TRIAL-OMAHA

U.S. District Court
District of Nebraska (8 Omaha)
CIVIL DOCKET FOR CASE #: 8:14-cv-00194-JMG-CRZ

Continental Casualty Company v. Greater Omaha Packing Company, Inc.
Assigned to: Judge John M. Gerrard
Referred to: Magistrate Judge Cheryl R. Zwart
Cause: 28:1332 Diversity-(Citizenship)

Date Filed: 07/01/2014
Jury Demand: Plaintiff
Nature of Suit: 110 Insurance
Jurisdiction: Diversity

Plaintiff

Continental Casualty Company
an Illinois corporation

represented by **Dain J. Johnson**
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TERMINATED: 09/26/2014

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V.

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a Nebraska corporation

represented by

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Date Filed	#	Docket Text
07/01/2014	1	COMPLAINT with jury demand against Greater Omaha Packing Company, Inc. (Filing fee $ 400, receipt number 0867-2738804), by Attorney Dan H. Ketcham on behalf of Continental Casualty Company (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Ketcham, Dan) (Entered: 07/01/2014)

07/01/2014	2	TEXT NOTICE OF JUDGES ASSIGNED: Judge John M. Gerrard and Magistrate Judge Cheryl R. Zwart assigned. (GJG) (Entered: 07/01/2014)
07/01/2014	3	TEXT NOTICE REGARDING CORPORATE DISCLOSURE STATEMENT by Deputy Clerk as to Plaintiff Continental Casualty Company. Pursuant to Fed. R. Civ. P. 7.1, non-governmental corporate parties are required to file Corporate Disclosure Statements (Statements). The parties shall use the form Corporate Disclosure Statement, available on the Web site of the court at http://www.ned.uscourts.gov/forms/. If you have not filed your Statement, you must do so within 15 days of the date of this notice. If you have already filed your Statement in this case, you are reminded to file a Supplemental Statement within a reasonable time of any change in the information that the statement requires.(GJG) (Entered: 07/01/2014)
07/01/2014	4	ATTORNEY LETTER by Clerk that Attorney Dain J. Johnson has not registered for the system. If the requested action is not taken within fifteen (15) days of the date of this letter, this matter will be referred to the assigned magistrate judge for the entry of a show cause order. (GJG) (Entered: 07/01/2014)
07/23/2014	5	CORPORATE DISCLOSURE STATEMENT pursuant to Fed. R. Civ. P. 7.1 identifying Corporate Parent CNA Financial Corporation, Corporate Parent CNA Financial Corporation, Corporate Parent Loews Corporation, Corporate Parent Loews Corporation, Corporate Parent Continental Corporation, Corporate Parent Continental Corporation for Continental Casualty Company. by Attorney Dan H. Ketcham on behalf of Plaintiffs Continental Casualty Company, Continental Corporation, Continental Corporation, CNA Financial Corporation, CNA Financial Corporation, Loews Corporation, Loews Corporation.(Ketcham, Dan) (Entered: 07/23/2014)
09/12/2014	6	Summons Requested as to Greater Omaha Packing Company, Inc. regarding Complaint, 1 . (Ketcham, Dan) (Entered: 09/12/2014)
09/12/2014	7	Summons Issued as to defendant Greater Omaha Packing Company, Inc. regarding Complaint, 1 . YOU MUST PRINT YOUR ISSUED SUMMONS, WHICH ARE ATTACHED TO THIS DOCUMENT. PAPER COPIES WILL NOT BE MAILED. (MKR) (Entered: 09/12/2014)
09/17/2014	8	SUMMONS Returned Executed upon defendant Greater Omaha Packing Company, Inc. on 9/16/2014. (Ketcham, Dan) (Entered: 09/17/2014)
09/24/2014	9	MOTION for Extension of Time to File a Responsive Pleading by Attorney Michael F. Coyle on behalf of Defendant Greater Omaha Packing Company, Inc..(Coyle, Michael) (Entered: 09/24/2014)
09/24/2014	10	TEXT ORDER granting 9 Motion for Extension of Time to File a Responsive Pleading. Greater Omaha Packing Company, Inc. answer or response due 11/10/2014. Ordered by Deputy Clerk. (ADB) (Entered: 09/24/2014)
09/24/2014	11	TEXT NOTICE REGARDING CORPORATE DISCLOSURE STATEMENT by Deputy Clerk as to Defendant Greater Omaha Packing Company, Inc.. Pursuant to Fed. R. Civ. P. 7.1, non-governmental corporate parties are required to file Corporate Disclosure Statements (Statements). The parties shall use the

		form Corporate Disclosure Statement, available on the Web site of the court at http://www.ned.uscourts.gov/forms/. If you have not filed your Statement, you must do so within 15 days of the date of this notice. If you have already filed your Statement in this case, you are reminded to file a Supplemental Statement within a reasonable time of any change in the information that the statement requires.(ADB,) (Entered: 09/24/2014)
09/26/2014	12	NOTICE of Appearance by Attorney Michael L. Moran on behalf of Plaintiff Continental Casualty Company (Moran, Michael) (Entered: 09/26/2014)
09/26/2014	13	MOTION to Withdraw as Attorney , *Dain J. Johnson* by Attorney Michael L. Moran on behalf of Plaintiff Continental Casualty Company.(Moran, Michael) (Entered: 09/26/2014)
09/26/2014	14	ORDER granting 13 Motion to Withdraw as Attorney. Ordered by Magistrate Judge Cheryl R. Zwart. (Zwart, Cheryl) (Entered: 09/26/2014)
10/08/2014	15	CORPORATE DISCLOSURE STATEMENT pursuant to Fed. R. Civ. P. 7.1 by Attorney Michael F. Coyle on behalf of Defendant Greater Omaha Packing Company, Inc..(Coyle, Michael) (Entered: 10/08/2014)
11/10/2014	16	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *under Fed. R. Civ. P. 12(b)(1) and 12(b)(6)* by Attorney Michael F. Coyle on behalf of Defendant Greater Omaha Packing Company, Inc..(Coyle, Michael) (Entered: 11/10/2014)
11/10/2014	17	BRIEF in support of MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *under Fed. R. Civ. P. 12(b)(1) and 12(b)(6)* 16 by Attorney Michael F. Coyle on behalf of Defendant Greater Omaha Packing Company, Inc..(Coyle, Michael) (Entered: 11/10/2014)
11/10/2014	18	INDEX in support of MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *under Fed. R. Civ. P. 12(b)(1) and 12(b)(6)* 16 by Attorney Michael F. Coyle on behalf of Defendant Greater Omaha Packing Company, Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Coyle, Michael) (Entered: 11/10/2014)
11/21/2014	19	APPLICATION/ORDER admitting pro hac vice Attorney Valerie L. Walker Rodriguez for Plaintiff Continental Casualty Company. Ordered by Deputy Clerk. (ADB,) (Entered: 11/21/2014)
11/21/2014	20	ATTORNEY LETTER by Clerk that Attorney Valerie L. Walker Rodriguez has not registered for the system. If the requested action is not taken within fifteen (15) days of the date of this letter, this matter will be referred to the assigned magistrate judge for the entry of a show cause order. (ADB,) (Entered: 11/21/2014)
11/24/2014	21	Unopposed MOTION to Extend *Briefing Deadlines Concerning Defendant's* MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *under Fed. R. Civ. P. 12(b)(1) and 12(b)(6)* 16 by Attorney Michael L. Moran on behalf of

		Plaintiff Continental Casualty Company.(Moran, Michael) (Entered: 11/24/2014)
12/01/2014	22	TEXT ORDER granting defendant's unopposed Motion to Extend 21 . Defendant shall have until December 25, 2014 to file any brief in opposition to plaintiff's motion to dismiss 16 . Plaintiff shall file any reply brief on or before January 15, 2015. Ordered by Judge John M. Gerrard. (AJC,) (Entered: 12/01/2014)
12/23/2014	23	BRIEF in opposition to MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *under Fed. R. Civ. P. 12(b)(1) and 12(b)(6)* 16 by Attorney Dan H. Ketcham on behalf of Plaintiff Continental Casualty Company.(Ketcham, Dan) (Entered: 12/23/2014)
01/15/2015	24	REPLY BRIEF in support of MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *under Fed. R. Civ. P. 12(b)(1) and 12(b)(6)* 16 by Attorney Michael F. Coyle on behalf of Defendant Greater Omaha Packing Company, Inc..(Coyle, Michael) (Entered: 01/15/2015)
06/22/2015	25	MEMORANDUM AND ORDER that GOPAC's motion to dismiss 16 is granted in part, as set forth in this order. Continental is ordered to show cause, on or before July 7, 2015, why the Court should not dismiss its complaint, as set forth in this order. GOPAC may file a brief in opposition on or before July 21, 2015. Ordered by Judge John M. Gerrard. (JSF) (Entered: 06/22/2015)
07/02/2015	26	UNOPPOSED MOTION to Extend Order to Show Cause,, Terminate Motion and R&R Deadlines/Hearings, 25 by Attorney Michael L. Moran on behalf of Plaintiff Continental Casualty Company.(Moran, Michael) (Entered: 07/02/2015)
07/06/2015	27	TEXT ORDER granting plaintiff's unopposed Motion to Extend 26 . The deadlines set forth in the Court's order of June 22, 2015 25 are modified as follows. Plaintiff is ordered to show cause, on or before August 6, 2015, why the Court should not dismiss its complaint, as set forth in the Court's order of June 22, 2015 25 . Defendant may file a brief in opposition on or before August 20, 2015. Ordered by Judge John M. Gerrard. (AJC,) (Entered: 07/06/2015)
08/06/2015	28	RESPONSE regarding Order to Show Cause,, Terminate Motion and R&R Deadlines/Hearings, 25 *and Motion for Leave to Amend Complaint* by Attorney Valerie L. Walker Rodriguez on behalf of Plaintiff Continental Casualty Company. (Attachments: # 1 Exhibit A)(Rodriguez, Valerie) Modified on 9/9/2015 to add (PART 1 OF 2) (JAB) (Entered: 08/06/2015)
08/06/2015		PART 2 OF 2 - MOTION for Leave to amend complaint by Attorney Valerie L. Walker Rodriguez on behalf of Plaintiff Continental Casualty Company.(JAB) (Entered: 09/09/2015)
08/17/2015	29	UNOPPOSED MOTION to Extend Order on Motion to Extend, 27 by Attorney Patrick S. Cooper on behalf of Defendant Greater Omaha Packing Company, Inc..(Cooper, Patrick) (Entered: 08/17/2015)
08/17/2015	30	

		TEXT ORDER granting 29 Motion to Extend. The defendant's motion is granted. The defendant may file its responsive brief on or before September 21, 2015. Ordered by Judge John M. Gerrard. (KME) (Entered: 08/17/2015)
09/21/2015	31	BRIEF in support of *#16 Motion to Dismiss* by Attorney Michael F. Coyle on behalf of Defendant Greater Omaha Packing Company, Inc..(Coyle, Michael) (Entered: 09/21/2015)

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Description:	Docket Report	**Search Criteria:**	8:14-cv-00194-JMG-CRZ
Billable Pages:	4	**Cost:**	0.40

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CONTINENTAL CASUALTY COMPANY, an Illinois corporation,

Plaintiff,

vs.

GREATER OMAHA PACKING COMPANY, INC., a Nebraska corporation,

Defendant.

8:14-CV-194

MEMORANDUM AND ORDER

This matter is before the Court on the motion to dismiss (filing 16) filed by defendant Greater Omaha Packing Company ("GOPAC"). For the reasons discussed below, GOPAC's motion will be granted in part, and Continental will be ordered to show cause why the remainder of its complaint should not be dismissed for failure to state a claim and for lack of an issue ripe for judicial review.

I. BACKGROUND

At all times relevant to this lawsuit, GOPAC was a Nebraska corporation and supplier of raw beef based in Omaha, Nebraska, and Continental was an Illinois corporation based in Chicago. Filing 1 at ¶¶ 13–14, 18. In 2009, Continental was GOPAC's commercial umbrella insurer. Filing 1 at ¶ 1. Under its policy with GOPAC ("the Policy"), Continental agreed to defend and indemnify GOPAC against certain claims for "bodily injury" and "property damage." *See* filing 1 at ¶¶ 24–30; filing 1-2 at 8, 21–22.

In October 2009, GOPAC was implicated in an *E. coli* outbreak in New England, and GOPAC was named in multiple tort lawsuits. Filing 1 at ¶ 2. In October 2011, Continental assumed GOPAC's defense from GOPAC's primary insurer. Since then, Continental has defended GOPAC in several lawsuits related to the New England outbreak. To date, Continental spent significant sums defending GOPAC. Filing 1 at ¶ 3. Continental has also paid approximately $3.5 million in defense fees, settlements, and prejudgment interest for GOPAC's indemnitee, Fairbank Reconstruction Corporation d/b/a Fairbank Farms ("Fairbank"), a processor and seller of ground beef, after a federal jury sitting in Maine found that GOPAC delivered raw sirloin trim contaminated with *E. coli* to Fairbank. Filing 1 at ¶ 4. Continental (along

with another insurer of GOPAC) has also indemnified GOPAC for settlements in four tort lawsuits, which together total $1.95 million. Filing 1 at ¶ 5. Continental alleges that substantial defense fees are still being incurred in that case, and additional, substantial indemnity obligations are likely to be incurred going forward. Filing 1 at ¶ 6.

In this case, Continental seeks a declaration regarding its duty to defend and indemnify GOPAC in a lawsuit filed against GOPAC by Fairbank in the United States District Court for the Western District of New York (the "New York suit"). Filing 1-1; *see also Fairbank v. GOPAC,* case no. 1:13-CV-907, filing 1 (W.D.N.Y. 2013). In the New York suit, Fairbank alleges that by supplying *E. coli*-contaminated beef, GOPAC violated a "Product Guarantee" GOPAC provided to Fairbank. Filing 1 at ¶ 18; filing 1-1 at ¶¶ 14–18. Fairbank's complaint asserts multiple theories of recovery: breach of contract, breach of express warranty, and breach of the implied warranties of merchantability and fitness for a particular purpose. Filing 1-1 at 8–12. Fairbank seeks a declaration that GOPAC breached the Product Guarantee and is liable for Fairbank's resulting damages, including Fairbank's recall costs; lost profits; lost enterprise value; and recall-related attorney fees, costs, and expenses. Filing 1 at ¶ 20; filing 1-1 at 6–8. Continental is currently defending GOPAC in the New York suit under a full reservation of rights. Filing 1 at ¶ 9.

II. STANDARD OF REVIEW

A. Rule 12(b)(6)

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). A claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* While the Court must accept as true all facts pleaded by the nonmoving party and grant all reasonable inferences from the pleadings in favor of the nonmoving party, *Gallagher v. City of Clayton,* 699 F.3d 1013, 1016 (8th Cir. 2012), a pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. *Iqbal,* 556 U.S. at 678. Determining whether a complaint states a plausible claim for relief requires the Court to draw on its judicial experience and common sense. *Id.* at 679.

B. Rule 12(b)(1)

A motion pursuant to Fed. R. Civ. P. 12(b)(1) challenges whether the court has subject matter jurisdiction. The party asserting subject matter jurisdiction bears the burden of proof. *Great Rivers Habitat Alliance v.*

FEMA, 615 F.3d 985, 988 (8th Cir. 2010). Rule 12(b)(1) motions can be decided in three ways: at the pleading stage, like a Rule 12(b)(6) motion; on undisputed facts, like a summary judgment motion; and on disputed facts. *Jessie v. Potter*, 516 F.3d 709, 712 (8th Cir. 2008).

III. ANALYSIS

Continental contends that it should not be required to insure GOPAC's business dealings, and that the damages sought in the New York suit are beyond the scope of the Policy. Continental seeks a declaration that it has no obligation (under the Policy or otherwise) to indemnify or defend GOPAC in connection with the claims alleged in the New York suit. Filing 1 at 7. The Policy contains a "Contractual Liability" exclusion, which Continental has pleaded, apparently as the basis for its assertion of non-coverage. *See* filing 1 at ¶¶ 29–31.

In response, GOPAC filed the pending motion to dismiss. GOPAC's motion attacks Continental's complaint in two steps. GOPAC first asserts that the complaint, as well as certain materials which it contends are embraced by the pleadings under Fed. R. Civ. P. 12(d), demonstrate as a matter of law that Continental has a duty to defend GOPAC in the New York suit. According to GOPAC, Fairbank's claims are for property damage and are covered by the Policy, and do not fall within the Contractual Liability exclusion. Thus, GOPAC argues that Continental does have a duty to defend it in the New York suit and its request for a declaration to the contrary must be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. GOPAC then contends that the remainder of Continental's complaint—a request for a declaration regarding its duty to indemnify—is not ripe for review. So, GOPAC argues, the remainder of Continental's complaint should be dismissed for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).[1]

The Court finds that at least some portion of the New York suit presents a claim for property damage within the meaning of the Policy. The Court further finds that the Contractual Liability exclusion does not apply to at least some portions of the New York suit. Continental asserts that other exclusions may apply, but it has not identified them. Thus, the Court will dismiss Continental's request for a declaration that it owes no duty to defend,

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[1] GOPAC has actually phrased its Rule 12(b)(1) argument more broadly, asserting that the complaint as a whole is not ripe. But Continental's claim regarding its duty to defend is ripe. GOPAC has been sued and Continental has been called upon to provide a defense, which it has done under a reservation of rights. *See, e.g., Scottsdale Ins. Co. v. Universal Crop Prot. Alliance,* LLC, 620 F.3d 926, 933–34 (8th Cir. 2010); *Aetna Cas. and Sur. Co. v. Gen. Dynamics Corp.*, 968 F.2d 707, 711 (8th Cir. 1992). It remains to be seen whether Continental's duty-to-indemnify claim is ripe.

insofar as that request is based upon the Contractual Liability exclusion or the lack of a claim for property damage. And the Court will order Continental to show cause why its duty-do-defend claim should be not dismissed in its entirety.

At this time, Continental's duty-to-indemnify claim is similarly underdeveloped, and the Court is therefore unable to determine if the remainder of Continental's complaint states a claim for relief or is even ripe for review. Accordingly, the Court will order Continental to show cause why the remainder of its complaint should not be dismissed.

A. The Damages Sought in the New York Suit

As noted above, the Policy covers claims against GOPAC for "property damage." GOPAC contends that, in the New York suit, Fairbank is asserting claims for property damage which are covered by the Policy. As proof, GOPAC has submitted two documents from the New York suit: Fairbank's Rule 26 Initial Disclosures and Fairbank's answers to certain interrogatories. Filings 18-1 and 18-2.

As a preliminary matter, the Court must determine whether it may consider these materials. When deciding a motion to dismiss under Rule 12(b)(6), the Court is normally limited to considering the facts alleged in the complaint. If the Court considers matters outside the pleadings, the motion to dismiss must be converted to one for summary judgment. Fed. R. Civ. P. 12(d). However, the Court may consider exhibits attached to the complaint and materials that are necessarily embraced by the pleadings without converting the motion. *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 697 n.4 (8th Cir. 2003). Documents necessarily embraced by the pleadings include those whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading. *Ashanti v. City of Golden Valley*, 666 F.3d 1148, 1151 (8th Cir. 2012). The Court may also take notice of public records. *Levy v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007).

The pertinent contents of GOPAC's first submission—Fairbank's Rule 26 initial disclosures—are alleged in Continental's complaint and are necessarily embraced by the pleadings. Continental does not contend otherwise. Continental does object, however, to GOPAC's second submission—Fairbank's answers to certain interrogatories. *See* filing 23 at 7. These answers are neither embraced by the pleadings nor, when GOPAC first provided them, were they matters of public record. Although they had been produced in the New York suit, they had not been filed with that court. Since then, however, these answers have been filed in the New York suit. *Compare* filing 18-2 at 3 *with* case no. 1:13-cv-907, filing 79-46 at 11 (authenticated at filing 79-48 at ¶ 47). As public filings in an ongoing lawsuit, these are now

matters of public record, and properly considered without converting GOPAC's motion to one for summary judgment. *See Levy*, 477 F.3d at 991.

In its initial disclosures, Fairbank stated that it is seeking, among other damages, certain expenses not reimbursed by insurance. Filing 1 at ¶ 21. In its answers to GOPAC's interrogatories, Fairbank clarified that this includes, among other things, $349,620 in expenses for "[h]eld product or disposal." Filing 18-2 at 3. GOPAC contends that these expenses qualify as "property damage," which the Policy defines as including, among other things, "[p]hysical injury to tangible property, including all resulting loss of use of that property." Filing 1 at ¶ 27 (emphasis supplied).

The Court agrees that expenses incurred for holding and disposing of tainted beef qualify as expenses resulting from the "loss of use" of that beef. Continental does not argue otherwise, except to assert that "a more complete analysis of the policy language and the additional terms and exclusions that may apply" is needed. Filing 23 at 7. But Continental is presumably familiar with the terms of its own policies, and this is the time to raise additional terms and exclusions, which Continental has not done.

The New York suit includes a claim for "property damage" within the meaning of the Policy. And once a complaint states one claim within the policy's coverage, the insurer has a duty to accept defense of the entire lawsuit, even though other claims may fall outside of the policy's coverage. *Babcock & Wilcox Co. v. Parsons Corp.*, 430 F.2d 531, 537 (8th Cir. 1970) (applying Nebraska law); *Fireman's Fund v. Structural Sys. Tech., Inc.*, 426 F. Supp. 2d 1009 (D. Neb. 2006).

B. The Contractual Liability Exclusion

As noted above, the Policy contains an exclusion for "Contractual Liability." As the Court understands it, Continental's argument is that the Contractual Liability exclusion applies because the New York suit is based (in part) on GOPAC's Product Guarantee to Fairbank. GOPAC counters that, by its terms, this exclusion does not apply. Alternatively, GOPAC asserts that the claims asserted against it in the New York suit fall within several exceptions to the exclusion, and are thus brought back within the Policy's coverage.

The Court must first determine which state's law governs its interpretation of the Policy. The Policy itself contains no choice-of-law clause. *See* filing 1-2. Continental asserts that the Policy is governed by Nebraska law, *see* filing 23 at n.1, and GOPAC does not contend otherwise. And based on its own review, the Court agrees that Nebraska law controls.[2]

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[2] A federal court sitting in diversity applies the forum state's choice of law principles. *American Guar. and Liability Ins. Co. v. U.S. Fidelity & Guar. Co.*, 668 F.3d 991, 996 (8th Cir. 2012). When deciding conflict of law issues, the Supreme Court of Nebraska seeks

An insurance policy is a contract, and the Court will construe it like any other contract, according to the meaning of the terms that the parties have used. *Am. Family Mut. Ins. Co. v. Wheeler*, 842 N.W.2d 100 (Neb. 2014). When an insurance policy's terms are clear, the Court will give them their plain and ordinary meaning as a reasonable person in the insured's position would understand them. *Id.* If a policy is ambiguous, it will be construed in favor of the insured. *Id.*

The Contractual Liability exclusion and its exceptions provide, in relevant part:

> This Insurance does not apply to:
>
> . . . .
>
> "Bodily injury," [or] "property damage" . . . for which [GOPAC] is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to [otherwise-covered] liability . . . .
>
> (1) That [GOPAC] would have in the absence of the contract or agreement; or
>
> (2) Because of "bodily injury" or "property damage" assumed in a contract or agreement that is an "insured contract," provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement.

Filing 1 at ¶ 29; filing 1-2 at 8–9.

An "insured contract" is defined as, among other things:

> The part of other contracts or agreements pertaining to [GOPAC's] business . . . under which [GOPAC] assume[s] the tort liability to pay damages because of "bodily injury" or "property damage" to a third person or organization, if the contracts or agreements are made prior to the "bodily injury" or "property damage."

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guidance from the Restatement (Second) of Conflict of Laws (1971). *See Erickson v. U-Haul Int'l.*, 767 N.W.2d 765, 772 (Neb. 2009). Under the Restatement, contract issues are governed by the law of the state with the most significant relationship to the parties or transaction at issue. Restatement, *supra*, § 188(a). The Court has reviewed the factors set forth in § 188 and finds that Nebraska law controls.

> Tort liability means liability that would be imposed by law in the absence of contracts or agreements.

Filing 1 at ¶ 30; filing 1-2 at 18.

For the Contractual Liability exclusion to apply, GOPAC's potential liability to Fairbank must have arisen "by reason of the assumption of liability in a contract or agreement." Filing 1 at ¶ 29; filing 1-2 at 8–9. This language—and the Contractual Liability exclusion, exceptions and all—is standard language found in many commercial general liability (CGL) policies. *See Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65, 74, 79 (Wis. 2004).

"'The key to understanding this exclusion . . . is the concept of liability assumed.'" *Id.* at 80 (quoting 2 Rowland H. Long, *The Law of Liability Insurance* § 10.05[2], 10–56, 10–57 (2002)); *see also Fisher v. Am. Family Mut. Ins. Co.*, 579 N.W.2d 599, 603 (N.D. 1998).

> "Although, arguably, a person or entity assumes liability (that is, a duty of performance, the breach of which will give rise to liability) whenever one enters into a binding contract, in the CGL policy and other liability policies an 'assumed' liability is generally understood and interpreted by the courts to mean the liability of a third party, which liability one 'assumes' in the sense that one agrees to indemnify or hold the other person harmless."

Am. Girl, 673 N.W.2d at 80 (quoting 21 Eric Mills Holmes, *Holmes' Appelman on Insurance* § 132.3, 36-37 (2d ed. 2000)).

The term "assumption" must be interpreted to add something to the phrase "assumption of liability in a contract or agreement." If the phrase is read to apply to all liabilities sounding in contract, the term "assumption" is rendered superfluous. *Id.* at 80–81. Thus, the majority of courts have concluded that this exclusion applies only where the insured has contractually assumed the liability of a third party, as in an indemnification or hold harmless agreement. *See, e.g.*, *Ferrell v. West Bend Mut. Ins. Co.*, 393 F.3d 786, 795 (8th Cir. 2005) (applying Wisconsin law and following *Am. Girl*); *Owners Ins. Co. v. Ala. Powersport Auction, LLC*, No. 5:14-cv-147, 2015 WL 3439126, at *10–13 (N.D. Ala. May 28, 2015); *Goodyear Tire & Rubber Co. v. Dynamic Air, Inc.*, No. 02-1218, 2004 WL 2501196, at *4–5 (D. Minn. Nov. 4, 2004); *Desert Mountain Props. Ltd. P'ship v. Liberty Mut. Fire Ins. Co.*, 236 P.3d 421, 431–32 (Ariz. Ct. App. 2010); *Broadmoor Anderson v. Nat'l Union Fire Ins. Co. of La.*, 912 So. 2d 400, 407 (La. Ct. App. 2005); *Travelers Prop. Cas. Co. of America v. Peaker Servs., Inc.*, 855 N.W.2d 523, 528–34

(Mich. Ct. App. 2014); *Fischer,* 579 N.W.2d at 602–04; *Gibbs M. Smith, Inc. v. U.S. Fid. & Guar. Co.,* 949 P.2d 337, 341–42 (Utah 1997); *see also, Olympic, Inc. v. Providence Wash. Ins. Co. of Alaska,* 648 P.2d 1008, 1010–11 (Alaska 1982); *USM Corp. v. First State Ins. Co.* 652 N.E.2d 613, 615–16 (Mass. 1995); *cf. Day v. Toman,* 266 F.3d 831, 835 (8th Cir. 2001); *but see Gilbert Tex. Const., L.P. v. Underwriters at Lloyd's London,* 327 S.W.3d 118, 124–133 (Tex. 2010). Conversely, the exclusion does not operate to exclude coverage for any and all liabilities to which the insured is exposed under the terms of the contracts it makes generally. *Am. Girl,* 673 N.W.2d at 81.

The majority interpretation is reasonable in light of the fact that all business transactions are entered into according to some sort of agreement or understanding. *Gibbs,* 949 P.2d at 342. If the exclusion were interpreted otherwise, so as to exclude all liability associated with a contract by the insured, then CGL policies would be severely limited in their coverage. *Id.* The majority interpretation also accords with the generally-recognized understanding of the term "assumption," which is defined as "[t]he act of taking (*esp. someone else's debt or other obligation*) for or on oneself." *Black's Law Dictionary* 143 (9th ed. 2009) (emphasis supplied).

In the Product Guarantee, GOPAC agreed to

> indemnify and hold harmless . . . [Fairbank] . . . from all claims, damages, causes of action, suits, proceedings, judgments, charges, losses, costs, liabilities, and expenses . . . arising from any products (raw materials) as delivered to [Fairbank] by [GOPAC], that do not comply with the provisions of [Fairbank's] Raw Material Specifications or that are caused by the negligence . . . of GOPAC . . . .

Filing 1 at ¶ 18; filing 1-1 at ¶ 14 & p. 16. At first glance, it would seem that Fairbank's claims arise out of an assumption of liability by GOPAC.

However, in the New York suit, Fairbank is not seeking indemnity from GOPAC for Fairbank's own conduct. In other words, Fairbank is not asking GOPAC to assume Fairbank's liability to third parties, such as the persons who were injured by consuming tainted beef and who have brought tort suits against Fairbank. *See* filing 1-1 at ¶¶ 1–4. Rather, Fairbank asserts that GOPAC is contractually liable under the Product Guarantee for the recall costs, lost profits, and recall-related attorney fees, costs, and expenses that Fairbank incurred as a result of the tainted beef. *See, e.g.*, filing 1-1 at ¶¶ 5, 37, 39, 46, 53. Thus, Fairbank's claims are for "damages . . . arising from" GOPAC's own alleged negligence or the alleged failure of GOPAC's products to comply with certain specifications. Fairbank seeks to hold

GOPAC liable for GOPAC's own conduct, and is not asking GOPAC to assume liability for Fairbank's conduct. Thus, the exclusion does not apply.

Alternatively, the Court finds that an exception to the exclusion applies to at least some of the claims asserted by Fairbank. The exclusion contains an exception for liability that GOPAC "would have in the absence of the contract or agreement." Filing 1 at ¶ 29; filing 1-2 at 8–9. Fairbank's complaint asserts multiple theories of recovery: not only claims for breach of contract and express warranty, but also for the breach of the implied warranties of merchantability and fitness for a particular purpose. Those implied warranties attached independent of the Product Guarantee, and thus would have arisen "in the absence of the contract." *See USM Corp.*, 652 N.E.2d at 616.

The Court does not read this exception as applying only to liability arising in the absence of *any* contract. From the use of the phrase "*the* contract" immediately following the exclusion, it is clear that the exception is referring to the contract in the exclusion, i.e., one in which the insured has assumed the liability of another. Compare this language to the definition of "tort liability" in the "insured contract" section—"liability that would be imposed by law in the absence of contracts or agreements." The latter provision demonstrates that the drafters of the Policy knew how refer to liability in the absence of any contracts.

In sum, the exclusion does not apply, and if it does, an exception to the exclusion does apply, to at least a portion of the claims asserted in the New York suit. And if one of the claims is covered, the duty to defend is triggered as to the whole suit.[3] *See, Babcock & Wilcox*, 430 F.2d at 537. Thus, to the extent that Continental seeks a declaration of non-coverage based on the Contractual Liability exclusion, that request fails to state a claim for relief. To be clear: the Court is not holding that Continental does have a duty to defend. GOPAC has moved to dismiss Continental's request for a declaration of non-coverage, and that is the scope of the Court's holding. If GOPAC desires an affirmative declaration of coverage, it will need to come forward with evidence that establishes such coverage.

C. Ripeness of the Remainder of Continental's Complaint

GOPAC contends that Continental's request for a declaration regarding its duty to indemnify is not ripe for review. Until it becomes legally obligated to pay something in the New York suit, GOPAC argues, any duty to

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[3] Continental asserts that its claim relating to its duty to defend should not be dismissed because GOPAC has attacked only the Contractual Liability exclusion, and other exclusions may apply. But Continental has not explained what those exclusions might be—it has only pleaded the Contractual Liability exclusion, and has not raised any others.

indemnify is contingent upon facts and circumstances which are uncertain and yet to be determined.

The ripeness doctrine flows both from Article III's "cases" and "controversies" limitation and also from prudential considerations. *Pub. Water Supply Dist. No. 10 of Cass Cnty., Mo. v. City of Peculiar, Mo.*, 345 F.3d 570, 572 (8th Cir. 2003). The ripeness inquiry requires examination of both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Id.* at 572–73. The ripeness doctrine prevents the Court, through avoidance of premature adjudication, from entangling itself in abstract disagreements. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967).

Continental has not explained the basis for its claim that it lacks a duty to indemnify. Thus, the Court cannot determine if the claim is ripe or not.[4] If Continental's claim presents a question of law, based upon the language of the Policy, then it may be ripe for review. *See, e.g., Capitol Indem. Corp. v. Miles*, 978 F.2d 437, 438 (8th Cir. 1992). In contrast, if Continental's claim requires consideration of unresolved factual disputes also at issue in the New York suit, it may not be ripe. *See, e.g., Atl. Cas. Ins. Co. v. Value Waterproofing, Inc.*, 918 F. Supp. 2d 243, 261 (S.D.N.Y. 2013). In that case, the Court might also be less inclined to exercise its discretion under the Declaratory Judgment Act. *See, e.g., Med. Assur. Co., Inc. v. Hellman*, 610 F.3d 371, 379 (7th Cir. 2010); *Aetna Cas. and Sur. Co. v. Jefferson Trust and Sav. Bank of Peoria*, 993 F.2d 1364, 1366 (8th Cir. 1993).

Therefore, the Court will order Continental to show cause why its duty-to-defend claim should not be dismissed in its entirety for failure to state a claim. And the Court will order Continental to show cause why the remainder of its complaint should not be dismissed for failure to state a claim and lack of ripeness. Accordingly,

IT IS ORDERED:

1. GOPAC's motion to dismiss (filing 16) is granted in part, as set forth above.

2. Continental is ordered to show cause, on or before July 7, 2015, why the Court should not dismiss its complaint, as set forth above. GOPAC may file a brief in opposition on or before July 21, 2015.

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[4] Continental has also sought a declaration of the parties' rights and obligations under the Policy, including the limits of Continental's duty to defend and indemnify in the New York suit. This issue is likewise too undeveloped for the Court to evaluate its merits or ripeness.

Dated this 22nd day of June, 2015.

BY THE COURT:

John M. Gerrard
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CONTINENTAL CASUALTY COMPANY, an Illinois corporation, Plaintiff, v. GREATER OMAHA PACKING COMPANY, INC., a Nebraska corporation, Defendant.	)	CASE NO.: 8:14-cv-00194 **SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS**

I. INTRODUCTION

Defendant Greater Omaha Packing Company, Inc. ("Greater Omaha") respectfully submits this reply brief in response to the August 6, 2015 brief filed by Plaintiff Continental Casualty Company ("Continental"), and in further support of Greater Omaha's Motion to Dismiss.

Having failed to convince the Court that the contractual liability exclusion bars coverage in this action, Continental now claims there may be other issues impacting its coverage obligations in the underlying case, and it seeks leave to file an Amended Complaint to pursue those other coverage issues. It also seeks leave to amend its Complaint for purposes of seeking reimbursement for past indemnity payments made in other, unrelated cases -- a position it had specifically disclaimed in its original Complaint. See Filing No. 1, ¶ 7. Even this seismic shift in Continental's coverage position, however, cannot save this action from dismissal because Continental's arguments fail as a matter of law; the issues are not ripe for review and are based on a set of facts that is future, contingent and uncertain; and the Court should exercise its discretion under the Declaratory Judgment Act to decline to hear this action at this time.

II. BACKGROUND

In its original Complaint, Continental alleged it was not obligated to defend or indemnify Greater Omaha in connection with an ongoing lawsuit filed by Fairbank Farms ("Fairbank") because the lawsuit did not assert any property damage, and because the contractual liability exclusion in the Continental insurance policy barred coverage. Continental did not identify any other bases for its coverage position.

In its June 22, 2015 Memorandum and Order, the Court granted Greater Omaha's Motion to Dismiss in part. (Filing No. 25). Specifically, the Court rejected Continental's property damage argument, finding that the Fairbank lawsuit "includes a claim for property damage within the meaning of the Policy." (Filing No. 25, p. 5). The Court also held that "once a complaint states one claim within the policy's coverage, the insurer has a duty to accept defense of the entire lawsuit, even though other claims may fall outside of the policy's coverage." (Id.).

The Court also rejected Continental's argument regarding the contractual liability exclusion, finding that "the exclusion does not apply." (Filing No. 25, p. 9). The Court concluded that "an exception to the exclusion applies to at least some of the claims asserted by Fairbank" because the exclusion contains an exception for liability Greater Omaha "would have in the absence of the contract or agreement." (Id.). Again, the Court noted that because the exclusion does not apply to at least some of the claims asserted in the Fairbank lawsuit, Continental's argument regarding its duty to defend was without merit.

The Court also noted that Continental had failed to explain the basis for its claim that it lacks a duty to indemnify. The Court stated that if Continental's claim presents a question of law, it may be ripe for review; but if Continental's claim "requires consideration of unresolved factual disputes also at issue in the New York suit, it may not be ripe," and the Court "might also

be less inclined to exercise its discretion under the Declaratory Judgment Act." (Filing No. 25, p. 10).

Ultimately, the Court ordered Continental to "show cause why its duty-to-defend claim should not be dismissed in its entirety for failure to state a claim." (Id.). The Court also ordered Continental to "show cause why the remainder of its complaint should not be dismissed for failure to state a claim and lack of ripeness." (Id.).

III. CONTINENTAL'S RESPONSE TO THE SHOW CAUSE ORDER

Rather than explaining why the operative Complaint states a claim or why the Court should exercise its discretion to hear the claims presented in its Complaint, Continental has abandoned its original Complaint and now focuses instead on policy provisions not referenced in the Complaint. Continental argues that Greater Omaha created a "straw man" argument when it moved to dismiss Continental's Complaint by focusing only on the property damage and contractual liability exclusion issues -- an argument that ignores the fact that those were the only two coverage issues raised in Continental's Complaint. Continental now seeks leave to file an Amended Complaint -- which it refers to as a mere "amplification" of its original Complaint -- so that it can argue new coverage defenses that it claims may impact its duty to indemnify Greater Omaha in connection with the Fairbank lawsuit.

Continental's proposed Amended Complaint also includes a claim for "reimbursement" of past indemnity payments Continental made in connection with other, unrelated lawsuits. Continental's new proposed cause of action is directly contrary to its original Complaint (where it stated it was not seeking "reimbursement for the amounts it has paid...in defending and indemnifying [Greater Omaha] against the Northeast Outbreak tort lawsuits"), and this new claim is therefore not responsive to the Court's Order to show Cause. In addition, Continental's

attempt to be "reimbursed" for past indemnity payments it voluntarily made also fails as a matter of law, and it would be futile to allow such proposed amendment.

IV. ARGUMENT

A. Continental's original Complaint fails to state a claim upon which relief may be granted.

The Court already dismissed Continental's original Complaint to the extent it sought a determination that Continental did not have a duty to defend Greater Omaha in the Fairbank lawsuit, and it found that the remaining issues may not be ripe for resolution. In response, Continental does not argue that its original Complaint states a claim upon which relief may be granted. It does not argue that the contractual liability exclusion precludes a duty to defend. (See Filing No. 28, p. 4 ("Continental is, in fact, not seeking that outcome here.")). Likewise, Continental no longer argues that the underlying Fairbank lawsuit does not involve allegations of property damage. (Id.). As such, there is no dispute that the original Complaint filed by Continental fails as a matter of law and should be dismissed.

B. The Court should deny Continental's informal request for leave to amend its Complaint.

1. Continental's request for "a determination as to whether Nebraska law provides coverage for consequential damages under an umbrella policy" fails to state a claim upon which relief may be granted.

In Continental's brief in response to the Court's Order to Show Cause, Continental's lead argument is that its proposed Amended Complaint states a claim because Continental "seeks a determination as to whether Nebraska law provides coverage for consequential damages under an umbrella policy." (Filing No. 28, p. 2). This issue does not state a claim upon which relief may be granted for several reasons.

First, Continental's request for a determination as to whether Nebraska law covers a certain type of damage is an improper request for an advisory opinion. Continental's argument is divorced from the actual policy language in the insurance policy and does not account for the specific types of damages at issue in this case -- which the Court has already concluded constitute property damage for which Continental owes a duty to defend.

Second, to the extent Continental's proposed Amended Complaint is tied to the actual policy language, Continental's position fails as a matter of law. Although not argued in its Brief, Continental's proposed Amended Complaint raises the consequential damages issue in the context of a declaratory judgment action, seeking a determination that any "consequential damages" are not covered under the policy for the specific reason that "they do not fall within the definition of 'ultimate net loss' in Continental's policy..." Filing No. 28-1, p. 12, ¶ 44. This is simply not correct as a matter of law. The policy defines "ultimate net loss" in pertinent part to include "the actual damages the insured is legally obligated to pay, either through (1) final adjudication on the merits; or (2) through compromise settlement with our written consent or direction." Filing No. 28-1, p. 89, ¶ 18. The policy does not exclude "consequential damages" from the definition of "ultimate net loss," and any attempt to do so through litigation is an improper attempt to alter the plain terms of the policy to which the parties agreed. Continental's "consequential damages" argument does not state a viable claim and must be dismissed.

Continental's argument is not supported by any controlling case law -- it cites only two California cases, and a Nebraska case that Continental itself acknowledges "did not directly rule on the issue." (Filing No. 28, pp. 2-3). None of the cases cited by Continental support its position.

Last, Continental's request for declaratory relief regarding consequential damages is also flawed because Continental is asking this Court to analyze a select category of damages claimed by Fairbank in the underlying lawsuit and to determine whether that singular damage category ("lost profits of not less than $6 million") is within the scope of the policy. (Filing No. 28, p. 3). Litigating a declaratory judgment action with respect to a certain damage category makes no sense, is inefficient, and would result in piecemeal litigation of insurance coverage issues. Where the insurer owes a duty to defend its insured such as in this case, it is a waste of judicial resources to litigate whether one aspect of the underlying plaintiff's damages claim is subject to coverage. If the underlying plaintiff does not recover that aspect of damages, then the declaratory judgment proceeding would have been undertaken at great cost, but at no benefit to any party. Even if a judgment against the insured is obtained in the underlying case, a declaratory judgment obtained now on one aspect of the claimed damages will not resolve the coverage and duty to defend disputes between the parties, and more litigation would be required in the future to determine what part of any future judgment is subject to the insurer's indemnity obligations. Greater Omaha's third party complaint is also still pending in the underlying case and its resolution could also impact the necessity and scope of the parties' coverage dispute. As such, the Court should decline to exercise jurisdiction over Continental's proposed declaratory judgment action, even if it could be construed to state a claim.

2. Continental's argument regarding the contractual liability exclusion also does not show cause why its Complaint should not be dismissed.

Continental acknowledges in its Brief that it is not seeking "to nullify its duty to defend on the basis of the contractual liability exclusion." (Filing No. 28, p. 4). Instead, Continental argues that if it is given "the opportunity to fully address its claims," it "will seek a determination distinguishing between those amounts Continental has already paid for [Greater Omaha's]

assumption of Fairbank's tort liability and the $3.9 million it has already paid, in two past lawsuits, for [Greater Omaha's] contractual indemnification of Fairbank." (Filing No. 28, p. 4). According to Continental, this would assist in identifying "those damages that are because of accidental injury, people who became ill from *E. coli*, and those damages that are because of other liability [Greater Omaha] voluntarily assumed through its sales contract with Fairbank." (Id., p. 4). Respectfully, an analysis of past amounts that Continental has paid for past lawsuits is entirely irrelevant to the issue in this case of whether Continental owes a duty to defend or indemnify Greater Omaha in connection with the now-pending underlying lawsuit filed by Fairbank.

Continental argues that this issue "is ripe for consideration in this action, because Continental has already paid these amounts on behalf of [Greater Omaha] in lawsuits brought by Fairbank on [Greater Omaha's] contractual indemnity obligation, and no further appeals of the jury trial verdicts and judgments entered against [Greater Omaha] are allowed." (Filing No. 28, p. 5). Continental's argument makes no sense. If, on one hand, Continental is seeking to litigate an issue related to a payment Continental already made in connection with a past lawsuit (as Continental's brief suggests), then there is no case or controversy to be litigated because the indemnity payment has already been made (and, as discussed below, Continental has no right to reimbursement). If, on the other hand, Continental is merely seeking to somehow compare the now-pending underlying Fairbank lawsuit to past lawsuits for which coverage has been provided, such comparison is irrelevant, as the plain language of the policy will control Continental's indemnity obligations, without regard for what Continental has paid or refused to pay in the past.

3. Continental's argument regarding "breach of sales contract lawsuit" also does not show cause why its Complaint should not be dismissed.

In the section of its brief titled "Continental's Arguments on the Breach of Sales Contract Lawsuit," Continental argues Greater Omaha "tried to circumvent the process of litigation by creating a straw man out of Continental's complaint and then attacking it without ever touching the substance of Continental's actual coverage defenses." (Filing No. 28, p. 7). Of course, Continental raised only two "coverage defenses" in its Complaint, and Greater Omaha successfully addressed both of the issues that Continental actually pleaded. Continental's continued assertion that Greater Omaha "created a straw man argument" is disingenuous, in light of what Continental actually pleaded in its original Complaint.

Continental attempts to fix its pleading deficiencies by arguing, for the first time, that the insurance policy's "business risk" exclusions apply in this case, as set forth in paragraph 37 of Continental's proposed Amended Complaint. (Filing No. 28, pp. 6-8 (citing proposed Amended Complaint, ¶ 37)). Specifically, Continental argues in conclusory fashion that the "recall exclusion," "your work" exclusion, and "your product" exclusion bar coverage. (Id.). Continental does not cite the language of the exclusions in its Brief, but instead simply argues that its proposed Amended Complaint, which contains reference to those exclusions, is a sufficient response to the Court's Order requiring Continental to "show cause" why its Complaint should not be dismissed. Continental's response does not show cause, and the business risk exclusions do not bar coverage here.

As an initial matter, simply inserting the language of other policy exclusions into the proposed Amended Complaint does not state a claim upon which relief may be granted. Continental's insertion of the "business risk" exclusions is merely a formulaic recitation of the elements of the policy's exclusionary language, but the law requires Continental to do more than

merely plead the elements of the exclusion. Bell Atlantic v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

In addition, litigation of the business risk exclusions would require a fact-intensive inquiry relating to the underlying lawsuit. Continental has not explained the factual basis for why these exclusions would apply, nor does its proposed Amended Complaint sufficiently set forth any such factual basis. Continental has failed to adequately "show cause" for why its Complaint should not be dismissed for failure to state a claim upon which relief may be granted, or why the Court should exercise its discretion to hear this declaratory judgment action at this time.

4. The second cause of action in Continental's proposed Amended Complaint also fails to state a claim upon which relief may be granted, and allowing amendment would be futile.

In addition, Continental now proposes filing an Amended Complaint that purports to seek "reimbursement" for past indemnity payments made by Continental under the policy of insurance it issued to Greater Omaha. This claim fails as a matter of law, and it would be futile for Continental to be permitted to make such an argument in an Amended Complaint. If an insurer undertakes a duty to defend or indemnify, it does not have the right to change its mind later and seek reimbursement for defense costs or indemnity payments it voluntarily made. Here, Continental argues in Count II of its proposed Amended Complaint that it "disputes the $3.9 million in damages it paid to Fairbank" in connection with a prior lawsuit, and it apparently seeks an Order "declaring the rights and obligations of the parties" with respect to its prior payment of $3.9 million in the unrelated lawsuit. Continental titled its second cause of action as a claim for "Reimbursement of Certain Contractual Indemnification Payments." Continental couches this claim as a reimbursement claim and/or declaratory judgment claim, but it states no

legal theory pursuant to which it could be entitled to claw back any indemnity payments it voluntarily made in the past.

Although the Nebraska Supreme Court has not addressed the issue, courts in several other states have not allowed an insurer to require an insured to "reimburse" the insurer for indemnity payments or defense costs voluntarily incurred in the past by the insurer. See, e.g., Mt. Airy Ins. Co. v. The Doe Law Firm, 668 So.2d 534 (Ala. 1995) (insurer's indemnity payment was voluntary, and insurer was not entitled to reimbursement when it subsequently filed a declaratory judgment action seeking a determination of coverage and the right to reimbursement); Tex. Ass'n of Counties County Government Risk Mgmt. Pool v. Matajorda County, 52 S.W.3d 128 (Tex. 2000) (no right to reimbursement unless the insured clearly and unequivocally consents to the insurer's right to seek reimbursement when the insurer makes the indemnity payment); Houston Cas. Co. v. Sprint Nextel Corp., Case No. 09-cv-1387 (E.D.Va. Nov. 22, 2010); Shoshone First Bank v. Pacific Employers Ins. Co., 2 P.3d 510, 513-14 (Wyo. 2000) (unless the policy specifically provides otherwise, insurer is not entitled to reimbursement); Am. and Foreign Ins. Co. v. Jerry's Sports Center, Inc., 2 A.3d 526 (Pa. 2010) (disallowing reimbursement of defense costs); Gen. Agents Ins. Co. of Am. v. Midwest Sporting Goods Co., 828 N.E.2d 1092 (Ill. 2005) (absent express policy provision, insurer has no right to reimbursement for defense costs allocable to non-covered claims); Medical Liab. Mut. Ins. Co. v. Alan Curtis Enters., Inc., 373 Ark. 525 (2008) (disallowing reimbursement of defense costs based on reservation of rights letter); Transp. Ins. Co. v. Freedom Elecs., Inc., 264 F.Supp.2d 1214, 1221 (N.D.Ga. 2003); Blue Cross of Idaho Health Serv., Inc. v. Atlantic Mut. Ins. Co., 734 F.Supp.2d 1107 (D.Idaho 2010); Pekin Ins. Co. v. Tysa, Inc., 2006 U.S. Dist. LEXIS 93525 (S.D.Iowa Dec. 27, 2006); Med. Protective Co. v. McMillan, 2002 WL 31990490 (W.D.Va. Dec. 16, 2002). The Eighth Circuit

has rejected an insurer's claim for reimbursement of past defense costs where it was later determined the claims were not covered by the applicable policy, even where the insurer reserved its right to seek reimbursement of those costs. See Westchester Fire Ins. Co. v. Wallerich, 563 F.3d 707, 719-20 (8th Cir. 2009).

The insurance policy Continental issued to Greater Omaha does not contain any language giving Continental the right to reimbursement for indemnity payments voluntarily made by Continental in the past. The only right of reimbursement provided for in the policy is the right for Continental to be reimbursed for certain recoveries made in connection with subrogation claims, after the insured has been made whole. See Filing No. 28-1, p. 86, ¶ 12(a)-(c). Continental's attempt to recover from Greater Omaha the indemnity payments purportedly made in connection with past lawsuits finds no support in the policy, and may even violate the principle that an insurer cannot subrogate against its own insured.

Simply put, there is no basis upon which Continental could be entitled to be "reimbursed" for past indemnity payments, and it has not pled any facts that would entitle it to such reimbursement. The Court should not permit Continental to pursue a claim for reimbursement of past indemnity payments it voluntarily made because such a claim would be futile and Continental's brief responding to the Court's show-cause Order does not provide a legal basis for Continental's proposed relief.

C. Continental's request for a summary judgment briefing schedule is not only presumptuous, but premature.

Having not yet stated a claim upon which relief may be granted, Continental makes the unusual request that the Court skip the discovery stage of the lawsuit and simply set a briefing schedule for cross-motions for summary judgment "so as to permit both parties to fully brief the

arguments on the record." (Filing No. 28, p. 2). There are numerous problems associated with Continental's request.

First, Continental's request suggests that the parties have not yet had the opportunity to "fully brief the arguments on the record." Although Continental's briefs have been scant with detail, Continental has already had two opportunities to fully brief the merit of its claims -- first in response to Greater Omaha's Motion to Dismiss, and then again in response to the Court's Order to Show Cause. A summary judgment briefing schedule is unnecessary for purposes of allowing the parties to brief the relevant issues at this time, as the parties have now filed a total of five briefs on these issues.

Second, Continental's request is both presumptuous (it has not even yet survived a 12(b)(6) Motion to Dismiss) and also premature because the case is not yet at issue. It is unknown whether Continental will survive Greater Omaha's Motion to Dismiss. It is unknown which version of the Complaint will go forward. Greater Omaha has not yet answered or asserted its affirmative defenses. The parties have not conducted any discovery. Greater Omaha's third party complaint is still pending in the underlying case. The underlying case against Greater Omaha in New York is also still progressing, and no decision can be reached in this case unless and until the underlying case reaches that point at which the material facts are no longer future, contingent, or uncertain. Medical Protective Co. v. Schrein, 255 Neb. 24, 28, 582 N.W.2d 286, 290 (1998) (citing Allstate Ins. Co. v. Novak, 210 Neb. 184, 188, 313 N.W.2d 636, 638 (1981)).

Requiring Greater Omaha to litigate summary judgment issues, before Greater Omaha has filed an answer, asserted affirmative defenses, or been afforded any opportunity to conduct discovery, would be inappropriate. Thus, if any part of Continental's case survives Greater

Omaha's Motion to Dismiss -- which it should not -- the Court should decline Continental's request to set a summary judgment briefing schedule before the case is even at issue and before any discovery has been conducted. Rather, the Court should enter its standard order requiring the parties to prepare a Joint Rule 26(f) Report and propose a progression schedule, and the Court should then enter a progression schedule which gives the parties the opportunity to conduct discovery before additional motion practice takes place.

III. CONCLUSION

For the foregoing reasons, Greater Omaha respectfully requests an Order dismissing Continental's Complaint, denying Continental's informal request to amend its Complaint, and for such other and further relief as the Court deems fair and just.

DATED this 21st day of September, 2015.

Respectfully submitted,

GREATER OMAHA PACKING COMPANY, INC., Defendant

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CERTIFICATE OF SERVICE

This is to certify that on the 21st day of September, 2015, a copy of the above and foregoing was filed with the Clerk of the Court using the CM/ECF system, which will deliver notice of the foregoing to the following recipient:

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