

15.2201

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS,  
EASTERN DIVISION**

THE NETHERLANDS INSURANCE )  
COMPANY, a New Hampshire )  
corporation, and INDIANA INSURANCE )  
COMPANY, an Indiana corporation, )

*Plaintiffs,* )

— vs — )

PHUSION PROJECTS INC., a Delaware )  
corporation, and PHUSION PROJECTS, )  
LLC, a Delaware limited liability )  
company, )

*Defendants.* )

**COMPLAINT FOR DECLARATORY JUDGMENT**  
**(28 USC 2201, et seq.)**

The plaintiffs, THE NETHERLANDS INSURANCE COMPANY, a New Hampshire corporation (“Netherlands”), and INDIANA INSURANCE COMPANY, an Indiana corporation (“Indiana”), by their attorneys, Joseph P. Postel, David S. Osborne, and Christopher J. Pickett of Lindsay, Rappaport & Postel, LLC, bring this action under the Declaratory Judgment Act (28 USC 2201, *et seq.*), against PHUSION PROJECTS INC., a Delaware corporation, and PHUSION PROJECTS, LLC, a Delaware limited liability company (hereinafter collectively referred to as “Phusion”), and allege as follows:

**Nature of the Action**

1. This is a declaratory judgment action wherein commercial general liability (“CGL”) insurer Netherlands and commercial umbrella liability insurer Indiana seek a declaration that they do not owe a duty to defend or indemnify their named insured,

Phusion, against four underlying complaints filed and pending in California, New York, New Jersey, and Pennsylvania, and a third-party complaint filed and pending in Florida.

### **Jurisdiction and Venue**

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

3. Venue is proper pursuant to 28 U.S.C. §1391 because a substantial part of the events giving rise to this litigation occurred in this judicial district, including:

- a. Phusion's principal place of business is in Chicago, Illinois;
- b. The insurance producer for this policy is located at 1700 E. Higgins Rd., Suite 320, Des Plaines, Illinois 60018;
- c. The underwriter for this policy is located in Lisle, Illinois;
- d. The insurance policies at issue in this case were delivered to Phusion in Chicago, Illinois.
- e. Illinois law therefore determines the rights and obligations of the parties to this case with respect to the insurance policies at issue.

### **Parties**

4. Netherlands is a New Hampshire corporation, and an indirect subsidiary of Liberty Mutual Insurance Company. Netherlands' principal place of business is in Keene, New Hampshire.

5. Indiana is an Indiana corporation, and an indirect subsidiary of Liberty Mutual Insurance Company. Indiana's principal place of business is in Indianapolis, Indiana.

6. Phusion Projects Inc. is a Delaware corporation with its principal place of

business in Chicago, Illinois.

7. Phusion Projects LLC is a Delaware limited liability company with its principal place of business in Chicago, Illinois. The members (owners) of Phusion Projects LLC are Phusion Projects, Inc., and Riverside Projects, LLC. Phusion Projects Inc. is a Delaware corporation with its principal place of business in Chicago, Illinois. Riverside Projects, LLC is a Delaware corporation with its principal place of business in Cincinnati, Ohio.

**Nonjoinder of Certain Parties**

8. Brett A. Fiorini (“Fiorini”) is the plaintiff in one of the underlying complaints and is, on information and belief, a citizen of California. He has not been joined because plaintiffs believe that he has done nothing that would submit him to the jurisdiction of an Illinois court, and that therefore, this court does not have personal jurisdiction over him. Plaintiffs will provide notice of this suit to Fiorini by mailing it to his lawyer in the underlying California state court proceedings and advising him of his right to petition this court for leave to intervene in this action, should he choose to do so.

9. Peggy S. Blume and Stephen K. Blume (“the Blumes”) are the plaintiffs in one of the underlying complaints and are, on information and belief, citizens of New York, residing in the Town of Cicero, New York. They have not been joined because plaintiffs believe that the Blumes have done nothing that would submit them to the jurisdiction of an Illinois court, and that therefore, this court does not have personal jurisdiction over the Blumes. Plaintiffs will provide notice of this suit to the Blumes by mailing it to their lawyer in the underlying New York state court proceedings and advising the Blumes of their right to petition this court for leave to intervene in this

action, should they choose to do so.

10. The Estate of Matthew Hus (“Hus”) is the plaintiff in one of the underlying complaints and, on information and belief, is a citizen of New Jersey, residing, according to its complaint, in the Borough of Audubon, New Jersey. Hus has not been joined because plaintiffs believe that it has done nothing that would submit it to the jurisdiction of an Illinois court, and that therefore, this court does not have personal jurisdiction over it. Plaintiffs will provide notice of this suit to Hus by mailing it to its lawyer in the underlying New Jersey state court proceedings and advising it of its right to petition this court for leave to intervene in this action, should it choose to do so.

11. Kathleen D’Alterio (“D’Alterio”) is the plaintiff in one of the underlying complaints and is, on information and belief, a citizen of Pennsylvania. She has not been joined because plaintiffs believe that she has done nothing that would submit her to the jurisdiction of an Illinois court, and that therefore, this court does not have personal jurisdiction over her. Plaintiffs will provide notice of this suit to D’Alterio by mailing it to her lawyer in the underlying Pennsylvania state court proceedings and advising her of her right to petition this court for leave to intervene in this action, should she choose to do so.

12. Schenk Company, a Florida corporation not registered to do business in Illinois (“Schenk”), is the third-party plaintiff in one of the underlying lawsuits, and is a citizen of Florida. Schenk has not been joined because plaintiffs believe that Schenk has done nothing that would submit it to the jurisdiction of an Illinois court, and that therefore, this court does not have personal jurisdiction over Schenk. Plaintiffs will provide notice of this suit to Schenk’ by mailing it to Schenk lawyer in the underlying

Florida state court proceedings and advising Schenk of its right to petition this court for leave to intervene in this action, should it choose to do so.

### **The Underlying Complaints**

#### **The Fiorini Complaint**

13. On or about November 1, 2011, Fiorini filed a complaint in the Superior Court of California, County of Fresno, styled *Brett A. Fiorini v. Phusion Projects, LLC, et al.*, Case No. 11 CE CG 03802 (the “*Fiorini* complaint”). A copy of the *Fiorini* complaint is attached hereto as Exhibit A, and is incorporated herein by reference.

14. The *Fiorini* complaint seeks damages for the wrongful death of Fiorini’s son Rod, and alleges, among other things, as follows:

- a. That Fiorini’s late son, Rod, purchased and consumed two 23.5 oz. cans of Four Loko, an alcoholic beverage created, formulated, and marketed by Phusion. (¶¶ 36-38.)
- b. That as a result thereof, he began to act in an irritated, agitated, and disoriented manner. (¶38.)
- c. Thereafter, he became extremely disoriented, excited, agitated, and paranoid. (¶39.)
- d. Thereafter, he got a shotgun and started firing it at targets on a fence, and saying “they” were coming to get him. (¶40.)
- e. That Rod’s roommates called 911, and upon arrival of responding police officers, Rod walked out onto the front porch with the shotgun on his shoulder and in a disoriented state of mind, whereupon the officers shot him eight times, resulting in his death. (¶41.)
- f. That in the hours prior to his death, Rod had consumed enough alcohol by drinking the two cans of Four Loko that he should have lost consciousness or acted in a subdued manner, but due to Four Loko’s high caffeine content, and the presents of the stimulants guarana, taurine, and wormwood, he remained awake, and was in an extremely disoriented, excited, agitated, and paranoid state of mind. (¶42.)
- g. That Four Loko was unsafe and inherently dangerous for consumption,

and misled and inadequately warned consumers of its contents, potency, and dangerousness. (¶48.)

#### The Blume Complaint

15. On or about January 9, 2012, the Blumes filed a lawsuit in the Supreme Court of the State of New York, County of Onondaga, styled as *Peggy S. Blume and Stephen K. Blume v. Phusion Projects, Inc., et al.*, Index No. 2011-3155 (the *Blume* complaint). A copy of the *Blume* complaint is attached hereto as Exhibit B, and is incorporated herein by reference.

16. The *Blume* complaint seeks damages for injury to Peggy Blume, sustained in auto accident between a car driven by Blume, and a car driven by co-defendant Chelsea Kuss (“Kuss”), who, according to the Blumes’ complaint, was intoxicated from Four Loko (¶¶78, 81, 84, 86) and further alleges, among other things, as follows:

- a. That Phusion designed, created, manufactured, marketed and sold an alcoholic beverage known as Four Loko. (¶28.)
- b. That Four Loko was made from alcohol, taurine, gurana, and caffeine. (¶31.)
- c. That the stimulants in Four Loko masked the effects of alcohol and intoxication, making users feel less intoxicated. (¶35.)
- d. That Four Loko was dangerous because users would engage in dangerous behavior such as driving, because they would not feel as intoxicated as they would b, even though their motor skills would be degraded. (¶36.)
- e. That because of the stimulant and highly intoxicating effect of Four Loko, Kuss was overly stimulated and intoxicated, and drove a car in a reckless manner, causing a severe auto accident which injured Blume. (¶42.)

#### The Hus Complaint

17. On April 9, 2012, Hus filed a lawsuit in the Superior Court of New Jersey, Law Division, Camden County, styled *The Estate of Matthew Hus v. Phusion Projects,*

*LLC., et al.*, Docket No. L-1657-12 (the “*Hus* complaint”). A copy of the *Hus* complaint is attached hereto as Exhibit C, and is incorporated herein by reference.

18. The *Hus* complaint seeks damages for the wrongful death of Matthew Hus, who, according to the complaint, was attacked and stabbed to death by Paige Pfefferle (Pfefferle) while a guest in the Pfefferle home (§12), and after Pfefferle purchased and imbibed Four Loko. (§51.) The *Hus* complaint further alleges, among other things, that Pfefferle was visibly intoxicated while drinking alcohol at the premises of a local dram shop (§31), and that she consumed more alcohol at her parents’ house (§19) before attacking and stabbing Matthew Hus. The *Hus* complaint alleges (by implication) that Four Loko is unreasonably dangerous because of the combination of alcohol and stimulants. (*See, e.g.*, §§ 43-44.)

#### The *D’Alterio* Complaint

19. On a date unknown to plaintiffs, but which they believe and therefore allege to have been some time in 2012, D’Alterio filed a lawsuit in the Court of Common Pleas, Philadelphia County, State of Pennsylvania, styled as *Kathleen D’Alterio v. Phusion Products, et al.*, Case ID 120802303 (the *D’Alterio* complaint). A copy of the *D’Alterio* complaint is attached hereto as Exhibit D, and is incorporated herein by reference.

20. The *D’Alterio* complaint seeks damages for injury to and the wrongful death of D’Alterio’s son, Joshua L. Snyder (“Snyder”). The *D’Alterio* complaint alleges that Snyder was run over by a public transit trolley in Drexel Hill, Pennsylvania, causing his death, because, as a result of consuming Four Loko (§9), Snyder was in a “highly intoxicated state” (§12), and as a result, “either blacked out or was otherwise unable to

appreciate his actions, and sat upon the...trolley track (§12), and while so sitting, was struck by the trolley (§15) and killed (§16).

The *Bailey* Complaint and Third-Party Complaint

21. On or about August 31, 2011, Donna Bailey and Lawrence Bailey (“the Baileys”) filed a lawsuit in the Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida, styled *Donna Bailey and Lawrence Bailey v. Schenk Co., et al.*, Case No. 2011-C-005825-0 (the “*Bailey* complaint”). A copy of the *Bailey* complaint is attached hereto as Exhibit E and is incorporated herein by reference.

22. The *Bailey* complaint does not name Phusion as a defendant, but it does name Schenk as a defendant, and alleges that Schenk distributed Four Loko (§4), that the Baileys’ 16 year-old son Kason Bailey bought two cans of Four Loko from a beverage store and became intoxicated and impaired from drinking them (§§7-10), that as a result of the intoxication and impairment, he was struck by more than one car while he was a pedestrian, and was killed (§11), and that the Four Loko Kason Bailey consumed was unreasonably dangerous because, among other reasons, its ingredients mask or desensitize users to their intoxication. (§36).

23. The Schenk third-party complaint against Phusion seeks “common law indemnity” and “contractual indemnity,” with respect to the *Bailey* complaint. A copy of the Schenk third-party complaint is attached hereto as Exhibit F and is incorporated herein by reference.

**The Netherlands CGL Policy**

24. Netherlands issued policy no. CBP 8778317 to “Phusion Projects Inc and Phusion Projects LLC 1658 S Milwaukee Suite 424 Chicago IL 60647.” A copy of the

policy is attached hereto as Exhibit G, and is incorporated herein by reference.

25. The policy has an effective period of May 6, 2010 to May 6, 2011 and included commercial property and CGL coverages. The CGL limits are \$1,000,000 per occurrence.

26. The policy contains the ISO CG 000 01 10 01 coverage form with the following coverage grant:

**SECTION I – COVERAGES  
COVERAGE A BODILY INJURY AND PROPERTY  
DAMAGE LIABILITY**

**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. But:

(1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

27. The CGL coverage form contains the following exclusion:

**2. Exclusions**

This insurance does not apply to:

\* \* \*

**c. Liquor Liability**

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling serving or furnishing alcoholic beverages.

**The Indiana Commercial Umbrella Liability Policy**

28. Indiana issued Commercial Umbrella Liability policy no. CU 8777618 to “Phusion Projects Inc and Phusion Projects LLC 1658 S Milwaukee Suite 424 Chicago IL 60647” (“the umbrella policy”). A copy of the umbrella policy is attached hereto as Exhibit H and is incorporated herein by reference.

29. The umbrella policy has an effective period of May 6, 2010 to May 6, 2011 with per occurrence and aggregate limits of \$5,000,000.

30. The umbrella policy contains the following coverage grant:

**SECTION I – COVERAGE**

**1. Insuring Agreement**

a. We will pay on behalf of the insured those sums in excess of the “retained limit” that the insured becomes legally obligated to pay as damages because of “bodily injury”, “property damage” or “personal and advertising injury” to which this insurance applies. \*\*\*

31. The umbrella policy contains a nearly identical Liquor Liability exclusion:

**3. Exclusions**

This insurance does not apply to:

\* \* \*

**c. Liquor Liability**

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling serving or furnishing alcoholic beverages.

**Coverage Allegations**

32. The Liquor Liability exclusion in the Netherlands CGL policy negates coverage for the *Fiorini*, *Blume*, *Hus*, and *D'Alterio* complaints, as well as for the Schenk third-party complaint in the *Bailey* case.

33. As such, Netherlands does not owe a duty to defend or indemnify Phusion under the CGL policy against any one of the three underlying complaints, or the third-party complaint.

34. The Liquor Liability exclusion in the Indiana umbrella policy negates coverage for the *Fiorini*, *Blume*, *Hus*, and *D'Alterio* complaints, as well as for the Schenk third-party complaint in the *Bailey* case.

35. As such, Indiana does not owe a duty to defend or indemnify Phusion under the umbrella policy against any one of the three underlying complaints, or the third-party complaint.

### **The Previous Coverage Litigation**

36. Netherlands and Indiana have previously litigated their coverage obligations or lack thereof to Phusion with respect to complaints that are substantially similar to the *Fiorini*, *Blume*, *Hus*, and *D’Alterio* complaints, in an action filed in this court styled *The Netherlands Insurance Company, a New Hampshire corporation, and Indiana Insurance Company, an Indiana corporation, Plaintiffs, vs. Phusion Projects Inc., a Delaware corporation, and Phusion Projects, LLC, a Delaware limited liability company*, no. 1:11-cv-1253 (“the previous coverage litigation”).

37. On January 25, 2012, this court entered judgment in the previous coverage litigation, finding and declaring, among other things, that “the plaintiff has no duty to defend the defendant with respect to the [underlying] lawsuits.” The judgment order is attached hereto as Exhibit “I.”

38. The judgment order in the previous coverage litigation was entered pursuant to a Memorandum Opinion and Order issued by the court (Kennelly, J.) on January 17, 2012, in which Judge Kennelly opined, held, and found, in pertinent part, as follows:

- a. “The plain language of [the liquor liability] exclusion is susceptible to one reasonable interpretation: all suits based on allegations that Phusion’s products caused someone to become intoxicated, leading to personal injury, are excluded under both policies.” (P. 4.)
- b. “The language of the liquor liability exclusion is unambiguous. It clearly provides that plaintiffs have no duty to defend any case arising from Phusion causing a person to become intoxicated. (P. 6.)
- c. “Any claim made in the underlying lawsuits that are [sic] not ‘wholly independent’ of intoxication, however, fall [sic] within the liquor liability exclusion.” (P. 7.)

