

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

WELCH FOODS, INC., A COOPERATIVE)	
)	
Plaintiff,)	
)	
v.)	
)	
ZURICH AMERICAN INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PA and AXIS SURPLUS INSURANCE COMPANY,)	Civil Action No. 1:09-cv-12087-RWZ
)	
Defendants)	
)	

**MEMORANDUM OF LAW IN SUPPORT OF AXIS SURPLUS INSURANCE
COMPANY’S MOTION FOR SUMMARY JUDGMENT**

Defendant AXIS Surplus Insurance Company (“AXIS”) submits this memorandum of law in support of its Motion for Summary Judgment in its favor on all claims asserted against it by Plaintiff, Welch Foods, Inc., a Cooperative (“Welch’s”) and on AXIS’s counterclaim.

INTRODUCTION

Welch’s seeks insurance coverage for an inherently uninsurable business risk—the risk that its products fail to live up to their advertised quality. For years, the market in pomegranate juice has been dominated by a single company, POM Wonderful, which sells a 100% pomegranate juice product. Since approximately 2007, Welch’s has offered an allegedly competing blended juice product, called “White Grape Pomegranate,” which, as alleged, is composed of apple and grape juices, with “little or no” pomegranate juice. The most prominent element of Welch’s product label, however, is an image of a pomegranate, while there is no depiction of apples. As a result of its alleged conduct, Welch’s was sued by POM and a putative

class of consumers for “false designations of origin and false descriptions” under the Lanham Act (“POM Complaint”) and Unfair Competition and False Advertising (“Class Complaint”) (collectively, “Underlying Complaints”). AXIS issued three successive “Media Perils And Professional Errors And Omissions Liability Insurance” policies none of which guarantee that Welch’s products will live up to their advertised attributes. Indeed this risk is not within the insuring agreements and is expressly excluded from coverage under the AXIS Policies. Therefore, AXIS is entitled to summary judgment on all of Welch’s claims and on AXIS’s counterclaim.

FACTUAL BACKGROUND¹

A. Welch’s and National Grape Cooperative Association

National Grape Cooperative Association, Inc. (“National Grape”) is a grower-owned agricultural cooperative comprised of 1,282 grape growers located throughout Michigan, New York, Ohio, Pennsylvania, Washington and Ontario, Canada. National Grape is also the sole owner of Welch Foods, Inc., which acts as its processing and marketing arm. Welch’s provides promotional and marketing services only to the cooperative, and does not provide any such services to third parties. SUMF ¶s 5-7, Exhibit B.

B. POM v. Welch’s Lawsuit

1. POM’s Claims

On January 23, 2009 POM filed its claim against Welch’s in the United States District Court for the Central District of California. The complaint alleges generally that Welch’s made false and misleading representations regarding its White Grape Pomegranate juice product, insofar as it gave the impression that pomegranate juice was a primary ingredient. According to

¹ A detailed recitation of the undisputed material facts is set forth in AXIS’s Local Rule 56.1 Statement of Undisputed Material Facts (“SUMF”). All exhibit references herein are to the exhibits attached to the SUMF.

the complaint, Welch's introduced the product at issue "in or about 2007." POM's specific claims are brought under Section 43A of the Lanham Act (15 U.S.C. § 1125(a) [False designations of origin and false descriptions]) (First Claim for Relief), and the California statute prohibiting false advertising (Cal. Bus. & Prof. Code §17500) (Second Claim for Relief) and statutory unfair competition (Cal. Bus. & Prof. Code §17200 et seq.) (Third Claim for Relief). The latter two claims were dismissed on December 21, 2009. SUMF ¶ 8, Exhibit C and E.

C. Consumer Class Action

On August 14, 2009, a putative class of consumers also filed an action against Welch's in the USDC for the Central District of California. The consumers claims are under the California unfair and deceptive trade practice statute (Cal. Bus. & Prof. Code §17200 et seq.) and the California statute prohibiting false advertising (Cal. Bus. & Prof. Code §17500 et seq.). The class seeks restitution and disgorgement of Welch's profits, as well as an injunction requiring a marketing change and a public information campaign to correct consumer misimpressions about the product. SUMF ¶ 9, Exhibit J.

D. The AXIS Policies

AXIS insures "National Grape Cooperative Association, Welch Foods Inc., A Cooperative" under successive policies described as "PRO ME&O A Media Perils and Professional Errors And Omissions Liability Policy, Policy No. EGN 711111/01/2006 (the "2006 AXIS Policy") effective September 1, 2006 to September 1, 2007; Policy No. EGN 711111/01/2007 (the "2007 AXIS Policy") effective September 1, 2007 to September 1, 2008 and Policy No. EGN 711111/01/2008 (the "2008 AXIS Policy") effective September 1, 2008 to September 1, 2009 (collectively, the "AXIS Policies"). The relevant provisions of the AXIS Policies are identical. SUMF ¶s 1-4, Exhibit A (the 2008 AXIS Policy).

Each AXIS Policy includes two “Insuring Agreements.” Agreement A provides coverage for “Loss arising from any Claim for a Media Wrongful Act, provided that such Media Wrongful Act occurred during the Policy Period.” Insuring Agreement B provides coverage for “Loss arising from any Claim first made against such Insured during the Policy Period...for a Professional Services Wrongful Act committed on or After the Prior Acts Date...and before the Expiration of the Policy Period.” SUMF ¶s 17, 24.

Under the Policies, AXIS does not have a duty to defend Welch’s unless Welch’s affirmatively assigns the defense of a particular claim to AXIS. Welch’s has made no such assignment to AXIS. Exhibit A, Endorsement 1 ¶ 4, SUMF ¶s 8d, 10, 39, Exhibits G, K.

AXIS, has disclaimed coverage under the 2006 and 2007 AXIS Policies, and has agreed to reimburse Welch’s reasonable defense costs in the Underlying Complaints subject to a reservation of rights under the 2008 AXIS Policy. SUMF ¶s 8f, 11, Exhibits I, L. AXIS sought declaratory relief in this Court but agreed to dismiss the action to permit the parties to mediate the existence of coverage. The mediation was unsuccessful, and thereafter, Welch’s initiated the present action and included claims against the other insurer parties. SUMF ¶s 14-16.

ARGUMENT

A. Establishing A Duty To Defend Or To Reimburse Defense Costs Requires A Detailed Comparison Of The Allegations Of The Underlying Complaints With The Provisions Of The Policy To Confirm Whether The Allegations Reasonably State Or Adumbrate A Claim Within The Scope Of Coverage

There is a well-established methodology for the Court’s determination of whether an insurer has a duty to defend, or to reimburse the insured’s defense costs, which requires comparing the underlying allegations to the insurance contract:

It is settled [under Massachusetts law], and generally elsewhere, that the question of the initial duty of a liability insurer to defend third-party actions against the insured is decided by matching the third-party complaint with the policy

provisions: if the allegations of the complaint are ‘reasonably susceptible’ of an interpretation that they state or adumbrate a claim covered by the policy terms the insurer must undertake the defense.... Otherwise stated, the process is one of envisaging what kinds of losses may be proved as lying within the range of the allegations of the complaint, and then seeing whether any such loss fits the expectation of protective insurance reasonably generated by the terms of the policy.

Sterilite Corp. v. Continental Cas. Co., 17 Mass. App. Ct. 316, 318 (1983). Accord GRE Ins.

Group v. Metropolitan Boston Housing Partnership, Inc., 61 F.3d 79, 81(1st Cir. 1995). “As a

general rule, the policyholder bears the initial burden of proving coverage within the policy

description of covered risks.” Markline Co. v. Travelers Ins. Co., 384 Mass. 139, 140 (1981).

Only if the insured accomplishes that feat, the burden shifts to the insurer, who may defeat

coverage by showing the applicability of one or more exclusionary provisions in the policy. See

B&T Masonry Constr. Co. v. Public Servs. Mut. Ins., 382 F.3d 36, 39 (1st Cir. 2004)

The interpretation of provisions in an insurance policy where the facts are undisputed generally is a matter of law for the Court and is appropriate for resolution by summary judgment.

See B&T Masonry, 382 F.3d at 38-39; Crestview Country Club, Inc. v. St. Paul Guardian Ins.

Co., 321 F. Supp. 2d 260, 262 (D. Mass. 2004). Courts apply traditional rules of contract

interpretation to insurance policies. See B&T Masonry, 382 F.3d at 39. The fundamental

principle of contract interpretation is to effectuate the intent of the parties at the time of the

contract. See, e.g., Commercial Union Ins. Co. v. Walbrook Ins. Co., 7 F.3d 1047, 1050 (1st Cir.

1993). To this end, unambiguous terms in an insurance contract are given their usual and

ordinary meaning. See id.

In interpreting the usual and ordinary meaning of policy terms, the Court is aided by

industry custom and usage. See Commercial Union Ins. Co. v. Seven Provinces Ins. Co., 9 F.

Supp. 2d 49, 66 (D. Mass. 1998). Moreover, the interpretation of policy terms relies heavily on

context. See McAdama v. Massachusetts Mut. Life Ins. Co., 391 F.3d 287, 299 (1st Cir. 2004). Since “words can have different meanings in different contexts ... agreements must be construed with reference to the situation of the parties when they made it and to the objects sought to be accomplished.” Id. (internal quotations omitted). The court must also consider the reasonable expectations of the parties . See Central Int’l Co. v. Kemper Nat’l Ins. Co., 202 F.3d 372, 375 (1st Cir. 2000) (recognizing that capturing the reasonable expectations of the parties is “the central object of all contract interpretation”). In order to discern the parties’ reasonable expectations, a court may consider the actual language used and the context in which the policy was written, as well as its “common-sense intuition... as to what the parties likely had in mind.” Id. See also United States Aviation Underwriters, Inc. v. Fitchburg-Leominster Flying Club, Inc., 42 F.3d 84, 87 (1st Cir. 1994) (“[T]o probe the fair and reasonable meaning [of an insurance policy] ..., we examine the actual language used, the context, the parties’ reasonable expectations, and the relevant cases.”).

B. There Is No Coverage Because The Underlying Complaints Do Not State Or Adumbrate A Claim Within The Scope Of Coverage Under The Insuring Agreements Of The AXIS Policies.

1. Insuring Agreement A (Media Wrongful Acts) does not apply because the Underlying Complaints do not allege “Loss arising from [a] Claim for a Media Wrongful Act.

AXIS submits that Welch’s will be unable to meet its burden to demonstrate that the POM Complaint and the Consumer Class Complaint allege “Loss arising from any Claim for a Media Wrongful Act” because, reasonably read, the Underlying Complaints make it clear that Welch’s alleged liability does not arise from a Claim for a Media Wrongful Act (“acts errors and omissions ...in connection with the creation or dissemination of ... Covered Media or ... Advertising Material”) but, rather, relates to Welch’s conduct in making products that don’t live

up to Welch's advertising. In a covered Media Wrongful Act claim, the Loss arises from, and is actionable based on, the creation or dissemination of the advertising.

The principal allegations of the POM Complaint may be summarized as follows:

- [U]nscrupulous competitors [of POM] have set out to cash in on Plaintiff's success by marketing and selling to consumers products labeled as "pomegranate juice," that in fact contain little or no actual pomegranate juice. Welch's is one such competitor.(Ex. C, POM Complaint, ¶ 16)
- Welch's has confused and misled consumers, who reasonably expect that the primary ingredients are white grape and pomegranate juice.(Ex. C, POM Complaint, ¶ 20)
- Because the cost to produce Welch's product containing economically inferior components is far less than the cost to produce Plaintiff's blended pomegranate juices, Welch's can charge less for its product than competitors, including[POM], while reaping substantial profit Welch's wrongfully tricks consumers into thinking that they are getting a product similar to Plaintiff's products for a lower price, when in fact they are getting an economically and nutritionally inferior product.(Ex. C, POM Complaint, ¶ 24)
- The natural, probable and foreseeable result of Welch's wrongful conduct has been to cause confusion, deception and mistake in the pomegranate juice market as a whole, to deprive [POM] of business and goodwill, and to injure [POM's] relationships with existing and prospective customers. (Ex. C, POM Complaint, ¶ 25)
- [W]elch's wrongful conduct has resulted in increased sales of Welch's own White Grape Pomegranate Product while hindering the sales of [POM's] pomegranate juice products and damaging [POM's] goodwill. (Ex. C, POM Complaint ¶ 26)
- [Welch's has] misrepresent[ed] the nature, quality, and characteristics of their White Grape Pomegranate Product(Ex. C, POM Complaint, ¶ 43)
- [POM] prays for judgment ... [f]or an order requiring [W]elch's to correct any erroneous impression persons may have derived concerning the nature, characteristics, or qualities of their White Grape Pomegranate Product[;] [t]hat [Welch's] be adjudged to have violated 15 U.S.C. §1125(a) by unfairly competing against Plaintiff by using false, deceptive or misleading statements of fact that misrepresent the nature, quality and characteristics of their White Grape Pomegranate Products[;] unlawfully and unfairly competed against [POM] under the laws of the State of California[, and] unfairly competed against [POM] by engaging in false or misleading advertising under the laws of the state of

California[;] [for] damages [POM] sustained as a result of [Welch's] conduct[; and] profits. (Ex. C, POM Complaint, Prayer For Relief)

Thus, the POM Complaint does not allege that Welch's liability results from a media liability—i.e., a harm created by the creation or dissemination of Welch's advertising—but from a liability resulting from the sale of juice which does not live up to such advertising. POM does not allege that Welch's Covered Media or advertising even mentions POM or any of POM's products, such that Welch's liability was based on the “creation or dissemination” of media content. Instead, POM alleges that POM's reputation and goodwill have been damaged because Welch's pomegranate juice fails to conform with the advertised standards of authenticity, quality and performance. Moreover, it is clear from the allegations in the POM Complaint that, but for the deficient Welch's product, POM would have no claims against Welch's since, had Welch's made conforming juice, there would be nothing about the creation or dissemination of the advertising that would be actionable.

The allegations of the Consumer Class Complaint are nearly identical to those in the POM Complaint and focus exclusively on the failure of Welch's products to live up to Welch's “description of the authenticity of [such products] [and/or] the failure of [such products] to conform with the standards of quality” represented by Welch's. As noted with respect to POM's claims, if the product conformed to the standards set forth in the advertisements, the putative class would not have a claim against Welch's.

The Class Complaint includes the following principal allegations:

- [T]he White Grape Pomegranate Juice which has been packaged, advertised, marketed and sold by Welch's based on the label and other forms of advertising to Plaintiff, and others similarly situated, represented that the primary ingredients in the juice product are white grape and pomegranate [when, in] fact, the[j]uice contains very **little or no actual pomegranate juice**, a fact which [Welch's] knew and purposely failed to disclose. (Ex. J, Class Complaint, ¶ 2) (original emphasis)

- As a result of [Welch's] representations and/or omissions regarding the White Grape Pomegranate Juice, Plaintiff and Class members overpaid for the juice because the value of the product was diminished at the time it was sold to consumers. Had the Plaintiff and Class members been made aware that the juice contained almost no pomegranate juice, they would not have purchased the [juice], would have paid less for it, or purchased another juice product . (Ex. J, Class Complaint, ¶ 4)

The essential nature of the Underlying Complaints as seeking liability for Welch's tortious sale of non-conforming products is further demonstrated by POM's own characterization of its claims:

As alleged in POM's Complaint, POM is informed and believes that responsive information [discovery requests concerning the ingredients and the relative percentages of those ingredients, contained in the With Grape Pomegranate Product] will show that the White Grape Pomegranate Product contains very little, if any, pomegranate juice, and that Welch's is intentionally deceiving consumers regarding the contents of the White Grape Pomegranate Product. **The lower the percentage of pomegranate juice that is in the product, the greater the likelihood of confusion. This information is at the core of POM's case and is directly relevant to POM's Claims against Welch's**

Exhibit F, p. 3 (emphasis added).

As documented above, both of the Underlying Complaints concern Welch's conduct in selling a product that failed to conform to Welch's representations and the allegations cannot be read reasonably as stating a claim for harm caused by the creation or dissemination of Welch's advertisement. As such, the Underlying Complaints do not state claims within the media risks covered under the Media Wrongful Acts coverage of the AXIS Policies.

2. *Insuring Agreement B (Professional Services Wrongful Acts) does not apply because the Underlying Complaints do not allege Loss arising from [a]Claim ...for a Professionals Services Wrongful Act.*

Any suggestion by Welch's that the POM Complaint and/or the Class Complaint are covered under the Professional Services coverage of the AXIS Policies² is similarly unavailing because the complaints do not allege Professional Services Wrongful Acts as defined by the policies.

The Professional Services coverage is found in Insuring Agreement B:

[T]he Insurer shall pay on behalf of any **Insured** all **Loss** arising from any **Claim** first made against such **Insured** during the **Policy Period** ... for a **Professional Services Wrongful Act** committed on or after the Prior Acts Date set forth in Item 7 of the Declarations and before the expiration of the Policy Period.

Exhibit A, (the 2008 AXIS Policy), Insuring Agreement B (emphasis added).

The AXIS Policies define Professional Services Wrongful Act to mean:

[A]ny actual or alleged negligent act, error or omission committed or attempted solely in the performance of or failure to perform Professional Services by any Insured in his, her or its capacity as such, or by any other person or entity for whose actions the Insured, in his, her or its capacity as such, is legally responsible.

Exhibit A, Section III. Definitions, S, Professional Services Wrongful Act (emphasis added).

The AXIS Policies define "Professional Services" as:

[O]nly [those] services that are identified in Item 6 of the Declarations["Promotional and Marketing Services"], including any such service that are performed electronically using the Internet or a network of two or more computers.

Exhibit A, Endorsement 2 (emphasis added).

² The coverage for Professional Services Wrongful Acts is provided on a claims-first-made basis. Based on the filing dates of the POM Complaint and the Class Complaint, and there being no indication that Welch's had notice of the claims prior to the suits being filed, only the 2008 Policy is potentially applicable, and there can be no Professional Services Wrongful Acts coverage under any prior policy.

The focus of the Underlying Complaints on Welch's conduct in selling non-conforming products also places such claims outside the scope of the Professional Services Wrongful Act Coverage provided by Insuring Agreement B of the AXIS Policies.

The failure of the allegations in the complaints to assert liability within the scope of the Professional Services Wrongful Acts coverage exists on two levels: First, errors and omissions coverage such as that provided by the AXIS Policies is intended to provide liability protection for insureds whose clients hire them to provide services. See, e.g., Nationwide Mut. Ins. Co. v. Am. Reins. Co., 796 F. Supp. 275 (S.D. Ohio 1991) ("An errors and omissions policy is intended to insure a member of a designated calling against liability arising out of the mistakes inherent in the practice of that particular profession or business.") (quoting Albert J. Schiff & Assocs., Inc. v. Flack, 417 N.E.2d 84 (N.Y. 1980)). Courts have distinguished between an insured's business functions and professional functions when interpreting the scope of professional services coverage, generally concluding that the former class is not covered. See, e.g., National Recovery Agency, Inc. v. AIG Tech. Servs., Inc., No. 4:05 CV 0033, 2005 WL 2100702, at *6-8 (M.D. Pa. Aug. 26, 2005) (recognizing that claims related to the insured's billing for its professional services does are not claims based on acts "committed solely" in the conduct of the insured's professional services). Professional services coverage, therefore, is not meant to cover claims by competitors since such claims involve how the insured generally operates its business, rather than the particular professional duties it owes. See, e.g., Visiting Nurse Ass'n v. St. Paul Fire & Marine Ins. Co., 65 F.3d 1097, 1102 (3d Cir. Pa. 1995) (rejecting professional services coverage for monopolization and interference with contractual relations claims of competitor); Crum & Forster Managers Corp. v. Resolution Trust Corp., 156 Ill. 2d 384, 620 N.E.2d 1073, 1079, 189 Ill. Dec. 756 (Ill. 1993) (no duty to defend where claims alleging that insureds "committed

intentional business torts and engaged in unfair competitive practices" did not "arise or result because of the insureds' performance of real estate services," the service listed in policy's definition of "professional services").

As a cooperative, Welch's provides services to its members—the grape growers—and owes professional duties to them. In other words, Welch's acts as a service provider to its clients, the grape growers. SUMF ¶s 5-7, Exhibit B. The duties it owes its growers/clients are no doubt why it purchased Professional Services Wrongful Acts coverage. The Underlying Complaints, however, do not represent a suit by Welch's members for a breach of any of the services Welch's agreed to provide. Instead they are suits by competitors and consumers, not for breach of professional duties owed, but for making a product that did not meet its advertised qualities.

Second, Welch's has not been sued "solely" for its errors or failure to provide Promotional and Marketing Services as is required for Professional Services Wrongful Acts coverage. Instead, even if one could somehow construe some aspect of Welch's conduct to be within the Professional Services coverage, its liability is, at a minimum, also based on its sale of non-conforming product (i.e., not solely as a result of professional services). See Carlson v. Twin City Fire Ins. Co., No. 09-608, 2009 WL 1793887, at *4 (D. Minn. Jun. 23, 2009) (recognizing that, since "solely" -- as used in an insuring agreement requiring that covered wrongful act arise solely out of the discharge of insured's duties -- means "to the exclusion of alternate or competing things,"³ claim based on conduct arising only partly out of discharge of insured's duties is insufficient to trigger coverage); Discover Fin. Servs. LLC v. National Union Fire Ins. Co., 527 F. Supp. 2d 806, 820 (N.D. Ill. 2007) (recognizing that the requirement that

³ Webster's New Int'l Dictionary 2168 (3d ed. 1993).

covered claim be for injury “arising solely out of” defined activities implicates a more rigorous standard than “causal connection” because the activities must have been the sole cause of injury).

C. The Underlying Complaints Are Expressly Excluded From Coverage Under The AXIS Policies.

1. The AXIS Policies expressly exclude (Exclusion B4) false advertising claims of the type alleged in the Underlying Complaints

Pursuant to Exclusion B.4, which is applicable to Media Wrongful Acts coverage under each of the Policies, AXIS is not liable for Loss arising from any Claim made against any Insured:

4. based upon, arising out of, directly or indirectly resulting from, in consequence of or in any way involving the actual or alleged wrong description of the price or authenticity of any good or services, or the failure of any goods or services to conform with the standards of quality or performance stated in the Covered Media;

Exhibit A, AXIS Policy, IV. Exclusions, B. Exclusions Applicable Solely to Section I, Insuring Agreement A, 4 (emphasis added).

The Lanham Act allegations of the POM Complaint involve the alleged wrong description of the authenticity of Welch’s White Grape Pomegranate Juice, and the allegations of both the POM Complaint and the Consumer Class Complaint allege the failure of those goods to conform with the standards of quality or performance described in “content” produced or disseminated by Welch’s.

Faced with similar policy language and underlying allegations, courts have held that a “non-conforming goods” exclusion, like Exclusion B.4, excludes coverage for claims that the insured has misrepresented the quality of its product. See Harleystville Mut. Ins. Co. v. Buzz Off Insect Shield, LLC, 2010 WL 1492136 (N.C.); Staff Pro, Inc. v. National Union Fire Ins. Co., 2006 Cal. App. Unpub. LEXIS 5919. See also R.C. Bigelow, Inc. v. Liberty Mut. Ins. Co., 287

F.3d 242 (2d Cir. 2002); New Hampshire Ins. Co. v. Power-O-Peat, Inc., 907 F.2d 58 (8th Cir. 1990)

The decision in Buzz Off is particularly applicable to the present matter. There, the leading manufacturer of topical insect repellent, SC Johnson (“SCJ”), had asserted Lanham Act claims, as well as claims under various state unfair and deceptive practices statutes, against the developer and manufacturer of an insect repellent treatment for fabric. In particular, SCJ alleged that the manufacturer falsely claimed that the fabric treatment:

- reduces or eliminates the wearer’s need to apply insect repellent to the skin;
- protects uncovered skin from mosquito bites;
- is equivalent to or superior in performance to topical repellents, such as those containing DEET (like SJC’s products);
- provides protection from mosquito bites without the “hassle” of applying “messy” topical repellents;
- is effective through repeated washings; and
- contains “a version of a natural insecticide.”

The manufacturer’s insurer denied coverage on the ground, among others, that SCJ’s claims against the insured were excluded from coverage pursuant to the “non-conforming goods” exclusion, which excluded coverage for injury “arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your ‘advertisement’.” The court agreed with the insurer. In so doing, it recognized that the exclusion “envisions a scenario in which a plaintiff shows that an insured’s product is, in reality, something different from what the insured has advertised.” Buzz Off, 2010 WL 1492136, *8. The court held that SCJ’s false advertising claims fit squarely within that scenario because they all essentially

alleged that the defendants had made false statements regarding the efficacy of their own product. See id. at *18.

The court further held that SCJ's allegations could not be read reasonably as encompassing any claim that the advertisements at issue disparaged any of SCJ's products. In particular, the court found that the comparison in the advertisements between the fabric treatment and DEET-based topical repellents, like those sold by SCJ:

is alleged to be false not because defendants made representations that SCJ's products were ineffective, but because defendants made allegedly false claims that their products worked just as well as, if not better than, SCJ's products. As such, the alleged falsity of the advertisements arises from the failure if defendants' products to actually perform as well as defendants claim they perform.

Id. at *19. The court also found that the advertising claims that the fabric treatment was naturally-derived and hassle- and mess-free, likewise related primarily to the insured's own products. In this respect, the allegations were similar to those in the POM Complaint; the gravamen of POM's claims is that Welch's made false statements regarding the content, performance and/or quality of Welch's own product. POM does not allege that Welch's makes any direct representations regarding the quality of POM's products. Even if the POM Complaint could be read to allege that Welch's advertisements contain an implicit comparison to POM's 100% pomegranate juice, under the reasoning in Buzz Off, such allegations relate primarily to the quality of Welch's product, not POM's. The allegations in the POM Complaint and the Consumer Class Complaint, thus, are exactly the type envisioned by the non-conforming goods exclusion in the AXIS Policies.

Other cases confirm this conclusion. In Staff Pro, the underlying plaintiff, a security guard business which competed with the insured, alleged that the insured's advertising falsely implied that the insured's employees were licensed security guards under the applicable state

regulations. According to the plaintiff, which used only licensed guards, the insured's misleading advertising placed the plaintiff at a competitive disadvantage by allowing the insured to artificially lower its own labor costs. The policies at issue excluded coverage for losses arising out of the "failure of goods, products or services to conform with advertised quality or performance" or the "wrong description of the price of goods, products or services." The court held that, based on this exclusion, there was no coverage because "claims for false advertising are expressly excluded from coverage in the policies." Staff Pro, 2006 Cal. App. Unpub. LEXIS 5919 at *19.

In R.C. Bigelow, the Second Circuit similarly held that there was no duty to defend the insured, a tea manufacturer, against a competitor's claim in a Lanham Act suit that alleged that the insured's advertising falsely implied that its herbal tea was all natural (when, in fact, it was artificially flavored). In particular, the court recognized that "false claims about the insured products are explicitly excluded by the policy." Bigelow, 287 F.3d at 246.

In Power-O-Peat, a competitor brought Lanham Act and state-law unfair competition claims against an insured fertilizer company, alleging that the insured misrepresented the contents of its composted manure products. The policy at issue excluded losses "arising out of incorrect description or mistake in advertised price of good [sic], products or services sold, offered for sale or advertised." The Eighth Circuit affirmed the decision of the trial court, which had concluded that the plain language of the exclusion unambiguously excluded incorrect description of goods. See Power-O-Peat, 907 F.2d at 59.

As these cases make clear, "content" coverages such as those contained in the AXIS Policies (and in the personal and advertising injury coverage under the general liability policies discussed in the cases) do not apply to claims based on failures of the insured's products to live

up to advertised qualities or performance. Such claims are purely and simply uninsurable business risks.

Indeed, Welch's understands full well that the underlying litigation concerns uninsurable business risks, as evidenced by its counterclaims and defenses in the POM suit. In the POM Lawsuit, Welch's has asserted an affirmative defense of "unclean hands" in which it alleges that

- POM has engaged in conduct similar or identical to that which it asserts against [Welch's] by characterizing, advertising and promoting one or more of its own blended juice products by the names of juices not stated in their order of predominance by volume, and with juice omitted[.]
- [POM has] promot[ed] the consumption of its POM Wonderful brand 100% pomegranate juice beverage product to consumers as having special benefits relating to diseases and health-related conditions, including for the prevention, mitigation, and/or treatment of prostate cancer, cardiovascular disease, and other age-related medical conditions[.]
- [POM has] promot[ed] the consumption of its POM Wonderful brand 100% pomegranate juice beverage product to consumers as an all-purpose health elixir that can prevent and/or delay the effects of advancing age, prolong youth, and prolong life[.]
- [POM has] claim[ed] in its advertising that its POM Wonderful brand 100% pomegranate juice beverage product is healthier than other beverages and has special antioxidant powers to protect health and prevent disease which are not found in other foods or beverages, including other 100% juice beverage products and the juice from other pomegranate fruit varieties.

Ex. D. (Welch's Answer, Affirmative Defenses and Counterclaim)

Welch's also asserted counterclaims against POM, alleging generally that POM has falsely represented its 100% pomegranate juice as having certain health benefits and nutritional value not available from other juice products. Welch's asserted that POM's health claims render its juice a drug requiring FDA approval which it has not obtained. See Ex. D. (Welch's Answer, Affirmative Defenses and Counterclaim)

These defenses and counterclaims by Welch's reveal that the Welch's understands that the claims against it, its unclean hands affirmative defense and its counter claims are elements of its business strategy. Such business strategy litigation represents circumstances which a business controls, and not a fortuitous risk of loss which is covered under a liability insurance policy. See American Medical Security, Inc. v. Executive Risk Specialty Ins. Co., 393 F. Supp. 2d 693, 709-10 (E.D. Wis. 2005) (stating "a party may not use insurance to put itself in a better position than it would have been absent in its wrongdoing (sic)" and applying the "profit, remuneration or advantage" exclusion under an E&O policy to preclude coverage of profit gained by insured by charging excessive health insurance premiums and profit gained by avoiding costs by wrongfully forcing insureds to cancel their policies or allow them to lapse).

2. *The AXIS Policies expressly exclude coverage for unfair trade practices and restraint of trade activities (Exclusion A. 11) as alleged in the Underlying Complaints.*

Exclusion A11 of the AXIS Policies provide that:

The Insurer shall not be liable for Loss arising from any Claim made against any Insured:

11. based upon, arising out of, directly or indirectly resulting from, in consequence of or in any way involving any actual or alleged price fixing, restraint of trade, monopolization, unfair trade practices or any actual or alleged violation of the Federal Trade Commission Act, the Sherman Anti-Trust Act, the Clayton Act, or any other federal statutory provision involving anti-trust, monopoly, price fixing, price discrimination, predatory pricing or restraint of trade activities, or any amendment to or any rule or regulation promulgated under or in connection with any such statute; or any similar provision of any federal, state, or local law or common law anywhere in the world;

Ex. A, Section IV. Exclusions, A. Exclusions Applicable to All Insuring Agreements. Based on the plain, unambiguous language of this exclusion, the AXIS Policies do not provide coverage

for Underlying Complaints which in essence focus on Welch's unfair and deceptive trade practices and/or other anticompetitive conduct.

3. ***The AXIS Policies expressly exclude Loss arising from any claim for misappropriation of name or likeness; harm to the character or reputation of POM, dilution of slogan or misappropriations of information or ideas (Exclusions C,1-2, 4-5).***

Even if the POM Complaint and the Class Complaint could somehow be reasonably construed as seeking coverage for Professional Services Wrongful Acts, which they cannot, the claims would otherwise be excluded under the AXIS Policies based on exclusions for "Loss under Insuring Agreement B arising from any Claim made against any Insured for: 1) [m]isappropriation of name or likeness; 2) [d]isparagement, or any other form of ... harm to the character or reputation of any ... entity;... 3) infringement or dilution of ...slogan...; or 4)[m]isappropriation of property rights, information or ideas." See Ex. A, Section IV. Exclusions, C. Exclusions Applicable Solely To Section I. Insuring Agreement B.

CONCLUSION

For all of the reasons above, there is no coverage under the AXIS Policies for the liabilities alleged in the POM and Burcham Suits and, thus, the Court should grant summary judgment in AXIS's favor on all counts against AXIS and issue a declaration regarding the absence of coverage on AXIS's counterclaim for declaratory relief.

Respectfully Submitted:

AXIS SURPLUS INSURANCE COMPANY
By its Attorneys,

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Dated: May 4, 2010

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on May 4, 2010.

/s/ John E. Matosky