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IN THE SUPREME COURT OF THE STATE OF IDAHO

SCOUT LLC, an Idaho limited liability
company, doing business as Double Tap Pub,

Plaintiff/Appellant,

vs.

TRUCK INSURANCE EXCHANGE, an
inter-insurance exchange organized under the
laws of the State of California,

Defendant/Respondent,

and

FARMERS GROUP, INC., a California
corporation,

Defendant.

Supreme Court No. 45349

RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho,
In and for the County of Ada, Honorable Steven Hippler, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This appeal arises out of a federal trademark infringement lawsuit (“OBC Lawsuit”) brought by Oregon Brewing Company (“OBC”) for the wrongful use of its trademark “Rogue” by Appellant Scout, LLC, d/b/a Gone Rogue Pub (“Scout”). The OBC Complaint alleged that Scout’s wrongful use of its trademark (an “advertising injury”) began in October 2012. (R., p. 51, ¶ 14.) (Appendix A.) This infringing use/advertising injury began before Respondent Truck Insurance Exchange (“Truck”) issued a Businessowners Liability policy to Gone Rogue Pub (“Policy”) on November 7, 2012. (R., p. 162.)

Scout tendered the defense of the OBC Lawsuit to Truck under the Policy. (R., p. 326.) The Policy excluded from coverage any advertising injury “[a]rising out of oral or written publication of material whose first publication took place before the beginning of the policy period.” (“Prior Publication exclusion”) (R., p. 234.) (Appendix B.) Truck denied coverage and the tender of defense based on the Prior Publication exclusion and the allegations in the OBC Complaint that the first publication of the infringing mark took place in October 2012, before the beginning of the Policy period on November 7, 2012. (R., pp. 336-342.)

Scout sued Truck for allegedly breaching its duty to defend it in the OBC Lawsuit. (R., p. 6-13.) The District Court granted summary judgment dismissing breach of contract on the grounds that there was no potential for liability under the Policy because the Prior Publication exclusion applied and therefore Truck had no duty to defend Scout in the OBC Lawsuit and dismissing breach of the implied covenant of good faith and good fair dealing and bad faith on

the grounds that there can be neither if there is no coverage under the Policy or breach of contract. (R., pp. 595-613.) (Appendix C.)

B. Course of Proceedings.

Truck agrees with Scout's "Procedural History" but adds the following:

Scout timely filed its Notice of Appeal on August 23, 2017. (R., pp. 616-621.)

C. Statement of Facts.

Truck disagrees with Scout's characterization that the District Court's recitation of facts in its Memorandum Decision and Order on Cross Motions for Summary Judgment are "factual findings". The parties requested a jury trial and, therefore, the District Court was not a finder of fact when ruling on the motions for summary judgment. (R., pp. 13, 22.) Truck agrees that Scout has correctly quoted the District Court's recitation of facts but disagrees that all of the facts set forth by Scout are relevant to the issues on appeal. The parties, the District Court and this Court are constrained to reviewing the facts in the OBC Complaint and the Policy to determine whether the District Court properly granted summary judgment. *See Hoyle v. Utica Mut'l Ins. Co.*, 137 Idaho 367, 371-372, 48 P.3d 1256, 1260-1261 (2002). Truck refocuses the facts accordingly:

1. OBC Complaint

Within the four corners of the OBC Complaint and its attachments,¹ the following facts bearing on coverage are alleged:

¹ Attachments to a complaint are a part of the complaint for all purposes. I.R.C.P. 10(c).

- a. OBC has continuously used the Rogue mark in the name of Rogue-branded restaurants, brew pubs and alcohol beverages since 1989 and owns five (5) trademark registrations for the Rogue mark for use with restaurant and pub services, glassware, beer, ale and clothing. (R., p. 50, ¶ 9.)
- b. These marks were applied for and issued prior to Scout/Gone Rogue Pub's "conduct giving rise to" the OBC Lawsuit. (R., p. 50, ¶ 10.)
- c. Scout/Gone Rogue Pub's "conduct giving rise to" the OBC Lawsuit began in October 2012 when Scout/Gone Rogue Pub commenced use of the Rogue mark to market and advertise Gone Rogue Pub. (R., p. 51, ¶ 14.)
- d. Scout/Gone Rogue Pub continued to use the same Rogue mark until at least September 2014. (R., pp. 52-53, ¶ 17.)
- e. The unauthorized use of the Rogue mark violated all five (5) trademarks held by OBC. (R., pp. 53-54, ¶ 24.)
- f. Scout/Gone Rogue Pub's wrongful conduct caused harm to OBC. (R., p. 54, ¶ 25.)
- g. Attached as an exhibit to the OBC Complaint is a Facebook posting showing use in the Gone Rogue name and logo of the infringing Rogue mark in October 2012. (R., p. 131.) ("October Post") The Facebook posting shows a picture of the "Gone Rogue Pub" logo with accompanying text stating "Here is our new logo! Signs are going up today and tomorrow! Hope everyone likes it! Let us know what you guys think!" *Id.*

(Appendix A.)

2. The Policy.

The Policy was issued with an effective Policy period beginning November 7, 2012. (R., p. 162.) The relevant provisions of the Policy are as follows:

BUSINESSOWNERS LIABILITY COVERAGE FORM

A. Coverages

1. Business Liability

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage", "personal injury" or "advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit"

seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury”, “property damage”, “personal injury”, or “advertising injury” to which this insurance does not apply.

...

...
b. This insurance applies:

...
(2) To:

...
(b) “Advertising injury” caused by an offense committed in the course of advertising your goods, products, or services; but only if the offense was committed in the “coverage territory” during the policy period.

...
B. Exclusions

1. Applicable To Business Liability Coverage

This insurance does not apply to:

...
p. Personal Or Advertising Injury

“Personal Injury” or “advertising injury”:

...
(2) Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period;

...
F. Liability And Medical Expenses Definitions

1. “Advertising injury” means injury arising out of one or more of the following offenses:

- a.** Oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services;
- b.** Oral or written publication of material that violates a person’s right to privacy;
- c.** Misappropriation of advertising ideas or style of doing business; or
- d.** Infringement of copyright, title or slogan.

(R., pp. 229, 231, 234, 239.) (Appendix B.)

II. ISSUES PRESENTED ON APPEAL.

Truck believes that the “Issues Presented on Appeal” can be more clearly and concisely stated as follows:

1. Did the District Court properly grant summary judgment dismissing breach of contract on the grounds that there was no potential for liability under the Policy because coverage was excluded and, therefore, there was no duty to defend?
2. Did the District Court properly grant summary judgment dismissing breach of the implied covenant of good faith and fair dealing and bad faith on the grounds that there can be no breach of the implied covenant or bad faith when there is no coverage or breach of contract?
3. Whether Scout is entitled to attorney fees on appeal under Idaho Code § 41-1839?

III. ARGUMENT

The OBC Complaint clearly alleges the undisputed facts bearing on coverage – advertising injury (infringement of a trademark) arising out of a written publication of allegedly infringing material (the Gone Rogue Pub name and logo) first published by Scout (in October 2012) before the Businessowners Policy became effective (November 7, 2012). Application of the clear and unambiguous Policy language (the Prior Publication exclusion) to these undisputed facts show that there is no potential for liability under the Policy. There is no duty to defend when there is no potential for liability under the Policy. Because there was no duty to defend, there was no breach of contract and because there was no breach of contract there can be no breach of the implied covenant of good faith and fair dealing or bad faith. The District Court properly dismissed Scout’s Complaint against Truck.

A. Standard of Review.

When reviewing the grant of a motion for summary judgment, this Court applies the same standard used by the District Court in ruling on the motion. *Farm Bureau Ins. Co. of Idaho v. Kinsey*, 149 Idaho 415, 418, 234 P.3d 739, 742 (2010). Summary judgment is proper if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. I.R.C.P. 56(a). The Court is to liberally construe all disputed facts and draw all reasonable inferences from the record in favor of the nonmoving party. *Nettleton v. Canyon Outdoor Media*, 163 Idaho 70, ___, 408 P.3d 70-71 (2017). (Citations omitted.) The moving party carries the burden of proving the absence of a genuine issue of material fact. *Id.* “The fact that the parties have filed cross motions for summary judgment does not change the applicable standard of review and this Court must evaluate each party’s motion on its own merits.” *Intermountain Forrest Mgt., Inc. v. Louisiana Pacific Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001). The filing of cross-motions for summary judgment does not establish the absence of genuine issues of material fact, nor does it transform the trial court that will hear those motions into the trier of fact. *Nettleton*, 163 Idaho at ___, 408 P.3d at 71.

B. Analysis.

There is no breach of contract by Truck unless there was a duty to defend Scout against the allegations and claims in the OBC Complaint. There is no duty to defend if there is no potential for liability under the Businessowners Policy. There is no potential for liability under the Policy if the claims alleged in the OBC Complaint are excluded from coverage. All of the claims alleged in the OBC Complaint are excluded from coverage by the Prior Publication

exclusion. There is no potential for liability under the Policy. There was no duty to defend Scout in the OBC Lawsuit and therefore there was no breach of contract.

1. **The OBC Complaint Did Not Give Rise to a Potential for Liability Under the Policy; No Duty to Defend was Triggered; the District Court Properly Granted Summary Judgment Dismissing Breach of Contract.**

There is no duty to defend if the allegations in the underlying complaint do not give rise to a potential for liability under the insurance policy. *Hoyle*, 137 Idaho at 373, 48 P.3d at 1262. “The duty to defend exists so long as there is a genuine dispute over facts bearing on coverage under the policy or over the application of the policy’s language to the facts.” *Construction Management System, Inc. v. Assurance Co. of America*, 135 Idaho 680, 682-83, 23 P.3d 142, 144-145 (2001). Scout argues on appeal: (1) there exists a genuine dispute over the facts bearing on coverage because the District Court erred when it broadly construed the OBC Complaint to determine whether the Prior Publication exclusion applied; and (2) there exists a genuine dispute over the application of the Policy language to the facts because the District Court erred in finding the Prior Publication exclusion was unambiguous because: (a) there is a split of authority amongst other Courts in the interpretation and application of the exclusion; and (b) the exclusion is susceptible to at least two differing and reasonable interpretations as applied to this case.

a. **There is No Genuine Dispute Over Facts Bearing on Coverage.**

Under Idaho law, the only facts bearing on coverage are those facts alleged in the OBC Complaint. There is no genuine dispute over those facts. Scout attempts to create a dispute by looking at facts outside of the OBC Complaint that allegedly show that the prior publication of

OBC's Rogue mark was not injurious when made or did not cause the same injury as later publications or were fresh wrongs not otherwise excluded. However, disputes based on facts outside of the OBC Complaint are irrelevant to the determination of whether there is a potential for liability under the Policy. Regardless, the OBC Complaint alleges injury arising out of the pre-policy publication and continuing to cause the same or similar injury after the Policy was issued.

- (1) Under Idaho Law, Only Facts Within the Four Corners of the Underlying Complaint Filed Against Its Insured Can Be Considered to Determine Whether There is a Duty to Defend.

The analysis of whether an insurer has a duty to defend an insured is limited to a review of the facts and allegations of the complaint filed against the insured (sometimes referred to as the Four Corners Doctrine) and a determination of whether the complaint, read broadly, gives rise to a potential for liability covered by the policy. *Hoyle*, 137 Idaho at 371-372, 48 P.3d at 1260-1261 (2002). Whether the complaint gives rise to a potential for liability under the insurance policy is determined exclusively by the facts and claims alleged in the complaint. *Hoyle*, 137 Idaho at 373, 48 P.3d at 1262 (citing *Construction Management System, Inc.*, 135 Idaho at 684, 23 P.3d at 146 (“ . . . an insurer does not have to look beyond the words of the complaint to determine if a possibility of coverage exists.”).) In *Hoyle*, the insured argued that the facts behind the complaint filed in the underlying action potentially gave rise to an action for negligence and, therefore, the insurer had a duty to defend. *Id.*, 137 Idaho at 373, 48 P.3d at 1262. This Court rejected that argument and held that whether the complaint gives rise to a potential for liability under the insurance policy is determined exclusively by the facts and claims

alleged in the complaint. *Id.* See also *AMCO Ins. Co. v. Tri-Spur Investment Co.*, 140 Idaho 733, 738, 101 P.3d 226, 231 (2004) (holding that even if the facts behind a complaint may give rise to a covered claim, such facts are irrelevant to an insurer's duty to defend).

(2) The Test for Determining the Potential for Liability Under the Policy Does Not Change When an Exclusion is Involved.

Scout argues, however, that the Four Corners Doctrine for determining whether there is a duty to defend is a two-step process: (1) the OBC Complaint allegations must be construed broadly when examining the insuring language in the policy to determine if there is any potential for coverage; and (2) the OBC Complaint allegations must then be construed narrowly to determine whether an exclusion to coverage applies. The District Court erred, argues Scout, because it broadly construed the OBC Complaint when it applied the Prior Publication exclusion.

There is no such two-step process. In Idaho, the complaint is read broadly for all purposes in determining whether there is a potential for liability under the Policy. This holistic approach requires comparing a broad reading of the OBC Complaint to the Policy as a whole to determine if there is a potential for liability under the Policy. This broad reading of the complaint generally favors the insured. As this Court has previously held:

The problem that faces the insurers when a claim is made is determining if there is a potential for liability. However, . . . since the advent of notice pleading there will likely be broad ambiguous claims made against the insured making it more difficult for the insurer to determine whether the insurance policy covers the claims. . . .

Hoyle, 137 Idaho at 372, 48 P.3d at 1265, quoting *Kootenai County v. Western Cas. and Sur. Co.*, 113 Idaho 908, 910-11, 750 P.2d 87, 89-90. But, when a broad reading of the Complaint

reveals no potential for liability under the policy as a whole, including exclusions, an insurer has no duty to defend the excluded claims. *See Construction Mgt. System v. Assurance Co. of America*, 135 Idaho 680, 683, 23 P.3d 142, 145 (2001). The District Court properly applied the Four Corners Doctrine.

- (3) There is No Dispute Over Any Facts Alleged in the OBC Complaint that Bear on Whether the Prior Publication Exclusion Applies.

The Policy excludes coverage for advertising injury “[a]rising out of oral or written publication of material whose first publication took place before the beginning of the policy period”. (R., p. 234.) (Appendix B.) The only facts bearing on coverage are those alleged in the OBC Complaint. The inquiry is thereby limited to whether the OBC Complaint alleges: (1) an advertising injury; (2) when the infringing material was first published; and (3) when the Policy period began. If the allegations in the OBC Complaint allege an advertising injury and that Scout began using OBC’s Rogue mark before the Policy period, there is no genuine dispute over the facts bearing on coverage.

An “advertising injury” is an injury arising out of a misappropriation of advertising ideas or style or an infringement of copyright, title or slogan. (R., p. 239.) The OBC Complaint alleges an advertising injury. (R., p. 49 (¶ 1 – “[t]his is an action for trademark counterfeiting, trademark infringement . . .”); pp. 51-52 (¶ 14 – Scout “created a Facebook page . . . and began marketing and advertising the ROGUE restaurant and bar . . . including using photographs of people partaking in alcoholic beverages, using beverage glassware and coasters containing the mark ROGUE, wearing clothing containing the mark ROGUE, depicting beer taps for various

beers on tap at Gone Rogue Pub . . .”); p. 52 (¶ 16 – “OBC . . . called one of [Scout’s] owners . . . and explained that their conduct infringed OBC’s federally registered trademarks.”); p. 53 (¶ 18 – “Defendants’ conduct is likely to cause confusion, mistake and/or deception as to the affiliation, connection or association of Defendants with OBC and as to whether OBC approves, sponsors or endorses Defendants’ services.”); p. 53 (¶ 19 – “Defendants’ conduct constitutes intentional and deliberate trademark counterfeiting and infringement. Defendants used OBC’s ROGUE mark with the intention of trading on the good will and reputation of OBC’s mark.”); p. 53, (¶ 20 – “Unless enjoined, Defendants’ continued unlawful conduct will irreparably injure OBC. . . .”.)

The OBC Complaint alleges when the infringing mark was first published. The OBC Complaint specifically states that “[i]n October 2012 . . . [Scout] commenced use of the mark ROGUE in the name of their restaurant and bar (‘Gone Rogue Pub’).” (R., p. 51, ¶ 14.) The attachments to the OBC Complaint include photos with “comments” by third parties that predate November 7, 2012 (some dating back to August 2012). (R., pp. 126, 128 and 130.) Also attached to the OBC Complaint is the October Post, a printed screenshot from Gone Rogue Pub’s Facebook page posting an image of their logo using the ROGUE mark with the statement “Here is our new logo! Signs are going up today and tomorrow! Hope everyone likes it! Let us know what you think!” (R., p. 131.) Three comments on the logo are dated October 11, 2012. (*Id.*) The allegations in the OBC Complaint clearly fix October 2012 (if not earlier) as the start date of Scout’s publishing material using the ROGUE mark.

The Policy period began on November 7, 2012. (R., pp. 162, 165 and 171.) It is undisputed that Scout first published material using the ROGUE mark before the Policy period began.

An example of a dispute over facts bear on coverage in the context of this matter would be if the OBC Complaint did not allege a date of first publication at all, or if it alleged inconsistent dates (e.g., October 2012 and December 2012). Then the facts bearing on coverage would be disputed and Truck would be required to provide a defense, at least until the dispute over the facts was resolved. But, no such dispute exists here. The Complaint expressly and specifically alleges an advertising injury beginning with the wrongful use of the ROGUE mark prior to the Policy and continued use of that same mark after the Policy. Had, under the scenarios described above, the District Court selected an alleged date that favored no coverage over an alleged date that favored coverage, there may have been error. Had the District Court looked behind the Complaint to determine when the infringing publication was first published, there may have been error. Here, however, there was no need to construe, interpret, or select facts within the Complaint, or otherwise examine facts outside the Complaint because the Complaint clearly set forth a single date when first publication occurred.

The only facts that can be considered in determining whether there is a duty to defend are those facts alleged in the OBC Complaint. There is no dispute that the OBC Complaint alleged an advertising injury that arose out of allegedly infringing material first published before the beginning of the Policy period. These facts bearing on coverage are not in dispute. Under Idaho law, the analysis of the facts bearing on coverage should end here.

(4) Scout Cannot Create a Genuine Dispute Over the Facts Bearing on Coverage by Looking at Facts Outside the OBC Complaint.

Scout attempts to create a dispute over the facts bearing on coverage by looking to facts outside of the Complaint. Scout argues that the Prior Publication exclusion does not apply because facts outside the Complaint show that the alleged advertising injury was not actionable or injurious when made and was not the same injury caused by subsequent publications.

(Appellant's Brief, pp. 30-31.) Scout asked the District Court to consider that Gone Rogue Pub, at the time it first published the ROGUE mark, was not yet open or operating as a pub, had not yet received necessary licenses or permits and was not yet selling beer, ale, glassware or clothing. (*Id.*) These facts are not alleged in the OBC Complaint and cannot be considered as facts bearing on coverage or considered in determining whether there is a potential for liability under the Policy. The District Court did not err by not considering these facts in granting summary judgment.²

b. There is No Genuine Dispute Over Application of the Policy's Language to the Undisputed Facts Bearing on Coverage.

Scout argues that because there is a split of authority in other jurisdictions over the interpretation and application of the Prior Publication exclusion, it is not clear and unambiguous and that the Prior Publication exclusion is susceptible to differing interpretations in the circumstances of this matter.

² The District Court did, alternatively, consider the facts outside of the OBC Complaint but held that even if they were considered there was no potential for liability under the Policy. (R., pp. 607, 608, 610, 611-12.)

An insurer has a duty to defend if there is “a genuine dispute over the application of the policy’s language to the facts.” *DeLuna v. State Farm Fire and Cas. Co.*, 149 Idaho 81, 84, 233 P.3d 12, 15 (2008). A split of authority or differing potential interpretations does not create a genuine dispute over the application of the Policy language to the specific facts alleged in the underlying complaint. There is no requirement, when interpreting an insurance policy, that the Court must adopt case law most favorable to an insured. The Court is only obligated to apply the correct law when examining legal issues in the context of the particular facts bearing on coverage. The District Court properly found that the Prior Publication exclusion was clear and unambiguous and only required that the advertising injury arise out of the prior publication.

Regardless, the undisputed facts bearing on coverage (those alleged in the OBC Complaint) show that the Prior Publication exclusion provides no potential for liability under the Policy regardless of which differing interpretation is adopted when applied to this case. The OBC Complaint alleges injury from the prior publication of the Rogue mark, that the prior publication violated all five trademarks, that the prior publication was the basis for each separate tort alleged in the OBC Complaint and that the prior publication infringement was a continuing infringement through to and including at least nearly two years after the Policy was issued. (R., pp. 51-54, ¶¶ 14, 17, 24, 25.)

While the duty to defend is broader than the duty to indemnify, the duty to defend is not absolute. *Black v. Fireman’s Fund American Ins. Co.*, 115 Idaho 449, 455, 767 P.2d 824, 830 (Ct.App. 1989). If the facts and claims alleged in an action filed against an insured trigger the

application of a clear and unambiguous exclusion from coverage, the insurer has no duty to defend the insured. *Construction Mgt.*, 135 Idaho at 684, 23 P.3d at 146.

In *Construction Mgt.*, this Court held that a commercial general liability insurer had no duty to defend its insured against a claim of copyright infringement. The Court stated that “the insurer may not be required to defend if it can establish that the exclusion contained in the policy is clear and unambiguous.” *Construction Mgt.*, 135 Idaho at 684, 23 P.2d at 146. *See also AMCO Ins. Co.*, 140 Idaho at 738-9, 101 P.3d at 231-2 (holding that a policy exclusion negated an insurer’s duty to defend a sexual harassment complaint). Therefore, if the Prior Publication exclusion clearly and unambiguously applies to the undisputed facts alleged in the OBC Complaint, there is no duty to defend. *See Hoyle*, 137 Idaho at 373, 48 P.3d at 1262 (the policy’s intentional act exclusion negated the insurer’s duty to defend the claim for breach of the implied covenant of good faith and fair dealing). As discussed above, the facts alleged in the OBC Complaint are not disputed. As discussed below, the application of the Prior Publication exclusion to the facts is also not disputed.

(1) The Prior Publication Exclusion is Clear and Unambiguous.

The test for determining whether policy language is clear and unambiguous is set forth in *Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 141 Idaho 660, 115 P.3d 751 (2005):

In interpreting an insurance policy, “**where the policy language is clear and unambiguous, coverage must be determined, as a matter of law, according to the plain meaning of the words used.**” . . . In construing an insurance policy, the Court must look to the plain meaning of the words to determine if there are any ambiguities. This determination is a question of law.

Id., 141 Idaho at 662–63, 115 P.3d at 753–54 (citations omitted) (emphasis added). A court, by construction, cannot create a liability not assumed by the insurer, or make a new contract for the parties, or one different from that plainly intended, nor add words to the contract of insurance to create or avoid liability. *Armstrong v. Farmers Ins. Co. of Idaho*, 147 Idaho 67, 69, 205 P.3d 1203, 1205 (2009). In deciding whether a particular provision is ambiguous, the provision must be read within the context in which it occurs in the policy. *Id.*, 147 Idaho at 70, 205 P.3d at 1206. The District Court correctly placed the burden on Truck to use clear and precise language if it wishes to restrict the scope of its coverage. (R., p. 606 (quoting *Arreguin v. Farmers Ins. Co. of Idaho*, 145 Idaho 459, 461, 180 P.3d 498, 500 (2008).) The District Court correctly recognized that a provision that seeks to exclude coverage must be strictly construed in favor of the insured. *Id.*

The identical Prior Publication exclusion has been held by other courts to be clear and unambiguous.³ (See e.g., *United National Ins. Co. v. Spectrum Worldwide*, 555 F.3d 772, 777 (9th Cir. 2009) (“Plainly reading the first publication exclusion and the relevant advertising injury definition together indicates that the parties intended it to exclude from coverage any copyright infringement injury that arose from an oral or written publication of material first published before the policy became effective.”); *Capitol Indemnity Corp. v. Elstone Self-Service Wholesale Groceries, Inc.*, 559 F.3d 616, 620 (7th Cir. 2009) (“We do not see any ambiguity in the meaning of the [Prior Publication] exclusion; it seems clear that the exclusion . . . abrogates

³ Neither the parties nor the District Court were able to locate an Idaho appellate court decision interpreting the Prior Publication exclusion.

the duty to defend where the insured's first publication of actionable material occurred prior to the beginning of its policy").

(2) Application of the Clear and Unambiguous Prior Publication Exclusion to the Undisputed Facts Shows No Potential for Liability Under the Policy.

The Prior Publication exclusion is included in a liability insurance policy to insulate an insurer from providing coverage for a risk that arose before the policy was issued:

The Policy's prior publication exclusion exempts from coverage '[p]ersonal and advertising injury' arising out of oral or written publication of material whose first publication took place before the beginning of the policy period. The straightforward purpose of this exclusion is to 'bar coverage' when the 'wrongful behavior . . . [began] prior to the effective date of the insurance policy'.

Street Surfing, LLC v. Great American E & S Ins. Co., 776 F.3d 603, 610 (9th Cir. 2014)

(citation omitted) (emphasis added). Here, as in *Street Surfing*, the Policy excludes coverage for advertising injury "arising out of" the publication of material whose first publication took place before the policy became effective. (R., p. 234.) "Arise" is defined as "to come into being, action or notice; originate; appear; spring up." <http://www.dictionary.com/browse/arising>. The phrase "arising out of" as used in insurance policy has been interpreted to mean "originating from" or "growing out of" or "flowing from" or "done in connection with" – "that is, it requires some causal connection to the injuries suffered, but does not require proximate cause in the legal sense." *Federal Ins. Co. v. Tri-State Ins. Co.*, 157 F.3d 800, 804 (10th Cir. 1998).⁴

⁴ See also *Hugenberg v. West Am. Ins. Co./Ohio Cas. Group*, 249 S.W.3d 174, 186 (Ky. Ct. App. 2006) ("arising out of" means "originating from, or having its origin in, growing out of or flowing from"); *Taurus Holdings, Inc. v. United States Fid. & Guar. Co.*, 913 So. 2d 528, 539 (Fla. 2005) ("arising out of" as used in a Commercial General Liability policy exclusion is

The Prior Publication exclusion thereby precludes coverage of the chance that advertising injuries will materialize from the pre-policy publication of allegedly infringing material. “Risk” is defined as “exposure to the chance of injury or loss; a hazard or dangerous chance.” <http://www.dictionary.com/browse/risk>. “Materialize” is defined as “to come into perceptible existence; appear; become actual or real.” <http://www.dictionary.com/browse/materialize>. *Taco Bell Corp. v. Continental Casualty Co.*, 388 F.3d 1069, 1072-73 (7th Cir. 2004) (“[T]he purpose of insurance is to spread risk – such as the risk that an advertising campaign might be deemed tortious – and if the risk has already materialized, what is there to insure?”) (internal citation omitted). *Kim Seng Co. v. Great American Ins. Co. of New York*, 179 Cal.App. 4th 1030, 1044, 101 Cal. Rptr.3d 537, 548 (2009) (“The purpose of the prior publication exclusion is to preclude coverage for risks that have already materialized”).

The chance of an advertising injury arising out of Scout’s use of the ROGUE mark in the Gone Rogue Pub name and logo came into existence in October 2012 (at the latest). The OBC Complaint alleges that Scout’s use of the Gone Rogue Pub name and logo was continuous from at least as early as October 2012, until the OBC Complaint was filed on October 14, 2014. (R., pp. 48, 51.) That there was a risk of advertising injury created by Scout’s pre-policy publication of the Rogue mark is proven by the complaint allegation that OBC contacted Scout just two

unambiguous and broader in meaning than the term “caused by” and means “originating from,” “having its origin in,” “growing out of,” “flowing from,” “incident to” or “having a connection with”); *Meadowbrook, Inc. v. Tower Ins. Co., Inc.*, 559 N.W.2d 411, 419 (Minn. 1997) (“arising out of” in a Commercial General Liability insurance policy exclusion means “causally connected with” and not “proximately caused by”); *accord Records v. Aetna Life & Cas. Ins.*, 683 A.2d 834 (N.J. Super. 1996), *American Motorists Ins. Co. v. L-C-A Sales Co.*, 713 A.2d 1007 (N.J. 1998).

months after it opened the Gone Rogue Pub and explained that Scout's "conduct infringed OBC's federally registered trademarks." (R., p. 52, ¶ 16.) Based on the clear and unambiguous terms and the purpose of the Prior Publication exclusion and applying that language to the undisputed facts bearing on coverage, the claims alleged in the OBC Complaint were excluded, there was no potential for liability under the Policy, and there was no duty to defend.

Scout argues that the District Court erred in finding that the Prior Publication exclusion unambiguously excluded coverage because the language of the exclusion does not have a "settled legal meaning" because other courts have interpreted or applied the language differently. Scout argues that because there is a split of authority the District Court was required to accept the holdings of those courts that favored Scout. This is not the proper standard for determining whether there is a dispute over the application of the policy's language to the facts requiring a duty to defend. The District Court is required to apply the law correctly, not to apply the law that favors one party over the other. The District Court did so here when it distinguished those cases Scout felt favored its position on either the facts, the law or both.

In addition, Scout argues that the term "publication of material" in the Prior Publication exclusion is susceptible to at least two differing interpretations when applied to the facts of this case and the District Court erred when it did not adopt an interpretation that required the prior publication to be actionable (injurious when published) or cause the same harm as subsequent publications. The District Court properly adopted the legally correct interpretation of the exclusion. The District Court also properly held that no matter the interpretation, the exclusion eliminated any potential for liability under the Policy.

First, the District Court did not err in its application of the case law to the Policy language and the facts bearing on coverage. That the District Court can properly find the Prior Publication exclusion to be unambiguous as applied to the circumstances and facts of the present case, even though other Courts have found the exclusion to be ambiguous, is proved by case law relied on by Scout to support its differing interpretation of the exclusion. The Court in *Transportation Ins. Co. v. Pennsylvania Manufacturer Assoc. Ins. Co.*, 346 Fed.Appx., 862, 863 (3rd Cir. 2009) held:

Although the “prior publication” exclusion has been considered ambiguous in other circumstances, it is not ambiguous in the circumstances before us. Because the underlying complaint clearly states that all of the relevant injurious conduct began in August 1999 – more than six months before the . . . policy period commenced.

Id. at 863. The Third Circuit determined that the exclusion was not ambiguous in those situations when the underlying complaint alleges that the relevant conduct began before the Policy period even though the exclusion might be ambiguous in other situations. That is the situation here – the alleged wrongful conduct began in October 2012, before the Policy period began on November 7, 2012 and therefore the Prior Publication exclusion is not ambiguous. *See also Applied Bolting Technology Products Inc. v. United States Fidelity & Guaranty Co.*, 942 F.Supp. 1029, 1036-37 (E. D. PA 1996) (citations omitted) (“Under the exclusion’s plain terms, the ‘first publication’ date is a landmark: if the injurious advertisement was ‘first published’ before the policy coverage began, then coverage for the ‘advertising injury’ is excluded. It is irrelevant that later publications, made after the policy became effective, also caused ‘advertising

injury' or increased the damages.”).⁵ In the present case, the first publication (landmark) date is October 2012. Scout's alleged wrongful use of the ROGUE mark in its advertisement was first published before the Policy coverage began on November 7, 2012. It is irrelevant to the coverage determination that later publications also caused advertising injury or increased the damages. Here, under the exclusion's plain terms, there is no potential for liability under the Policy and therefore no duty to defend.

The District Court properly distinguished *Capitol Indemnity's* interpretation of the exclusion because, under Idaho law, a court must apply the policy according to its plain language and not add words to either create or avoid liability. (R., p. 608.) (citing *Armstrong*, 147 Idaho at 69-70, 205 P.3d at 1205-06.) The Prior Publication exclusion does contain the words “actionable” or “injurious”. Instead, the exclusion applies where the advertising injury “arises out of” the first publication of the infringing material. The District Court examined the plain meaning of the phrase “arising out of” and the case law treatment of that phrase as used in insurance policies and determined that the Prior Publication exclusion did not require the first publication of material be independently “actionable” or “injurious” for the exclusion to apply. (R., p. 608.)

Rather, it need be causally connected to the advertising injuries alleged. Stated another way, the advertising injuries alleged must flow from the first publication, but the first publication need not be the proximate cause of the injuries. To construe the provision as requiring that the first publication be independently injurious or actionable would not only ignore the common definition of “arising out of” but would also insert words where they do not appear, which is contrary to

⁵ The fact that these Courts used the term “injurious” did not change the interpretation of the exclusion or make it ambiguous in the circumstances of those cases.

Idaho's rules of contract interpretation. For this reason, the court does not find Scout's interpretation reasonable and, therefore, does not find the exclusion ambiguous for the reasons cited by Scout.

(R., pp. 608-609.)

The District Court also properly distinguished *Capitol Indemnity's* application of the Prior Publication exclusion to the facts in that case:

Capitol Indemnity involved a suit for trademark infringement based on the defendant's sale of counterfeit cigarettes displaying the Newport trademark. 559 F.3d at 619-20. Prior to the effective date of the policy, the defendant sold *genuine* Newport cigarettes with packaging and wrapping displaying the Newport marks. After the policy went into effect, however, the defendant began selling counterfeit cigarettes in the same packaging. *Id.* The insurer argued that the Prior Publication exclusion barred coverage – and, therefore abrogated its duty to defend – because the cigarette packaging and wrapping containing the Newport marks was first “published” before the policy began. *Id.* at 620. The court disagreed because the pre-policy publication was not actionable – the defendant was actually selling genuine Newport cigarettes. *Id.* The infringement alleged in the underlying complaint was the defendant's sale of *counterfeit* cigarettes with Newport packaging, not the sale of genuine Newport cigarettes. *Id.* at 619. By contrast, OBC alleged that Scout's pre-policy publication of the Gone Rogue Pub logo in October of 2012 marked the origination date of Scout's acts that resulted in the infringement.

(R., pp. 609-610.)

The District Court then properly analyzed and relied on that case law which was consistent with Idaho's rules of construction. For instance, in *Matagorda Ventures, Inc. v. Travelers Lloyds Ins. Co.*, 203 F. Supp. 2d 704 (S.D. Tex. 2000), Plaintiff Matagorda Ventures sought a declaration that its insurer, Travelers, owed a duty to defend it in a trademark and copyright infringement lawsuit brought by Movado Group. *Matagorda*, 203 F. Supp. 2d at 706. Travelers, relying on an identical Prior Publication exclusion, moved for summary judgment on

the basis that the material from which Movado's infringement claims against Matagorda arose was published on Matagorda's website prior to the date the policy was issued. *Id.* at 712. The District Court granted summary judgment to Travelers. *Id.*

Like Scout, Matagorda argued that the Prior Publication exclusion did not apply because Movado's claims for infringement were not actionable until after the policy was issued because some of the copyrights allegedly infringed upon were not registered when the prior publications took place and therefore the prior publications were not infringing, thereby triggering Traveler's duty to defend the entire suit. *Id.* at 717-718. The appellate court rejected this argument. *Id.* The Court held that when an infringement claim becomes actionable is irrelevant under the plain language of the Prior Publication exclusion. *Id.* The only relevant inquiry is whether the infringement claim arose from material published before the policy period began:

The relevant question for the exclusion, however, is not when the claim first became actionable, but when the material giving rise to the claim was first published. The copyright infringement claim arose from "material whose first publication took place before the beginning of the policy period."

Id. The *Matagorda* court's holding is consistent with the plain language of the Truck Policy and was properly adopted by the District Court. When the actual infringement does or does not occur is irrelevant to application of the Prior Publication exclusion if the alleged advertising injury arises from a pre-policy publication.⁶

Further, support for the District Court's holding is found in *Kim Seng Co. v. Great American Ins. Co. of New York*, 179 Cal.App.4th 1030, 101 Cal.Rptr.3d 186 (2009), *as modified*

⁶ Under the relevant facts bearing on coverage (those in the OBC Complaint), the infringement began before the Policy and the advertising injuries arose out of that prior publication.

on denial of reh'g (Dec. 7, 2009). There, the insured argued that the Court should consider whether its pre-policy publication gave rise to the “likelihood of confusion” and constituted infringement when it was made. *Kim Seng Co.*, 179 Cal. App. at 1043, 101 Cal. Rptr. 3d at 547. The Court held “[w]e do not deal with whether there was an infringement, but rather whether there is coverage.” *Id.* Likewise, here, whether the October 2012 Facebook post did or did not infringe on OBC’s marks when it was published is irrelevant to coverage. Only whether the advertising injury alleged in the OBC Complaint arose out of Scout’s October 2012 use of the “Gone Rogue Pub” name and logo. It did.

Second, even accepting Scout’s argument that the Prior Publication exclusion is ambiguous and susceptible to differing interpretations and required the “publication of material” to be injurious or cause the same harm, the District Court found that the facts bearing on coverage in the OBC Complaint demonstrated that there was no dispute that the publication of the material was injurious and caused the same harm.

Here, the OBC Complaint alleges that Scout’s use of the “ROGUE” mark was unauthorized, the use commenced in October of 2012, and the use caused OBC harm. Thus, the OBC Complaint asserts a continuing course of infringing and injurious conduct since prior to the effective date of the policy. Whether or not Scout’s October Post was actually injurious because Gone Rogue Pub was not yet opened for business is not germane to the inquiry since injury beginning in October of 2012 was clearly alleged in the OBC Complaint.

(R., p. 607.) The analysis need go no further. Even under Scout’s proposed interpretation, the District Court alternatively applied the case law “favorable” to Scout in construing the terms of the Prior Publication exclusion, and interpreted that exclusion as if it were ambiguous and determined, based on the allegations in the OBC Complaint (the only relevant facts that bear on

coverage) that the advertising injury claims alleged against Scout did not give rise to the potential for liability under the Policy. *See Farm Bureau Ins. Co. of Idaho v. Kinsey*, 149 Idaho 415, 419, 234 P.3d 739, 743 (2010) (the District Court acknowledged that the phrase “residents of your household” is potentially ambiguous but found that sufficient evidence was presented to demonstrate that Jamey was not a resident of the household in spite of any ambiguity).

- c. There are No Genuine Disputes Over Facts Bearing on Coverage or Genuine Disputes Over Application of the Prior Publication Exclusion to Those Facts; Therefore, There is No Potential for Liability Under the Policy for All Claims Alleged in the OBC Lawsuit.

Scout argues that the District Court erred in finding that the October Post excluded coverage of all claims alleged in the OBC Complaint. Specifically, Scout argues that the OBC Complaint alleges five separate torts based on five different trademarks and that Truck must show that the prior publication constituted a violation of each tort and a violation of all five trademarks. At most, argues Scout, the October Post violates only one trademark (for restaurant, pub and catering services) but did not violate the other trademarks. Scout contends that use of the Rogue mark on glassware, clothing, beer and ale did not relate to (or arise out of) its prior publication of the identical Rogue mark in the Gone Rogue Pub name and logo. Scout contends that these uses constitute “fresh wrongs” to which the Prior Publication exclusion does not apply.

The entirety of Scout’s argument relies on examining facts outside of the OBC Complaint. In other words, Scout cannot even argue that there were later publications of the Rogue mark that were “fresh wrongs” without looking behind the OBC Complaint. In addition,

the case law relied on by Scout to create these “fresh wrongs” is either contrary to its position or factually distinguishable.

Scout creates so-called “fresh wrongs” and “later uses” of the Rogue mark by pointing to facts outside of the OBC Complaint that Gone Rogue Pub was not yet open, was not yet selling beer or ale, and was not yet selling glassware or clothing when the first publication of the mark was made and before the Policy became effective. Therefore, Scout claims, any infringement on four of the five trademarks could not have occurred until after the Policy was issued. There are no allegations in the OBC Complaint that Gone Rogue Pub was not yet open or that it was not selling beer, ale or merchandise when the first publication occurred or until after the Policy was issued. There are no allegations of post-policy uses of the Rogue mark that caused separate, distinct and fresh wrongs or that there were different post-policy infringements from the pre-policy infringements. The District Court correctly held that “Scout’s argument relies on facts outside of the allegations of the OBC Complaint, which is irrelevant in considering whether an insurer has a duty to defend. Rather, as discussed above, the duty to defend is framed solely by the allegations of the underlying complaint.” (R., p. 607.) The Complaint alleges a single continuing wrong based on the pre-policy publication with all advertising injuries arising out of that pre-policy publication. There are no facts bearing on coverage (within the four corners of the OBC Complaint) to support “fresh wrongs” to which the Prior Publication exclusion does not apply.

Regardless, case law supports that whatever later uses were made of the ROGUE mark, they were not “fresh wrongs”. The Ninth Circuit held that when there is a publication of material

prior to policy issuance and the insured continues to publish the same material after policy issuance, the publications are part of a “single, continuing wrong” dating back to before the policy took effect, triggering application of the Prior Publication exclusion. *Street Surfing LLC*, 776 F.3d at 610.

In the context of advertising injury coverage, an allegedly wrongful advertisement published before the coverage period triggers application of the prior publication exclusion.... If this threshold showing is made, the exclusion bars coverage of injuries arising out of republication of that advertisement, or any substantially similar advertisement, during the policy period, because such later publications are part of a single, continuing wrong that began before the insurance policy went into effect.

Id. (emphasis added). In *Street Surfing*, there was a single pre-policy publication of a logo “for the purpose of attracting future customers who might like what they saw . . .” and later publications on other products. Nevertheless, the Prior Publication exclusion applied. *Id.* at 612. The determination to be made here is whether the OBC Complaint alleges Scout’s continued use of the same or substantially similar Rogue mark before and after the policy effective date. The OBC Complaint unambiguously does so. (R., pp. 51-54.) The Prior Publication exclusion applies.

In *Street Surfing*, the infringer initially sold skateboards affixed with a particular Street Surfing logo. *Id.* at 606. After obtaining insurance, Street Surfing expanded its product line to skateboard accessories, also affixed with the Street Surfing logo. Ultimately, Street Surfing was sued by the owner of the mark and Street Surfing’s insurer declined to defend based on the Prior Publication exclusion. *Id.* Street Surfing sued its insurer, arguing *inter alia*, that its pre-policy publication of the logo was not substantially similar to the post-policy advertisements because

they were affixed to different products. *Id.* at 612-13. The *Street Surfing* Court disagreed for two reasons. First, the underlying complaint did not charge the misappropriations as separate torts depending on the specific advertisements. Rather, it generally alleged that Street Surfing infringed on the mark by using the same name and logo on its products, without making any distinction between the types of products. *Id.* at 614. Second, although the advertisements featured different products, the court found it was not a “material distinction”, because the advertising idea being used was the same regardless of the product: the products all used the allegedly infringing identification “Street Surfing.” *Id.*

Here, the OBC Complaint did not charge the infringements as separate torts depending on whether the logo appeared on a sign, glassware, clothing, beer or ale. Rather, the OBC Complaint alleged that Scout infringed on the mark by using the same name and logo to advertise and market before and continued to do so after the Policy without making any distinction between what sign or product the name and logo was on. Scout used the same name and logo regardless of the product: the products all used the allegedly infringing Rogue mark in the name and logo.

Likewise, in *Hanover Ins. Co. Urban Outfitters, Inc.*, 806 F.3d 761 (3rd Cir. 2015), Hanover sought a declaratory judgment that it had no duty to defend its insured, Urban Outfitters, in an underlying trademark infringement action brought against Urban Outfitters by the Navajo Nation. The underlying trademark action complaint alleged that Urban Outfitters had been advertising, promoting and selling goods under the Navajo name and marks since at least

March 16, 2009. *Id.* at 763. Urban Outfitters, like Scout, tendered the defense of the trademark action to Hanover Insurance. *Id.* at 766.

Hanover first issued a commercial general liability policy to Urban Outfitters on July 7, 2010. *Id.* at 764. The policy's Prior Publication exclusion was identical to that in Truck's Policy.

Id. Holding that Hanover had no duty to defend Urban Outfitters, the Third Circuit stated:

In each instance, Navajo Nation fixed March 16, 2009 (if not earlier) as a start date for Urban Outfitters' alleged misconduct. Under the terms of the Hanover policies' "prior publication" exclusions, we must treat this date of "first publication" as a landmark. Because Hanover was not responsible for Urban Outfitters' liability insurance coverage until sixteen months thereafter, the exclusions apply.

Id. at 767. *See also United Nat. Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 780 (9th Cir. 2009), (holding that because the insured's first publication of infringing material was prior to the policy inception date, the Prior Publication exclusion applied and there was no duty to defend the insured).

Further support is again found in *Matagorda*. *Matagorda* argued in that case, like Scout does in this appeal, that the Prior Publication exclusion only applied to some of the claims alleged in the underlying trademark infringement lawsuit and not others and therefore Traveler's duty to defend the entire suit was triggered. *Matagorda*, 203 F.Supp.2d at 717-178. The *Matagorda* court rejected this argument, finding that all of the infringement claims were based on material first published on *Matagorda's* website before the policy inception date.

Second, plaintiffs argue that even if the "first publication" exclusion applies to some of the *Movado Group* claims, other *Movado Group* claims are not subject to the exclusion, triggering the duty to defend. If some of the causes of action alleged in the *Movado Group* suit were not subject to the exclusion or otherwise

outside the scope of coverage, Travelers would have a duty to defend the entire lawsuit. However, all the causes of action asserted in the *Movado Group* complaint arose from the content of, and information posted on, the wristwatch.com web site. The material of the web site constitutes the “written material” first published before the beginning of the policy period. All of the *Movado Group* claims are subject to the exclusion. Travelers owes plaintiffs no duty to defend.

Matagorda, 203 F.Supp.2d at 718. (internal citation omitted.) Likewise, the OBC Complaint alleges that all of the violations and causes of action originated with and arose out of Scout’s undisputed use of the Rogue mark in October 2012.

The District Court properly distinguished *Taco Bell Corp. v. Continental Casualty Co.*, 388 F.3d 1069 (7th Cir. 2004) on the grounds that unlike in *Taco Bell*, the OBC Complaint did not charge separate torts based on uses prior to the Policy period versus during the Policy period and that there was no thematic difference between the alleged publications here as there was in *Taco Bell*. (R., p. 612.) The District Court held “[r]ather, as in *Street Surfing*, Scout’s publications all arise from [the] same single, continuous use [of] the word ‘ROGUE’ in advertising Gone Rogue Pub, which is an appropriation of OBC’s advertising idea [and] [t]herefore, Scout’s post-[policy] effective date uses of the mark are not ‘fresh wrongs’ which avoid the application of the Prior Publication exclusion.” (*Id.*)

It is undisputed that the Complaint alleges that Scout published the Gone Rogue Pub logo and name on Facebook in October 2012 for the express purpose of advertising and marketing. Scout thereafter engaged in a “single, continuing wrong” by continuously using the same Gone Rogue Pub name and logo at least until the OBC complaint was filed on October 14, 2014. Like *Street Surfing*, Scout continued to use the same Gone Rogue Pub name and logo in violation of

all of the trademarks. The OBC Complaint did not allege separate legal violations for each infringing use of the Rogue mark by Scout; rather, it alleged legal violations that all originated with the first use of the “Gone Rogue Pub” name and logo in October 2012. These continuous violations are not “fresh wrongs” and the Prior Publication exclusion applies to negate coverage for all claims alleged against Scout in the OBC Complaint.

2. **Without Coverage There Can Be No Breach of the Implied Covenant of Good Faith and Fair Dealing or Bad Faith; the District Court Properly Granted Summary Judgment Dismissing Breach of the Implied Covenant and Bad Faith.**

Scout requests that this Court reverse the District Court’s grant of summary judgment dismissing the breach of the implied covenant of good faith and fair dealing and bad faith claims and to adjudicate those claims and find that Truck actually breached the implied covenant and is liable for bad faith. As discussed below, this Court can only reverse dismissal of breach of the implied covenant and bad faith if it reverses dismissal of the breach of contract claim. Even if this Court reverses dismissal of the breach of contract claim, it cannot, as requested by Scout, adjudicate those claims in this appeal or affirmatively determine that Truck breached the implied covenant or is liable for bad faith.

a. **The District Court Properly Dismissed Breach of the Implied Covenant.**

The District Court properly dismissed the breach of the implied covenant of good faith and fair dealing when it determined there was no coverage, no duty to defend, and, therefore, no breach of contract. An implied duty of good faith and fair dealing “exists between insurers and insureds in every insurance policy.” *Mortensen v. Stewart Title Guar. Co.*, 149 Idaho 437, 445,

235 P.3d 387, 395 (2010). The covenant requires that “the parties perform in good faith the obligations imposed by their agreement,” and a violation of the covenant occurs only when “either party . . . violates, nullifies or significantly impairs any benefit” of the contract. *Idaho First Nat. Bank v. Bliss Valley Foods*, 121 Idaho 266, 288, 824 P.2d 841, 863 (1991). If there has been no breach of contract, however, there can be no impairment of any benefit under the contract and therefore no breach of an implied covenant. *Id.* Likewise, when there is no coverage under an insurance policy, there can be no breach of the duty of good faith and fair dealing. *Rizzo v. State Farm Ins. Co.*, 155 Idaho 75, 84, 305 P.3d 519, 528 (2013) (holding that if no benefit of the policy has been violated, nullified, or significantly impaired by the insurer’s actions, there was no breach of the duty of good faith and fair dealing.) Because there is no breach of the insurance contract, there can be no breach of the implied covenant of good faith and fair dealing as a matter of law.

b. The District Court Properly Dismissed Bad Faith.

A predicate to an action for bad faith is a covered claim and a breach of the insurance contract. “Fundamental to the claim of bad faith is the idea that there must be coverage of the claim under the policy.” *Robinson v. State Farm Mutual Auto. Ins. Co.*, 137 Idaho 173, 176, 45 P.3d 829, 832 (2002). The existence of a breach of a contractual duty is essential to the cause of action for bad faith. *Robinson*, 137 Idaho at 179, 45 P.3d at 835. “The duty in tort is founded upon contract and the existence of a breach of the contractual duty is essential to the cause of action in tort. The duty is in contract, the damages in tort.” *Id.* The tort of bad faith cannot exist without a breach of a duty under the insurance contract. *See Id.* *See also Rizzo, supra*, 155

Idaho at 84, P.3d at 528 (holding that the insurer did not commit bad faith because there was no coverage under the policy.) Because there is no coverage under the Policy, there can be no bad faith as a matter of law.

Even if the Court reverses the District Court's dismissal of breach of contract, the Court cannot adjudicate whether Truck breached the implied covenant or is liable for bad faith. First, the District Court did not address the merits of these claims and therefore the merits are not ripe for review by this Court. *See State v. Barrett*, 138 Idaho 290, 295, 62 P.3d 214, 219 (Ct.App. 2003). ("Where a district court has not ruled on an issue, it is not ripe for review and should be dismissed.")

Second, Scout is asking this Court to review the District Court's denial of its cross motion for summary judgment. It is well settled in Idaho that "[a]n order denying a motion for summary judgment is an interlocutory order from which no direct appeal may be taken." *Dominguez, ex rel. Hamp v. Evergreen R.E.S., Inc.* 142 Idaho 7, 13, 121 P.3d 938, 944 (2005) (citation omitted). This rule is not altered by entry of an appealable final judgment. *Id.* Consequently, Scout's arguments in its Appellant's Brief that Truck is liable for breach of the implied covenant and bad faith are not relevant to the issues on appeal and should be stricken or ignored.⁷

⁷ It should be noted that Scout claims that Truck breached the duty of good faith and acted in bad faith based on one of the alternative grounds for denying the duty to defend – that Scout, LLC was not listed as a named insured. It remains undisputed that Scout was not a named insured under the policy. (R., p. 165.) Regardless, breach of the duty of good faith and a claim for bad faith cannot arise from the insurer's actions when underwriting a policy (i.e., failing to identify Scout as the actual insured or having knowledge of Scout's association with Gone Rogue Pub).

The District Court properly dismissed breach of the implied covenant of good faith and fair dealing and bad faith because there was no coverage or breach of contract.

3. Scout is Not Entitled to Attorney Fees, Even if it Prevails on Appeal.

Scout requests an award of attorney fees on appeal under Idaho Code § 41-1839(1) if it is the prevailing party.⁸ Idaho Code § 41-1839(1) allows for attorney fees when an insurer fails to pay an insured within a specified period of time “the amount that person is justly due under such policy.” Idaho Code § 41-1839(1). Scout is not entitled to attorney fees on appeal under this section because there has been no determination of an “amount justly due” as required by this statute. *See Allstate Ins. Co. v. Mocaby*, 133 Idaho 593, 601, 990 P.2d 1204, 1212 (1999).⁹

See Simper v. Farm Bureau Mutual Ins. Co. of Idaho, 132 Idaho 471, 474, 974 P.2d 1100, 1103 (1999). Consequently, there was no breach of the duty of good faith and Truck did not act in bad faith for raising the fact that Scout was not a “named insured” as one of several grounds for denying the claims (including that the claims were excluded by the Prior Publication exclusion).

⁸ Scout also requests that this Court award attorney fees and costs incurred in the proceedings before the District Court. There were no attorney fees requested by either party in the District Court. There was no determination by the District Court relating to attorney fees. The issue of Scout’s entitlement to attorney fees incurred below is not a proper issue on appeal because the District Court did not make a determination that Scout was the prevailing party (it was not) or determine an amount of attorney fees or costs to be awarded.

⁹ Idaho Code § 41-1839(4) also allows an award of attorney fees when a case is brought, pursued or defended frivolously, unreasonably or without foundation. Scout has not requested attorney fees on appeal under this section. Nor could it, since, as the prevailing party below, Truck is merely defending on appeal its win in the District Court.

IV. CONCLUSION

This appeal should be denied. The District Court's grant of summary judgment dismissing the complaint should be affirmed. Scout's request for attorney fees on appeal should be denied.

DATED this 7 day of March, 2018.

ELAM & BURKE, P.A.

By: 

Jeffrey A. Thomson, Of the firm
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7 day of March, 2018, I caused a true and correct copy of the foregoing document to be served as follows:

Chynna C. Tipton
Tipton Law, PLLC
910 W. Main Street, Suite 242
Boise, ID 83712

U.S. Mail
 Hand Delivery
 Federal Express
 Via Email to:

tipton@tiptonlawyers.com


Jeffrey A. Thomson

APPENDICES TO RESPONDENT'S BRIEF

- Appendix A: OBC Complaint, without exhibits (except for Facebook October Post, filed in *Oregon Brewing Company v. Scout, LLC*, Case No. 14-cv-0043*9-CWD, U.S. Dist. Ct., Dist. of Idaho (R., pp. 48-50, 131).
- Appendix B: Relevant excerpts from Businessowner's insurance policy (R., pp. 162, 229, 231, 234, 239) (emphasis added).
- Appendix C: Memorandum Decision and Order on Cross Motions for Summary Judgment, filed July 13, 2017 (R., pp. 595-613).

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Attorneys for Plaintiff
Oregon Brewing Company

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

OREGON BREWING COMPANY, an
Oregon corporation,

Plaintiff,

vs.

SCOUT LLC, dba GONE ROGUE PUB, an
Idaho limited liability company, JASON
GRACIDA, an individual, PHO
XAYAMAHAKHAM, an individual, and
TOM BUTLER, an individual,

Defendants.

Civil Action No.:

**COMPLAINT FOR TRADEMARK
COUNTERFEITING, TRADEMARK
INFRINGEMENT, FALSE
DESIGNATION OF ORIGIN, UNFAIR
COMPETITION AND TRADEMARK
CYBERSQUATTING**

JURY TRIAL DEMANDED

Plaintiff Oregon Brewing Company (“OBC”) for this Complaint against Defendants Scout LLC, dba Gone Rogue Pub, Jason Gracida, Pho Xayamahakham, and Tom Butler (hereinafter “Defendants”), alleges as follows:

STATEMENT OF THE CASE

1. This is an action for trademark counterfeiting, trademark infringement, false designation of origin, and unfair competition. OBC owns the well-known mark ROGUE for restaurants, pubs and alcohol beverages. Since 1989, OBC has continuously used the mark ROGUE in connection with the advertising, promotion and sale of alcohol beverages, as well as in the name of a ROGUE-branded line of restaurants and brew pubs. OBC owns incontestable federal trademark registrations for ROGUE for alcohol beverages, restaurants, and glassware, and has been manufacturing and selling apparel since 1989. Despite OBC's registrations, Defendants commenced use of the mark ROGUE in the name of its restaurant and bar.

THE PARTIES

2. OBC is an Oregon corporation.

3. Defendant Scout LLC, dba Gone Rogue Pub, is an Idaho limited liability company with its registered agent located at 12547 West Camas Drive, Boise, Idaho 83709 and doing business as Gone Rogue Pub at 409 South 8th Street, Boise, Idaho 83702.

4. Defendant Jason Gracida is an individual who, on information and belief, is a co-owner of Scout LLC, dba Gone Rogue Pub and conducts business in the District of Idaho.

5. Defendant Pho Xayamahakham is an individual who, on information and belief, is a co-owner of Scout LLC, dba Gone Rogue Pub and conducts business in the District of Idaho.

6. Defendant Tom Butler is an individual who, on information and belief, is a co-owner of Scout LLC, dba Gone Rogue Pub and conducts business in the District of Idaho.

JURISDICTION AND VENUE

7. OBC's claims arise under the trademark laws of the United States (Trademark Act of 1946, 15 U.S.C. § 1051 *et seq.*), and the laws of the State of Idaho. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1332, 1338, 1367 and 15 U.S.C. § 1121. This Court has supplemental jurisdiction over the claims arising under the laws of the State of Idaho pursuant to 28

U.S.C. § 1367(a), because those claims are so related to the federal claims that they form part of the same case or controversy and derive from a common nucleus of operative facts.

8. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to the claims herein transpired in this judicial district.

FACTUAL BACKGROUND

9. OBC is among the oldest and most well-established micro-brewers in the United States. Since 1989, OBC has continuously used the mark ROGUE in commerce in the name of a ROGUE-branded line of restaurants and brew pubs, as well as for alcohol beverages. OBC owns the following federal trademark registrations for ROGUE:

TRADEMARK	REG. NO.	REG. DATE	GOODS / SERVICES
ROGUE	2669318	12/31/2002	Beer and ale
ROGUE	3041464	01/10/2006	Restaurant, pub and catering services
ROGUE	3126616	08/08/2006	Beverage glassware
ROGUE	3773029	04/06/2010	Beer
ROGUE	3365653	01/08/2008	Clothing

10. OBC’s federally registered ROGUE marks were applied for and issued prior to Defendants’ conduct giving rise to this action. OBC’s Registration Nos. 2669318; 3041464; 3126616, and 3773029 for ROGUE have achieved “incontestable” status under the Federal Trademark Act, which means that they are “conclusive evidence” of OBC’s “ownership” of these marks, of the registration of those marks, the “validity” of the marks, and of OBC’s “exclusive right” to use the ROGUE marks in commerce for the goods and services specified in the federal registrations. See 15 U.S.C. §§ 1065, 1115(b).

11. OBC's ROGUE mark is inherently distinctive because it does not describe an attribute of OBC's goods or services.

12. OBC has invested considerable resources to develop and promote the mark ROGUE. For over 15 years, OBC has advertised its ROGUE line of restaurants and alcohol beverages over the internet at rogueales.com and, starting in 1999, at rogue.com. On account of OBC's investment, and its long and substantial use of the mark ROGUE, that mark has come to be associated exclusively with goods and services emanating exclusively from OBC. OBC owns common law marks for ROGUE for alcohol beverages, restaurant and pub services, beverage glassware, and clothing.

13. OBC operates 11 restaurants and brew pubs which feature the mark ROGUE. OBC has been advertising and selling its well-known ROGUE lagers, ales, porters, and stouts in Idaho, including in the Boise, Idaho Metropolitan Area, for over 15 years. OBC has advertised and sold ROGUE spirits in the Boise, Idaho Metropolitan Area since 2008. OBC's ROGUE mark for its lagers, ales, porters, stouts and spirits, restaurant and pub services is well-known in the Boise, Idaho Metropolitan Area and was so long before any of the conduct that forms the basis for this Complaint. OBC's ROGUE-branded beer and spirits are frequently served in restaurants and bars across the country and in the Boise, Idaho Metropolitan Area; ROGUE-branded beer is, or has been served, by defendants at their restaurant and bar ("Gone Rogue Pub").

14. In October 2012, long after OBC's first use and registration of the mark ROGUE, Defendants commenced use of the mark ROGUE as the name of their restaurant and bar ("Gone Rogue Pub"). In addition, Defendants created a Facebook Page www.facebook.com/GoneRoguePub and began marketing and advertising the ROGUE restaurant and bar at www.facebook.com/GoneRoguePub, including using photographs of people partaking in alcoholic beverages, using beverage glassware and coasters containing the mark ROGUE, wearing clothing containing the mark ROGUE, depicting beer taps for various beers on tap at Gone Rogue

Pub, including at least one of ROGUE's beers, issued press releases specifically mentioning that the bar and restaurant serves ROGUE beers, and displayed ROGUE promotional material inside their restaurant and pub. A true and correct copy of pages from Defendants' Facebook page is attached as Exhibit A.

15. On information and belief, Defendants and Defendants' actual and potential customers refer to Defendants' restaurant and bar as "Rogue", including on the menu. Defendants offer micro-brews at their restaurant and bar, including on information and belief, OBC's ROGUE beer.

16. In January 2013, OBC owner Brett Joyce called one of Defendants' owners Mr. Jason Gracida and explained that their conduct infringed OBC's federally registered trademarks. Mr. Joyce attempted to discuss a reasonable resolution with Mr. Gracida that protected OBC's trademark rights and avoided litigation. Initially, Mr. Gracida indicated a willingness to work with OBC, but needed to discuss the matter with the co-owners and his attorney. Mr. Joyce followed up with Mr. Gracida by email in February 2013, asking that Mr. Gracida call him to discuss the issue. Mr. Joyce again indicated a willingness to be flexible with defendants and gave Mr. Gracida his personal cell phone number. Mr. Gracida never responded to Mr. Joyce. Instead, Mr. Joyce received an email from Mr. Gracida's attorney stating that all further correspondence should be directed to him. A subsequent telephone message from OBC's general counsel to defendants' attorney was ignored.

17. Mr. Joyce again reached out to Mr. Gracida in August 2014, again expressing a desire to resolve this issue without resorting to litigation and was told to discuss the matter with co-owner Pho Xayamahakham. Mr. Joyce emailed Mr. Xayamahakham in September 2014 in the hope that Mr. Xayamahakham would discuss a reasonable resolution of this matter but received no response. For over a year and a half OBC has attempted to reasonably resolve this issue with defendants in a manner that avoided litigation but protected its valuable trademark rights. Despite OBC's efforts, none of defendants' owners or representatives has acknowledged OBC's trademark rights,

defendants continue to use the ROGUE mark, and have left OBC with no option but to protect its valuable trademark rights through litigation.

18. Defendants' conduct is likely to cause confusion, mistake and/or deception as to the affiliation, connection, or association of Defendants with OBC and as to whether OBC approves, sponsors or endorses Defendants' services.

19. Defendants conduct constitutes intentional and deliberate trademark counterfeiting and infringement. Defendants used OBC's ROGUE mark with the intention of trading on the goodwill and reputation of OBC's mark.

20. Unless enjoined, Defendants' continued unlawful conduct will irreparably injure OBC. OBC has no adequate remedy at law.

**COUNT I
TRADEMARK COUNTERFEITING UNDER THE LANHAM ACT
(15 U.S.C. § 1114)**

21. OBC incorporates by reference and re-alleges, as if fully set forth herein, paragraphs 1 through 20 of this Complaint.

22. OBC owns incontestable federal trademark registrations for ROGUE for restaurant and pub services (Reg. No. 3041464), beer and ale (Reg. No. 2669318), beer (Reg. No. 3773029), and beverage glassware (Reg. No. 3126616).

23. Defendants' unauthorized use of ROGUE is likely to cause confusion, mistake, and deception as to the affiliation, connection, association, origin, sponsorship or approval of Defendants' services and business activities.

24. Defendants' unauthorized use of ROGUE constitutes trademark counterfeiting because Defendants knowingly used the identical or substantially indistinguishable marks ROGUE, GONE ROGUE, and GONE ROGUE PUB for the services contained in Plaintiff's federal trademark registration for ROGUE, Reg. No. 3041464, i.e., restaurant services, Reg. No. 2669318 i.e., beer and

ales, Reg. No. 3773029 i.e., beer, Reg. No. 3126616 i.e., beverage glassware, and clothing, Reg. No. 3365653.

25. As a direct result of Defendants' intentionally wrongful conduct, Defendants are causing OBC irreparable harm and have been unjustly enriched by their unlawful conduct.

**COUNT II
TRADEMARK INFRINGEMENT, UNFAIR COMPETITION AND FALSE
DESIGNATION OF ORIGIN UNDER THE LANHAM ACT
(15 U.S.C. § 1114)**

26. OBC incorporates by reference and re-alleges, as if fully set forth herein, paragraphs 1 through 25 of this Complaint.

27. OBC owns federal trademark registrations for ROGUE for restaurant and pub services, alcohol beverages, beverage glassware, and clothing.

28. Defendants' unauthorized use of ROGUE, GONE ROGUE, GONE ROGUE PUB, and www.facebook.com/GoneRoguePub constitutes trademark infringement, unfair competition and false designation of origin because such conduct is likely to cause confusion, mistake, and deception as to the affiliation, connection, association, origin, sponsorship or approval of Defendants' services and business activities.

29. As a direct result of Defendants' intentionally wrongful conduct, Defendants are causing Plaintiff irreparable harm and have been unjustly enriched by their unlawful conduct.

**COUNT III
TRADEMARK INFRINGEMENT, UNFAIR COMPETITION, AND
FALSE DESIGNATION OF ORIGIN UNDER THE LANHAM ACT
(15 U.S.C. § 1125)**

30. OBC incorporates by reference and re-alleges, as if fully set forth herein, paragraphs 1 through 29 of this Complaint.

31. OBC owns common law marks for ROGUE for alcohol beverages, restaurant, pub services, beverage glassware, and clothing.

32. Defendants' unauthorized use of ROGUE, GONE ROGUE, GONE ROGUE PUB, and similar marks, as well as www.facebook.com/GoneRoguePub, constitutes trademark

infringement, unfair competition and false designation of origin because such conduct is likely to cause confusion, mistake, and deception as to the affiliation, connection, association, origin, sponsorship or approval of Defendants' services and business activities.

33. As a direct result of Defendants' wrongful conduct, Defendants are causing OBC irreparable harm and have been unjustly enriched by their unlawful conduct.

**COUNT IV
CYBER-SQUATTING UNDER THE LANHAM ACT (15 U.S.C. § 1125)**

34. OBC incorporates by reference and re-alleges, as if fully set forth herein, paragraphs 1 through 33 of this Complaint.

35. Defendants' creation and use of **www.facebook.com/GoneRoguePub** constitutes cyber-squatting, because Defendants created and used **www.facebook.com/GoneRoguePub** in an attempt to profit from OBC's ROGUE marks.

36. Defendants Facebook page **www.facebook.com/GoneRoguePub** is confusingly similar to OBC's mark ROGUE and OBC's mark ROGUE was distinctive at the time Defendant created the Facebook page **www.facebook.com/GoneRoguePub**.

37. As a direct result of Defendants' wrongful conduct, Defendants are causing OBC irreparable harm and have been unjustly enriched by their unlawful conduct.

**COUNT V
UNFAIR BUSINESS PRACTICES UNDER IDAHO LAW
(I.C. §§ 48-601 *et seq.*)**

38. OBC incorporates by reference and re-alleges, as if fully set forth herein, paragraphs 1 through 37 of this Complaint.

39. Defendants' unauthorized use of ROGUE, GONE ROGUE, GONE ROGUE PUB and similar marks, as well as the creation and use of **www.facebook.com/GoneRoguePub**, constitutes passing off, unfair competition, and false designation of origin in violation of Idaho law because such conduct is likely to cause confusion, mistake, and deception as to the affiliation,

connection, association, origin, sponsorship or approval of Defendants' services and business activities.

40. As a direct result of Defendants' wrongful conduct, Defendants are causing OBC irreparable harm and have been unjustly enriched by their unlawful conduct.

**COUNT VI
COMMON LAW TRADEMARK INFRINGEMENT
(I.C. §§ 48-500 *et seq.*)**

41. OBC incorporates by reference and re-alleges, as if fully set forth herein, paragraphs 1 through 40 of this Complaint.

42. Defendants' unauthorized use of ROGUE, GONE ROGUE, GONE ROGUE PUB, and similar marks, as well as the creation and use of **www.facebook.com/GoneRoguePub**, constitutes trademark infringement in violation of Idaho law because such conduct is likely to cause confusion or mistake or to deceive as to the source of origin of Defendants' services and business activities.

43. As a direct result of Defendants' wrongful conduct, Defendants are causing OBC irreparable harm and have been unjustly enriched by their unlawful conduct.

PRAYER FOR RELIEF

WHEREFORE, OBC prays that this Court enter judgment against Defendants and:

1. That this Court grants a permanent injunction:
 - a. Enjoining Defendants, their employees, owners, agents, officers, directors, attorneys, representatives, affiliates, subsidiaries, successors and assigns, and all those in active concert or having knowledge of the causes of action, from using Plaintiff's ROGUE marks, alone or in combination with any other word(s), term(s), designation(s), mark(s), and/or design(s), as well as all similar marks and domain names, including, without limitation, ROGUE, GONE ROGUE, and GONE ROGUE PUB, as well as the Facebook page **www.facebook.com/GoneRoguePub**;

- b. Requiring Defendants to destroy all literature, signs, billboards, labels, prints, packages, wrappers, containers, advertising materials, stationery, menus, beverage glassware and other items in their possession, custody or control that use ROGUE, GONE ROGUE, and GONE ROGUE PUB, as well as the Facebook page **www.facebook.com/GoneRoguePub**;
 - c. Requiring Defendants to discontinue all use of the Facebook page **www.facebook.com/GoneRoguePub**; and
 - d. Requiring Defendants to file with the Court and serve on Plaintiff, within thirty (30) days after entry of an injunction, a report in writing under oath setting forth in detail the manner in which Defendants have complied with the Court's injunction.
2. That this Court grants relief in the form of reasonable costs and attorney fees to OBC pursuant to 15 U.S.C. § 1117, 18 U.S.C. § 1964 (c), and the laws of the State of Idaho including, but not limited to, I.C. §§ 12-120, 12-121, 12-123, and 48-514.
 3. That this Court award treble damages to OBC pursuant to 15 U.S.C. § 1117 and I.C. § 48-514.
 4. That this Court grant OBC such other and further injunctive relief as it should deem just and proper.

DATED THIS 14th day of October, 2014.

PARSONS BEHLE & LATIMER

By /s/ Dana M. Herberholz

Dana M. Herberholz

Maria O. Hart

Attorneys for Plaintiff Oregon Brewing Company

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all issues so triable pursuant to Federal Rule of Civil Procedure 38.

DATED THIS 14th day of October, 2014.

PARSONS BEHLE & LATIMER

By /s/ Dana M. Herberholz

Dana M. Herberholz

Maria O. Hart

Attorneys for Plaintiff Oregon Brewing Company

Exhibit A

facebook Sign Up

Email or Phone

Keep me logged in

Gone Rogue Pub's Photos

Back to Album

Previous Next



Gone Rogue Pub

Here is our new logo! Signs are going up today and tomorrow! Hope everyone likes it! Let us know what you guys think!

Christine N Barrera, Brian Humphreys, Kim Moen Butler and 6 others like this.

3 shares



Atomic Treasures Love it!

October 11, 2012 at 12:58pm · 1



Chris Harvey Sniper scope and caveman rock. Priceless.

October 11, 2012 at 1:13pm · 1



Terry Abruzzese Now all you need is your very own "Gone Rogue" house brew...

October 11, 2012 at 9:11pm · 1

Album: Gone Rogue Pub's Photos in Timeline Photos

Shared with: Public

Open Photo Viewer

Download

Report

Mobile Find Friends Badges People Pages Places Apps Games Music About Create Ad Create Page Developers Careers Privacy Cookies Terms Help

Facebook © 2013 · English (US)

Common Policy Declarations

TRUCK INSURANCE EXCHANGE
(A RECIPROCAL COMPANY)

Members Of The Farmers Insurance Group Of Companies
Home Office: 4680 Wilshire Blvd., Los Angeles, California 90010

RESTAURANTS - PREMIER

1.

Named · XAYAMAHAKHAM, PHO
Insured · SEE E0002
Mailing · 409 S 8TH STREET #103
Address ·
· BOISE ID 83702

Acct. No.	Prod. Count
75-35-342	60541-78-07
Agent No.	Policy Number

The named insured is an individual unless otherwise stated:

Partnership Corporation Joint Venture Organization (Any other)

Type of Business RESTAURANT

2. Policy Period from 11/07/12 (not prior to time applied for) to 11/07/13 12:01 a.m. Standard Time

If this policy replaces other coverage that ends at noon standard time of the same day this policy begins, this policy will not take effect until the other coverage ends. **This policy will continue for successive policy periods as follows:** If we elect to continue this insurance, we will renew this policy if you pay the required renewal premium for each successive policy period subject to our premiums, rules and forms then in effect.

This Policy Consists Of The Following Coverage Parts Listed Below And For Which A Premium Is Indicated. This Premium May Be Subject To Change.

Premium After Applicable Discount and Modification

BUSINESSOWNERS POLICY	\$1,933.00
EMPLOYMENT PRACTICES INSURANCE COVERAGE	INCLUDED
CERTIFIED ACTS OF TERRORISM - SEE DISCLOSURE ENDORSEMENT	INCLUDED
Total *see Additional Fee Information below	See Invoice Attached



BUSINESSOWNERS LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the Company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section C - Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section F - Liability And Medical Expenses Definitions.

A. Coverages

1. Business Liability

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage", "personal injury" or "advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury", "property damage", "personal injury", or "advertising injury" to which this insurance does not apply. We may at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section D - Liability And Medical Expenses Limits Of Insurance; and
- (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements or medical expenses.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Coverage Extension - Supplementary Payments.

b. This insurance applies:

- (1) To "bodily injury" and "property damage" only if:
 - (a) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
 - (b) The "bodily injury" or "property damage" occurs during the policy period.

(2) To:

- (a) "Personal injury" caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you;
- (b) "Advertising injury" caused by an offense committed in the course of advertising your goods, products or services;

but only if the offense was committed in the "coverage territory" during the policy period.

- c. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".
- d. Coverage Extension - Supplementary Payments

In addition to the Limit of Insurance we will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

- (1) All expenses we incur.
- (2) Up to \$250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which Business Liability Coverage for "bodily injury" applies. We do not have to furnish these bonds.
- (3) The cost of bonds to release attachments, but only for bond amounts within our Limit of Insurance. We do not have to furnish these bonds.

2. Medical Expenses

a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

- (1) On premises you own or rent;
- (2) On ways next to premises you own or rent; or
- (3) Because of your operations;

provided that:

- (a) The accident takes place in the "coverage territory" and during the policy period;
 - (b) The expenses are incurred and reported to us within one year of the date of the accident; and
 - (c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.
- b. We will make these payments regardless of fault. These payments will not exceed the Limit of Insurance. We will pay reasonable expenses for:
- (1) First aid administered at the time of an accident;
 - (2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and
 - (3) Necessary ambulance, hospital, professional nursing and funeral services.

B. Exclusions

1. Applicable To Business Liability Coverage

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
 - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
 - (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability

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

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

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

d. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

- (8) Body piercing services; and
- (9) Services in the practice of pharmacy; but this exclusion does not apply to an insured whose operations include those of a retail druggist or drugstore.

k. Damage To Property

"Property damage" to:

- (1) Property you own, rent or occupy;
- (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody or control of the insured;
- (5) That particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the "property damage" arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products - completed operations hazard".

l. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

m. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products - completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

n. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

o. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property";

if such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

p. Personal Or Advertising Injury

"Personal injury" or "advertising injury":

- (1) Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;
- (2) Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period;

b. If a claim is made or "suit" is brought against any insured, you must:

- (1) Immediately record the specifics of the claim or "suit" and the date received; and
- (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
- (2) Authorize us to obtain records and other information;
- (3) Cooperate with us in the investigation, or settlement of the claim or defense against the "suit"; and
- (4) Assist us, upon our request, in the enforcement of any right against any person or organization that may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Financial Responsibility Laws

- a. When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law, the insurance provided by the policy for "bodily injury" liability and "property damage" liability will comply with the provisions of the law to the extent of the coverage and limits of insurance required by that law.
- b. With respect to "mobile equipment" to which this insurance applies, we will provide any liability, uninsured motorists, underinsured motorists, no-fault or other coverage required by any motor vehicle law. We will provide the required limits for those coverages.

4. Legal Action Against Us

No person or organization has a right under this policy:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or
- b. To sue us on this policy unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial; but we will not be liable for damages that are not payable under the terms of this policy or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

5. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this policy to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or "suit" is brought.

F. Liability And Medical Expenses Definitions

1. "Advertising injury" means injury arising out of one or more of the following offenses:
 - a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
 - b. Oral or written publication of material that violates a person's right of privacy;
 - c. Misappropriation of advertising ideas or style of doing business; or
 - d. Infringement of copyright, title or slogan.

JUL 13 2017

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
CHRISTOPHER D. RICH, Clerk
By EMILY CHILD
DEPUTY

SCOUT, LLC, an Idaho limited liability company, doing business as Double Tap Pub,

Plaintiff,

vs.

FARMERS GROUP, INC., a California corporation; and TRUCK INSURANCE EXCHANGE, an inter-insurance exchange organized under the laws of the state of California,

Defendants.

Case No. CV01-16-17560

MEMORANDUM DECISION AND ORDER
ON CROSS MOTIONS FOR SUMMARY
JUDGMENT

I. INTRODUCTION

This is a dispute over whether Defendant, Truck Insurance Exchange (“Truck”) breached its duty to defend its alleged insured, Scout LLC d/b/a, Gone Rogue Pub, (“Scout”) in a trademark infringement action brought over Scout’s use of trademark “ROGUE” in the operation and advertisement of its restaurant/pub, Gone Rogue Pub.. In this action, Scout brought claims against Truck for breach of contract, breach of the implied covenant of good faith and fair dealing and insurance bad faith. Both parties moved for summary judgment on the claims.

Oral argument was held on the motions on May 30, 2017, after which the Court took the matter under advisement.

II. STANDARD

A motion for summary judgment must be granted if the movant shows, based on cited materials in the record, that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. IRCP 56(a), (c). The burden of proving the absence of a material fact rests at all times upon the moving party. *McCoy v. Lyons*, 120 Idaho 765, 769-70, 820 P.2d 360, 364-65 (1991). If the moving party challenges an element of the nonmoving party’s case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to come forward with sufficient evidence to create a genuine issue of fact. *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 719, 918 P.2d 583, 588 (1996). To this

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end, the nonmoving party's case must not rest on mere speculation because a mere scintilla of evidence is not enough to create a genuine issue of fact. *Id.* A party against whom a motion for summary judgment is sought "may not merely rest on allegations contained in his pleadings," but must establish the existence of a genuine issue of fact by citing to portions of the record or through affidavits setting forth facts that are admissible as evidence. *Id.*; IRCP 56(c).

The standards for summary judgment further require the district court to liberally construe the facts in favor of the non-moving party and to draw all reasonable inferences from the record in favor of the non-moving party. *McCoy*, 120 Idaho at 769, 820 P.2d at 364. This means that all doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom, and if reasonable people might reach different conclusions. *Id.*

III. FACTS

Scout was registered as an Idaho limited liability company on or around November 30, 2011. Decl. Xayamahakham, ¶ 2. On or around October 1, 2012, Scout purchased the assets of 8th Street Bistro, LLC, which included a restaurant and bar operating as "Casa Del Sol" located in downtown Boise, Idaho ("Premises"). *Id.* at ¶¶ 5-10. Shortly thereafter, the members of Scout decided to rebrand the restaurant and bar and operate under the name "Gone Rogue Pub." *Id.* at ¶¶ 11-13. On or around October 11, 2012, Scout posted to Facebook a picture of a "Gone Rogue Pub" logo that Scout was thinking about using. *Id.* at ¶¶ 28-29, Exh. 7 ("October Post"). The text accompanying the logo post stated, "Here is our new logo! Signs are going up today and tomorrow! Hope everyone likes it! Let us know what you guys think!" *Id.* According to Pho, Scout posted the logo because it was "thinking about using" it and wanted to get feedback from followers. Decl. Xayamahakham, ¶ 28.

Thereafter, on or around October 16, 2012, Scout registered "Gone Rogue Pub" as an assumed business name for Scout with the Idaho Secretary of State. *Id.* at ¶¶ 13-14, Exh. 4. Scout did not post any other pictures of the logo or otherwise advertise the name "Gone Rogue Pub" on its Facebook page or through any other media until November 7, 2012. *Id.* at ¶¶ 28-32.

Prior to opening for business on or about October 23, 2012, Pho Xayamahakham ("Pho"), on behalf of Scout, contacted Theresa Vincent-Leiterman, an agent for Truck Insurance Exchange ("Truck"), to request a commercial business insurance policy for Scout. *Id.* at ¶¶ 16-18. Pho informed Ms. Vincent-Leiterman that Scout would be operating a restaurant and pub

under the assumed business name “Gone Rogue Pub”, filled out an information sheet for Scout. *Id.* at ¶¶ 16-22. Between October 23, 2012 and November 7, 2012, at the request of Ms. Vincent-Leiterman and assumedly in order to obtain the Policy, Pho provided Ms. Vincent-Leiterman, multiple documents including copies of Scout’s Certificate of Organization, the Gone Rogue Certificate of Assumed Business Name, the Lease Agreement between Foster Family Limited Partnership, Melinda L. Foster, General Partner and Scout LLC (“Scout Lease”), and the occupancy permits and licenses issued to Scout, dba as Gone Rogue Pub, by the City of Boise and Ada County. *Id.* at ¶¶ 16-18, Exh.4-6. After providing the requisite business records and completing the required inspections of the Premises, Truck issued a business liability insurance policy (“Policy”), with an effective coverage date beginning November 7, 2012.¹ *Aff. Thomson*, Exh. B (Policy). Scout paid all premiums due under the Policy. *Decl. Xayamahakham*, ¶ 22.

The first section of the Policy identifies Pho, his wife, Sakpraseuth Outhinh, and “Gone Rogue” as the named insureds, lists the Premises as the insureds’ address, identifies the type of business insured as a “Restaurant,” and describes the Policy Coverage as a “Businessowners Policy” and “Employment Practices Insurance Coverage.” *Policy*, pp. 23, 27. While Pho did not personally complete the insurance application or draft the language of the Policy, he was assured at all time by Ms. Vincent-Leiterman that the Policy would and did provide the requested coverage for Scout as it did business as Gone Rogue Pub. *Decl. Xayamahakham*, ¶¶ 16-27.

Scout obtained the necessary alcohol licenses and permits from the Boise City and Ada County on or around November 15, 2012. *Id.* at ¶¶ 33-34, Exh. 9. Scout hung its outdoor signage on November 19, 2012, obtained merchandise and glassware bearing the logo “Gone Rogue Pub” on November 20, 2012, and opened for business on or about November 21, 2012. *Id.* at ¶¶ 35-40 and Exhs. 10, 11.

Two years later, on October 14, 2014, Scout, dba Gone Rogue Pub, was sued by Oregon Brewing Company (“OBC”). *Aff. Thomas*, Exh. A, p. 3 (OBC Complaint). The OBC Complaint alleged that OBC had continuously used the mark “ROGUE” in commerce in the name of a ROGUE-branded line of restaurants and brew pubs, as well as for alcoholic beverages, and that OBC owed five federal trademark registrations for “Beer and Ale”; “Restaurant, pub and catering services”; “Beverage glassware”; “Beer”; and “Clothing.” OBC alleged that it had been

¹ The Policy was applied for on October 23, 2012 but did not become effective until November 7, 2012. *Thomson Aff.*, Ex. A. The Policy was automatically renewed on November 7, 2013.

advertising and selling its well-known ROGUE lagers, ales, porters and stouts in Idaho for over fifteen years. OBC asserted that “[i]n October of 2012, long after OBC’s first use and registration of the mark ROGUE, Defendants commenced use of the mark ROGUE as the name of their restaurant and bar (‘Gone Rogue Pub’).” *Id.* at ¶ 14. Attached as exhibits to the OBC Complaint were various examples of Scout’s use of the ROGUE mark, including a screen shot of the October Post. *Id.* at Exh A, p. 73. OBC asserted various claims against Scout for its violation of OBC’s five different trademark registrations² and sought injunctive relief, attorney fees and costs, and treble damages pursuant to 15 U.S.C. § 1117 and I.C. § 48-514. *Id.*, p. 10.

The Policy provides coverage for “those sums that the insured becomes legally obligated to pay as damages because of ... ‘advertising injury’ ... caused by an offense committed in the course of advertising your goods, product or services; but only if the offense was committed in the ‘coverage territory’ during the policy period.” Policy, § A(1)b(2)(b). An “advertising injury” is defined as, *inter alia*, “[m]isappropriation of advertising ideas or style of doing business” or “infringement of copyright, title or slogan.” *Id.* at § F(1)(c), (d). Excluded from coverage under the Policy is “advertising injury” “arising out of oral or written publication of material whose first publication took place before the beginning of the policy period[.]” (“Prior Publication exclusion”) *Id.* at § B(1)(p)(2).

On December 3, 2014, Scout’s counsel sent a letter to Truck informing it of the OBC lawsuit and requesting coordination for representation of Scout and Pho. Decl. Tipton, Exh. A. On December 23, 2014, Truck responded, indicating there was a “possibility” the claim was not covered and requested a conference with Plaintiff’s counsel about its investigation. *Id.* at Exh. B. A conference was held between Plaintiff’s counsel and Truck’s claims examiner and, on January 9, 2015, Plaintiff’s counsel sent a follow-up letter to Truck which explained that a factual allegation in the OBC Complaint—namely, that the violation began in October of 2012—was incorrect because Gone Rogue Pub did not open for business until commence operations until after the Policy took effect. *Id.* at Exh. C. Enclosed with the letter were documents evidencing that Gone Rogue Pub did not receive its alcohol permits until November 14, 2012. *Id.*

² Specifically, the OBC Complaint alleged Trademark Counterfeiting Under The Lanham Act (15 U.S.C. § 1114); Trademark Infringement, Unfair Competition and False Designation of Origin Under The Lanham Act (15 U.S.C. § 1114); Trademark Infringement, Unfair Competition and False Designation of Origin Under The Lanham Act (15 U.S.C. § 1125); Cyber-squatting Under The Lanham Act (15 U.S.C. § 1125); Unfair Business Practices Under Idaho Law (I.C. § 48-601 et seq.); and Common Law Trademark Infringement (I.C. § 48-500 et seq.).

On January 16, 2015, Truck sent a letter denying coverage and a defense for the OBC Lawsuit based on the fact that: (1) Scout was not a named insured under the Policy; (2) the “advertising injury” arose out of publications that were first published in October of 2012 and, therefore, was excluded by the Prior Publication exclusion, and; (3) the Policy did not cover the damages sought in the OBC Complaint. *Id.* at Exh. D.

On March 26, 2015, Scout entered into a Settlement Agreement and Mutual Release (“Settlement”) with OBC to settle the OBC lawsuit. *Id.*, Ex. J. As part of the Settlement, Scout agreed to abandon its use of the word “Rogue” and in August of 2015 changed its business name from “Gone Rogue Pub” to “Double Tap Pub.” *Id.* On September 20, 2016, Scout filed the instant action.

IV. ANALYSIS

Truck cites three separate bases for judgment in its favor: 1) only Gone Rogue Pub—not Scout—was a named insured and, therefore, Truck had no duty to defend the infringement suit against Scout; 2) coverage for the “advertising injury” was excluded under the Prior Publication exclusion, and; 3) the Policy does not provide coverage for the damages sought by OBC.

Scout, in turn, argues that: 1) because Gone Rogue Pub is a named insured under the policy and Scout is the legal entity doing business as Gone Rogue Pub, Scout is necessarily insured as well; 2) the Prior Publication exclusion does not apply, and; 3) whether or not damages in the lawsuit would ultimately be Truck’s responsibility does not affect its duty to defend.

A. Scout is a Named Insured.

The determination of whether Scout is insured under the Policy requires ascertaining the distinction, if any, between a business and its trade name. At the time the Policy was issued, assumed business names were governed by The Assumed Business Names Act of 1997, Idaho Code §§ 53–501 et. seq.³ Pursuant to I.C. 53-503(1)(a), an “assumed business name” was defined as “[a]ny name other than the true name of any formally organized or registered entity, under which name the entity holds itself out for the transaction of business in the state of Idaho[.]” Importantly, because an assumed business name is nothing more than another name for a recognized legal entity, the filing of a certificate of assumed business name does not create a

³ Idaho Code §§ 53-501 was replaced in 2015 with the comparable provisions of I.C. § 30-21-801, et. seq.

separate legal entity. *Salazar v. Tilley*, 110 Idaho 584, 716 P.2d 1356, 1357 n. 1 (Ct.App.1986); *O'Banion v. Select Portfolio Servs., Inc.*, 2011 WL 5572625, at *9 (D. Idaho Nov. 16, 2011).

Idaho law, like the majority of states, recognizes that, “in the absence of statutory prohibition, a corporation may conduct business and enter into a valid contract under an assumed name.” *W.L. Scott, Inc. v. Madras Aerotech, Inc.*, 103 Idaho 736, 739, 653 P.2d 791, 794 (1982). This includes insurance contracts. 3 Couch on Ins. § 40:4 (3rd ed., updated Dec. 2016)(“An individual may contract for insurance using a trade name.”). Because a trade name is not a legal entity, many courts have determined that, in such cases, the legal entity behind the trade name is the insured under policies listing the insured by a trade name. *Gen. Cas. Co. of Wis. v. Outdoor Concepts*, 667 N.W.2d 441, 444 (Minn. Ct. App. 2003)(collecting cases).

For example, in *O'Hanlon v. Hartford Accident & Indem. Co.*, the plaintiff sought uninsured motorist coverage under his policy after his son suffered serious injuries. The policy agreed to cover “the Named Insured... and, while residents of the same household, the...relatives of [the Named Insured].” 639 F.2d 1019, 1026 (3d Cir.1981). The policy designated the named insured as “Coe Management Company,” the trade name under which plaintiff operated his business. *Id.* at 1021. In conducting its analysis, the Third Circuit stated that “an insured's trade name and given name should be equated” and that “where an insured purchases a policy in a trade name, the policy will be viewed as if issued in his given name.” *Id.* at 1025.⁴

Here, the Declarations Page lists the Named Insured as Pho—an individual—and identifies the type of business being insured as a “restaurant.” Through an endorsement, Pho’s wife and “Gone Rogue” were added as Named Insureds. While “Gone Rogue” is not specifically identified as an assumed business name, it is not identified as an independent legal entity either. Rather, the evidence establishes that the legal entity behind the “Gone Rogue” trade name has

⁴ See also, *Simmons v. Ins. Co. of N. Am.*, 17 P.3d 56, 62 (Alaska 2001) (when a business owner acquires insurance in his trade name, coverage extends to the owner as well as the business); *Chmielewski v. Aetna Cas. and Sur. Co.*, 591 A.2d 101, 113 (Conn. 1991) (stating that “one who operates a business under a trade name is nonetheless an individual insured under a policy issued in that trade name.”); *Purcell v. Allstate Ins. Co.*, 310 S.E.2d 530, 531–533 (Ga. App. 1983) (business auto liability policy naming “Purcell Radiator Serv.” as the insured applied to individual operating under that trade name and, by extension, to his family member injured by an uninsured motorist); *Sterling v. Ohio Cas. Ins. Co.*, 936 So. 2d 43, 47 (Fla. Dist. Ct. App. 2006) (stating that when insurance is issued to a partnership or in the trade name of the owner of a business, coverage usually extends to the family members of the partners or owner); *Patrevito v. Country Mut. Ins. Co.* 118 Ill.App. 3rd 573, 74 Ill.Dec. 259, 455 N.E.2d 289 (3d Dist.1983) (concluding an insurance policy issued to “Patrevito’s Florist & Greenhouse,” an unincorporated business, covered its owner.)

always been Scout and, therefore, Scout must be considered the “Named Insured.” To find otherwise would be illogical. Because “Gone Rogue” has no legal existence complete in itself, there is no need for it to be independently insured. Further, it has no ability to enter into an insurance contract in the first place. Its designation as a Named Insured becomes meaningful only in reference to the entity actually operating it, which is Scout. Therefore, Truck’s argument that “Gone Rogue” is a Named Insured but Scout is not is not a reasonable interpretation of the Policy. Consequently, the Policy is not ambiguous and this Court finds as a matter of law that Scout is a Named Insured.⁵

B. The OBC Complaint Did Not Trigger a Duty to Defend

Truck’s second argument in support of summary judgment is that, even if Scout were a Named Insured, the allegations within the four corners of the OBC Complaint did not give rise to a duty to defend. Namely, since the OBC Complaint alleged that the first publication of “Gone Rogue Pub” occurred in October of 2012—prior to the effective date of the Policy—and provided evidence of the publication through an exhibit to the OBC Complaint, Truck argues it properly declined the defense pursuant to the Prior Publication exclusion.

Scout disputes that Truck can avoid its duty to defend by relying solely on the allegations in the OBC Complaint. Rather, Scout asserts that Truck must also consider known extrinsic facts outside the OBC Complaint in determining whether it has a duty to defend. Namely, Scout argues that Truck’s duty to defend consideration should have accounted for the information later conveyed by Scout’s counsel to Truck’s claim representative that Gone Rogue Pub was not even operating until the latter part of November of 2012—after coverage became effective—and, therefore, the October 2012 post was not an injurious publication within the scope of the Prior Publication exclusion.

⁵ Even assuming, *arguendo*, that the Policy were ambiguous as to the identities of the Named Insureds, ambiguities are to be construed most strongly against the insured. *Armstrong v. Farmers Ins. Co. of Idaho*, 147 Idaho 67, 69–70, 205 P.3d 1203, 1205–06 (2009). Therefore, the Court would reach the same conclusion that Scout is a Named Insured. Additionally, where an insurer—through its agent—knows the true name of the insured but issues a policy in a trade name or assumed name, the insurer will not be permitted to deny liability on the basis of that designation. 3 Couch on Ins. § 40:4 (3rd ed., updated Dec. 2016). The undisputed facts establish that Pho informed Truck’s agent that Scout was going to operate a restaurant and bar under the assumed business name of “Gone Rogue Pub” and provided her with Scout’s certificate of organization, the Gone Rogue ABN, the lease agreement for the Gone Rogue Pub space, which was executed by Scout, and the alcohol license issued to Scout dba Gone Rogue Pub. Decl. Pho, ¶ 23 and Exhs. 1, 4, 5 and 9. Thus, Truck cannot deny liability on the basis that Scout was not listed as a Named Insured.

These arguments raise two issues: 1) whether Truck was required to look to facts beyond the allegations in the OBC Complaint in determining its duty to defend, and; 2) the application of the Prior Publication exclusion.

1. A Duty to Defend is Defined by Allegations of the Underlying Complaint.

Idaho has long held that the duty to defend “arises upon the filing of a complaint whose allegations, in whole or in part, read broadly, reveal a potential for liability that would be covered by the insured’s policy.” *County of Boise v. Idaho Counties Risk Mgmt. Program, Underwriters*, 151 Idaho 901, 904, 265 P.3d 514, 517 (2011); *Kootenai County v. W. Cas. and Sur. Co.*, 113 Idaho 908, 910-11, 750 P.2d 87, 89-90 (1988). The duty to defend arises only where an insurance policy provides that the insurer has a duty to defend against the specific type of claim alleged. *Dave’s, Inc. v. Linford*, 153 Idaho 744, 748, 291 P.3d 427, 431 (2012). Stated another way, “[f]or there to be a duty to defend, the complaint’s allegations, in whole or in part, when read broadly, must allege a claim to which the duty to defend applies under the terms of the insurance policy.” *Id.* “If the complaint discloses no possibility of coverage, the insurer may properly decline to defend against it.” *County of Boise, supra*. However, if there is doubt as to whether a theory of recovery pled within the complaint is covered under the policy, the insurer must defend regardless of potential defenses arising under the policy. *Kootenai County, supra*.

Where an insurance policy clearly excludes certain types of claims from coverage, a duty to defend those claims does not arise. *Dave’s, Inc.*, 153 Idaho at 749-50, 291 P.3d at 432–33 (finding no duty to defend a contractor’s action against homeowner brought as a breach of contract claim under a “because of ... property damage” provision “to which this coverage applies” because the policy excluded property damage to the home); *County of Boise*, 151 Idaho at 905, 265 P.3d at 517 (finding no duty to defend where lawsuit arose out of or was connected with land use regulation or planning and zoning activities which were specifically excluded under policy).⁶

⁶ Scout argues that any time an insurer believes coverage is excluded under the policy by a policy exclusion, the insurer must undertake the defense and then file a declaratory judgment action to establish the application of the exclusion. However, the Idaho Supreme Court has unequivocally stated that “the insurer may not be required to defend if it can establish that the exclusion contained in the policy is clear and unambiguous.” *Constr. Mgmt. Sys., Inc. v. Assurance Co. of Am.*, 135 Idaho 680, 684, 23 P.3d 142, 146 (2001).

However, where a claim presents a fact pattern arguably within the policy, and the application of an exclusion presents a fairly debatable question of law or fact, the insurer has a duty to defend its insured until that question is resolved. *Black v. Fireman's Fund Am. Ins. Co.*, 115 Idaho 449, 457, 767 P.2d 824, 832 (Ct. App. 1989). “The proper procedure for the insurer to take is to evaluate the claims and determine whether an arguable potential exists for a claim covered by the policy; if so, then the insurer must immediately step in and defend the suit. At the same time, if the insurer believes that the policy itself provides a basis for noncoverage through an exclusion, it may seek declaratory relief.” *Deluna v. State Farm Fire & Cas. Co.*, 149 Idaho 81, 85, 233 P.3d 12, 16 (2008), quoting *Kootenai County*, 113 Idaho at 911, 750 P.2d at 90.

In recent years, the Court has uniformly held that “[a]n insurer does not have to look beyond the words of the complaint to determine if a possibility of coverage exists.” *Hoyle v. Utica Mut. Ins. Co.*, 137 Idaho 367, 373, 48 P.3d 1256, 1262 (2002), citing *Construction Management v. Assurance Company of America*, 135 Idaho 680, 23 P.3d 142 (2001). In *Hoyle*, the insured argued that because the facts behind the underlying complaint potentially gave rise to an action for negligence—which would be covered by the policy—the insurer had a duty to defend. The Court rejected the argument, holding that: 1) the complaint made no express claim for negligence, and 2) even if facts behind the underlying complaint “might disclose negligent acts, it is irrelevant” since an insurer need not look beyond the words of the underlying complaint. *Id.*; see also *AMCO Ins. Co. v. Tri-Spur Inv. Co.*, 140 Idaho 733, 738, 101 P.3d 226, 231 (2004)(holding that even if facts behind a complaint may give rise to covered claims, the facts are irrelevant to insurer’s duty to defend.)

Relying on earlier Idaho precedent, Scout argues that an insurer must also consider facts outside the underlying complaint in determining whether it has a duty to defend. To this end, Scout relies primarily on *Pendlebury v. W. Cas. & Sur. Co.*, 89 Idaho 456, 464, 406 P.2d 129, 134 (1965) and *State of Idaho v. Bunker Hill Co.*, 647 F. Supp. 1064, 1068 (D. Idaho 1986). However, these cases are factually distinguishable. Both pertain to situations where the complaint initially states a claim against the insured which is potentially covered—thereby triggering the duty to defend—but then later-developed facts reveal that the claim falls outside of coverage, which would then allow the insurer to revoke the duty to defend through a separate

declaratory judgment proceeding. In other words, facts beyond the underlying complaint are pertinent to the *continuing* duty to defend, but not to the *initial* duty to defend.⁷

On the initial duty to defend—which is at issue here—the more recent case law cited herein unequivocally holds that the duty is solely dependent on the broadly construed allegations of the underlying complaint. Thus, following this precedent, the Court will ascertain whether Truck’s duty to defend was triggered based on the allegations of the OBC Complaint.

2. The Prior Publication Exclusion Unambiguously Excludes Coverage.

The OBC Complaint asserts that Scout’s use of the mark “ROGUE” violated OBC’s five different trademark registrations of the mark for: “Beer and Ale”; “Restaurant, pub and catering services”; “Beverage glassware”; “Beer”; and “Clothing.” OBC Cmplt., ¶ 9. Notably, the OBC Complaint alleges that “In October 2012, long after OBC’s first use and registration of the mark ROGUE, Defendants commenced use of the mark ROGUE as the name of their restaurant and bar (‘Gone Rogue Pub’).” *Id.*, ¶ 14. Attached to the OBC Complaint as an exhibit is the October Post.

The Policy provides coverage for “those sums that the insured becomes legally obligated to pay as damages because of ... ‘advertising injury’ ... caused by an offense committed in the course of advertising your goods, product or services; but only if the offense was committed in the ‘coverage territory’ during the policy period.” Policy, § A(1)b(2)(b). An “advertising injury” is defined as, *inter alia*, “[m]isappropriation of advertising ideas or style of doing business” or “infringement of copyright, title or slogan.” *Id.* at § F(1)(c), (d). The Prior Publication exclusion excludes “advertising injury” “arising out of oral or written publication of material whose first publication took place before the beginning of the policy period[.]” *Id.* at § B(1)(p)(2).

The parties do not dispute that Scout’s use of the “ROGUE” mark constitutes an “advertising injury” which would otherwise be covered under the Policy. However, the issue is whether the allegations of the OBC Complaint, when read broadly, trigger the Prior Publication exclusion. To this end, Truck bears the burden of establishing that the Prior Publication exclusion clearly and unambiguously excludes coverage. *Construction Management*, 135 Idaho at 684, 23 P.3d at 146. Stated another way, Truck must establish that the exclusion, as applied to

⁷ Indeed, in *Kootenai County*, the Idaho Supreme Court cited approvingly to *Bunker Hill*, pointing out if it is “foreseeable” to the insurer that the claim against the insured could be covered, the insurer has a duty to defend unless and until the “unfolding of litigation” reveals facts which place the claim outside coverage. 113 Idaho at 911, 750 P.2d at 90.

the allegations in the OBC Complaint, does not present a “fairly debatable question of law or fact.” *Black*, 115 Idaho at 457, 767 P.2d at 832.

a. *The Prior Publication exclusion is unambiguous.*

Insurance policies are a contract between the insurer and the insured. *Mortensen v. Stewart Title Guar. Co.*, 149 Idaho 437, 442, 235 P.3d 387, 392 (2010), citing *Hall v. Farmers Alliance Mut. Ins. Co.*, 145 Idaho 313, 318, 179 P.3d 276, 280 (2008). When interpreting insurance policies, a court is to apply the general rules of contract law subject to certain special canons of construction. *Armstrong v. Farmers Ins. Co. of Idaho*, 147 Idaho 67, 69–70, 205 P.3d 1203, 1205–06 (2009), quoting *Arreguin v. Farmers Ins. Co. of Idaho*, 145 Idaho 459, 461, 180 P.3d 498, 500 (2008). Whether an insurance policy is ambiguous is a question of law. *Id.*, quoting *Purvis v. Progressive Cas. Ins. Co.*, 142 Idaho 213, 216, 127 P.3d 116, 119 (2005).

Where policy language is found to be unambiguous, a court is to construe the policy as written, “and the Court by construction cannot create a liability not assumed by the insurer nor make a new contract for the parties, or one different from that plainly intended, nor add words to the contract of insurance to either create or avoid liability.” *Id.*, quoting *Purvis, supra*. “Unless contrary intent is shown, common, non-technical words are given the meaning applied by laymen in daily usage—as opposed to the meaning derived from legal usage—in order to effectuate the intent of the parties.” *Id.*, quoting *Howard v. Oregon Mut. Ins. Co.*, 137 Idaho 214, 217, 46 P.3d 510, 513 (2002). In deciding whether a particular provision is ambiguous, the provision must be read within the context in which it occurs in the policy. *Id.*, citing *Purvis, supra*. An insurance policy provision is ambiguous if “it is reasonably subject to conflicting interpretations.” *N. Pac. Ins. Co. v. Mai*, 130 Idaho 251, 253, 939 P.2d 570, 572 (1997). Words in an insurance policy that have a settled legal meaning are not ambiguous merely because the policy does not contain a definition. *Id.*

Because insurance contracts are adhesion contracts that are not typically subject to negotiation between the parties, any ambiguity that exists in the contract is construed most strongly against the insurer and in favor of the insured. *Armstrong*, 147 Idaho at 70, 205 P.3d at 1206, citing *Arreguin* 145 Idaho at 461, 180 P.3d at 500 (“A provision that seeks to exclude the insurer’s coverage must be strictly construed in favor of the insured.”). Further, insurance contracts are to be construed “in a light most favorable to the insured and in a manner which will provide full coverage for the indicated risks rather than to narrow its protection.” *Cascade Auto*

Glass, Inc. v. Idaho Farm Bureau Ins. Co., 141 Idaho 660, 662, 115 P.3d 751, 753 (2005). “The burden is on the insurer to use clear and precise language if it wishes to restrict the scope of its coverage.” *Arreguin*, 145 Idaho at 461, 180 P.3d at 500.

Although no Idaho appellate court has yet undertaken to interpret the Prior Publication exclusion found in the Truck policy, the identical exclusion has been held by other courts to be clear and unambiguous. *See, e.g., United Nat. Ins. Co. v. Spectrum Worldwide*, 555 F.3d 772, 777 (9th Cir. 2009) (“Plainly reading the first publication exclusion and the relevant advertising injury definition together indicates that the parties intended to exclude from coverage any copyright infringement injury that arose from an oral or written publication of material first published before the policy became effective.”); *Hanover Ins. Co. v. Urban Outfitters, Inc.*, 806 F.3d 761, 767–68 (3d Cir. 2015); *Capitol Indem. Corp. v. Elston Self Serv. Wholesale Groceries, Inc.*, 559 F.3d 616, 620 (7th Cir. 2009).⁸

The exclusion was recently analyzed by the Ninth Circuit in the case of *Street Surfing, LLC v. Great Am. E & S Ins. Co.*, 776 F.3d 603, 610 (9th Cir. 2014)(applying California law). Initially, the court noted that the “straightforward purpose of this exclusion is to ‘bar coverage’ when the ‘wrongful behavior ... beg[an] prior to the effective date of the insurance policy.’”, quoting *Taco Bell Corp. v. Cont’l Cas. Co.*, 388 F.3d 1069, 1072 (7th Cir.2004) and citing *Kim Seng Co. v. Great Am. Ins. Co.*, 179 Cal.App.4th 1030 (2009)(“The purpose of the prior publication exclusion is to preclude coverage for risks that have already materialized....”). The court further explained:

In the context of advertising injury coverage, an allegedly wrongful advertisement published before the coverage period triggers application of the prior publication exclusion. If this threshold showing is made, the exclusion bars coverage of injuries arising out of republication of that advertisement, or any substantially similar advertisement, during the policy period, because such later publications are part of a single, continuing wrong that began before the insurance policy went into effect

Id., cites omitted.

Truck points out that OBC’s claims against Scout arise directly from Scout’s unauthorized use of the mark “ROUGE” in the operation of its restaurant and bar—a use which

⁸ See also, *Scottsdale Ins. Co. v. Sullivan Properties, Inc.*, 2006 WL 505170, at *8 (D. Haw. Feb. 28, 2006)(finding the exclusion unambiguously precludes coverage for Defendants’ prior infringing use of the “Kapalua” name.)

was alleged to have begun prior to the effective date of the policy. According to Truck, these allegations place the claims squarely within the exclusion. Scout argues that the term “publication of material” in the Prior Publication exclusion refers only to an actionable publication of injurious material.⁹ It argues that since the October Post only infringed on OBC’s “Restaurant, pub and catering services” trademark, and Gone Rogue Pub was not even operating at the time of the post, the post could not have been injurious to OBC. On this point, Scout relies on the Seventh Circuit case of *Capitol Indemnity Corp. v. Elston Self Service Wholesale Groceries, Inc.*, which stated:

We understand the term “material” in the exclusion to refer to “injurious” material. By its terms, the prior publication exclusion abrogates the insurer’s duty to defend only where it can prove that the insured’s prior publication of the same actionable, injurious material alleged in the underlying complaint occurred prior to the beginning of its policy. This interpretation is logical because the exclusion exists to prevent an insured from purchasing an insurance policy to cover liability for illegal acts which it had undertaken prior to purchasing the policy. Put another way, the purpose of the exclusion is to prevent an individual who has caused an injury from buying insurance so that he can continue his injurious behavior. We do not see any ambiguity in the meaning of the exclusion; it seems clear that the exclusion only abrogates the duty to defend where the insured’s first publication of actionable material occurred prior to the beginning of its policy.

559 F.3d 616, 620 (7th Cir.2009).

Initially, Scout’s argument relies on evidence outside the allegations of the OBC Complaint, which is irrelevant in considering whether an insurer has a duty to defend. Rather, as discussed, the duty to defend is framed solely by the allegations of the underlying complaint. Here, the OBC Complaint alleges that Scout’s use of the “ROGUE” mark was unauthorized, the use commenced in October of 2012, and the use caused OBC harm. Thus, the OBC Complaint asserts a continuing course of infringing and injurious conduct since prior to the effective period of the policy. Whether or not Scout’s October Post was actually injurious because Gone Rogue Pub was not yet open for business is not germane to the inquiry since injury beginning in October of 2012 was clearly alleged in the OBC Complaint.

⁹ Alternatively, Scout argues that the exclusion is ambiguous because it does not expressly indicate whether the first publication of the material be injurious or actionable.

Further, even if facts extrinsic to the OBC Complaint were considered, i.e., that Gone Rogue Pub was not yet operation in October of 2012, the exclusion would still apply. To this end, the Court does not agree with *Capitol Indemnity's* interpretation of the exclusion. Unless ambiguous, this Court must apply the policy according to its plain language and not add words to either create or avoid liability. *Armstrong*, 147 Idaho at 69–70, 205 P.3d at 1205–06. The exclusion applies where the advertising injury “aris[es] out of... written publication of material whose first publication took place before the beginning of the policy period.” “Arise” is commonly defined as “to come into being, action or notice; originate; appear; spring up.”¹⁰ Courts have broadly interpreted the phrase “arising out of” as used in insurance policies. In *Fed. Ins. Co. v. Tri-State Ins. Co.*, the Tenth Circuit Court examined the phrase “arising out of” as it is used in insurance policies in depth. 157 F.3d 800, 804 (10th Cir. 1998). It held that “...the general consensus [is] that the phrase “arising out of” should be given a broad reading such as “originating from” or “growing out of” or “flowing from” or “done in connection with”—that is, it requires some causal connection to the injuries suffered, but does not require proximate cause in the legal sense.” *Id.* The Court’s holding was based upon its analysis of case law throughout the country, as well as several treatises on insurance law. *Id.* The Court also held that the broad reading of the phrase “arising out of” is applicable to both inclusionary and exclusionary causes. *Fed. Ins. Co.*, 157 F.3d at 804-805.¹¹

Applying this broad definition of “arising out of” to the exclusion, it is evident that the first publication of material need not be independently “actionable” or “injurious” for the exclusion to apply. Rather, it need only be causally connected to the advertising injuries alleged. Stated another way, the advertising injuries alleged must flow from the first publication, but the first publication need not be the proximate cause of the injuries. To construe the provision as requiring that the first publication be independently injurious or actionable would not only ignore

¹⁰ <http://www.dictionary.com/browse/arising> (last visited July 7, 2017).

¹¹ See also *Hugenberg v. West Am. Ins. Co./Ohio Cas. Group*, 249 S.W.3d 174, 186–87 (Ky. Ct. App. 2006) (“arising out of” means “originating from, or having its origin in, grounding out of or flowing from”); *Taurus Holdings, Inc. v. United States Fid. & Guar. Co.*, 913 So. 2d 528, 539–40 (Fla. 2005) (“arising out of” as used in a CGL policy exclusion unambiguous and broader in meaning than the term “caused by” and means “originating from,” “having its origin in,” “growing out of,” “flowing from,” “incident to” or “having a connection with”); *Meadowbrook, Inc. v. Tower Ins. Co., Inc.*, 559 N.W.2d 411, 419–20 (Minn. 1997) (“arising out of” in a CGL insurance policy exclusion means “causally connected with” and not “proximately caused by”); *accord Records v. Aetna Life & Cas. Ins.*, 683 A.2d 834 (N.J. Super. 1996), *American Motorists Ins. Co. v. L-C-A Sales Co.*, 713 A.2d 1007 (N.J. 1998).

the common definition of “arising out of” but would also insert words where they do not appear, which is contrary to Idaho’s rules of contract interpretation. For this reason, the Court does not find Scout’s interpretation reasonable and, therefore, does not find the exclusion ambiguous for the reason cited by Scout.

Case law supports this Court’s conclusion in this regard. In *Matagorda Ventures, Inc. v. Travelers Lloyds Ins. Co.*, the court concluded that the application of an identical exclusion does not hinge on whether the first publication was actionable, but rather on when the material giving rise to an actionable claim was first published. 203 F. Supp. 2d 704, 718 (S.D. Tex. 2000). Similar to Scout’s argument, the insureds in *Matagorda* argued that the Prior Publication exclusion did not preclude coverage since some of the copyrights allegedly infringed upon were not registered when the prior publications took place and, therefore, the prior publications were not infringing. *Id.* at 717-18. The court found that argument unpersuasive, noting that “[t]he relevant question for the exclusion, however, is not when the claim first became actionable, but when the material giving rise to the claim was first published. The copyright infringement claim arose from “material whose first publication took place before the beginning of the policy period.” *Id.* Likewise, in *Kim Seng Co. v. Great American Ins. Co. of New York*, the insured argued that the Court should consider whether its pre-policy-issuance publication gave rise to the “likelihood of confusion” and constituted infringement when it was made. 179 Cal.App.4th 1030, 1043 101 Cal.Rptr.3d 537, 547 (2009), *as modified on denial of reh’g* (Dec. 7, 2009). The Court declined, stating, “[w]e do not deal with whether there was an infringement, but rather whether there is coverage.” *Id.*

To the extent *Capitol Indemnity* holds that first publication of a mark be independently injurious or actionable, the holding is confined to the unique facts of that case and cannot be interpreted as requiring an insurer to evaluate whether the first alleged publication of a mark is independently actionable in determining its duty to defend. *Capitol Indemnity* involved a suit for trademark infringement based on the defendant’s sale of counterfeit cigarettes displaying the Newport trademark. 559 F.3d at 619-20. Prior to the effective date of the policy, the defendant sold *genuine* Newport cigarettes with packaging and wrapping displaying the Newport marks. After the policy went into effect, however, the defendant began selling counterfeit cigarettes in the same packaging. *Id.* The insurer argued that the Prior Publication exclusion barred coverage—and, therefore, abrogated its duty to defend—because the cigarette packaging and

wrapping containing the Newport marks was first “published” before the policy began. *Id.* at 620. The court disagreed because the pre-policy publication was not actionable—the defendant was actually selling genuine Newport cigarettes. *Id.* The infringement alleged in the underlying complaint was the defendant’s sale of *counterfeit* cigarettes with Newport packaging, not the sale of genuine Newport cigarettes. *Id.* at 619. By contrast, OBC alleged that Scout’s pre-policy publication of the Gone Rogue Pub logo in October of 2012 marked the origination date of Scout’s acts that result in the infringement. Thus, *Capitol Indemnity* is not factually or legally applicable.

b. *The publications occurring during the coverage period were not fresh wrongs.*

Even if pre-coverage infringing advertisement triggers the application of the Prior Publication exclusion, some courts find that the exclusion will not apply to post-coverage advertisements which are sufficiently distinct from the pre-coverage advertisements. As explained by the Ninth Circuit, “[i]f a later advertisement is not substantially similar to the pre-coverage advertisement, [...], it constitutes a distinct, or ‘fresh,’ wrong that does not fall within the prior publication exclusion’s scope.” *Street Surfing*, 776 F.3d at 610. A post-coverage publication is ‘substantially similar’ to a pre-coverage publication if both publications carry out the same alleged wrong.” *Id.* at 613. Additionally, where the underlying complaint charges the infringing publications as separate torts, the torts that occurred during the policy period are covered because they are substantially different from the torts that occurred prior to the policy period. *Id.*

Scout contends that, even if its October Post triggered the application of the exclusion, its later publications of the mark, occurring after coverage took effect were “fresh wrongs” as described in *Street Surfing* because they violated OBC’s other trademarks: “Beer and Ale”; “Beverage glassware”; “Beer”; and “Clothing.” According to Scout, for Truck to be relieved of its duty to defend, it must establish that Scout’s October Post violated all five trademarks and constituted a violation of each tort set forth in the OBC Complaint.

Street Surfing lends no favor to Scout’s position. There, the infringer initially sold skateboards affixed with a particular Street Surfing logo. *Id.* at 606. After obtaining insurance, Street Surfing expanded its product line to skateboard accessories, also affixed with the Street Surfing logo. Ultimately Street Surfing was sued by the owner of the mark and Street Surfing’s

insurer refused to defend pursuant to the Prior Publication exclusion. *Id.* Street Surfing sued its insurer, arguing *inter alia*, that its pre-policy publications of the logo were not substantially similar to the post-coverage advertisements because they were affixed to different products. *Id.* at 612-13. The court disagreed for two reasons. First, the underlying complaint did not charge the misappropriations as separate torts depending on the specific advertisements. Rather, it generally alleged that Street Surfing infringed on the mark by using the name and logo on its products, without making any distinction between the types of products. *Id.* at 614. Second, although the advertisements featured different products, the court found it was not a “material distinction”, because the advertising idea being used was the same regardless of the product: the products all used the allegedly infringing identification “Street Surfing.” *Id.*¹²

In so holding, the court contrasted the facts of the case from those presented in *Taco Bell Corp.*, where the Seventh Circuit found the “fresh wrong” argument applicable. 388 F.3d at 1073-74. In *Taco Bell*, the underlying complaint arose from Taco Bell's advertising campaign using the general theme of a “Chihuahua obsessed with the thought of Taco Bell food to the exclusion of anything else.” *Id.* at 1072. The plaintiff in that suit alleged that Taco Bell had misappropriated a marketing gimmick he had created featuring a “psycho Chihuahua.” *Id.* Because a portion of Taco Bell's ad campaign began before its insurance policy took effect, its insurer contended that the policy's Prior Publication exclusion eliminated its duty to defend. However, the court ruled that even though Taco Bell had used the same basic crazy Chihuahua theme in different ways before and after the inception of the insurance policy, the Prior Publication exclusion did not apply because the underlying lawsuit charged Taco Bell with misappropriation of distinct advertising ideas as separate torts, some of which occurred during the policy period. *Id.*¹³

The facts of this case are far more closely aligned with *Street Surfing* than *Taco Bell*. As in *Street Surfing*, the claims asserted in the OBC Complaint are grounded in Scout's continuing

¹² See also, *Hanover Ins. Co. v. Urban Outfitters, Inc.*, 806 F.3d 761, 768 (3d Cir. 2015) (rejecting argument that Urban Outfitters pre-coverage use of the mark “Navajo” in advertising a bracelet on its website was substantially different from its post-coverage use of the mark in later product lines, which included clothing, shoes, flasks, etc. because they all carried a consistent theme and common objective).

¹³ For example, later Taco Bell commercials appropriated not only the underlying psycho Chihuahua theme, but also subordinate ideas such as the Chihuahua's poking its head through a hole at the end of the commercial. 388 F.3d at 1073.

unauthorized use of the mark "ROGUE" in advertising. Unlike in *Taco Bell*, OBC did not charge separate torts based on uses prior to versus during Truck's coverage period. Further, there is no thematic difference between the alleged publications as there was in *Taco Bell*. Rather, as in *Street Surfing*, Scout's publications all arise from same single, continuing use the word "ROGUE" in advertising Gone Rogue Pub, which is an appropriation of OBC's advertising idea. Therefore, Scout's post-effective date uses of the mark are not "fresh wrongs" which would avoid the application of the Prior Publication exclusion.

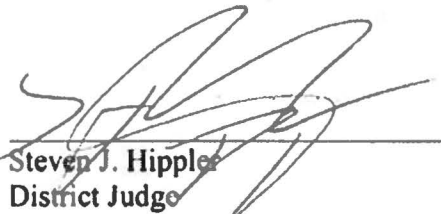
In sum, Truck has established that the Prior Publication clearly and unambiguously excludes coverage for the claims asserted against Scout in the OBC Complaint. Consequently, this Court concludes as a matter of law that Truck did not have a duty to defend against the claims and summary judgment in Truck's favor is warranted on Scout's breach of contract claim. Further, where there is no coverage under an insurance policy, there can be no breach of the duty of good faith and fair dealing, nor can there be liability for bad faith. *Rizzo v. State Farm Ins. Co.*, 155 Idaho 75, 84, 305 P.3d 519, 528 (2013). Therefore, summary judgment in Truck's favor is also warranted on Scout's breach of the implied covenant of good faith and fair dealing and insurance bad faith claims.

V. ORDER

For the foregoing reasons, the Court hereby DENIES Scout's motion for summary judgment and GRANTS Truck's motion for summary judgment. A final judgment shall be issued contemporaneously with this Order.

IT IS SO ORDERED

Dated this 13th day of July, 2017


Steven J. Hippler
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 13 day of July, 2017, I emailed (served) a true and correct copy of the within instrument to:

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CHRISTOPHER D. RICH
Clerk of the District Court

By: 
Deputy Court Clerk

