STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

ATLAS SYSTEMS, INC.,

Plaintiff,

Case No. 21-187529-CB
v **Hon. Michael Warren**

HOME-OWNERS INSURANCE COMPANY,

Defendant.

OPINION AND ORDER REGARDING PLAINTIFF ATLAS SYSTEMS INC.'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10) AND DEFENDANT HOME-OWNERS INSURANCE COMPANY'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court, held in the County of Oakland, State of Michigan
June 7, 2022

PRESENT: HON. MICHAEL WARREN

OPINION

I

This cause of action arises out of a dispute regarding insurance coverage for a federal lawsuit[1] filed against insured Atlas System, Inc. ("Atlas"). Atlas alleges that Home-Owners Insurance Company ("Home-Owners") has a duty to defend Atlas against

[1] *Avaya, Inc. v Atlas Systems, Inc d/b/a Atlasphones.com and "The Telecom Dealer" et al.*, filed in the United States District Court, Northern District of California, San Francisco Division, Case No. 3:19-cv-00565-SI (the "Avaya action").

the claims made in the Avaya action under a Commercial General Liability policy of insurance. In particular, Atlas alleges Declaratory Action (Count I) and Breach of Contract (Count II).

Before the Court is Plaintiff Atlas Systems Inc.'s Motion for Summary Disposition pursuant to MCR 2.116(C)(10) and Defendant Home-Owners Insurance Company's Motion for Summary Disposition. Oral argument is dispensed as it would not assist the Court in its decision-making process.[2]

At stake is whether the terms of the subject Commercial General Liability policy of insurance contractually obligate Home-Owners to defend Atlas against the Avaya action? Because Coverage A does not afford coverage where Avaya has not alleged bodily injury or property damage and any coverage afforded under Coverage B is excluded, coverage is not available under the Policy and the answer is "no."

[2] MCR 2.119(E)(3) provides courts with discretion to dispense with or limit oral argument and to require briefing. MCR 2.116(G)(1) specifically recognizes application of MCR 2.119(E)(3) to summary disposition motions. Subrule (G)(1) additionally authorizes courts to issue orders establishing times for raising and asserting arguments. This Court's Scheduling Order clearly and unambiguously set the time for asserting and raising arguments, and legal authorities to be in the briefing – not to be raised and argued for the first time at oral argument. Therefore, both parties have been afforded due process as they each had notice of the arguments and an opportunity to be heard by responding and replying in writing, and this Court has considered the submissions to be fully apprised of the parties' positions before ruling. Because due process simply requires parties to have a meaningful opportunity to know and respond to the arguments and submissions which has occurred here, the parties' have received the process due.

II
Background

The parties agree that Atlas procured a Commercial General Liability policy of insurance from Home-Owners, Policy No. 164611-04983994-18, effective December 8, 2018 through December 8, 2019 (the "Policy"). The Policy covers bodily injury and property damages liability and personal and advertising injury.

Coverage A of the Policy applies to Bodily Injury and Property Damage. The Insuring Agreement states "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' 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' or 'property damage' to which this insurance does not apply. We may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result . . . ." [Policy, Section I, Coverage A, ¶1a.][3] "Property damage" is defined as "Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or Loss of use of tangible property that is not

[3] The Policy identifies seventeen Exclusions under Coverage A which the insurance does not apply to: expected or intended injury; contractual liability; liquor liability, workers' compensation, and similar laws; employer's liability; pollution; aircraft, auto or watercraft; mobile equipment; war; damage to property; damage to your product; damage to your work; damage to impaired property or property not physically injured; recall of product; work or impaired property; personal and advertising injury; electronic data; and recording and distribution of material or information in violation of law.

physically injured. All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it." [Policy, Section V, ¶17.]

Coverage B of the Policy applies to Personal and Advertising Injury Liability. The Insuring Agreement states "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. We may, at our discretion, investigate any offense and settle any claim or 'suit' that may result." [Policy, Section I, Coverage B, ¶1a.] The Policy excludes coverage for infringement of copyright, patent, trademark, or trade secret; however, that exclusion "does not apply to infringement, in your 'advertisement', of copyright, trade dress or slogan."[4] [Policy, Coverage B, ¶2i.] "Advertisement" is defined as "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." [Policy, Section V, ¶1.] An "Advertisement" includes "material placed on the internet" and "that part of a website that is about your goods, products or services for the purposes of attracting customers or supporters." [Policy, Section V, ¶1.] "Personal

[4] The Policy identifies sixteen Exclusions under Coverage B which the insurance does not apply to: knowing violation of rights of another; material published with knowledge or falsity; material published prior to policy period; criminals acts; contractual liability; breach of contract; quality or performance of goods – failure to confirm to statements; wrong description of prices; infringement of copyright, patent, trademark or trade secret; insureds in media and internet type businesses; electronic chatrooms or bulletin boards; unauthorized use of another's name or product; pollution; pollution-related; and war.

and advertising injury" is defined as "injury, including consequential "bodily injury", arising out of one of more of the following offenses: a. False arrest, detention or imprisonment; b. Malicious prosecution; c. the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owners, landlords or lessor; d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; e. Oral or written publication, in any manner, of material that violates a person's right of privacy; f. The use of another's advertising idea in your 'advertisement'; or g. Infringing upon another's copyright, trade dress or slogan in your 'advertisement.'" [Policy, Section V, ¶14.]

On or about January 31, 2019, the Avaya action was filed in the Northern District of California. Avaya alleges that Atlas participated in an illegal software piracy operation, sold and distributed pirated Avaya Internal Use Licenses, and resold counterfeit Avaya phones and genuine Avaya phones with counterfeit labels that bore counterfeit trademarks. Atlas allegedly advertised, promoted, distributed, sold and/or offered for sale pirated software and counterfeit phone equipment bearing the Avaya Marks via Atlas' website. In particular, Avaya alleges Federal Trademark Infringement and Counterfeiting, 15 USC 1114 (Count I), Federal Unfair Competition, 15 USC 1125(a) (Count II), Federal Direct and Indirect Copyright Infringement, 17 USC 501, *et seq*. (Count III), Violations of the Digital Millennium Copyright Act, 17 USC 1201, *et seq*. (Count IV),

Trafficking in Counterfeit or Illicit Labels, 18 USC 2318 (Count VII) and Unjust Enrichment/Restitution/Constructive Trust (Count VIII) against Atlas.

Atlas allegedly tendered its defense to Home-Owners three times.[5] Home-Owners has declined to defend Atlas, claiming that Atlas is not entitled to coverage under the insuring agreements of the Policy and/or that applicable exclusions preclude coverage.

Atlas alleges as follows:

> 22. Atlas seeks a declaration that Defendant has a duty and obligation under the Policy to defend Atlas in the Avaya Lawsuit.
>
> 23. Specifically, Atlas believes and has asserted that Defendant has a duty and obligation to defend Atlas for one or more of the following reasons:
>
> • Avaya seeks damages for "trade dress," which constitutes "personal and advertising injury" under the Policy;
>
> • Avaya seeks damages for Atlas' alleged use of its advertising idea, which constitutes "personal and advertising injury" under the Policy;
>
> • Avaya seeks damages for Atlas' alleged disparagement of its goods, products, or services, which constitutes "personal and advertising injury" under the Policy;
>
> • Avaya asserts a claim for unfair competition, which by definition includes trade dress infringement and constitutes "personal and advertising injury" under the Policy; and
>
> • Avaya seeks damages for lost phone sales as a result of Atlas' alleged counterfeit phone scheme, which constitutes "property damage" under the Policy.
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> 24. Defendant has refused to defend Atlas in the Avaya Lawsuit.

[5] Home-Owners admits that Atlas tendered its defense on May 14, 2019.

25. An actual, existing and bona fide case and controversy exists between Atlas, on the one hand, and Defendant, on the other hand, concerning their respective rights and obligations under the Policy, and a declaratory judgment is necessary to safeguard Atlas' rights and future interests.

26. If Atlas' rights are not adjudicated by way of declaratory action, there will be immediate adverse consequences to it.

* * *

29. The Policy constitutes a valid and binding contract between the parties.

30. Atlas timely and properly tendered its defense of the Avaya Lawsuit to Defendant.

31. Defendant has denied that Atlas is entitled to a defense under the Policy and refused to provide Atlas with a defense in the Avaya Lawsuit.

32. Defendant's failure and/or refusal to provide Atlas with a defense in the Avaya Lawsuit is a material breach of contract, which has resulted in damages to Atlas.

* * *

[Complaint.]

III
The Arguments

Atlas argues that Home-Owners is required to defend it in the Avaya action pursuant to the Policy and has breached the Policy by failing to do so. Specifically, Atlas argues that Avaya's allegations include that Atlas infringed on its trade redress; used its advertising ideas; disparaged its goods, products and services; and suffered property

damage, and that all of these allegations are covered by the Policy and the Policy exclusions do not apply.

Home-Owners argues that it does not have a duty to indemnify or defend because the alleged acts of Atlas do not qualify as an occurrence or as personal and advertising injury under the terms of the Policy. Home-Owners further argues that it owes no coverage because the Policy excludes any alleged coverage under numerous Exclusions. Finally, Home-Owners argues that the Cyber-Liability Coverage removes coverage for the actions as alleged in the Avaya action.[6]

IV
Standard of Review

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim or defense. See, e.g., MCR 2.116(G)(3)(b); *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996). Accordingly, "[i]n evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden v Rozwood,* 461 Mich 109, 119-120 (1999); MCR 2.116(C)(10); MCR 2.116(G)(4); *Quinto*, 451 Mich at 358. The moving party "must specifically identify the issues" as to which it "believes there is no genuine

[6] Atlas' Response and Reply Brief reflect that it is neither seeking coverage nor a defense pursuant to the Cyber Liability Coverage part of the Policy.

issue" of material fact and support its position as provided in MCR 2.116. MCR 2.116(G)(4).

Under Michigan law, the moving party may satisfy its burden of production under MCR 2.116(C)(10) by demonstrating to the court that the non-moving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Quinto*, 451 Mich at 361. If the moving party properly supports its motion, the burden "then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Id.* at 362. If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion. MCR 2.116(G)(4); see also *Meyer v City of Center Line*, 242 Mich App 560, 575 (2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116[C][10]).

In all cases, MCR 2.116(G)(4) squarely places the burden on the parties, not the trial court, to support their positions. A reviewing court may not employ a standard citing mere possibility or promise in granting or denying the motion. *Maiden*, 461 Mich at 121-120 (citations omitted), and may not weigh credibility or resolve a material factual dispute in deciding the motion. *Skinner v Square D Co*, 445 Mich 153, 161 (1994). Rather, summary disposition pursuant to MCR 2.116(C)(10) is appropriate if, and only if, the evidence, viewed most favorably to the non-moving party, fails to establish any genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362, citing MCR 2.116(C)(10) and (G)(4); *Maiden*, 461

Mich at 119-120 (1999). A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160 (2019) (citation omitted). Granting a motion for summary disposition under MCR 2.116(C)(10) is warranted if the substantively admissible evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362-363.

V
Summary disposition in Home-Owners' favor is warranted

A
The Law

"An insurance company has a duty to defend its insured if the allegations of the underlying suit arguably fall within the coverage of the policy." *Citizens Ins Co v Secura Ins*, 279 Mich App 69, 74 (2008) (quotation marks and citation omitted). Courts must effectuate the intent of the parties by looking at the language of the contract. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467 (2003). Insurance policies are interpreted and construed in accordance with well-established rules of contract construction. *Citizens Ins Co v Pro–Seal Serv Group, Inc*, 477 Mich 75, 82 (2007) ("in reviewing an insurance policy dispute we must look to the language of the insurance policy and interpret the terms therein in accordance with Michigan's well-established principles of contract construction"). "[A]n insurance policy must be read as a whole to determine and effectuate the parties' intent." *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287,

292 (2009). "An insurance contract must be construed so as to give effect to every word, clause, and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory." *Royal Prop Group LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715 (2005). In other words, "an insurance contract must be enforced in accordance with its terms." *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353–354 (1999). Our Michigan Supreme Court has elaborated:

> First, an insurance contract must be enforced in accordance with its terms. A court must not hold an insurance company liable for a risk that it did not assume. Second, a court should not create ambiguity in an insurance policy where the terms of the contract are clear and precise. Thus, the terms of a contract must be enforced as written where there is no ambiguity.
>
> While we construe the contract in favor of the insured if an ambiguity is found, this does not mean that the plain meaning of a word or phrase should be perverted, or that a word or phrase, the meaning of which is specific and well recognized, should be given some alien construction merely for the purpose of benefitting an insured. The fact that a policy does not define a relevant term does not render the policy ambiguous. Rather, reviewing courts must interpret the terms of the contract in accordance with their commonly used meanings. Indeed, we do not ascribe ambiguity to words simply because dictionary publishers are obliged to define words differently to avoid possible plagiarism.
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> *Id*. at 354-355 (internal citations omitted).

Thus, courts must enforce clear and specific policy exclusions because an "insurance company cannot be found liable for a risk it did not assume." *Group Ins Co of Mich v Czopek (After Remand)*, 440 Mich 590, 597 (1992). On the other hand, "[i]n case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under

the policy, the doubt must be resolved in the insured's favor." *Matouk v Mich Muni League Liability & Prop Pool*, 320 Mich App 402, 409 (2017).

B
Analysis

1
Coverage A of the Policy does not afford coverage

The Insuring Agreement under Coverage A contractually obligates Home-Owners to pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." [Policy, Section I, Coverage A, ¶1a.] "Property damage" is defined under the Policy as "Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it." [Policy, Section V, ¶17.]

In its Third Amended Complaint, Avaya has not alleged any bodily injury.[7] Avaya has also not alleged property damage, that being any physical injury to tangible property. Instead, Avaya alleges lost sales and the diminution of trust and goodwill; however, economic damages do not constitute property damage. *Fitch v State Farm Fire & Casualty Co*, 211 Mich App 468 (1995) (a policy's definition of "property damage" which referred

[7] Atlas attached the Second Amended Complaint instead of the Third Amended Complaint to its Motion.

only to physical damage to or destruction of tangible property did not include claimed economic and business losses); *Krueger Seed Farms, Inc v Szlarczyk*, unpublished per curiam opinion of the Court of Appeals, issued March 9, 1999 (Docket Nos. 200249 and 200250) ("lost profits do not constitute damage to tangible property").[8] Accordingly, because Coverage A of the Policy does not afford coverage, Home-Owners has no duty to defend under this provision. *Group Ins Co of Mich*, 440 Mich at 597 (an "insurance company cannot be found liable for a risk it did not assume.")

2
Coverage B of the Policy does not afford coverage

The Insuring Agreement under Coverage B contractually obligates Home-Owners to "pay those sums that the insured becomes legally obligated to pay as damages because of 'personal and advertising injury' to which this insurance applies." [Policy, Section I, Coverage B, ¶1a.] "Personal and advertising injury" is defined, in part, as "injury, including consequential 'bodily injury', arising out of one of more of the following offenses: . . . d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; . . . f. The use of another's advertising idea in your 'advertisement'; or g.

[8] Atlas relies upon a case from the Third Circuit Court of Appeals, *Lucker Mfg, A Unit of Amclyde Engineered Products, Inc v Home Ins Co*, 23 F3d 808 (CA 3 1994), but in that case, the costs incurred to increase safety precautions during the manufacturing of an anchoring system for offshore drilling due to a defective component were determined to be covered under "loss of use." Here, Avaya did not lose the use of its software or phones or incur additional costs related to the software or phones.

Infringing upon another's copyright, trade dress or slogan in your 'advertisement.'" [Policy, Section V, ¶14.]

Avaya alleges trade dress infringement and federal unfair competition against Atlas, in part, as follows:

> 3. Adding to the injury, Defendant Atlas has been caught not only offering for sale and distributing these pirated Internal Use Licenses, but in addition, reselling over a thousand counterfeit "Avaya" branded phones, as well as apparently genuine Avaya phones - marketed and sold as "new" - that were repackaged and resold with counterfeit labels that closely mimicked genuine Avaya factory labels and bore counterfeit Avaya trademarks. Atlas has identified newly-added Defendant Telecom as the source for the counterfeit "Avaya" branded phones that Avaya has uncovered thus far.
>
> 4. Defendants' unlawful schemes, as alleged in more detail below, have not only caused Avaya significant monetary damages, but also they have significantly undermined Avaya's brand, goodwill, and reputation with customers. Thousands of end customers have been duped into believing they were receiving a genuine high-quality Avaya product, rather than a counterfeit and otherwise infringing product, and/or a lawful software license, rather than pirated software license that conveys no actual license rights at all to the end customer.
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> * * *
>
> 56. Avaya has also recently uncovered additional direct infringement and counterfeiting by Defendant Atlas, doing business as Atlasphones.com. In or about mid-2016, Avaya was informed about a purchase of over a thousand Avaya phone systems by an end customer, which were represented as "new" Avaya IP Phones. The end customer complained of a high rate of failure of these "Avaya" branded IP Phones. Upon analysis, over a thousand of these supposedly new "Avaya" IP Phones turned out to be counterfeit, based on the associated data for the phones. Upon further analysis of a sample of the phones, these counterfeit phones not only had fake serial numbers and fake manufacturing codes, but also had internal components that had been hacked and programmed to bypass internal software controls. This large sale of counterfeit Avaya products traced back

to Atlas. This is but one example of Atlas' counterfeiting, and therefore, Avaya is informed and believes and thereon alleges that, if left unchecked, Atlas will continue to resell counterfeit products with impunity.

57. In addition, Avaya has confirmed through additional test purchases that Atlas is also purchasing gray market Avaya products originally sold overseas in bulk and then repackaging and reselling these previously sold phones as "new." To convince their end customers that the phones are new and authorized by Avaya, Atlas sells these phones in new packaging that counterfeits the Avaya Marks and tradename and that counterfeits Avaya's genuine factory seals with counterfeit factory labels that closely mimic genuine Avaya factory labels.

58. The above unlawful conduct has a high likelihood of causing substantial consumer confusion, and Avaya is informed and believes and thereon alleges, that Defendants' illegal conduct caused significant actual consumer confusion. In looking at the online sites through which Defendants made their sales, neither those sites nor the customer reviews for Defendants' license sales shows any acknowledgment of the illicit nature of the software licenses being bought and sold, and therefore reflects the confusion by these customers about the lack of authorization and lack of genuineness of these "Avaya" branded software license sales. Further, as to Defendant Atlas, the purchase of thousands of counterfeit phones by end customers similarly reflects a belief by the customer that they were purchasing genuine Avaya phones, and were not aware the products Atlas sold were counterfeit. Avaya is informed and believes, and thereon alleges, that Defendants intentionally and willfully traded on Avaya's Marks, reputation, and goodwill to increase Defendants' sales by causing consumers to believe that their unlawful product and software sales were somehow associated with, affiliated with, and authorized by, Avaya, when they are not, and when the unlawful products and/or software, as alleged in detail above, are nongenuine and/or are counterfeit within the meaning of the Lanham Act.

* * *

67. Each Defendant did, without authorization, use in commerce the Avaya Marks, and also make false designations of origin, false or misleading descriptions of fact, and/or false or misleading representations of fact, which were and are likely to cause confusion, or to cause mistake, or to deceive customers as to the affiliation, connection, or association of Defendants with Avaya, and/or as to the origin, sponsorship, or approval of the Defendants' goods, services, or commercial activities.

> 68. Avaya alleges on information and belief that Defendants' acts have been committed with knowledge of Avaya's exclusive rights and goodwill in Avaya Marks, as well as with willfulness, bad faith, and the intent to cause confusion, mistake and/or to deceive. Defendants' conduct, as alleged herein, constitutes an exceptional case under 15 U.S.C. § 1117.
>
> 69. Defendants' unauthorized use of counterfeit copies of Avaya's Marks falsely represents Defendants' counterfeit "Avaya" products as emanating from, or being authorized by, Avaya and places beyond Avaya's control the quality of products bearing Avaya Marks.
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> 70. Avaya has been, and continues to be, damaged by Defendants' infringement, including by suffering irreparable harm through the diminution of trust and goodwill among Avaya consumers and members of the general consuming public and the trade. Avaya has no adequate remedy at law. As a result of Defendants' infringement of the Avaya Marks, Avaya is entitled to an injunction, and an order of destruction of all of Defendants' infringing materials.
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> * * *
>
> [Avaya Third Amended Complaint.]

Avaya further alleges, in part, that Atlas' sale of counterfeit and infringing products and pirated software license has undermined Avaya's brand, goodwill and reputation. [Third Amended Complaint, ¶4, 32, 39, 57, 70.]

Even assuming those allegations would otherwise be considered included as "Personal and Advertising Injury" under Coverage B of the Policy, Coverage B excludes coverage for the knowing violation of the rights of another and for the publication of material with knowledge of its falsity. That is, the Policy states in pertinent part as follows:

2. Exclusions

This insurance does not apply to:

a. Knowing Violation Of Rights Of Another

"Personal and advertising injury" caused by or at the direction of the insured with knowledge that the act would violate the rights of another and would inflict "personal and advertising injury."

b. Material Published With Knowledge Of Falsity

"Personal and Advertising injury" arising out of oral or written publication, in any manner, of material, if done by or at the direction of the insured with knowledge of its falsity.

* * *

[Section I, Coverage B, ¶2a and b.]

Avaya alleges that Atlas acted willfully, knowingly and intentionally:

22. This Court has personal jurisdiction over Defendants because each Defendant, in participating in the scheme to create and/or distribute the stolen Internal Use Licenses, has **willfully** infringed intellectual property rights of Avaya, a known forum resident, including by trafficking in pirated Avaya software and otherwise causing tortious injury to Avaya, including to its trademarks and copyrights, within California, and within this District in particular. Defendants **did so with knowledge** that Avaya was located in California. Further, Defendants have performed intentional acts expressly aimed at Avaya in this forum and thereby caused damage that they **knew** would be suffered by Avaya in this forum. In addition, Defendants have marketed, advertised, and offered infringing Avaya software licenses for sale into California and, upon information and belief, transacted other business within California specifically related to the infringing distribution scheme. Defendants have also misrepresented the authentic nature of the counterfeit and/or otherwise infringing "Avaya" products to residents of California, including within this District. Defendants engaged in the unlawful conduct alleged in this Complaint, with knowledge that Avaya is located in California.

* * *

55. Defendants Pearce, Sharkfish, Hines, DBSI, and Tri-State thereby **willfully and knowingly** infringed Avaya's copyrights and trademarks,

and the other reseller defendants, including at least Defendants Atlas, Telephone Man, Featurecom, Drew Telecom, and Conroy either acted **willfully and knowingly** in supporting this unlawful scheme or with willful blindness and complete disregard for the harm caused to Avaya and its end customers as a result of their direct and substantial involvement in enabling this vast illegal operation and in thereby infringing Avaya's intellectual property. Defendants are each jointly and severally liable for their direct and substantial involvement in, and actions taken in support of, the alleged infringing distribution chain, and each Defendant profited handsomely for their part in this scheme. Defendants are also indirectly liable for the infringement related to their downstream customers due to Defendants' conduct alleged above in (i) controlling the distribution of infringing products and directly profiting therefrom, and (ii) knowingly inducing, causing, and/or materially contributing to the infringing activity of their downstream customers.

* * *

58. The above unlawful conduct has a high likelihood of causing substantial consumer confusion, and Avaya is informed and believes and thereon alleges, that Defendants' illegal conduct caused significant actual consumer confusion. In looking at the online sites through which Defendants made their sales, neither those sites nor the customer reviews for Defendants' license sales shows any acknowledgment of the illicit nature of the software licenses being bought and sold, and therefore reflects the confusion by these customers about the lack of authorization and lack of genuineness of these "Avaya" branded software license sales. Further, as to Defendant Atlas, the purchase of thousands of counterfeit phones by end customers similarly reflects a belief by the customer that they were purchasing genuine Avaya phones, and were not aware the products Atlas sold were counterfeit. Avaya is informed and believes, and thereon alleges, that Defendants **intentionally and willfully** traded on Avaya's Marks, reputation, and goodwill to increase Defendants' sales by causing consumers to believe that their unlawful product and software sales were somehow associated with, affiliated with, and authorized by, Avaya, when they are not, and when the unlawful products and/or software, as alleged in detail above, are nongenuine and/or are counterfeit within the meaning of the Lanham Act.

* * *

68. Avaya alleges on information and belief that Defendants' acts have been committed **with knowledge** of Avaya's exclusive rights and goodwill

in Avaya Marks, as well as **with willfulness, bad faith, and the intent** to cause confusion, mistake and/or to deceive. Defendants' conduct, as alleged herein, constitutes an exceptional case under 15 U.S.C. § 1117.

* * *

74. Without consent, authorization, approval, or license, each Defendant **knowingly, willingly, and unlawfully** copied, prepared, published, and distributed Avaya's copyrighted works, portions thereof, and/or derivative works of the same, constituting direct copyright infringement.

* * *

77. Defendants' direct and indirect infringements are, and have been, **knowing and willful**. By this unlawful copying, use, and distribution, Defendants have violated Avaya's exclusive rights under 17 U.S.C. § 106 of the Copyright Act.

* * *

88. Defendants' acts of software access control circumvention, alleged further above, are and have been **knowing and willful**. As a direct and proximate result of their infringements, Defendants have realized unjust profits, gains and advantages at the expense of Avaya, including as set forth above. In addition, Avaya has suffered substantial loss and damages to its property and business, including significant monetary damages as a direct and proximate result of Defendants' infringements, including as set forth above. The harm caused by Defendants' unlawful conduct entitles Avaya to recovery of all available remedies under the law, including but not limited to actual damages, infringers' profits, statutory damages (if elected), reasonable attorney fees, costs, and prejudgment interest.

* * *

105. Avaya's software license keys are identifying labels accompanying and designed to accompany copies of Avaya's computer programs. The pirated Avaya Internal Use Licenses that Defendants all trafficked in constitute illicit labels within the meaning of 18 U.S.C. § 2318, as they are genuine licensing documents that are used by Avaya to verify that a copy of a computer program is not infringing of any Avaya copyright. Defendants **knowingly** trafficked in illicit labels by distributing pirated Avaya Internal Use Licenses. As further alleged above, Defendants Pearce, Sharkfish, Hines, DBSI, and Tri-State were willfully and knowingly

trafficking in counterfeit or illicit labels, documentation, or packaging accompanying a copy of a computer program. Hines, DBSI, Tri-State, Featurecom, and Drew Telecom were authorized partners and therefore knew how Avaya software licenses were distributed through Avaya's authorized distribution channels. Hines, DBSI, and Tri-State therefore knew, or were willfully blind to the fact, that the distribution of Avaya software and the illicit labels accompanying it, obtained through Pearce, was not legal, authorized, or permitted by Avaya.

106. Further, the other reseller Defendants, including at least Atlas, Telephone Man, Featurecom, Conroy, Drew Telecom, and Telecom Spot, also acted **willfully and knowingly** in supporting this unlawful scheme or with willful blindness and complete disregard for the harm caused to Avaya and its end customers as a result of their direct and substantial involvement in enabling this vast illegal operation and in thereby infringing Avaya's intellectual property. These reseller Defendants, including at least Atlas, Telephone Man, Featurecom, Conroy, Drew Telecom, and Telecom Spot, **knew or should have known** that the Avaya software and the accompanying illicit labels they were trafficking in were not authorized or permitted by Avaya. These reseller Defendants, including at least Atlas, Telephone Man, Featurecom, Conroy, Drew Telecom, and Telecom Spot, were not buying the stolen Internal Use Licenses through Avaya's authorized distribution channels, which means they **knew or should have known** that the further resale of such licenses was not authorized and in violation of Avaya's software license restrictions on transfer and/or resale. These reseller Defendants, including at least Atlas, Telephone Man, Featurecom, Conroy, Drew Telecom, and Telecom Spot, were purchasing the stolen Internal Use Licenses from Pearce and/or Hines, **knowing, or with willful blindness** to the fact, that they were trafficking in illicit or counterfeit labels by doing so. Avaya is informed and believes, and thereon alleges, that these stolen Internal Use Licenses were being resold by Pearce and Hines (including, at least, through Sharkfish, DBSI, and Tri-State) at prices that were often below Avaya's own internal pricing to its authorized distributors, which is of course well below the price that Avaya's authorized distributors could then sell to end users. As such, no one, and certainly not resellers who have done any business with respect to Avaya products, could possibly believe in good faith that such Avaya software and the illicit labels accompanying them had been authorized or permitted by Avaya.

107. Further, as alleged further above, Avaya is informed and believes, and thereon alleges, that individuals or entities in Austin, Texas, Auburn Hills, Michigan, and Tampa/Largo, Florida, (the locations of Atlas,

> Telephone Man, and Telecom Spot and therefore likely connected with or employed by these reseller defendants) were directly themselves leveraging the log-in credentials unlawfully used by Defendants Hines and DBSI, as alleged further above to download and/or otherwise facilitate the distribution of the pirated Internal Use Licenses, showing further **knowledge** that the Avaya software and the illicit labels accompanying them were not legal, authorized, or permitted by Avaya.
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> * * *
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> 109. Defendants' conduct in violation of 18 U.S.C. § 2318 alleged above are, and have been, **knowing and willful**. Defendants' aforesaid conduct is causing immediate and irreparable injury to Avaya and to Avaya's goodwill, and will continue to damage Avaya unless enjoined by this Court. Avaya has no adequate remedy at law. Avaya is entitled to an injunction restraining Defendants from engaging in any further such acts in violation of 18 U.S.C. § 2318. Unless Defendants are enjoined and prohibited from such conduct, and unless all illicit and/or counterfeit labels, including but not limited to all pirated software license keys, are seized and impounded pursuant to 18 U.S. C. § 2318, Defendants will continue to traffic in such illicit and/or counterfeit labels.
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> [Avaya Third-Amended Complaint (emphasis added).]

Simply put, because Avaya alleges that Atlas acted knowingly, coverage under Coverage B is plainly excluded. As such, Home-Owners has no duty to defend.[9] *Group Ins Co of Mich*, 440 Mich at 597 (an "insurance company cannot be found liable for a risk it did not assume").

[9] Other exclusions raised by Home-Owners are thereby moot.

ORDER

Based on the foregoing Opinion, Plaintiff Atlas Systems, Inc.'s Motion for Summary Disposition Pursuant to MCR 2.116(C)(10) is DENIED and Defendant Home-Owners Insurance Company's Motion for Summary Disposition is GRANTED.

This resolves the last pending claim and closes the case.