

AUG 26 2008

FILED

NO. A08-321

STATE OF MINNESOTA
IN SUPREME COURT

GENERAL CASUALTY COMPANY OF WISCONSIN,

Plaintiff,

v.

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

Defendants.

DEFENDANT WOZNIAK TRAVEL, INC.'S SUPPLEMENTAL 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. Given, 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)*

Defendant Wozniak Travel, Inc. (“Wozniak”) submits this supplemental brief per the Court’s August 18, 2008 Order, which asked: Whether the dismissal of The Saul Zaentz Company’s (“SZC’s”) claims against Wozniak has rendered moot either of the questions certified to this Court by the United States District Court for the District of Minnesota?

Wozniak respectfully answers “no,” because General Casualty’s duties to defend and indemnify Wozniak remain at issue.

Wozniak expects SZC will appeal from the dismissal entered by the U.S. District Court for the Northern District of California. Although Wozniak firmly believes it will prevail in the appeal, the United States Court of Appeals for the Ninth Circuit controls that decision. If the Ninth Circuit reverses and remands, SZC undoubtedly will continue to pursue its claims for damages. (See Wozniak’s Brief to this Court, at pp. 6-7, for a discussion of SZC’s damages claims.) Accordingly, General Casualty’s duty to indemnify, and the questions certified to this Court, remain at issue.

General Casualty’s defense duty also remains at issue. General Casualty has a duty to defend Wozniak in full throughout SZC’s appeal and any subsequent proceedings. See Meadowbrook, Inc. v. Tower Ins. Co., 559 N.W.2d 411, 417 (Minn. 1997) (holding insurer’s defense duty extends through appeal, until policyholder no longer faces potential liability on any arguably covered claim). The Ninth Circuit advises that the time from a notice of appeal until the court’s decision ranges from about 1¼ to 2⅔ years. See <http://www.ca9.uscourts.gov/ca9/courtinfo.nsf/main/page> (“Most FAQ’s,” question nos. 7 & 8). Thus, Wozniak’s need for a full and unconditional defense from General Casualty is far from over.

Although General Casualty has alleged to this Court that it is “defending” Wozniak, the insurer is in fact refusing to pay more than a portion of the rates Wozniak is paying its defense counsel.¹ Worse, General Casualty is broadly reserving a purported right to recoup from Wozniak the portion of defense costs it has paid if there are “any changes in the facts or the law at some point in the future.” (See record: Dkt. 107 (11/30/07 Mielenhausen Aff.), Exs. 2 & 3; Dkt. 103 (Wozniak’s 11/30/07 Reply Memo.), p. 11.) Thus, the questions of whether General Casualty has a duty to defend Wozniak, and whether it has breached that duty, remain at issue before the Minnesota federal district court. The district court’s resolution of those issues will depend on this Court’s answer to the certified questions.

CONCLUSION

The dismissal of SZC’s claims against Wozniak has not rendered the certified questions moot.

¹ For example, the hourly rate for Wozniak’s California local counsel, an experienced intellectual property defense lawyer, is \$465. General Casualty refuses to pay more than \$180. (See record: Dkt. 70 (10/29/07 Abramson Aff.), ¶ 3; Dkt. 72 (10/25/07 Knowles Aff.), Ex. A.) In its Reply Brief to this Court, at p. 13, General Casualty asserts that it had an “agreement” with Wozniak on rates. But any such agreement was conditioned on General Casualty not filing a declaratory judgment action. (Dkt. 108 (11/30/07 Abramson Aff.), ¶ 6; Dkt. 62 (10/29/07 Mielenhausen Aff.), Ex. 14.) General Casualty certainly understood this, because when it filed its declaratory judgment action it sought recoupment of all defense fees it had paid in connection with the SZC lawsuit. (Dkt 1, p. 11.) General Casualty would not have sought such relief if there were some unconditional “agreement” that forever resolved these defense issues.

DATED: August 26, 2008

Respectfully submitted,

LINDQUIST & VENNUM P.L.L.P.

By 
Thomas C. Mielehhausen (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.

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
)
COUNTY OF HENNEPIN) ss.

Marcia Lee of St. Louis Park, County of Hennepin, the State of Minnesota, being duly sworn, says that on August 26, 2008, she served the annexed:

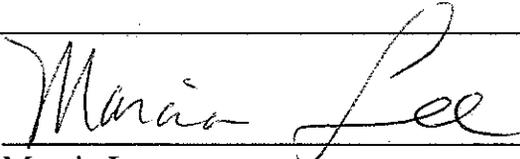
Defendant Wozniak Travel, Inc.'s Supplemental Brief

on the following by messenger:

| |
|---|
| Court Administrator Supreme Court 305 Minnesota Judicial Center 25 Rev. Dr. Martin Luther King, Jr. Blvd. St. Paul, MN 55155-6102 |
|---|

and copies of the same on the following by U.S. mail:

| | |
|--|--|
| James L. Haigh COUSINEAU McGUIRE CHARTERED 1550 Utica Avenue South, Suite 600 Minneapolis, MN 55416-5318 | Tiffany A. Blofield WINTHROP & WEINSTINE, P.A. 225 South Sixth Street, Suite 3500 Minneapolis, MN 55402-4629 |
| Gary J. Haugen MASLON EDELMAN BORMAN & BRAND, LLP 3300 Wells Fargo Center 90 South Seventh Street Minneapolis, MN 55402 | Jeffrey E. Faucette HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN 3 Embarcadero Center, Seventh Floor San Francisco, CA 94111-4024 |
| Jeffrey A. Evans COOK & FRANKE S.C. 660 East Mason Street Milwaukee, WI 53202 | |



Marcia Lee

Subscribed and sworn to before me
this 26th day of August, 2008.



Notary Public

