Docket: **2018-00635-BLS1**
Date:
Parties: **THE TRAVELERS INDEMNITY COMPANY and THE TRAVELERS INDEMNITY COMPANY OF AMERICA VS. LEAN & LOCAL, LLC, COLDBREW VENTURES, LLC, KYLE ROY, and PETER ROY**
Judge: **/s/ Karen F. Green Justice of the Superior Court**

MEMORANDUM OF DECISION AND ORDER ON PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

This is an insurance coverage dispute. It is now before me on the plaintiffs' motion for summary judgment (Docket No. 23), and the defendants' cross motion for summary judgment as to liability on Counts I, III,[1] VI and VII of their counterclaims. (Docket No. 24). The central issue is whether the plaintiffs, The Travelers Indemnity Company ("TICO") and the Travelers Indemnity Company of America ("TICOA") (collectively, "Travelers"), had a duty to defend and indemnify their respective insureds, Lean & Local, LLC ("LeanBox"),[2] Cold Brew Ventures LLC ("Cold Brew"), Kyle Roy and Peter Roy (collectively, "Defendants") in a federal lawsuit, Atomic Café, Inc., etal. v. Kyle Roy, et al., USDC D. MA Civil Action No. 17-cv-11927 IT (the "Underlying Suit"). After hearing, I conclude that they did not and allow plaintiffs' motion for summary judgment and deny defendants' cross-motion.

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[1]Although the Defendants' motion references Count II, their brief reflects that they are actually seeking summary judgment on Count III.

[2] Lean & Local, LLC does business as LeanBox.

Background
A. The Policies

TICO issued to LeanBox a Commercial General Liability Policy (the "LL Primary Policy") and an Excess Umbrella Policy ("LL Umbrella Policy"), covering the policy period from December 31, 2016 to December 31, 2017. Kyle Roy and Peter Roy, the principals and owners of LeanBox, are insureds under both policies.[3]

TICOA issued a Commercial General Liability Policy (the "CBV Primary Policy") and TICO issued an Excess Umbrella Policy (the "CBV Umbrella Policy") to Cold Brew, covering the policy period from October 6, 2017 to October 6, 2018. Kyle Roy and Peter Roy are also insureds under these policies.[4]

Both the LL and CBV Primary Policies (collectively, "Primary Policies") include identical Personal and Advertising Injury Liability coverage (Coverage B), and provide:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and 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 "personal and advertising injury" to which this insurance does not apply. . . .

Joint Appendix ("JA"), Ex. 1 at 198 and Ex. 3 at 102. "Personal and advertising injury" means "personal injury" or "advertising injury." JA, Ex. 1 at 212 and Ex. 3 at 116.

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[3] The LL Umbrella Policy contains the same or substantially similar terms, conditions and exclusions as in the LL Primary Policy with respect to coverage for "personal injury" or "advertising injury," such that if no coverage is available under the LL Primary Policy for the Underlying Suit, no coverage is available under the LL Umbrella Policy. See LL Primary and LL Umbrella Policies, Joint Appendix, Exs. 1 and 2, respectively.

[4]The CBV Umbrella Policy contains the same or substantially similar terms, conditions and exclusions as in the CBV Primary Policy with respect to coverage for "personal injury" or "advertising injury," such that if no coverage is available under the CBV Primary Policy for the Underlying Suit, no coverage is available under the CBV Umbrella Policy. See CBV Primary and CBV Umbrella Policies, Joint Appendix, Exs. 3 and 4, respectively.

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In relevant part, the Primary Policies define "Advertising injury" as:

> [I]njury, other than 'personal injury,' caused by one or more of the following offenses:
> (1) Oral or written publication, including publication by electronic means, of material in your "advertisement" that. . . disparages a person's or organization's goods, products or services, provided that the claim is made or the "suit" is brought by a person or organization. . . that claims to have had its goods, products or services disparaged; . . . . [or]
> (3) Infringement of. . . "slogan" in your "advertisement", provided that the claim is made or the "suit' is bought by a person or organization that claims ownership of such . . . "slogan."

JA, Ex. 1 at 214 and Ex. 3 at 118. "Slogan," in turn, is defined as "a phrase that others use for the purpose of attracting attention in their advertising." JA, Ex. 1 at 215 and Ex. 3 at 119. It "[d]oes not include a phrase used as, or in, the name of: (1) [a]ny person or organization, other than you; or (2) [a]ny business, or any of the premises, goods, products, services, or work of any person or organization, other than you." JA, Ex. 1 at 215 and Ex. 3 at 119.

In relevant part, the Primary Policies define "Personal injury" as:

> [I]njury, other than "advertising injury", caused by . . . [o]ral or written publication, including publication by electronic means, of material that . . . disparages a person's or organization's goods, products or services, provided that the claim is made or the "suit" is brought by a person or organization . . . that claims to have had its goods, products or services disparaged . . . .

JA, Ex. 1 at 214-215 and Ex. 3 at 118-119.

The Primary Policies' Personal and Advertising Injury coverage is subject to an Intellectual Property Exclusion. This exclusion provides that the insurance does not apply to:

> "Personal injury" or "advertising injury" arising out of any actual or alleged infringement or violation of any of the following rights or laws, or any other "personal injury" or "advertising injury" alleged in any claim or "suit" that also alleges any such infringement or violation: (1) Copyright; (2) Patent; (3) Trade dress; (4) Trade name; (5) Trademark; (6) Trade secret; or (7) Other intellectual property rights or laws.

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JA, Ex. 1 at 213 and Ex. 3 at 117. The Intellectual Property Exclusion contains the following exception:

> This exclusion does not apply to: (1) "[a]dvertising injury" arising out of any actual or alleged infringement or violation of another's . . . "slogan" in your "advertisement;" or (2) [a]ny other "personal injury" or "advertising injury" alleged in any claim or "suit" that also alleges any such infringement or violation of another's . . ."slogan" in your "advertisement."

JA, Ex. 1 at 213 and Ex. 3 at 117.

B. The Underlying Suit

On October 6, 2017, John Mahoney ("Mahoney") and The Atomic Cafe, Inc. ("Atomic Cafe") (collectively, "Atomic Plaintiffs") filed a lawsuit against the Defendants in the United States District Court for the District of Massachusetts. On November 13, 2017, they filed an Amended Complaint ("AC"), asserting claims for: trademark infringement and unfair competition in violation of the Lanham Act, 15 U.S.C. §§ 1114 and 1125(a); common law trademark infringement; misappropriation of trade secrets in violation of G.L. c. 93, § 42 and 18 U.S.C. § 1836(b)(1); breach of contract; promissory estoppel; violation of G.L. c. 93A, §§ 2, 11; unjust enrichment; breach of the covenant of good faith and fair dealing; fraudulent inducement; conversion; and replevin.

The AC alleged the following facts. Mahoney, who operates a coffee business through Atomic Cafe, has built a successful and recognizable coffee brand known as Atomic Coffee Roasters. Atomic Cafe owns two registered trademarks related to the Atomic Coffee Roasters brand. Leanbox is a company that delivers "smart" vending machines and provides food vending services to businesses. Grind is LeanBox's coffee business.[5] Cold Brew Ventures is the

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[5] The AC indicates that Grind is a d/b/a of LeanBox.

business the parties were jointly to form to manufacture and distribute Atomic Cafe's cold brew products to wholesale and retail customers on a larger scale.

Before partnering with the Defendants, Atomic Cafe owned three retail coffee shops as well as a roasting, toll-roasting, and kegging facility, which provided various products to the retail shops and customers located throughout the country, frequently on a made-to-order basis. "Each [retail shop] uses and has used the [Atomic Cafe] Trademarks and other unique identifiers of the Atomic Cafe brand for marketing and to brand a variety of items in the [retail shops] and items the [retail shop] sold including, without limitation, coffee (hot and cold brewed), coffee beans, labels, coffee mugs, signs, menus, gift cards, shopping bags, t-shirts, bottles, kegs, taps, and websites (including social media)." AC, ¶19.

In September 2016, the parties agreed to form Cold Brew Ventures. They agreed that Mahoney would be compensated for his role in the joint venture with a 25% ownership stake in the venture, a fixed salary under a term employment contract, and other financial benefits. Thereafter, Mahoney spent the next year developing a new cold brew product manufacturing facility with the expectation that he would receive the promised compensation.

While overseeing the facility's design and construction, Mahoney submitted a food processing and distribution license application to the Massachusetts Department of Public Health ("DPH"). "With it, [] Mahoney submitted product labels associated with the cold brew products that would be produced at the [facility]. .. . The cold brew product labels are branded with the Trademarks and other Atomic Cafe unique identifiers." AC, ¶39. These labels are depicted in Exhibit 3 to the AC. They feature the trademarked Atomic Cafe logo, the words "Cold Brew" or "Cold Brew Coffee" written in distinctive script, and/or a large stylized drawing of an atom (like the one used in the logo).

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In June of 2017, the DPH issued a license for the facility, which opened a month later. As of November 13, 2017, the Defendants were still "labelling cold brew products with the [Atomic Cafe] Trademarks and other Atomic Cafe unique identifiers to align with the product labels on file with the Department." Id. at ¶51.

Mahoney was charged with overseeing the facility's operations once it opened. Around this time, LeanBox launched "Grind" or "Grind Coffee," its coffee business. "Grind coffee products [were] offered in connection with LeanBox's smart vending machines and office supply services." Id. at ¶28.

In addition to his work on the cold brew facility, Mahoney sought to create and increase
the joint venture's business. He supplied the joint venture with his proprietary cold brew coffee, latte, and tea formulas and processes as well as his confidential business contacts. He also permitted the Defendants, subject to his prior approval, to "leverage[] the goodwill associated with Atomic Cafe's Trademarks and unique identifiers." Id. at ¶59. To this end, the Defendants "used the [Atomic Cafe] Trademarks and other Atomic Cafe unique identifiers in a variety of ways, including, without limitation, marketing, product labelling, websites (including social media), kegs taps, glasses, bottles, brochures, email signatures, employee contracts, invoices and other billing documentation." Id. at ¶60.

On September 18, 2017, the Defendants informed Mahoney that they were no longer
interested in a long-term commitment with him and reneged on their deal. Despite this, the Defendants continued to "use[] [Atomic Cafe's] Trademarks in connection with their business — without Atomic Cafe's or [ ] Mahoney's permission" in the time period that followed. AC, ¶61. The AC states:

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> 62. For example, as of October 5, 2017, Atomic Cafe's Trademark appeared on Grind's website, a pertinent screenshot of which is attached as Exhibit 4. Next to it:
>
> > The innovators behind LeanBox have partnered up with local artisan coffee roaster John Mahoney to create Grind coffee. Through the use of truly fresh products, innovative & flexible equipment solutions, and fully customizable programs, Grind strives to bring the barista experience right into your office.
>
> 63. LeanBox also continues to use and associate with Atomic Cafe's Trademarks and other indicia of Atomic Cafe. For example, as of October 5, 2017, Atomic Cafe's Trademark and other indicia appeared on LeanBox's website in connection with a job posting for a Coffee Brewing Assistant.[6]
>
> 64. Furthermore, upon information and belief, Defendants continue to use the Trademarks and other indicia of Atomic Cafe in connection with cold brew kegs it delivers to customers. Specifically, as of October 3, 2017, Defendants labelled cold brew kegs with Plaintiffs' unique "wrap" which depicts Plaintiffs' Trademark and their specialized cold brew label. . . . Exhibit 5, Photographs of Cold Brew Kegs and Labels.

(emphasis in original).

Exhibit 4 to the AC, which is referenced in ¶¶62 and 63, consists of two multi-page screenshots, the first purportedly from Grind's website, and the second purportedly from LeanBox's website. Both websites are operated by LeanBox. The initial page of the Grind screenshot displays:[7]

[See text for screenshot]

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[6] Although this paragraph, unlike 'll 62, does not reference Exhibit 4, Exhibit 4 contains a screenshot of the job posting referenced therein.

[7] The text below reflects approximations of the fonts used. In the printed copy of Exhibit 4 provided to the Court, the first page contains no visible images.

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AC, Ex. 4 at 1. The language quoted in ¶62 is found on a subsequent page of the Grind screenshot, under the heading, "A Brief History," displayed below:

[see text for screenshot]

Id. at 3.

C. Demand for Defense and Disclaimer of Coverage

1. LeanBox

On November 16, 2017, Leanbox and the Roys, through counsel, tendered their defense in the Underlying Suit to TICO. In connection with the tender, they asserted the the AC and its exhibits (particularly, Exhibit 4) alleged unauthorized use of "other indicia" of the Atomic Cafe brand, including use of the phrase, "Life Begins After Coffee" ("the Phrase"), and that the AC, therefore, triggered coverage for slogan infringement. TICO assigned the tender to Amy Baker ("Baker"). In an email dated November 20, 2017, she responded: "Pending the review of the applicable contracts of insurance, . . . Travelers fully reserves all of its' [sic] rights and defenses, including the right to decline to defend or indemnify [LeanBox] in connection with this matter." JA, Ex. 8. Baker also called Defendants' counsel that day and indicated that TICO would endeavor to complete its coverage review within 30 days.

On December 8, 2017, Baker sent an email to Defendants' counsel indicating that the AC was silent on whether that the Atomic Cafe used the Phrase in its advertising and requested that

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the Defendants provide information regarding its use. On December 21, 2017, Baker sent another email to counsel requesting information about Atomic Cafe's use of the Phrase. In a December 22, 2017 reply, Defendants' counsel questioned the need for additional information and requested TICO's coverage position.

On January 10, 2018, Baker contacted outside counsel for possible retention in connection with a coverage lawsuit involving Leanbox's claim. On January 17, 2018, Defendants' counsel sent a letter to Baker purporting to be a "follow up" to their late-December 2017 email exchange and TICO's inquiry into whether the Atomic Plaintiffs had actually used the Phrase. JA, Ex. 11 at 1. The letter reiterated the Defendants' view that the AC triggered coverage for slogan infringement and separately asserted that the AC also triggered coverage for disparagement.

Appended to the January 17, 2018 letter were two exhibits. The first was a copy of the Atomic Plaintiffs' memorandum in support of their motion for preliminary injunction. The second was a July 13, 2017 email from Shea Coakley, a LeanBox co-founder, to a potential customer, Mahoney, and Kyle Roy, attaching a "Grind Coffee Overview" ("Overview") for the potential customer's review. See JA Exs. 11 and 12 at Ex. 2.[8]

The Overview describes Grind's coffee and tea services and LeanBox's partnership with Mahoney. Most pages feature the following image:[9]

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[8] Defendants' counsel contended that the first and second exhibits supported Defendants' claims that the AC triggered coverage for disparagement and for slogan infringement, respectively.

[9] The image below is rendered in black and white.

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On three pages, the image is directly above photos of several items featuring the Atomic Cafe brand. Atomic Cafe is not otherwise discussed or mentioned.

Baker informed in-house counsel of the January 17th letter and emailed Defendants' counsel on January 18, 2017 to acknowledge its receipt. On February 1, 2018, Defendants' counsel sent Baker a demand letter in which he asserted that TICO had violated its duty to defend and threatened to sue TICO if it failed promptly to provide its coverage determination and to acknowledge a duty to defend. On February 5, 2018, Baker responded in a letter denying coverage and addressing the arguments made by counsel in his January 17, 2018 letter.

During the period from December 7, 2017 until February 5, 2018, Baker regularly consulted with in-house counsel about the LeanBox tender.

2. Cold Brew

On November 21, 2017, Cold Brew and the Roys, through counsel, tendered their defense in the Underlying Suit to TICOA. In connection with this tender, they took the same coverage position that Leanbox took in connection with its tender. TICOA assigned Cold Brew's tender to Christopher Newkirk ("Newkirk"). In an email response dated November 27, 2017, he advised Cold Brew: "Until we have completed our investigation and are in a position to make a determination regarding coverage, we reserve all rights under the policy and the applicable law." JA, Ex. 10. Newkirk also requested additional information about Cold Brew. In an email dated November 29, 2017, Defendants' counsel provided the information requested, repeated Defendants' position on coverage, and stressed that the Defendants wanted a coverage decision as soon as possible. By November 29, 2017, Newkirk anticipated coverage litigation in connection with the Cold Brew tender.

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On December 5, 2017, Newkirk determined that TICOA had no duty to defend and requested assistance from in-house counsel regarding his determination. On December 26, 2017, Defendants' counsel emailed Newkirk and asked for TICOA's coverage position. In an email dated January 2, 2018, Newkirk responded: "I hope to have our written coverage position to you this week." JA, Ex. 19.

On January 8, 2018, Newkirk met with in-house counsel about his coverage determination and sent an email to Defendants' counsel. The email advised counsel that Newkirk disagreed that Exhibit 4 of the AC supported the Defendants' coverage position and asked whether there was any other basis for coverage. As of January 10, 2017, Newkirk understood that TICOA would pursue and file to file a declaratory judgment action against Cold Brew.

On January 19, 2018, Defendants' counsel sent a letter to Newkirk purporting to respond to his January 8th email and to "follow-up" on Defendants' coverage request. JA, Ex. 12 at 1.[10] Like his January 17, 2018 letter to Baker, this letter reiterated counsel's view that the AC triggered coverage for slogan infringement, separately asserted that the AC also triggered coverage for disparagement, and included the same two exhibits. On February 1, 2018, Defendants' counsel sent a demand letter to Newkirk similar to the one he sent to Baker on that date. After consulting with TICOA's in-house counsel, Newkirk responded in a letter dated February 9, 2018, disclaiming coverage and addressing the arguments made by Defendants'

counsel in his January 19, 2018 letter.

Thereafter, the Defendants settled the Underlying Suit. The docket to the Underlying Suit reflects that the parties filed a stipulation of dismissal with prejudice on March 5, 2018.

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[10]Although counsel's letter refers to a January 10, 2018 email from Newkirk, it appears from the record that the referenced email was actually dated January 8, 2018.

D. The Parties' Cross-Motions

Travelers commenced this declaratory judgment action on February 23, 2018, seeking declarations that it has no duty to defend or indemnify LeanBox and the Roys under the LL Primary and Umbrella Policies and no duty to defend or indemnify Cold Brew and the Roys under the CBV Primary and Umbrella Policies in connection with the Underlying Suit. The Defendants filed an Answer and Counterclaim ("Counterclaim"), which asserts eight counterclaims for: breach of contract by failing to defend under the Primary Policies (Count I); breach of contract by failing to defend under the Umbrella Policies (Count II); breach of duty to defend after reserving rights (Count III); breach of contract by failing to indemnify (Count IV); estoppel (Count V); violations of G.L. c. 93A, § 9 and G.L. c. 176D (Count VI);[11] violation of G.L. c. 93A, § 11 and G.L. c. 176D (Count VII); and a declaratory judgment (Count VIII).

In October 2019, Travelers moved for summary judgment on its claims and all of the counterclaims. The Defendants have opposed Travelers' motion and have cross-moved for summary judgment as to liability on Counts I, III, VI and VII of their Counterclaim.

Discussion

A. Standards for Summary Judgment and Construction of Insurance Policies

Summary judgment is properly entered when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Mass. R. Civ. P. 56(c). See Cassesso v. Commissioner of Corr., 390 Mass. 419, 422 (1983). The moving party first bears the burden of submitting evidence to establish the absence of any triable fact. Flesner v.

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[11] Count VI is asserted by Kyle and Peter Roy only against Travelers.

Technical Comm 'n Corp., 410 Mass. 805, 808-809 (1991). Once the moving party meets its burden of establishing the absence of a triable fact, the burden shifts to the non-moving party to respond with evidence of specific facts establishing the existence of a genuine dispute. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 711 (1991). "The interpretation of an insurance policy is a question of law for the trial judge and the reviewing court.. . . If an insurance policy is unambiguous, its interpretation is appropriately decided upon summary judgment." Sullivan v. Southland Life Ins. Co., 67 Mass. App. Ct. 439, 442 (2006) (internal citations omitted).

An insurance policy, like other contracts, is construed according to the fair and reasonable meaning of its words and must be enforced in accordance with its terms when those terms are "plain and definitely expressed in appropriate language." Cody v. Connecticut Gen. Life Ins. Co., 387 Mass. 142, 146 (1982), quoting Hyfer v. Metropolitan Life Ins. Co., 318 Mass. 175, 179 (1945). Where, however, the policy language is ambiguous such that there is more than one rational interpretation, the insured is entitled to the

benefit of the more favorable interpretation. Makrigiannis v. Nintendo of America, Inc., 442 Mass. 675, 681 (2004). "This rule of construction applies with particular force to exclusionary provisions....[;] [e]xclusions from coverage are to be strictly construed, and any ambiguity in the exclusion must be construed against the insurer." Hakim v. Massachusetts Insurers' Insolvency Fund, 424 Mass. 275, 282 (1997) (internal quotes and citation omitted).

The insured has the initial burden of proving that the insurance policy covers the claimed loss. Boazova v. Safety Ins. Co., 462 Mass. 346, 351 (2012). If this burden is satisfied, "the burden then shifts to the insurer to show that a separate exclusion to coverage is applicable to the

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particular circumstances of the case." Id. Where an exclusion is shown to apply, the burden returns to the insured to establish that an exception to the exclusion restores coverage. Id.

B. Analysis

1. Travelers' Claims and Counts I, III, IV, V. and VIII of the Counterclaim

The standard this Court must use to determine whether Travelers had a duty to defend the Defendants in the underlying action pursuant to the Primary Policies is well established:

> An insurer's duty to defend the insured is triggered where the allegations in the complaint "are reasonably susceptible of an interpretation that states or roughly sketches a claim covered by the policy terms," Billings v. Commerce Ins. Co., 458 Mass. 194, 200 (2010), notwithstanding the possibility that the underlying claim may ultimately fail, or that the merits of the claim are weak or frivolous. See Metropolitan Prop. & Cas. Ins. Co. [v. Morrison, 460 Mass. 352, 358 (2011)].
>
> "A liability insurer's duty to defend is determined by comparing the allegations in the third-party complaint against the provisions of the insurance policy." Deutsche Bank Nat'l Ass 'n v. First Am. Title Ins. Co., 465 Mass. 741, 744-745 (2013). The underlying complaint "need only show, through general allegations, a possibility that the liability claim falls within the insurance coverage. There is no requirement that the facts alleged in the complaint specifically and unequivocally make out a claim within the coverage." Billings, 458 Mass. at 200-201, quoting Sterilite Corp. v. Continental Gas. Co., 17 Mass. App. Ct. 316, 319 (1983). Accordingly, a duty to defend does not turn on the specific cause of action enunciated by the pleader or require that the complaint mirror the policy's coverage language. See Boston Symphony Orch., Inc. v. Commercial Union Ins. Co., 406 Mass. 7, 12-13 (1989). Rather, the analysis focuses on "envisaging what kinds of losses may be proved as lying within the range of the allegations of the complaint, and then seeing whether any such loss fits the expectation of protective insurance reasonably generated by the terms of the policy." Billings, supra at 201, quoting Boston Symphony Orch., Inc., supra at 12-13. "Any uncertainty as to whether the pleadings include or are reasonably susceptible to an interpretation that they include a claim covered by the policy terms is resolved in favor of the insured . . . ." Deutsche Bank Nat'l Ass 'n, 465 Mass. at 745.

Holyoke Mitt. Ins. Co. in Salem v. Vibram USA, Inc., 480 Mass. 480, 484 (2018). Applying this standard, the Court concludes that Travelers did not breach a duty to defend owed under the Primary Policies.

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The Defendants contend that Travelers owed them a defense because the AC's allegations are reasonably interpreted to assert slogan infringement. To support their position, they point to allegations that they improperly

used Atomic Cafe's "unique identifiers" and "other indicia" of the Atomic Cafe brand. See, e.g., AC, ¶51 (alleging that the Defendants were still "labelling cold brew products with [Atomic Cafe's] Trademarks and other Atomic Cafe unique identifiers to align with the product labels on file with the [Public Health] Department"); ¶63 (alleging that "LeanBox also continues to use and associate with Atomic Cafe's Trademarks and other indicia of Atomic Cafe"). The Defendants also refer to Exhibit 4 of the AC and more specifically, to the Phrase on the first page of the Grind website screenshot. They claim that when one reads the AC and Exhibit 4 together, the AC alleges that the Phrase is one of the Atomic Café's "unique identifiers" or "other indicia" that the Defendants improperly used, and, therefore, the Primary Policies require defense coverage.[12] I disagree.

The Defendants' reliance on Exhibit 4 is misplaced. Only paragraphs 62 and 63 reference Exhibit 4. They state:

> 62. For example, as of October 5, 2017, Atomic Cafe's Trademark appeared on Grind's website, a pertinent screenshot which is attached as Exhibit 4. Next to it [the Trademark]:
>
> > The innovators behind LeanBox have partnered up with local artisan coffee roaster John Mahoney to create Grind coffee. Through the use of truly fresh products, innovative & flexible equipment solutions, and fully customizable programs, Grind strives to bring the barista experience right into your office.
>
> 63. LeanBox also continues to use and associate with Atomic Cafe's Trademarks and other indicia of Atomic Cafe. For example, as of October 5, 2017, Atomic Cafe's Trademark and other indicia appeared on LeanBox's website [a screenshot of which is found in Exhibit 4] in connection with a job posting for a Coffee Brewing Assistant.

The Phrase is not mentioned in either paragraph, and nothing in the paragraphs indicate that the Atomic Plaintiffs considered it one of the "unique identifiers" or "other indicia" associated with the Atomic Cafe. Indeed, the section of Exhibit 4 referenced in ¶63 (the only paragraph of the two that uses the "other indicia" language) is a screenshot of the LeanBox website, which does not contain the Phrase.

Nothing in the AC suggests that the Atomic Plaintiffs owned or used the Phrase. Instead, several paragraphs reasonably suggest that the terms "unique identifiers" and "other indicia" do not refer to that Phrase. For example, ¶64 asserts:

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[12] At the hearing, the Defendants focused on this argument. In their briefing, however, they contend that Travelers had also breached a duty to defend a disparagement claim asserted by the Atomic Plaintiffs. See JA, Ex. 1 at 214215, Ex. 3 at 118-119 (providing coverage for "disparagement"). This argument lacks merit. Because the AC specifically alleges that the Defendants infringed Atomic Cafe's trademarks and misappropriated its trade secrets, coverage for any such disparagement is wholly barred by the Primary Policies' Intellectual Property Exclusion. See Sterngold Dental, LLC v. HDI Glob. Ins, Co., 929 F.3d 1, 8 (1st Cir. 2019) (coverage barred by similar exclusion); PTC, Inc. v. Charter Oak Fire Ins. Co., 123 F. Supp. 3d 206, 215 (D. Mass. 2015) (same). For the reasons stated in this decision, that Exclusion's exception for suits alleging slogan infringement does not apply because the AC is not reasonably susceptible of an interpretation that it states or roughly sketches a claim of slogan infringement within the Primary Policies. See Sterngold, 929 F.3d at 9-10. I reject the Defendants' contention that, in light of the Policies' Condition 7, the exclusion does not apply. See PTC, Inc., 123 F.3d at 215.

> Defendants continue to use the [Atomic Cafe] Trademarks and other indicia of Atomic Cafe in connection with cold brew kegs it delivers to customers. Specifically, as of October 3, 2017, Defendants labelled cold brew kegs with Plaintiffs' unique "wrap" which depicts Plaintiffs' Trademark and their specialized cold brew label. . . . Exhibit 5, Photographs of Cold Brew Kegs and Labels.

Exhibit 5 to the AC does not contain the Phrase at issue. Likewise, ¶39 alleges that product labels Mahoney submitted to the DPH, which are depicted in Exhibit 3 to the AC, were "branded with the Trademarks and other Atomic Cafe unique identifiers." Exhibit 3 also does not contain any reference to the Phrase.

In the absence of any indication that the Atomic Plaintiffs owned, or used the Phrase as an "unique identifier" or "other indicia" of Atomic Cafe, the AC cannot reasonably be interpreted to suggest that the Atomic Plaintiffs alleged or sought damages for the "advertising

injury" offense of "slogan" infringement covered by the Primary Policies.[13] Having no such duty to defend, Travelers also had no duty to indemnify the Defendants. See Bagley v. Monticello Ins. Co., 430 Mass. 454, 459 (1999) ("If an insurer has no duty to defend based on the allegations in the plaintiff's complaint, it necessarily follows that the insurer does not have a duty to indemnify."). Accordingly, Travelers' motion for summary judgment is allowed on its declaratory judgment claims and on Counts I, II, IV, V and VIII of the Counterclaim,[14] and the Defendants' cross-motion for summary judgment is denied on Count I of their Counterclaim.

2. Count III of the Counterclaim

Relying on footnote 15 in OneBeacon Am. Ins. Co. v. Celanese Corp. ("OneBeacon"), the Defendants claim that Travelers breached a duty, which resulted from "reservation of rights" letters, to reimburse them for the fees of its defense counsel until Travelers disclaimed coverage in February of 2018. Their argument is unavailing.

In footnote 15, the Appeals Court stated:

> Massachusetts has "adopted a per se rule that where an insurance company reserves the right to deny coverage for a particular claim, then a conflict of interest between the insurance company and insured exists." Twin City Fire Ins. Co. v. Ben Arnold—Sunbelt Bev. Co. of S.C., LP, 433 F.3d 365, 370 (4th Cir. 2005). See [Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. 387, 406-407 (2003)]. Under this per se rule, "the insured may require the insurer either to relinquish its reservation of rights or relinquish its defense of the insured and reimburse the insured for its defense costs." Id. at 407.

> [13] The Defendants contend that in addition to the AC and its Exhibit 4, the July 13, 2017 email and the Overview appended to their January 2018 letters to Baker and Newkirk support their position. See Citation Ins. Co. v. Newman, 80 Mass. App. Ct. 143, 146 (2011) ("[In analyzing the potential scope of the complaint, consideration must be given to extrinsic facts known or readily knowable by the insurer, which place liability within the coverage of the policy."). However, these further documents do not advance the Defendants' claim. Although the Overview repeatedly uses the Phrase, nothing in it suggests that it was ever owned or used by the Atomic Plaintiffs as an "unique identifier" or other "indicia" of Atomic Cafe. See Open Software Found, Inc. v. U.S. Fid & Guar. Co., 307 F.3d 11, 24 (1st Cir. 2002) ("There is a discernible line between adumbration in a complaint and the mischaracterization of a complaint by an insured relying creatively on extrinsic facts.")

[14] As previously noted, the Umbrella Policies contain the same or substantially similar relevant terms, conditions, and exclusions as the Primary Policies, such that if coverage is unavailable under the Primary Policies, it is unavailable under the Umbrella Policies, which are the subject of Count II of the Counterclaim.

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92 Mass. App. Ct. 382, 389 n.15 (2017). The Defendants' reliance on this footnote, however, apparently overlooks the following, earlier statement in the same opinion:

> In Massachusetts, 1w] hen an insurer seeks to defend its insured under a reservation of rights, and the insured is unwilling that the insurer do so, the insured may require the insurer either to relinquish its reservation of rights or relinquish its defense of the insured and reimburse the insured for its defense costs.... In other words, an insurer may [not] reserve its rights to disclaim liability in a case and at the same time insist on retaining control of its defen[s]e.

Id. at 386-387 (internal quotes and citations omitted) (italics added, underline in original).

Because Travelers never agreed to defend the Defendants' in the Underlying Suit, the referenced "per se rule" does not apply. Accordingly, Travelers' motion for summary judgment is allowed, and the Defendants cross-motion for summary judgment is denied, on Count III of the Counterclaim.

3. Counts VI and VII of the Counterclaim

The Defendants and Travelers have each separately moved for summary judgment as to liability on Counts VI and VII of the Counterclaim, in which the Defendants allege that Travelers' claims handling violated Chapter 93A, §§ 9 and 11, and Chapter 176D. Defendants contend that the facts are undisputed "that Travelers engaged in unfair conduct in evaluating its duty to defend and in failing "promptly [to] advise the [Defendants] of its coverage position until February 5 and 9, 2018.15 In particular, the Defendants allege that Travelers delayed issuance of its coverage determinations "for the purpose of getting more time to prepare to litigate against the insureds." Id. at p.18.

The Defendants' claim that Travelers engaged in unfair conduct in evaluating its duty to defend is precluded by my decision that Travelers owed the Defendants no duty to defend. See

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[15]Memorandum of Law in Support of Defendants' Motion for Summary Judgment on Liability on Counts I, II (sic), VI and VII of their Counterclaims at p. 17.

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Home Ins. Co. v. Liberty Mut. Fire Ins. Co., 444 Mass. 599, 608 (2005) ("An insurer does not commit a violation of G.L. c. 93A when it rightfully declines to defend a claim that is not covered by its policy."); Transamerca Ins. Co. v. KM'S Patriots, L.P., 52 Mass. App. Ct. 189, 197 (2001) ("When coverage has been correctly denied, as in this case, no violation of the Massachusetts statutes proscribing unfair or deceptive trade practices may be found."). Thus, I must evaluate Defendants' claim that Travelers engaged in unfair conduct by failing candidly and promptly to communicate its coverage decisions. See Doe v. Liberty Mut Ins. Co., 423 Mass. 366, 371 (1996) ("Because we have decided that [the insurer] had no duty to defend, we look to see whether the record presents a basis for recovery by the [insured] because of [insurer's] conduct independent of the denial of coverage."); Raytheon Co. v. Cont'l Cas. Co., 123 F. Supp. 2d 22, 31 (D.

Mass. 2000) (explaining, on a motion to dismiss, that even if insurer correctly denied coverage, it could still be liable "for its alleged dilatory actions regarding the handling of the claim"); G.L. c. 176D, § 3(9)(b) (unfair claims practices include "[flailing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies"); § 3(9)(n) (unfair claims practices include "[flailing to provide promptly a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement").

The Defendants' claim fails for two reasons. First, the Defendants have failed to present any evidence that they were prejudiced by the alleged delay in Travelers' issuance of its coverage determinations. Second, they have failed to present evidence that bad faith by Travelers caused the delay.. The evidence in the record reflects that TICO and TICOA delayed issuing their coverage determinations largely because Newkirk and Baker consulted with in-house counsel, TICO and TICOA waited to receive additional information that they requested

from the Defendants to support their coverage claims, and TICO and TICOA evaluated whether coverage was available in light of the Defendants' January 17 and 19, 2018 letters.[16] It further shows that TICO and TICOA clearly communicated the bases of their disclaimers of coverage.

Absent a showing of prejudice or bad faith and in light of this record evidence, the Defendants cannot prevail on their c. 93A and 176D claims. See Doe, 423 Mass. at 372 (where insurer took six months to respond to claim letter, c. 93A claim failed because the plaintiff offered "no evidence to show that he was prejudiced" by any delay and there was "nothing in the record to show that any delay in responding to the plaintiffs claim was the result of bad faith or ulterior motives."). Accordingly, Travelers' motion for summary judgment is allowed, and the Defendants cross-motion for summary judgment is denied, on Counts VI and VII.

Order

The Plaintiffs' Motion for Summary Judgment is ALLOWED and the Defendants' Motion for Partial Summary Judgment is DENIED. It is further ORDERED, ADJUDGED, and DECLARED that Plaintiffs' did not owe a duty to defend or indemnify the Defendants under their Primary and Umbrella Policies in connection with Atomic Cafe, Inc. v. Roy, 1:17-cv11927-IT.

/s/ Karen F. Green Justice of the Superior Court

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[16] Although there is some evidence that Travelers wished to coordinate the filing of its declaratory judgment action with the issuance of its declination letters, there is no evidence that this desire materially contributed to the delay.

