CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KIM SENG COMPANY, Cross-Complainant, Cross-Defendant and Appellant, v. GREAT AMERICAN INSURANCE CO. OF NEW YORK et al., Cross-Defendants, Cross-Complainants and Respondents.	B208699 (Los Angeles County Super. Ct. No. BC353925) ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on November 13, 2009, be modified as follows:

1. Insert the following sentence at the end of the last paragraph on page 14 after the words "Que Houng."

That alleged infringement preceded the policy periods.

2. Insert the following new paragraph after the first paragraph on page 15.

Kim Seng argues that the court in *Ringler, supra,* 80 Cal.App.4th at page 1183 used the term "substantially the same," and therefore the test "substantially similar" is not appropriate here. Both terms in this context have the same meaning.

(Cf. *McDonald v. Department of Motor Vehicles* (2000) 77 Cal.App.4th 677, 680 [referring to the statutory term "substantially the same" in Vehicle Code section 13363, subdivision (b) as requiring a "substantially similar determination"; see *Watson v. Fair Political Practices Com.* (1990) 217 Cal.App.3d 1059, 1085 [setting forth the then existing version of a Fair Political Practice Commission regulation that "pieces of mail are 'substantially similar' if their text is substantially the same"].) Sameness would seem to be absolute. There are no degrees of sameness. Just like the word "unique," which is said not to be "gradable." (See Burchfield, The New Fowler's Modern English Usage (rev. 3d ed. 1998) 809 ["It must, I think, be conceded that *unique* is losing its quality of being 'not gradable' (or absolute), but copy editors are still advised to query such uses while the controversy about its acceptability continues"]; Garner, A Dictionary of Modern Legal Usage (2d ed. 2001) 900 ["to write very *unique, quite unique, how unique,* and the like is slovenly"].)

The phrases "substantially similar,"[5] "substantially the same" (*Ringler, supra,* 80 Cal.App.4th at p. 1183) or "so slight as to be immaterial" (*Taco Bell, supra,* 388 F.3d at p. 1073), as the tests applicable here, are indistinguishable. They all mean, in effect, that a "fresh wrong" for coverage purposes has not occurred. (*Ibid.*)

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[5] Kim Seng notes that "substantially similar" is a term used in copyright cases (see *Jada Toys, Inc. v. Mattel, Inc.* (9th Cir. 2008) 518 F.3d 628, 636-637), but it is used in many other contexts. (See, e.g., Health & Saf. Code, § 11401, subd. (b)(1) [definition of controlled substance analog]; Govt. Code, § 82041.5 [definition of "mass mailing" in Political Reform Act]; *Pacific Merchant Shipping Assn. v. Voss* (1995) 12 Cal.4th 503, 523 [referring to use in tax context]; *Kurlan v. Columbia Broadcasting Systems, Inc.* (1953) 40 Cal.2d 799 [plagiarism]; *Parlour Enterprises, Inc. v. The Kirin Group, Inc.* (2007) 152 Cal.App.4th 281 [in connection with damages for lost profits]; *Fire Ins. Exchange v. Superior Court* (2004) 116 Cal.App.4th 446 [insurance coverage forms]; *People v. Silver* (1991) 230 Cal.App.3d 389 [term in Health and Safety Code not unconstitutionally vague]; *Sutton v. Walt Disney Productions* (1953) 118 Cal.App.2d 598 [breach of implied and express contracts regarding literary property].)

This modification does not change the judgment.

The petition for rehearing is denied.

MOSK, J. ARMSTRONG, Acting P. J. KRIEGLER, J.