

NO. A08-321

State of Minnesota
In Supreme Court

GENERAL CASUALTY COMPANY OF WISCONSIN,
Plaintiff,

vs.

WOZNIAK TRAVEL, INC. D/B/A HOBBIT TRAVEL AND
THE SAUL ZAENTZ COMPANY D/B/A TOLKIEN ENTERPRISES,
Defendants.

DEFENDANT WOZNIAK TRAVEL, INC.'S BRIEF

LINDQUIST & VENNUM P.L.L.P.

Thomas C. Mielenhausen (MN #160325)

Christopher L. Lynch (MN #284154)

Jessica L. Meyer (MN #0387195)

4200 IDS Center

80 South Eighth Street

Minneapolis, MN 55402

(612) 371-3211

*Attorneys for Defendant Wozniak Travel
d/b/a Hobbit Travel*

COOK & FRANKE S.C.

Jeffrey A. Evans (W.S.B. #1059025)

660 East Mason Street

Milwaukee, WI 53202

(515) 271-5900

COUSINEAU McGUIRE CHARTERED

James L. Haigh (MN #39469)

Trina R. Alvero (MN #0350667)

Andrea E. Reisbord (MN #22411X)

1550 Utica Avenue South, Suite 600

Minneapolis, MN 55416-5318

(952) 546-8400

*Attorneys for Plaintiff General Casualty
Company of Wisconsin*

(Additional Counsel listed on following page)

WINTHROP & WEINSTINE, P.A.
Tiffany A. Blofield (MN #0237379)
Robert R. Weinstein (MN #0115435)
225 South Sixth Street, Suite 3500
Minneapolis, MN 55402-4629
(612) 604-6400

HOWARD RICE NEMEROVSKI
CANADY FALK & RABKIN
Jeffrey E. Faucette (Cal. SBN 193066)
Sarah J. Givan, Esquire (Cal. SBN 238301)
3 Embarcadero Center, Seventh Floor
San Francisco, CA 94111-4024
(415) 434-1600

*Attorneys for Defendant The Saul Zaentz
Company, d/b/a Tolkien Enterprises*

MASLON EDELMAN BORMAN &
BRAND, LLP
Gary J. Haugen (MN #42328)
Mary R. Vasaly (MN #152523)
Margo S. Brownell (MN #307324)
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 672-8200

*Attorneys for Land O'Lakes, Inc.,
3M Company and Apogee Enterprises, Inc.
(Amicus Curiae)*

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ABBREVIATIONS USED IN THIS BRIEF

“**App. #**” refers to pages in General Casualty’s Appendix.

“**Br.**” refers to General Casualty’s 4/4/08 Brief to this Court.

“**U.S. District Court**” refers to the U.S. District Court for the District of Minnesota (Kyle, J.).

“**Order**” refers to U.S. District Court’s 2/14/08 Memorandum Opinion and Order for Certification.

“**W #**” refers to pages in Wozniak’s Appendix.

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III. STATEMENT OF ISSUES

The U.S. District Court certified these issues:

- A. Does trademark infringement fall within the scope of “misappropriation of advertising ideas or style of doing business” or constitute “infringement of copyright, title or slogan” as set forth in the CGL policy?
- B. Is a trademark an “advertising idea” or does trademark infringement constitute “infringing upon another’s copyright, trade dress or slogan” as set forth in the CUP policy?

Wozniak respectfully suggests these modifications to the wording of the issues:

- A. *Can* trademark infringement fall within the scope of “misappropriation of advertising ideas or style of doing business” or constitute “infringement of copyright, title or slogan” as set forth in the CGL policy?

Williamson v. N. Star Cos., No. C3-96-1139, 1997 WL 53029, *4 (Minn. Ct. App., Feb. 11, 1997);

Charter Oak Fire Ins. Co. v. Hedeem & Cos., 280 F.3d 730, 735-36 (7th Cir. 2002);

Fid. & Guar. Ins. Co. v. Kocolene Mktg. Corp., 2002 WL 977855, *6-15 (S.D. Ind. March 26, 2002);

Am. Employers’ Ins. Co. v. DeLorme Pub. Co., Inc., 39 F. Supp. 2d 64, 73-78 (D. Me. 1999).

- B. *Can* a trademark *be* an “advertising idea” or *can* trademark infringement constitute “infringing upon another’s copyright, trade dress or slogan” as set forth in the CUP policy?

State Auto Prop. & Cas. Ins. Co. v. Travelers Indem. Co. of Am., 343 F.3d 249, 254-60 (4th Cir. 2003);

Cincinnati Ins. Co. v. Zen Design Group, Ltd., 329 F.3d 546, 553-57 (6th Cir. 2003);

Hyman v. Nationwide Mut. Fire Ins. Co., 304 F.3d 1179, 1187-94 (11th Cir. 2002).

IV. STATEMENT OF CASE

In this insurance coverage case, General Casualty Company of Wisconsin (“General Casualty”) denies its duties to defend and indemnify Wozniak Travel, Inc. d/b/a Hobbit Travel (“Wozniak”) against an ongoing California federal action entitled *The Saul Zaentz Company d/b/a Tolkien Enterprises v. Wozniak Travel, Inc. d/b/a Hobbit Travel* (“Underlying Action”). General Casualty filed a declaratory judgment action against Wozniak in Minnesota federal court in August 2007, and named the plaintiff in the Underlying Action, The Saul Zaentz Company (“SZC”), as a co-defendant. (See record at Dkt. # 1). Wozniak filed its answer and counterclaims against General Casualty on October 1, including counterclaims for breach of contract. (Dkt. # 13).

On October 16, Wozniak filed a motion for partial summary judgment on General Casualty’s duty to defend, and for dismissal of SZC because it has no legitimate “interest” in the action as that term is used in Minn. Stat. § 555.11 (2006). (Dkt. #'s 23, 28 (pp. 26-27); 105 (pp. 12-13).) General Casualty filed a cross-motion for summary judgment on October 29. (Dkt. # 75.) During the course of briefing those motions, Wozniak requested certification of the “Williamson-Callas” issue now before this Court. (Dkt. # 105, pp. 1-6.) General Casualty opposed that request. (Dkt. # 132.)

The U.S. District Court for the District of Minnesota (Kyle, J.) (hereafter “U.S. District Court”) heard arguments on the cross-motions on January 15, 2008. (See transcript at Dkt. 140.) On February 14, the U.S. District Court issued its Memorandum Opinion and Order for Certification (Dkt. # 146), and this Court accepted certification by Order dated March 5, 2008. (Dkt. # 149.)

V. STATEMENT OF FACTS

A. The Claims and Allegations in the SZC Action.

Wozniak is a Minnesota business that advertises its travel agency services under the name “Hobbit Travel.” In September 2006, SZC sued Wozniak in California federal court. (See SZC’s Complaint in the Underlying Action, W001-42.) SZC claims that it has promotional and merchandising rights to the name “Hobbit,” the title of a literary work by J.R.R. Tolkien. (W004, 007-8, ¶¶ 13, 23, 24; W056.)

SZC’s Complaint alleged that, although Wozniak has operated under the name “Hobbit Travel” for many years in Minnesota, Wozniak more recently began to expand its business beyond Minnesota, “in particular through the use of internet websites that incorporate the word ‘Hobbit’ in the domain names.” (W002, ¶ 2.) SZC attached to its Complaint, as Exhibit B, September 2006 advertisements from one of Wozniak’s internet sites, www.hobbittravel.com, which called the public’s attention to Wozniak’s “Hobbit Hot Deals,” the Hobbit Travel “Snooze You Lose Newsletter,” and other Hobbit Travel services. (W013, 039-42, ¶ 37 & Ex. B.)¹ SZC alleged the website also offers an “email update service” that has attracted travel consumers to Wozniak’s services. (W013, ¶ 37.) SZC alleged Wozniak’s website “is directed to travel consumers all over the United States.” (*Id.*) In subsequent written discovery responses, SZC alleged that Wozniak began using the www.hobbittravel.com website in March 2000. (W064.)

¹ General Casualty omitted these advertisements from the copy of the Complaint in its Appendix. The entire SZC Complaint is included in Wozniak’s Appendix.

SZC's Complaint alleged that it extensively advertises goods and services throughout the United States that bear the "Hobbit Marks" and relate to the "Tolkien mythos." (W015, ¶ 48.) SZC alleged that the word "hobbit" is "intimately associated with travel in the Tolkien Works and related films, stage productions, and merchandise," and that SZC and its licensees use this "mythos" to promote various goods and services related to travel. (W004, 008, 014, ¶¶ 13, 24, 41.) SZC alleged that Wozniak's use of "hobbit" in its nationwide internet advertisements improperly seeks to capitalize on this promotional concept, and creates a likelihood of confusion in the minds of "prospective consumers" as to the origin of Wozniak's travel services within the meaning of Section 43 of the Lanham Act, 15 U.S.C. § 1125(a). (W013-14, ¶¶ 37, 39, 41, 42.) SZC alleged that the court should therefore prohibit Wozniak from using "hobbit" in its "promotion, advertisement or sale of travel services and/or other related goods or services," and award damages. (W015-21, ¶¶ 50, 55, 69, 74, Prayer for Relief #'s 2, 3, 9(a), 11-14.)

In subsequent written discovery responses and deposition testimony, SZC reiterated and expanded on the claims and allegations in its Complaint. SZC alleged that Wozniak's use of "hobbit" in its nationwide internet advertisements about its travel services misappropriates SZC's and its licensees' purported advertising ideas relating to an alleged association between hobbits and travel. (W050-56, #'s 3-6; W066-97.) SZC asserted that it and its licensees have used "hobbit" to promote and sell various travel-related goods and services, including travel promotions, souvenirs, postcards, toys, board games, role-playing games, and computer and electronic games featuring travel themes, some associated with online services. (W052, # 4; W069-78, 081-84, 087-88.)

An SZC licensee, for example, allegedly entered into a travel-related promotional agreement with Air New Zealand that allowed it to market itself as “Airline to Middle-earth,” and paint hobbit characters on its jets. (W050-51, # 3; W069-75, 87-88.) An SZC licensee also allegedly entered into a promotional agreement with an online travel ticketing service relating to a stage musical adaptation of *The Lord of the Rings* located in London and Canada. (Id.)

SZC’s representative (Laurie Battle) testified that hobbits are integral to these travel promotions, because the “idea” of travel is integral to the hobbit. (W070, 074-75, 079, 081, 085.) She testified that SZC’s licensee and New Zealand started travel promotions with the “idea” that potential customers could travel to Middle-earth and visit the locations shown in the *Lord of the Rings* movies. (W070-71.) As to the travel promotions for the musical, Ms. Battle testified that the “idea of the appeal – a large part of the appeal of the Tolkien mythos” – is that Middle-earth is a place that you can travel to. (W087.) According to Ms. Battle, that “idea” is both a creative point “and a marketing point” with the theatre medium. (Id.) She testified that it’s central to the marketing campaign. (W088.)

When asked to explain its alleged promotional idea of an association between hobbits and travel, SZC asserted:

Travel and maps are themes that run throughout the Middle-earth mythos. The dwarves in *The Hobbit* have an old map, marked with magical moon-letters, or runes, showing the location of the lost treasure. [The hobbit] Bilbo’s traveling song at the outset of *The Lord of the Rings*, as he passes his magic ring ... along to his nephew and heir, Frodo Baggins, has become closely associated with the narrative themes of the HOBBIT characters The word “travel” and its derivatives appear 9 times in *The Hobbit* and 108

times in *The Lord of the Rings* (“*LOTR*”). The word “journey” and its derivatives appear 38 times in *The Hobbit* and 242 times in *LOTR*. The word “road(s)” appears 50 times in *The Hobbit* and 657 times in *LOTR*. The word “quest(s)” appears 4 times in *The Hobbit* and 34 times in *LOTR*. The word “adventure” and its derivatives appear 53 times [in] *The Hobbit* and 43 times in *LOTR*.

(W052-54, # 5; see also W070, 078-80, 085, 087.)

SZC also alleged that Wozniak misappropriated SZC’s and its licensees’ marketing techniques, as well as their labeling and packaging, which purportedly are designed to make the “mythos” of the association between hobbits and travel unique in the marketplace and readily identifiable to consumers. (W052, # 4; W068, 074-78, 081-83, 086-87.) Ms. Battle testified that, “in the administration of [SZC’s] licensing program,” SZC considers “the ethic and philosophy that J.R.R. Tolkien was attempting to put out in his body of creative work” (W068.) SZC alleged that it and its licensees have employed this marketing technique by, among other things, putting the “Hobbit mark” on a variety of goods and services associated with travel. (W052, # 4; W074-78, 081, 086-87.) According to Ms. Battle, for example, SZC approved a board game with the word “Hobbit” on the package before it was sent to market. (W083.) Ms. Battle testified that such games, based on the “Tolkien mythos,” are uniquely associated with travel themes because that’s the central element of the Tolkien narrative. (W082.)

SZC alleges it incurred injury arising from Wozniak’s use of “hobbit” in its nationwide internet advertisements, and claims damages because of its purported injury. (W002, 013, 015-21, ¶¶ 2, 37, 49, 62, 68, 73 & Ex. B.) SZC’s claimed damages include a monetary award measured by constructive “reasonable royalties” from the year 2000,

disgorgement of profits, treble damages, an award of attorney fees, an award of costs, and all other relief that the court in that action deems just and proper. (W021; W116-117, W129-32. See also SZC's damages expert's report, filed under seal in the record as exhibits to the 12/12/07 and 1/3/08 affidavits of Thomas Mielenhausen (Dkt. #'s 130 & 137).)

Based on Wozniak's alleged conduct, SZC's Complaint asserts several causes of action against Wozniak: (1) Infringement of Registered Mark (15 U.S.C. § 1114); (2) Unfair Competition and False Designation of Origin (15 U.S.C. § 1125(a)); (3) Trademark Dilution (under 15 U.S.C. § 1125(c) and Cal. Bus. & Prof. Code § 14330); and (4) Unfair Competition (Cal. Bus. & Prof. Code § 17200, *et seq.*). (W015-21.)

B. General Casualty's Advertising Injury Liability Insurance.

General Casualty has sold and renewed advertising injury liability insurance to Wozniak, d/b/a Hobbit Travel, for the past 15 years, with annual limits of \$1,000,000 in the primary (commercial-general liability ("CGL") insurance) layer, and \$2,000,000 in the excess (commercial-umbrella liability ("CUL") insurance) layer. (See policy declarations pages in the record, attached as Exs. 1 & 2 to the 10/29/07 Mielenhausen affidavit (Dkt. #'s 30-34).)

1. CGL Policies (1993-2007), and CUL Policies (1993-2003).

In its CGL insurance policies, and in its CUL policies before August 21, 2003, General Casualty:

- (a) Promised to pay those sums Wozniak becomes legally obligated to pay as damages because of advertising injury caused by an offense

committed during the policy period, and in the course of advertising Wozniak's goods, products or services. (See 1993-2007 CGL policy language, App. 045; 1993-2003 CUL policy language, W100.)

- (b) Promised to defend any suit seeking those damages, with defense costs paid in addition to (*i.e.*, outside of) the policy's indemnity limits. (App. 045; W100-01.)
- (c) Defined "advertising injury" to mean injury "arising out of one or more of the following offenses," among others:
 - Misappropriation of advertising ideas or style of doing business; or
 - Infringement of copyright, title, or slogan. (App. 056; W108.)

2. CUL Policies (2003-2007).

In its renewal CUL policies after August 21, 2003, General Casualty unilaterally changed its "advertising injury" definition, added a definition of "advertisement," and added a limited exclusion for trademark infringement. (App. 070-71, 078, 080.) In its Order, the U.S. District Court found that General Casualty made these changes "without providing notice to Wozniak other than furnishing a copy of the policy." (App. 097 n.4, emphasis in original.)²

² Pending before the U.S. District Court, and not certified to this Court, is the issue of whether any coverage reductions in General Casualty's renewal-policy language changes are void because of its failure to provide separate written notice of the purported reduction. See Canadian Universal Ins. Co. v. Fire Watch, Inc., 258 N.W.2d 570, 575 (Minn. 1977) (holding, where insurer fails to provide proper written notice and explanation of coverage reduction in renewal policy, the purported reduction

In its 2003-07 CUL policies, General Casualty:

- (a) Promised to pay those sums Wozniak becomes legally obligated to pay as damages because of advertising injury caused by an offense committed during the policy period and arising out of Wozniak's business, when the underlying CGL policy doesn't cover those liabilities or is exhausted. (App. 067-68, 074.)
- (b) Promised to defend any covered claim or suit seeking those damages, when the underlying CGL policy doesn't apply to the loss or is exhausted. (App. 068.)
- (c) Purportedly re-defined "advertising injury" to mean injury "arising out of one or more of the following offenses," among others:
 - The use of another's advertising idea in Wozniak's advertisement; or
 - Infringing upon another's copyright, trade dress or slogan in Wozniak's advertisement. (App. 080.)
- (d) Defined "advertisement" to include:
 - A notice that is broadcast or published to the general public or specific market segments about Wozniak's goods, products or services for the purpose of attracting customers or supporters; and
 - Materials placed on the Internet or on similar electronic means of communication, and that is part of a web-site that is about Wozniak's goods, products, or services for the purposes of attracting customers or supporters. (App. 078.)

is void). Accord Hawkins Chem., Inc. v. Westchester Fire Ins. Co., 159 F.3d 348, 350-54 (8th Cir. 1998); Benton v. Mut. of Omaha Ins. Co., 500 N.W.2d 158, 160 (Minn. Ct. App. 1993).

- (e) Purportedly excluded advertising injury arising out of the infringement of copyright, patent, trademark, trade secret, or other intellectual property rights, except for infringement, in Wozniak's advertisement, of copyright, trade dress, or slogan. (App. 070.)

C. General Casualty's Failure to Comply With Its Defense Duties.

In its Statement of Facts, General Casualty asserts that it is currently "defending" Wozniak. Wozniak disputes that assertion. Pending before the U.S. District Court, and not certified to this Court, is the issue of whether General Casualty has breached its duty to defend by, among other things: (1) refusing to pay more than a portion of the rates Wozniak is paying its defense counsel; and (2) seeking from Wozniak reimbursement of the limited defense fees General Casualty is paying.³

D. SZC's Alignment with General Casualty.

At the summary judgment hearing below, SZC conceded that it does not want Wozniak to obtain defense and indemnity coverage in this matter, so that SZC can gain an advantage in the Underlying Action. (W127.) The court asked SZC for its position on coverage. SZC responded, in relevant part: If, "by virtue of a denial of coverage, [Wozniak] would be more willing to settle the case on terms that we're willing to agree

³ See discussion and exhibits in the record: Wozniak's 10/29/07 Memo. in Support of Mo. for Partial Summary Judgment (Dkt. # 28), pp. 24-25; Wozniak's 11/30/07 Reply Memo. in Support of Mo. for Partial Summary Judgment (Dkt. # 103), pp. 10-11.) See also Westchester Fire Ins. Co. v. Wallerich, 527 F. Supp. 2d 896, 905-08 (D. Minn. 2007) (Kyle, J.) (holding insurer has no right to reimbursement of defense fees or costs absent an express agreement to that effect in the insurance policy).

to, we would probably see that as an advantage versus continuing to have the case funded and take it all the way to trial.” (Id.)

VI. ARGUMENT

A. General Casualty Ignores Settled Minnesota Law on the Duty to Defend and the Rules of Insurance Policy Construction.

1. Duty to Defend.

The U.S. District Court’s certified questions should be analyzed through the lens of the duty to defend standard. At this point, the Underlying Action remains unresolved, so the terms of any settlement or judgment in that action are unknown.

The duty to defend is broader than the duty to indemnify. General Casualty must defend Wozniak against the entire Underlying Action if any of SZC’s claims or allegations *arguably* falls within the scope of General Casualty’s coverage. See Wooddale Builders, Inc. v. Md. Cas. Co., 722 N.W.2d 283, 302 (Minn. 2006); Home Ins. Co. v. Nat’l Union Fire Ins. of Pittsburgh, 658 N.W.2d 522, 529 (Minn. 2003). General Casualty bears the burden of establishing that all of SZC’s claims and allegations fall clearly outside the scope of coverage. See SCSC Corp. v. Allied Mut. Ins. Co., 536 N.W.2d 305, 313 (Minn. 1995); Lanoue v. Fireman’s Fund Am. Ins. Cos., 278 N.W.2d 49, 52 (Minn. 1976).

This is a “heavy” and “difficult” burden. U.S. Liab. Ins. Co. v. Johnson & Lindberg, P.A., 617 F. Supp. 968, 972 (D. Minn. 1985); Gruetzmacher v. Acuity, 393 F. Supp. 2d 860, 865 (D. Minn. 2005). Any and all doubts regarding the duty to defend must be resolved in Wozniak’s favor. See Atlantic Mut. Ins. Co. v. Judd Co., 380

N.W.2d 122, 126 (Minn. 1986); Prahm v. Rupp Const. Co., 277 N.W.2d 389, 390 (Minn. 1979). Whether an insurer is under an obligation to defend is not always free from doubt until the case is actually tried. Iowa Nat'l Mut. Ins. Co. v. Universal Underwriters Ins. Co., 150 N.W.2d 233, 237 (Minn. 1967); Crum v. Anchor Cas. Co., 119 N.W.2d 703, 711 (Minn. 1963).

Contrary to General Casualty's argument, it's not "axiomatic" that the duty to defend is determined by comparing only the allegations of the underlying complaint with the policy language. (Br., p. 7-9.) Minnesota is not a "four corners" state. Courts determine the defense duty by comparing the policy language with allegations and facts both within *and outside* the underlying complaint. This Court has explained that this is the better rule, because it must be kept in mind that "the insured who is sued has no control over the allegations of the complaint." Crum, 119 N.W.2d at 712. Accordingly, the insurer must defend if the policyholder advises the insurer of what it claims the facts to be, or the insurer by independent investigation ascertains facts, that, if established, would present a potentially covered liability on the policyholder's part. Id.⁴

⁴ Accord SCSC, 536 N.W.2d at 316; John Deere Ins. Co. v. Shamrock Ind., Inc., 929 F.2d 413, 418 (8th Cir.1991); Johnson v. AID Ins. Co. of Des Moines, Ia., 287 N.W.2d 663, 665 (Minn. 1980); Lanoue, 278 N.W.2d at 53; F.D. Chapman Const. Co. v. Glen Falls Ins. Co., 211 N.W.2d 871, 872 (Minn. 1973); Iowa Nat'l, 150 N.W.2d at 238. See also Bituminous Cas. Corp. v. Travelers Ins. Co., 122 F. Supp. 197, 201 (D. Minn. 1954) (Explaining: "If the rule were otherwise, then in order to be defended by his insurer, the insured would be required to move the court for an amendment of the pleading against him. Surely, such procedure would not be required when the insurer is possessed of all of the facts which bear upon the coverage of its policy.")

The Ross v. Briggs & Morgan case did not abrogate this settled rule. The Ross Court didn't compare the policy language to allegations and facts outside the underlying complaint because the policyholder didn't present such evidence to the Court. Ross v. Briggs & Morgan, 540 N.W.2d 843, 847-848 (Minn. 1995). There's no indication in Ross that the Court overruled the long-standing rule explained in Crum and its progeny. In fact, cases since Ross have reiterated that, in determining the defense duty, Minnesota courts look to facts and allegations both within and outside the underlying complaint. See Auto-Owners Ins. Co. v. Todd, 547 N.W.2d 696, 698 (Minn. 1996); Travelers Prop. Cas. Co. of Am. v. Gen. Cas. Ins. Cos., 465 F.3d 900, 903 (8th Cir. 2006); Gruetzmacher, 393 F. Supp. 2d at 865; General Cas. Co. of Ill. v. Four Seasons Greetings, Nos. A04-518, A04-920, 2004 WL 2987796, *6 (Minn. App. 2004). (W139.)

Likewise, the determination of General Casualty's defense duty is not controlled by the legal theories or nomenclature chosen by Wozniak's adversary, SZC. See Comsat Corp. v. St. Paul Mercury Ins. Co., 1998 WL 34088218 (D. Minn. 1998), *3-5. In Comsat, after discussing "ample authority" supporting this proposition, Judge Alsop observed: "What is important is not the legal label that the [underlying] plaintiff attaches to the [policyholder's] conduct, but whether that conduct as alleged in the complaint is at least arguably within one or more of the categories of wrongdoing that the policy covers." Id., *5 (quoting Curtis-Universal, Inc. v. Sheboygan Emergency Med. Services, Inc., 43 F.3d 1119, 1122 (7th Cir. 1994) (Posner, J.) (applying Wisconsin law)). Adhering to Crum's rationale that the policyholder has no control over its adversary's complaint, Judge Alsop explained that the underlying plaintiff's nomenclature is not

dispositive of the defense-duty issue because, otherwise, a policyholder's right to a defense under the CGL insurance policy would be determined by the plaintiff. Id. "Such a result would not be consistent with the reasonable expectations of [the policyholder] under the terms of this policy." Id.

This rule and reasoning are especially apt in this case. SZC, the underlying plaintiff, has conceded to the U.S. District Court that its goal is to see that Wozniak not obtain defense and indemnity coverage, so that SZC can gain an advantage in the Underlying Action. (W127.) This Court should not allow SZC to thwart through artifice the availability of a defense for Wozniak; nor should the Court allow General Casualty to exploit SZC's strategy. (See the record excerpts at W116-17 & W120-23, for an example of SZC's tactics. See also SZC's damages expert's report, in the record at Dkt. #'s 130 & 137.)

2. Rules of Insurance Policy Construction.

The U.S. District Court has asked this Court to construe undefined words of inclusion found in a "Commercial Marketplace" liability policy's description of covered advertising injury. In Minnesota, "[it] is well established that policy words of inclusion are to be broadly viewed and words of exclusion are to be narrowly considered. This is an accepted principle of insurance law and a 'fact of insurance life.'" Continental Cas. Co. v. Reed, 306 F. Supp. 1072, 1076 (D. Minn. 1969).⁵ This principle is "elementary" because it's the insurer who unilaterally chooses the broad insuring language of its pre-

⁵ Accord Am. Family Ins. Co. v. Walser, 628 N.W.2d 605, 609 (Minn. 2001); W. Bend Mut. Ins. Co. v. Milwaukee Mut. Ins. Co., 372 N.W.2d 438, 441 (Minn. Ct. App. 1985), aff'd 384 N.W.2d 877 (Minn. 1986).

printed policy for the purpose of attracting buyers of the policy and their premium dollars. See Thommes v. Milwaukee Ins. Co., 641 N.W.2d 877, 880 (Minn. 2002). Courts are wary of bait-and-switch tactics by the insurer, where the insurer lures policyholders with broad, undefined insuring language, and then asserts a narrow interpretation of the language when a claim comes in. See Amatuzio v. U.S. Fire Ins. Co., 409 N.W.2d 278, 280 (Minn. App. 1987) (recognizing insurer's advantage in unilaterally choosing policy language).

Any reasonable doubt as to the meaning of General Casualty's policy language must therefore be resolved in favor of Wozniak. See id. The terms of General Casualty's policies must be construed according to what a reasonable business in Wozniak's position would have understood the words to mean, not according to General Casualty's post-claim assertions of what it intended the language to mean. See Canadian Universal, 258 N.W.2d at 572.

If insurance policy language is reasonably susceptible to more than one meaning, it must be given the meaning that favors coverage. Columbia Heights Motors, Inc. v. Allstate Ins. Co., 275 N.W.2d 32, 34 (Minn. 1979).⁶ Thus, if a court determines the policy language is reasonably susceptible to both the insurer's and the policyholder's interpretation, that determination ends the analysis. Id. The language must be interpreted in the policyholder's favor. The court's role is not to determine which interpretation is

⁶ Accord Minn. Mining & Mfg. Co. v. Travelers Indem. Co., 457 N.W.2d 175, 179; Orren v. Phoenix Ins. Co., 179 N.W.2d 166, 169 (Minn. 1970); Weum v. Mut. Ben. Health & Acc. Ass'n, Omaha, 54 N.W.2d 20, 29 (Minn. 1952).

more reasonable, or to otherwise pick and choose between the two reasonable interpretations. Id.

The fact that standard policy language has received contradictory interpretations in other jurisdictions is a legitimate factor to consider in determining whether the language is reasonably susceptible to more than one interpretation. Minn. Mining & Mfg. Co. v. Travelers Indem. Co., 457 N.W.2d at 179 (Minn. 1990). This factor is particularly compelling in this case, where General Casualty's narrow interpretations of its undefined policy language have been soundly criticized and rejected by a majority of courts around the country.

General Casualty ignores the above settled law on the rules of insurance policy construction and on the duty to defend, but this Court should not.

B. The Claims and Allegations in the SZC Action "Arguably" Fall Within the Scope of General Casualty's Advertising Injury Definition.

1. Infringement of Title.

General Casualty's CGL and 1993-2003 CUL policies define "advertising injury" to include injury arising out of "infringement of copyright, title or slogan." SZC's allegations regarding Wozniak's conduct fall within the broad meaning of "infringement of title," and trademark infringement constitutes "infringement of title," for several reasons.

General Casualty chose not to define "title" in its policies, so the Court must resort to dictionaries to determine the word's meaning and whether the word is reasonably susceptible to a meaning favoring coverage. See Minn. Mining, 457 N.W.2d at 179-80

(examining dictionary definitions of undefined policy term “damages”). Accord Gen. Mills, Inc. v. Gold Medal Ins. Co., 622 N.W.2d 147, 151 (Minn. Ct. App. 2001); Amatuzio, 409 N.W.2d at 280.

The Black’s Law Dictionary in effect when General Casualty began selling its insurance policies to Wozniak defines “title” to include: “A *mark*, style, or designation; a distinctive appellation; the name by which anything is known.” Black’s Law Dictionary 1485 (6th ed. 1990) (emphasis added). Citing Black’s, and interpreting policy language identical to General Casualty’s, the Minnesota Court of Appeals has concluded that trademark infringement falls within the scope of “infringement of title.” Williamson v. N. Star Cos., No. C3-96-1139, 1997 WL 53029, *3-4 (Minn. Ct. App., Feb. 11, 1997). (W135.) The court reasoned that, because “title” and “copyright” appear in the same clause of the advertising injury definition, the policy language can be reasonably interpreted to use “title” in its intellectual property sense. Id. Recognizing that the word “title” is broader than the word “trademark,” the court explained that a “title” becomes a trademark through “extended usage or by compliance with statutory registration.” Id. In other words, the word “title” encompasses marks as well as other distinctive styles, designations, appellations or names to which a third-party may claim proprietary or other legal rights.⁷

⁷ Other courts have similarly relied on Black’s Law Dictionary in concluding that the word “title” encompasses trademarks. See Am. Employers’ Ins. Co. v. DeLorme Publ’g Co., Inc., 39 F. Supp. 2d 64, 78 (D. Me. 1999); Auto Owners Ins. Co. v. LA Oasis, Inc., 2005 WL 1313684, *6 (N.D. Ind. 2005); Energex Sys. Corp. v. Fireman’s Fund Ins. Co., 1997 WL 358007, *4 (S.D.N.Y. 1997); Poof Toy Prods., Inc. v. U.S. Fid. & Guar. Co., 891 F. Supp. 1228, 1233-34 (E.D. Mich. 1995); J.A. Brundage Plumbing &

Contrary to General Casualty's post-claim, narrow interpretation of the undefined coverage term "title," it's reasonable to conclude that the insurance industry's standard form CGL policy (which General Casualty adopted) used the word "title" because it's broader and provides more coverage protection than using just the word trademark. Charter Oak Fire Ins. Co. v. Hedeem & Cos., 280 F.3d 730, 735-36 (7th Cir. 2002). Infringement of "title" encompasses infringing use of anything in the Black's definition in the course of advertising (*i.e.*, any mark, style, designation, distinctive appellation, or name by which anything is known, to which a third-party claims a right), regardless of whether it's specifically trademarked or protected by trademark law. This interpretation, and the Willamson rationale, complies with the rule that courts must construe the coverage terms of policies broadly and inclusively in favor of coverage. See Cont'1, 306 F. Supp. at 1076.

In this case, SZC's allegations against Wozniak fall within the scope of infringement of "title," as that word is defined in Black's. SZC alleges that: (a) "hobbit" is a mark, style, designation, distinctive appellation, or name by which something is known; (b) SZC has promotional and merchandising rights to that title; (c) Wozniak infringed that title in the course of advertising its travel services on its various internet domains;⁸ and (d) SZC suffered injury as a direct result of that nationwide advertising

Roto-Rooter, Inc. v. The Mass. Bay Ins. Co., 818 F. Supp. 553, 558-59 (W.D.N.Y. 1993).

⁸ Courts recognize that the word "advertisement" encompasses internet web sites, including domain names, materials and other information on those sites, designed to call the public's attention to a policyholder's goods or services. See State Auto Prop. & Cas. Ins. Co. v. Travelers Indem. Co. of Am., 343 F.3d 249, 259 (4th Cir. 2003); CAT Internet

activity. (See Statement of Facts, above.) Wozniak is therefore entitled to a complete defense against SZC's Underlying Action.

General Casualty bases its denial of its defense and indemnity duties primarily on Advance Watch and ShoLodge, two sharply criticized and widely rejected Sixth Circuit cases interpreting Michigan and Tennessee law, and Callas, an Eighth Circuit case purporting to apply Minnesota law. See Advance Watch Co. v. Kemper Nat'l Ins. Co., 99 F.3d 795 (6th Cir. 1996); ShoLodge, Inc. v. Travelers Indem. Co. of Ill., 168 F.3d 256 (6th Cir. 1999); Callas Enters, Inc. v. The Travelers Indem. Co. of Am., 193 F.3d 952 (8th Cir. 1999). As the U.S. District Court indicated below (Order pp. 9, 11-12), the Callas court failed to address Williamson, any Minnesota rules of insurance policy construction, or other pertinent Minnesota law in the relevant part of its opinion. Instead, Callas simply adopted Advance Watch and ShoLodge with no additional analysis. General Casualty's reliance on these cases is wrong for several reasons.

Relying on ShoLodge, General Casualty argues that the word "title," undefined in its policies, necessarily means "the non-copyrightable title of a book, film, or other literary or artistic work." (Br., p. 15.) But General Casualty didn't use those limiting words in its policies, and can't retroactively add them now. See Canadian Universal, 258

Servs., Inc. v. Providence Wash. Ins. Co., 333 F.3d 138, 143 (3d Cir. 2003); Ohio Cas. Ins. Co. v. Cloud Nine, LLC, 464 F. Supp. 2d 1161, 1167 (D. Utah 2006). See also Carnival Brands, Inc. v. Am. Guar. & Liab. Co., 726 So.2d 496, 498 (La. Ct. App. 1999) (involving allegations, similar to SZC's, that policyholder recently expanded its business to include nationwide advertising through the internet).

General Casualty recognizes this, too. (App. 078, definition of "advertisement" in General Casualty's 2003-07 CUL policies.)

N.W.2d at 575. What's more, General Casualty ignores the context in which its policies use the phrase "infringement of copyright, title or slogan" – it's meant to broadly describe the kinds of conduct that can give rise to *advertising* injury. Advertising is an integral part of a travel service business like Wozniak's. An inherent risk of advertising activities is potential infringement of a third-party's alleged right to a "mark, style, designation, distinctive appellation, or name by which anything is known," regardless of whether it's one type of distinctive appellation – the name of a book, film, or other literary or artistic work. See Black's Law Dictionary 1485 (6th ed. 1990). Indeed, General Casualty's unreasonably narrow interpretation of "title" would lead to absurd results. As one court observed, under such an interpretation:

[C]overage would thus be afforded to *Catcher in the Rye Bread*[®], *Raisin in the Sun Cookies*[®], *Gulliver's Travels Agency*[®] and *Grapes of Wrath Vineyard*[®]. However, coverage would not be available for *Wonder Bread*[®], *Famous Amos Chocolate Chip Cookies*[®], *Liberty Travel Agency*[®] and *Gallo Vineyards*[®]. Would such a distinction fall within the reasonable expectations of [an] insured presented with similar inclusive and exclusive language? One would hardly think so

Villa Enters. Mgmt. Ltd. v. Fed. Ins. Co., 821 A.2d 1174, 1185 (N.J. Super., Law Div. 2002). Likewise, Wozniak has an objectively reasonable expectation that its alleged infringement of any mark, style, designation, distinctive appellation, or name in the course of its advertising is covered.⁹

General Casualty next argues that if its policies were intended to cover infringement of trademark, they would have referred to that recognized cause of action in

⁹ Of course, rather than "Gulliver's Travels Agency," this case involves Hobbit Travel agency. Thus, even under Callas' and ShoLodge's narrow definition of "title," Wozniak is entitled to a defense.

their advertising injury definition. (Br., p. 15.) But General Casualty did refer to infringement of trademark by using the broader phrase “infringement of title,” which expressly includes infringement of a “mark,” as well as any style, designation, distinctive appellation, or name. Black’s Law Dictionary 1485 (6th ed. 1990). As discussed above, it’s reasonable to conclude – especially in the context of advertising injury liability coverage – that the policies used the word “title” because it’s broader and provides more protection than using just the word trademark.

General Casualty’s argument also fails because its policies cover advertising injury arising out of conduct, not causes of action. General Casualty’s advertising injury definition lists types of offensive conduct that might occur in the course of advertising, not the myriad legal causes of action that plaintiffs might assert based on that conduct. See Comsat, 1998 WL 34088218, *5 (observing, in advertising injury coverage case, that what’s important is not legal label underlying plaintiff attaches to policyholder’s conduct, but whether that conduct is at least within one or more of the categories of wrongdoing the policy covers).

Indeed, under General Casualty’s logic, there would never be coverage for most of the offenses listed in the advertising injury definition, because they are not specific causes of action. In preparation for this brief, Wozniak’s counsel surveyed the published jury instruction guides for federal courts and the courts of all 50 states, and found no causes of action entitled Infringement of Title, Infringement of Slogan, Misappropriation of Advertising Ideas, or Misappropriation of Style of Doing Business. It’s thus reasonable to interpret these phrases as describing offensive conduct rather than specific

causes of action. See DeLorme Publishing, 39 F. Supp. 2d at 78 (finding no cause of action entitled “infringement of ... title or slogan”).

At best for General Casualty, even if its interpretation of its undefined policy language were reasonable (which it is not), it wouldn't be the only reasonable interpretation. As explained above, it's reasonable to conclude that insurers used the word “title” because it is broader than and provides more coverage than the word trademark. Because “title” is reasonably subject to more than one meaning, it must be construed in favor of coverage. See Minn. Mining, 457 N.W.2d at 179. Cf. W. Wis. Water, Inc. v. Quality Beverages of Wis., Inc., 738 N.W.2d 114, 122 (Wis. Ct. App. 2007).

2. Misappropriation of Advertising Ideas.

General Casualty's CGL and 1993-2003 CUL policies define “advertising injury” to include injury arising out of “misappropriation of advertising ideas.” Likewise, General Casualty's 2003-07 CUL policies define “advertising injury” to include injury arising out of the “use of another's advertising idea” in Wozniak's advertisement. The majority of courts that have considered the issue have held that a trademark is an advertising idea, and that trademark infringement falls within the scope of misappropriation of advertising ideas. See Fid. & Guar. Ins. Co. v. Kocolene Marketing Corp., 2002 WL 977855, *7 (S.D. Ind. March 26, 2002) (collecting cases). See also Cloud Nine, LLC, 464 F. Supp. 2d at 1168 n.8 (observing that “use” is an even broader term than “misappropriation”). In this case, SZC's allegations regarding Wozniak's

conduct fall within the meaning of “misappropriation of advertising ideas” and “use of another’s advertising idea.”

General Casualty failed to define “misappropriation” or “advertising idea” in its policies, so the Court must determine whether those words are reasonably susceptible to a meaning favoring coverage. “Advertising” includes the action of calling something to the attention of the public, so “advertising idea” can include any idea or concept related to attracting public attention to one’s goods or services. See Hyman v. Nationwide Mut. Fire Ins. Co., 304 F.3d 1179, 1188 (11th Cir. 2002) (citing Webster’s Collegiate Dictionary (9th ed. 1983). “Misappropriate” means “to appropriate wrongly.” See Westfield Ins. Co. v. Factfinder Mktg. Research, Inc., 860 N.E.2d 145, 152 (Ohio App. 2006) (citing Webster’s Third New Int’l Dictionary, Unabridged 1442 (1993)). Accordingly, the meaning of “misappropriation of advertising ideas,” undefined in General Casualty’s policies, can reasonably include the wrongful appropriation of any idea or concept related to attracting public attention to one’s goods or services. See also Cincinnati Ins. Cos. v. Pestco, Inc., 374 F.Supp. 2d 451, 459 (W.D. Pa. 2004) (defining “misappropriation of advertising ideas” to include “the wrongful taking of an idea concerning the solicitation of business and customers.”).

SZC alleges that: (a) it has advertising “ideas” about using a purported association between hobbits and travel to attract public attention to SZC’s and its licensees’ travel-related goods or services; (b) Wozniak has wrongly appropriated those alleged advertising ideas by using “hobbit” in advertising its travel services on its various internet domains; and (c) SZC suffered injury as a direct result of that nationwide advertising

activity. (See Statement of Facts, above.) Wozniak is therefore entitled to a complete defense against SZC's Underlying Action.

General Casualty argues that a trademark can never be an advertising idea (Br., p. 13-14), but the majority of courts have rejected General Casualty's narrow view as a basic misunderstanding of trademark law. One court has explained that advertising is one of the fundamental purposes of a trademark, and the trademark statute itself makes clear that advertising is one of the ways in which an act of infringement can occur. Lebas Fashion Imps. of USA, Inc., 50 Cal. App. 4th 548, 557 (Cal. App. 1996) (citing Lanham Act, 15 U.S.C. §1114(a)). The court observed that "a trademark is but a species of advertising" because its purpose is to fix the identity of goods or services and the name of the producer in the minds of people who see the advertisement. Id. Likewise, another court has explained that a trademark infringement claim under the Lanham Act inherently involves advertising because there can be no infringement without the occurrence of advertising:

Protection of a trademark serves to "secure the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers." [Citation omitted.] A Lanham Act claim, thus, requires a party to demonstrate that the infringing mark was used to identify the goods or services to the public in a manner which is likely to confuse the public as to the manufacturer of the goods. . . . [Webster's] defines the term "advertising" as "the action of calling something to the attention of the public." *Webster's New Collegiate Dictionary* 59 (9th ed.1987). Certainly then, a Lanham Act offense which requires the use of the infringing mark in the identification of the goods and services to the public could give rise to a set of facts that would include advertising activities. [Citation omitted.] Indeed 15 U.S.C. § 1114(a) specifically and explicitly prohibits the wrongful use of a registered mark in advertising. Accordingly, a claim for trademark infringement under the Lanham Act inherently and necessarily implicates possible advertising

activities and a claim for violation of the Act shows the potential that, if the facts are ultimately proved, the offenses were committed in the course of advertising and the claim comes within the policy's coverage.

DeLorme Publ'g, 39 F. Supp. 2d at 74.¹⁰

General Casualty relies on Sport Supply Group v. Columbia Cas. Co., 335 F.3d 453, 463 (5th Cir. 2003), for the narrow view that a trademark is necessarily only a "label or identifier." In rejecting that case, though, the Fourth Circuit has explained that a trademark is not merely an identifier, because by identifying and distinguishing a trademark holder's products, a trademark promotes those products to the public. State Auto, 343 F.3d at 258 n.12. Thus, trademark infringement can be reasonably interpreted to fall within the scope of "misappropriation of advertising ideas."

Relying on Advance Watch, General Casualty again argues that if its policies were intended to cover infringement of trademark, they would have referred to that recognized cause of action in their advertising injury definition. (Br., p. 15.) But, as discussed above, this argument fails because General Casualty's "advertising injury" definition lists various types of offensive conduct that might occur in the course of advertising, not the myriad legal causes of action that plaintiffs might bring based on that conduct. If any of the listed offensive conduct happens to form the basis for a trademark infringement cause of action, there's no language in General Casualty's CGL policies that prevents coverage.

Thus, the relevant issue here is not whether the SZC is alleging a cause of action entitled "Misappropriation of Advertising Ideas" against Wozniak. The issue is whether

¹⁰ Accord State Auto, 343 F.3d at 258-59; Westfield, 860 N.E.2d at 152; Kocolene Mktg., 2002 WL 977855 at *6-10; Gemmy Inds. Corp. v. Alliance Gen. Ins. Co., 190 F. Supp. 2d 915, 919-21 (N.D. Tex. 1998); Poof Toy Prods., Inc., 891 F. Supp. at 1232-33.

SZC is alleging injury arising out of misappropriation of advertising ideas Wozniak allegedly may have committed during the course of its advertising activities. This comports with the objectively reasonable expectations of a travel services agency whose advertising is an integral part of its business, and who expects broad protection against its errors or omissions during the course of its advertising, rather than against specific causes of action that might be based on that conduct.

In fact, the reasonableness of Wozniak's interpretation is amply demonstrated by the near-universal rejection of Advance Watch and its limited progeny. Key Citing reveals that, of the 28 states under whose laws the Advance Watch issue has been considered, 27 (including Minnesota) have either: (a) expressly rejected or declined to follow the reasoning in Advance Watch; (b) described Advance Watch as a minority view; or (c) found that the policy's definition of "advertising injury" encompasses trademark or trade dress infringement claims.¹¹ Indeed, in Cincinnati Ins. Co. v. Zen Design Group, Ltd., 329 F.3d 546 (6th Cir. 2003), the Sixth Circuit itself appears to have abandoned Advanced Watch when it ruled that an insurer has a duty to defend its policyholder against trademark infringement causes of action that allege infringement of slogan.

¹¹ See discussion in Order, p. 11, n.7. See also Frog, Switch & Mfg. Co., Inc. v. Travelers Ins. Co., 193 F.3d 742, 747 (3d Cir.1999) (observing Advance Watch "has been sharply criticized for ignoring the real contours of intellectual property litigation, which often proceeds under a bewildering variety of different labels covering the same material facts"); Kocolene Mktg., 2002 WL 977855 at *7, 9 (observing Advance Watch is unpersuasive minority view).

Notably, although the Advance Watch court was interpreting Michigan law, a Michigan circuit court emphatically rejected Advance Watch. The court explained:

Advance Watch stands literally alone in a sea of case law which holds that the policy term “misappropriation of advertising ideas or style of doing business” encompasses claims of trademark and trade dress infringement . . . the analysis and reasoning of the Sixth Circuit is not only unpersuasive and flawed, but demonstrates a lamentable lack of understanding and grasp of the law of trademark/trade dress, and ultimately lead to an unduly narrow holding and somewhat bizarre and tortured application of Michigan insurance law. The case has been roundly criticized and at present appears to be only cited as an example of what the law is clearly not

Am. States Ins. Co. v. Hayes Specialties, Inc. No. 97-020037, 1998 WL 1740968, *3 (Mich. Cir. Ct. 1998). General Casualty tries to belittle this case, as it did with the Minnesota Court of Appeals’ decision in Williamson, by claiming there was no reasoning. (Br., p. 12-13, 18-19.) But, in fact, American States set forth reasoning similar to Lebas and American Employers, discussed above.¹²

As with “infringement of title,” the phrases “misappropriation of advertising ideas” and “use of another’s advertising idea in [Wozniak’s] advertisement” are, at the very least, reasonably susceptible to Wozniak’s interpretation, and therefore those phrases must be construed in favor of coverage. See Minn. Mining, 457 N.W.2d at 179; Columbia Heights, 275 N.W.2d at 34. Cf. State Auto, 343 F.3d at 258 (finding these phrases reasonably susceptible to more than one meaning where “the courts in other jurisdictions are unable to agree on how to interpret them,” and “perhaps most

¹² General Casualty’s citation to Varilease is puzzling (Br., p. 12 n. 2), because that case rejects the notion (on which Advance Watch was based) that the defense duty is determined and controlled by the nomenclature of the causes of action in the underlying plaintiff’s complaint. See Varilease Tech. Group, Inc. v. Mich. Mut. Ins. Co., No. 249121, 2004 WL 2913661, *5-6 (Mich. Ct. App. 2004).

compelling,” the two insurers in the case had identical policy language yet disagreed on its interpretation).

3. Other Alleged Conduct.

The U.S. District Court phrased each of its certified questions in the disjunctive. Accordingly, if this Court concludes that trademark infringement falls within the scope of “infringement of title” or “misappropriation of advertising ideas” under the CGL policy, and that a trademark is an “advertising idea” under the CUL policy, there will be no need to address the additional policy language discussed below.

a. Misappropriation of Style of Doing Business, and Infringement of Trade Dress.

General Casualty’s CGL and 1993-2003 CUL policies define “advertising injury” to include injury arising out of “misappropriation of style of doing business.” Likewise, General Casualty’s 2003-07 CUL policies define “advertising injury” to include injury arising out of “infringing upon another’s trade dress” in Wozniak’s advertisement. The majority of courts considering the issue have held that “style of doing business” and “trade dress” are synonymous for purposes of advertising injury liability insurance coverage. See Adolfo House Distrib. Corp. v. Travelers Prop. & Cas. Ins. Co., 165 F. Supp. 2d 1332, 1337-38 (S.D. Fla. 2001) (collecting cases).

General Casualty didn’t define “style of doing business” or “trade dress” in its policies, so the Court must determine whether those words are reasonably susceptible to a meaning favoring coverage. In doing so, it’s important to keep in mind that General Casualty used those words in the context of describing *advertising* injury. While trade

dress often involves the packaging or labeling of goods, it may also extend to marketing techniques designed to make goods or services readily identifiable to consumers and unique in the marketplace. See Hyman, 304 F.3d at 1188-89; Adolfo, 165 F. Supp. 2d at 1338 n.1. Accordingly, the meaning of “misappropriation of style of doing business” or “infringing upon another’s trade dress” can reasonably include the wrongful appropriation of marketing or promotional techniques designed to make goods or services readily identifiable to consumers and unique in the marketplace. Id. See also Cincinnati, Inc., 374 F. Supp. At 459 (defining “misappropriation of style of doing business” to include “the wrongful taking of a company’s plan for interacting with consumers and getting their business.”).

SZC alleges that: (a) its marketing techniques, as well as its labeling and packaging, are designed to make the “mythos” of a purported association between hobbits and travel unique in the marketplace and readily identifiable to consumers; (b) Wozniak has wrongly appropriated this purported style of doing business or trade dress by using “hobbit” in advertising its travel services on its various internet domains; and (c) SZC suffered injury as a direct result of that nationwide advertising activity. (See Statement of Facts, above.) Wozniak is therefore entitled to a complete defense against SZC’s Underlying Action.

General Casualty has denied coverage under this portion of its advertising injury definition, again relying on Advance Watch. But its reliance is misplaced, for the reasons discussed in sections B.1 and B.2 above. The majority of courts addressing the issue have rejected Advance Watch, and instead adopted the analysis of the policy language

and trademark law set forth in Am. Employers', 39 F. Supp. 2d at 73-78. See Kocolene Mktg., 2002 WL 977855, *7 (collecting cases). At best for General Casualty, its policies are reasonably susceptible to more than one meaning, and therefore must be construed in favor of coverage. See Minn. Mining, 457 N.W.2d at 179; Columbia Heights, 275 N.W.2d at 34.

b. Infringement of Slogan.

The “advertising injury” definition in all of General Casualty’s policies includes “infringement of slogan.” General Casualty doesn’t define “slogan.” A “slogan” can be either a word phrase. Webster’s dictionary defines “slogan” as “a word or phrase used to express a characteristic position . . . or a goal to be achieved,” and a “brief attention-getting phrase used in advertising or promotion.” Merriam-Webster’s New Collegiate Dictionary (10th ed. 1994) at 1105. Random House defines “slogan” to include a “catchword” or “catch phrase.” Random House Unabridged Dictionary 1800 (2d ed. 1993). The salient point of these definitions is that the word or phrase is an “attention-getting” device. See Cincinnati, 329 F.3d at 553-57; Touch of Class Imps., LTD v. Aetna Cas. & Sur. Co., 901 F. Supp. 175, 176-77 (S.D.N.Y. 1995).

SCZ alleges that “hobbit” is such a device, because the public thinks of travel when it sees the word “hobbit.” SCZ alleges that: (a) “hobbit” is used by it and its licensees to promote various goods and services relating to travel, and to express characteristic positions and goals to be achieved (*e.g.*, an alleged “mythos”) relating to travel; (b) Wozniak has wrongly appropriated this purported slogan by using “hobbit” in advertising its travel services on its various internet domains; and (c) SZC suffered injury

as a direct result of that nationwide advertising activity. (See Statement of Facts, above.) Wozniak is therefore entitled to a complete defense against SZC's Underlying Action.

General Casualty's reliance on Hugo Boss to dispute this interpretation is misplaced. Hugo Boss Fashions, Inc. v. Fed. Ins. Co., 252 F.3d 608 (2nd Cir. 2001). The coverage term at issue in that case was "trademarked slogan," not the broader coverage term "slogan." Id. At 612, 618-20. Accordingly, the Hugo Boss court analyzed trademark law to determine whether the words at issue constituted a "trademarked" slogan. Id. The coverage term at issue in this case, however, is the broader word "slogan." Thus, regardless of whether the word "hobbit" is trademarked, coverage here turns on whether SZC is alleging that the word "hobbit" is an attention-getting device used by it and its licensees to promote various goods and services relating to travel.

Once again, at best for General Casualty, its undefined policy language is at least reasonably susceptible to Wozniak's interpretation, and therefore must be construed in favor of coverage. See Minn. Mining, 457 N.W.2d at 179; Columbia Heights, 275 N.W. 2d at 34.

VII. CONCLUSION

This Court should answer "yes" to the U.S. District Court's first certified question, regarding General Casualty's CGL policy. As evidenced by the facts of this case, trademark infringement can constitute "infringement of copyright, title or slogan," and can fall within the scope of "misappropriation of advertising ideas or style of doing business" because the policy language is reasonably susceptible to that interpretation and therefore must be construed in favor of coverage.

Likewise, this Court also should answer “yes” to the U.S. District Court’s second certified question, regarding General Casualty’s CUL policy. As evidenced by the facts of this case, a trademark can be an “advertising idea,” and trademark infringement can constitute “infringing upon another’s copyright, trade dress or slogan,” because the policy language is reasonably susceptible to that interpretation and therefore must be construed in favor of coverage.

Respectfully submitted,

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LINDQUIST & VENNUM P.L.L.P.

By 
Thomas C. Mielenhausen (MN #160325)
Christopher L. Lynch (MN #284154)
Jessica L. Meyer (MN #0387195)

4200 IDS Center
80 South 8th Street
Minneapolis, MN 55402
(612) 371-3211
(612) 371-3207 (facsimile)

**ATTORNEYS FOR DEFENDANT WOZNIAK
TRAVEL, INC.**