to the extent any “bodily injury” or “property damage” was not caused by an “occurrence” as defined in the Select Policies.

p. Coverage is barred under the Select Policies to the extent any “personal and advertising injury” was not caused by an offense enumerated in the Select Policies.

q. Coverage is barred under the Select Policies for amounts other than amounts RES or Sanders are or shall be obligated to pay as “damages,” as that term is used in the Select Policies, including costs of opposition to or complying with statutes or administrative regulations, fines, penalties, sanctions, punitive damages, injunctive or equitable relief or opposing or complying with the exercise of the government’s police power, none of which is covered by the Select Policies.

r. Coverage is barred under the Select Policies and by public policy for RES’s or Sanders’ liability for punitive or exemplary damages, in whatever form assessed.

s. Coverage is barred under the Select Policies to the extent RES or Sanders seek recovery for “property damage” to property owned, rented or occupied by RES.

t. Coverage is barred under the Select Policies to the extent RES or Sanders seek recovery for “property damage” to work performed by or on behalf of RES arising out of the work or any part of it, or out of materials, parts or equipment furnished in connection therewith.

u. Coverage is barred under the Select Policies to the extent RES or Sanders seek recovery for “property damage” to “impaired property” or property that has not been physically injured, arising out of a defect, deficiency, inadequacy or dangerous condition in work or operations performed by or on behalf of RES.

v. Coverage is barred under the Select Policies to the extent RES or Sanders seek recovery for “bodily injury” arising out of “personal and advertising injury.”

w. Coverage is barred under the Select Policies to the extent the Underlying Suit involves known losses, pre-existing conditions, losses-in-progress and/or losses that are otherwise non-contingent and non-fortuitous.

x. Coverage is barred under the Select Policies if an insured listed under Paragraph 1. of Section II - Who Is An Insured or an “employee” authorized by you to give or receive notice of an “occurrence” or claim knew, prior to the policy period, that “bodily injury” or “property damage” had occurred, in whole or in part.

y. Coverage is barred under the Select Policies for persons or entities which have been assigned rights to the Select Policies without the written consent of Select.

z. Select’s duty to indemnify, if any, under the Select Policies does not attach unless and until any and all deductibles have been exhausted and satisfied.

aa. Coverage under the Select Policies is limited because the Select Policies contain various limitations on coverage, including without limitation the following provisions: (i) limits of liability; (ii) each “occurrence” or aggregate limits; and (iii) “personal and advertising injury” limits.

bb. Select’s liability, if any, under the Select Policies for “bodily injury,” “property damage” or “personal and advertising injury” shall not exceed the limits as stated in the Select Policies regardless of the number of: (i) Insureds ; (ii) Claims made or “suits” brought; or (3) Persons or organizations making claims or bringing “suits.”

cc. For purposes of determining Select’s limit of liability, all “bodily injury” or “property damage” arising out of continuous or repeated exposure to substantially the same general harmful conditions shall be considered as arising out of one “occurrence.”

dd. The Select Policies provide that in the event other insurance applies to a loss on the same basis as any insurance which may be afforded by Select, Select shall not be liable for a greater proportion of the loss than stated in the Select Policies' "other insurance" provisions.

ee. Coverage is barred under the Select Policies to the extent RES or Sanders have failed to mitigate, minimize or avoid any alleged injury or damage.

ff. Coverage is barred under the Select Policies to the extent RES's or Sanders' acts or failures to act gave rise to the Underlying Suit and were in violation of law and/or public policy.

gg. Coverage is barred under the Select Policies to the extent RES or Sanders have failed to enforce any right of contribution or indemnity against any person or organization that may be liable to RES or Sanders because of injury or damage to which the Select Policies may also apply and to the extent RES or Sanders have failed to cooperate with Select in the enforcement of such right.

hh. Coverage is barred under the Select Policies to the extent RES or Sanders have impaired Select's right to recover all or part of any payment Select makes under the Select Policies from any other party against which RES or Sanders have any rights to recover.

ii. Coverage is barred under the Select Policies to the extent RES or Sanders have failed to provide Select with sufficient facts to demonstrate that they are entitled to any coverage under the Select Policies.

jj. Select reserves the right to allocate or reallocate liability (if any liability exists) to other insurers and to RES or Sanders for uninsured or self-insured periods or periods not insured by Select.

kk. Select reserves the right to assert all defenses which may be pertinent to the Underlying Suit or RES's and Sanders' claims for coverage once the precise nature of the claims are ascertained through further discovery and investigation.

24. Upon information and belief, RES and Sanders dispute the applicability of the various contract provisions and defenses set forth in subparagraphs (a) through (kk) of Paragraph 23.

25. There exists between Select and RES and Sanders a substantial, bona fide, actual and justiciable dispute regarding the application and interpretation of certain terms of the Select Policies in connection with RES's and Sanders' claims for coverage with respect to the Underlying Suit.

26. As a result of this current controversy, Select is unable to know or judge its obligations, if any, to defend or indemnify RES and Sanders in connection with the Underlying Suit. Select is therefore entitled to have a declaration of its rights and a judicial interpretation of the rights and obligations of the parties under the Select Policies. There is no adequate remedy, other than that requested herein, by which this controversy may be resolved.

WHEREFORE, Select Insurance Company respectfully prays as follows:

(1) That this Court enter a declaratory judgment that, under the Select Policies, Select is under no obligation to provide a defense to or indemnify RES or Sanders, or to pay any expenses they incur in connection with the Underlying Suit;

(2) In the alternative, that this Court enter a judgment declaring the extent of Select's duties (if any) to defend or indemnify RES and Sanders in connection with the Underlying Suit;

(3) Awarding Select its costs in this action; and

(4) Awarding Select such other relief as the Court deems just and proper.

JURY DEMAND

Select Insurance Company hereby demands a trial by jury.

Respectfully submitted,

SELECT INSURANCE COMPANY

By: /s/ Jason R. Scheiderer

One of Its Attorneys

DATED: February 7, 2008

Jason R. Scheiderer (jscheiderer@sonnenschein.com)(I.D. Number 53091)

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