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3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 ATLANTIC CASUALTY
7 INSURANCE COMPANY,

8 Plaintiff,

9 v.

10 EARTH METALS & JUNK
11 COMPANY, et al.,

12 Defendants.

C13-1177 TSZ

ORDER

13 THIS MATTER comes before the Court on Plaintiff's Motion for Summary
14 Judgment, docket no. 21. Having reviewed all papers filed in support of, and in
15 opposition to, Plaintiff's motion, the Court GRANTS Plaintiff's Motion for Summary
16 Judgment.

17 **Discussion**

18 The Court may grant summary judgment if no genuine issue of material fact exists
19 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

20 The moving party bears the initial burden of demonstrating the absence of a genuine issue
21 of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A fact is material if
22 it might affect the outcome of the suit under the governing law. Anderson v. Liberty
23 Lobby, Inc., 477 U.S. 242, 248 (1986). To survive a motion for summary judgment, the

1 adverse party must present affirmative evidence, which “is to be believed” and from
2 which all “justifiable interferences” are to be favorably drawn. *Id.* at 255, 257.

3 Interpretation of an insurance contract is a question of law appropriate for
4 resolution on summary judgment. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d
5 165, 171, 110 P.3d 733 (2005). The Court should consider the policy as a whole and give
6 it a “fair, reasonable, and sensible construction, as would be given to the contract by the
7 average person purchasing insurance.” *Id.* at 171. If the policy language is clear and
8 unambiguous, the court must enforce it as written; it may not modify the language or
9 create ambiguity where none exists. *Id.*

10 An insurance company has a duty to defend when there is a potential for coverage.
11 *Truck Ins. Co. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 760 (2002). The duty arises
12 when a complaint, construed liberally, against the insured alleges facts that could, if
13 proven, impose liability upon the insured within the policy’s coverage. *Id.* at 760. If the
14 claims are clearly not covered by the policy, an insurer has no duty to defend. *Nat’l*
15 *Surety Co. v. Immunex Corp.*, 176 Wn.2d 872 (2013).

16 Johnston and Metals West (collectively “Metals West”), the plaintiffs in the
17 underlying liability action, brought suit against Defendants Earth Metals NW, LLC,
18 Metals & Junk Company and Richard and Deborah Pezzner (collectively “Earth Metals”)
19 alleging six separate claims: breach of contract, violation of the Uniform Trade Secrets
20 Act, unjust enrichment, violation of Washington’s Consumer Protection Act, tortious
21 interference with a business or contractual expectancy, and conversion. Pl.’s Complaint,
22 docket no. 26-1 at 6 – 9. Plaintiff in this Declaratory Judgment Act matter, Atlantic
23

1 Casualty Insurance Company (“Atlantic”), argues that Earth Metals’s insurance policy
2 does not provide protection for any of the alleged claims. Pl.’s Mot. for Summary
3 Judgment, docket no. 21 at 10, 12, 15.

4 Breach of Contract

5 The first cause of action in the underlying complaint (the “Complaint”) is breach
6 of contract. Pl.’s Complaint, docket no. 26-1 at 6. The policy provides that “property
7 damage” coverage excludes liability for damages resulting from a breach of contract.
8 Def.’s Ex. B, docket no. 26-2.

9 Violation of Uniform Trade Secrets Act & Unjust Enrichment

10 Next, the Complaint alleges trade secret infringement. Pl.’s Complaint, docket
11 no. 26-1 at 6. However, Coverage B specifically excludes “personal and advertising
12 injury arising out of the infringement of copyright, patent, trademark, **trade secret** or
13 other intellectual property rights.” Def.’s Ex. B, docket no. 26-2 (emphasis added).

14 The Complaint further alleges that Earth Metals was unjustly enriched by utilizing
15 Metals West’s trade secrets, trade name and good will. Pl.’s Complaint, docket no. 26-1
16 at 8. Again, Atlantic’s argument is consistent with the language of the insurance policy:
17 the policy does not include protection for unjust enrichment liability. Def.’s Ex. B,
18 docket no. 26-2.

19 Violation of Consumer Protection Act

20 The Complaint also alleges that Earth Metals violated the Consumer Protection
21 Act. However, the insurance policy does not provide coverage for liability under the
22 Consumer Protection Act. Def.’s Ex. B, docket no. 26-2.

1 Tortious Interference with a Business or Contractual Expectancy

2 The Complaint alleges that Earth Metals intentionally interfered with contractual
3 relationships existing between Metals West and its customers. Atlantic correctly argues
4 that the insurance policy does not include coverage for liability for tortious interference
5 with a business or contractual expectancy. Def.'s Ex. B, docket no. 26-2.

6 Conversion

7 The Complaint alleges conversion of trade secrets, goodwill, funds, and personal
8 property. Pl.'s Complaint, docket no. 26-1 at 9. Liability for the conversion of trade
9 secrets and goodwill is not covered by the policy because the policy only provides
10 protection for damage to tangible property. See Def.'s Ex. B, docket no. 26-3 at 5.
11 Furthermore, if Earth Metals was found liable for conversion of funds or personal
12 property, this liability would still not fall within the policy's coverage because conversion
13 is an intentional tort, and intentional acts of property damage are specifically excluded
14 from the policy's coverage. Def.'s Ex. B, docket no. 26-2 at 2.

15 Claims not alleged in the Complaint

16 Earth Metals also argues that Atlantic is obligated to defend Earth Metals against
17 claims of Trade Dress Infringement and Slander. Def.'s Response, docket no. 25. Earth
18 Metals argues that, while the "underlying liability lawsuit does not (yet) specifically
19 designate Infringement of Trade Dress or Slander as causes of action in the case," the
20 claims are implied in the Complaint's statement of facts. Id. at 9. However, hypothetical
21 unpleaded claims "do not create 'potential coverage' entitling the insured to a defense."
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23

1 Chicago Ins. Co. v. The Ctr. for Counseling & Health Res., 2011 WL 1221019 (W.D.
2 Wash. 2011).

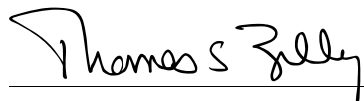
3 **Conclusion**

4 For the foregoing reasons, the Court hereby GRANTS Plaintiff's Motion for
5 Summary Judgment, docket no. 21. The Clerk is DIRECTED to enter judgment in favor
6 of plaintiff Atlantic Casualty Insurance Company and against defendants Earth Metals &
7 Junk Company, Richard and Deborah Pezzner, and Earth Metals NW, LLC, declaring
8 that plaintiff has no duty to defend or indemnify said defendants for the claims stated in
9 the Complaint filed in King County Superior Court, docket no. 26-1. As the prevailing
10 party plaintiff is entitled to costs, which may be taxed in the manner set forth in Local
11 Civil Rule 54(d).

12 IT IS SO ORDERED.

13 The Clerk is further directed to send a copy of this Order to all counsel of record
14 and to CLOSE this case.

15 DATED this 7th day of February, 2014.

16 

17 THOMAS S. ZILLY
18 United States District Judge