

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
SOUTHEASTERN DIVISION

Ronald D. Offutt, Jr.,

Plaintiff,

v.

Twin City Fire Insurance Company,

Defendant.

**MEMORANDUM OPINION AND  
ORDER GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT AND  
DENYING PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT ON  
THE DEFENSE ISSUE**

Civil No. 3:13-cv-54

**INTRODUCTION AND SUMMARY OF DECISION**

Before the Court are cross-motions for summary judgment on the “defense issue” in this matter.<sup>1</sup> Plaintiff Ron Offutt, Jr. (“Offutt”), held a seat on the board of directors of Idahoan Foods, LLC, which was insured under a policy issued by defendant Twin City Fire Insurance Company (“Twin City”). Offutt commenced this action in July 2013, alleging that Twin City improperly denied him coverage under the director and officer section of the Twin City Policy when it refused to advance the costs of defending three class action lawsuits that allege antitrust violations by potato growers and processors, including Offutt.<sup>2</sup> The parties filed cross-motions for summary judgment on January 31, 2014, addressing whether Twin City has a duty to advance defense costs to Offutt for the three class actions.<sup>3</sup> A hearing on the motions for summary judgment came on before the undersigned on September 16, 2014.

The Court finds that Twin City properly refused to advance defense costs, because the underlying lawsuits do not allege that Offutt committed a “wrongful act,” as defined

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<sup>1</sup> Doc. #23, Twin City Mot. for Sum. J.; Doc. #25, Offutt Mot. for Sum. J.

<sup>2</sup> Doc. #1, Compl.

<sup>3</sup> Doc. #18, Scheduling Order.

by the Twin City Policy. Even if the underlying lawsuits had alleged that Offutt committed a “wrongful act,” Twin City still properly refused to advance defense costs under the “Dual Service Exclusion,” because any allegations against Offutt related to his service as chairman of R.D. Offutt Co. and not exclusively to his service as a director of Idahoan Foods. The “Dual Service Exclusion” does not render the Twin City Policy void under the illusory coverage doctrine.

Twin City’s Motion for Summary Judgment on the defense issue is GRANTED.  
Offutt’s Motion for Summary Judgment on the defense issue is DENIED.

### **FACTUAL BACKGROUND**

Ron Offutt is a North Dakota resident and the chairman and founder of R.D. Offutt Co., a potato grower and processor.<sup>4</sup> R.D. Offutt Co., through two subsidiaries, owns 54% of Idahoan Foods, LLC. Offutt is a director of Idahoan Foods. Idahoan Foods manufactures mashed potato products and dehydrated potato products.<sup>5</sup> During the relevant time period, Twin City Fire Insurance Co. insured Idahoan Foods. Twin City is an insurance company incorporated in Indiana with its principal place of business in Connecticut.<sup>6</sup>

#### **I. UNDERLYING LAWSUITS**

R.D. Offutt Co., Idahoan Foods, and Ron Offutt (personally) are defendants in three ongoing lawsuits pending in the United States District Court in Idaho as a multi-district litigation case.<sup>7</sup> Each of the lawsuits alleges that a group of potato growers and processors violated antitrust laws by manipulating the potato market to increase the

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<sup>4</sup> See Doc. #1-2, Direct Purchasers’ Class Action, ¶ 139; Doc. #1, Compl. ¶ 3(a).

<sup>5</sup> See Doc. #1, Compl. ¶ 16.

<sup>6</sup> Id. at ¶ 2.

<sup>7</sup> One of the lawsuits was filed in Kansas but transferred to Idaho. See Case No. 4:13-cv-251 (D. Idaho).

price of fresh potatoes.<sup>8</sup> The suits claim that the growers formed United Potato Growers of Idaho, Inc. (“UPGI”), a cooperative.<sup>9</sup>

Two of the lawsuits are class actions composed of separate classes of plaintiffs that purchased potatoes from UPGI members.<sup>10</sup> The parties refer to these class actions as the “Direct Purchasers’ Class Action,” and the “Indirect Purchasers’ Class Action.” The plaintiffs filed Second Amended Complaints on January 31, 2012.<sup>11</sup> In the third lawsuit, filed in April 2013, the plaintiff is Associated Wholesale Grocers, Inc., a Kansas company that purchased potatoes from UPGI members for resale to grocery stores.<sup>12</sup>

Each of the lawsuits alleges similar facts. In essence, the plaintiffs allege that Ron Offutt and R.D. Offutt Co. joined UPGI in 2007 and partnered with United II (also a defendant in the underlying lawsuits) to form Idahoan Foods.<sup>13</sup> Idahoan Foods, in turn, gave UPGI members access to potato dehydration plants, which allowed members to dehydrate fresh potatoes and further lower potato supply without wasting potatoes.<sup>14</sup>

## **II. TWIN CITY INSURANCE POLICY**

The dispute in this action involves a Twin City insurance policy (the “Twin City Policy”) that insured Idahoan Foods from August 2009 to August 2010.<sup>15</sup> The policy provides coverage for Directors, Officers, and Entity Liability, through a clause which provides:

**The Insurer shall pay Loss on behalf of the Insured Persons resulting from an Insured Person Claim first made against the Insured Persons during**

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<sup>8</sup> Docs. ## 1-2, 1-3, 1-4.

<sup>9</sup> Doc. ## 1-2, Direct Purchasers’ Action, ¶¶ 20–27.

<sup>10</sup> Docs. ## 1-2, 1-3.

<sup>11</sup> Docs. ## 1-2, 1-3.

<sup>12</sup> Doc. #1-4, AWG Action.

<sup>13</sup> See Doc. #1-2, Direct Purchasers’ Class Action ¶¶ 138–152.

<sup>14</sup> See Doc. #1-2, Direct Purchasers’ Class Action ¶¶ 153–163.

<sup>15</sup> The policy is number 00 KB 0244312-09. Doc #1-1, Twin City Policy.

the Policy Period or Extending Reporting Period, if applicable, for a Wrongful Act by the Insured Persons, except for Loss that an Insured Entity pays to or on behalf of the Insured Persons as indemnification.<sup>16</sup>

“Insured persons” includes directors, officers, or board members.<sup>17</sup> “Wrongful Act” means an actual alleged “error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed by an Insured Person in their capacity as such....”<sup>18</sup> The policy also contains what is variously described as a “Dual-Service Exclusion” or “Outside Directors Exclusion.” The exclusion expressly excludes coverage of an Insured Person for any action “arising from, or in any way related to such Insured Person’s service, at any time, as a director, officer, trustee, regent, governor or equivalent executive...of any entity other than an Insured Entity....”<sup>19</sup>

Endorsement 11 to the policy expressly disclaims the duty to defend, instead providing that Twin City would have a duty to advance the costs of defending a lawsuit under certain circumstances:

Subject to section XI. ALLOCATION, the Insurer shall advance on behalf of the Insureds those Defense Costs which the Insureds have incurred in connection with Claims made against them, prior to the final disposition of such Claims, provided always that to the extent it is established that any such Defense Costs are not covered under this Policy, the Insureds agree to repay to the Insurer such non-covered Defense Costs.<sup>20</sup>

The “Allocation” section provides:

Where Insureds who are afforded coverage for a Claim incur an amount consisting of both Loss that is covered by this Policy and also loss that it is not covered by this Policy because such Claim includes both covered and uncovered matters or covered and uncovered parties, then Loss shall be

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<sup>16</sup> Doc. #1-1, Twin City Ins. Policy, p. 19.

<sup>17</sup> Id. at pp. 9, 20.

<sup>18</sup> Id. at p. 21.

<sup>19</sup> Id. at p. 22.

<sup>20</sup> Id. at p. 71, Endorsement 11.

allocated between covered Loss and non-covered loss based upon the relative legal exposure of all parties to such matters.<sup>21</sup>

In February 2012, Offutt sought coverage under the Twin City Policy for the costs of defending the underlying lawsuits.<sup>22</sup> Twin City initially required Offutt's attorneys to sign the Twin City litigation guidelines,<sup>23</sup> but in February 2013, it denied coverage. In denying coverage, Twin City noted that as the allegations in the lawsuits related only to Offutt's acts as a director of R.D. Offutt Co., there were no "Wrongful Acts" sufficient to trigger coverage. As an additional basis for denial, Twin City asserted that the Dual Service Exclusion precluded coverage because the plaintiffs' claims in the associated cases alleged that Offutt committed the acts in his capacity as chairman of R.D. Offutt Co., not in his capacity as director of Idahoan Foods.<sup>24</sup>

#### **PROCEDURAL HISTORY**

On July 22, 2013, Offutt commenced this action seeking a declaratory judgment that Twin City has a duty to advance costs and indemnify him in the underlying lawsuits.<sup>25</sup> He asserts that in failing to advance defense costs, Twin City has breached its insurance contract.<sup>26</sup> Chief Magistrate Judge Klein entered a scheduling order and discovery plan that bifurcated the lawsuit.<sup>27</sup> The parties would first address the issue of whether Twin City has a duty to advance defense costs to Offutt in the underlying litigation. Then, if any issues remained (including the issue of indemnity), the parties would conduct additional discovery and the Court would address those remaining

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<sup>21</sup> Doc. #1-1, Twin City Ins. Policy, p. 71, Endorsement 11.

<sup>22</sup> See Doc. #31-2, Email to Hartford Claims Consultant.

<sup>23</sup> Doc. #21-1.

<sup>24</sup> Doc. #30-2, Denial of Coverage Ltr.

<sup>25</sup> Doc. #1, Compl. ¶¶ 42–49.

<sup>26</sup> *Id.* at ¶¶ 50–52.

<sup>27</sup> Doc. #18, Scheduling Order.

issues.<sup>28</sup> The parties filed cross-motions for summary judgment on the defense issue.<sup>29</sup> The Court held a hearing on the motions on September 16, 2014.

### **STANDARD OF REVIEW**

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.<sup>30</sup> The burden is on the moving party to establish the basis for its motion.<sup>31</sup> Evidence must be viewed in the light most favorable to the nonmoving party, and the nonmoving party enjoys the benefit of all reasonable inferences to be drawn from the facts.<sup>32</sup> If the moving party shows there are no genuine issues of material fact, the burden shifts to the non-moving party to set forth facts showing a genuine issue for trial.<sup>33</sup> The non-moving party “may not rest upon mere denials or allegations, but must instead set forth specific facts sufficient to raise a genuine issue for trial.”<sup>34</sup>

A fact is “material” if it might affect the outcome of the case, and a factual dispute is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party.<sup>35</sup> The basic inquiry is whether the evidence presents a sufficient disagreement to require full consideration on the merits by a jury, or whether it is so one-sided that one party must prevail as a matter of law.<sup>36</sup> Where a party has failed to

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<sup>28</sup> Id.

<sup>29</sup> Doc. #23, Twin City Mot. for Sum. J.; Doc. #25, Offutt Mot. for Sum. J.

<sup>30</sup> Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

<sup>31</sup> Donovan v. Harrah's Md. Heights Corp., 289 F.3d 527, 529 (8th Cir. 2002).

<sup>32</sup> Quinn v. St. Louis Cnty., 653 F.3d 745, 750 (8th Cir. 2011).

<sup>33</sup> Donovan, 289 F.3d at 529.

<sup>34</sup> Wingate v. Gage Cnty. Sch. Dist., No. 34, 528 F.3d 1074, 1078 (8th Cir. 2008).

<sup>35</sup> Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

<sup>36</sup> Diesel Mach., Inc. v. B.R. Lee Indus., 418 F.3d 820, 832 (8th Cir. 2005).

present evidence sufficient to create a jury question as to an essential element of its claim, summary judgment is appropriate.<sup>37</sup>

### **DISCUSSION**

The parties agree that under North Dakota’s choice of law test, Idaho law applies to the motions.<sup>38</sup> Idaho courts apply general rules of contract law to the construction of insurance policies, subject to “certain special canons of construction.”<sup>39</sup> A court is instructed to begin with the plain language of the policy to see if there is any ambiguity.<sup>40</sup> If the language is unambiguous, a court decides as a matter of law whether the plain language of the insurance policy provides coverage.<sup>41</sup> If the language is ambiguous – i.e. reasonably subject to differing interpretations – its meaning becomes a question of fact, and “the trier of fact must determine what a reasonable person would have understood the language to mean and the words used must be construed given their ordinary meaning.”<sup>42</sup> Ambiguities are construed strongly against the insurer.<sup>43</sup>

#### **I. DUTY TO ADVANCE DEFENSE COSTS**

The Twin City Policy expressly disclaimed a duty to defend.<sup>44</sup> In lieu of a duty to defend, the policy provides that Twin City would advance the costs of defending the lawsuit.<sup>45</sup> Although Twin City has no duty to defend, Offutt asserts that the Court should apply the traditional standard of the duty to defend,<sup>46</sup> i.e., that Twin City has a duty to

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<sup>37</sup> Gentry v. Georgia-Pacific Corp., 250 F.3d 646, 649–50 (8th Cir. 2001).

<sup>38</sup> Doc. #24, Twin City Mem. for Sum. J., p. 12 n.3; Doc. #26, Offutt Mem. for Sum. J., p. 10; see Daley v. American States Preferred Ins. Co., 587 N.W.2d 159, 162 (N.D. 1998).

<sup>39</sup> Clark v. Prudential Property and Cas. Ins. Co., 66 P.3d 242, 244 (Idaho 2003).

<sup>40</sup> Id.

<sup>41</sup> Id. at 245.

<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> Doc. #1-1, Twin City Ins. Policy, p. 71, Endorsement 11.

<sup>45</sup> Id.

<sup>46</sup> Doc. #26, Offutt Mem. for Sum. J., p. 12.

defend if the underlying complaint alleges a claim that is potentially covered by the policy.<sup>47</sup> Twin City argues that the duty to advance costs is narrower than the duty to defend, and it only has a duty to advance costs for claims that are actually covered, not claims that are potentially covered.<sup>48</sup>

A majority of courts have held that a duty to advance costs clause requires the insurer to advance costs of defense if there is a possibility of coverage.<sup>49</sup> These courts reason that if the provision were more narrowly interpreted, no payment would be required until the conclusion of the litigation, which would render the advancement of costs meaningless.<sup>50</sup>

The minority position is that the duty to advance costs is narrower than the duty to defend.<sup>51</sup> Under this approach, the plaintiff must prove that the claims actually fall within the scope of coverage before the defendant has a duty to advance costs.<sup>52</sup>

This is an open question under Idaho law. The Court predicts that the Idaho Supreme Court would follow the majority view and find that the duty to defend standard is applicable to a claim for the duty to advance costs.

Idaho takes a “progressive attitude” regarding claims for the breach of the duty to defend,<sup>53</sup> broadly construing allegations to determine if a duty to defend exists.<sup>54</sup> “The

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<sup>47</sup> Dave’s Inc. v. Linford, 291 P.3d 427, 431 (Idaho 2012).

<sup>48</sup> Doc. #24, Twin City Mem. for Sum. J., p. 23.

<sup>49</sup> See Nick Nierengarten, The Duty to Advance or Reimburse Defense Costs v. the Duty to Defend, ABA Dec. 12, 2012, available at <http://apps.americanbar.org/litigation/committees/insurance/articles/novdec2012-reimburse-defense-costs.html> (collecting cases).

<sup>50</sup> Julio & Sons v. Travelers Casualty & Surety Co., 591 F. Supp. 2d 651, 659–60 (S.D.N.Y. 2008).

<sup>51</sup> See Jeff Tracy, Inc. v. United States Specialty Ins. Co., 636 F. Supp. 2d 995, 1003–04 (C.D. Cal. 2009) (citing Commercial Capital Bankcorp. Inc. v. St. Paul Mercury Ins. Co., 419 F. Supp. 2d 1173, 1182 (C.D. Cal. 2006)).

<sup>52</sup> Id. at 1004.

<sup>53</sup> Black v. Fireman’s Fund American Ins. Co., 767 P.2d 824, 830 (Idaho 1989).

<sup>54</sup> Dave’s Inc. v. Linford, 291 P.3d 427, 431 (Idaho 2012).

duty to defend exists so long as there is a genuine dispute over facts bearing on coverage under the policy or over the application of the policy's language to the facts."<sup>55</sup> If there are doubts over coverage, the insurer must defend the insured, even if a possible defense exists under the policy.<sup>56</sup> The duty is not absolute. Rather, the claims in the underlying lawsuit must "provide some link" to the insurance policy.<sup>57</sup>

## **II. "WRONGFUL ACTS" IN THE UNDERLYING LAWSUITS**

Under the terms of Endorsement 11's Duty to Advance Costs, Twin City has a duty to advance the costs Offutt incurs by defending the underlying lawsuits unless it can establish that the defense costs are not covered under the policy.<sup>58</sup> The Twin City Policy generally provides coverage for loss resulting from the insured person's wrongful act.<sup>59</sup> The parties agree that Offutt, as a director of Idahoan Foods, is an insured person under the Twin City Policy, but Twin City asserts that the underlying lawsuits do not allege that Offutt committed a "wrongful act" – i.e., an act or error in his capacity as director of Idahoan Foods.<sup>60</sup>

### **A. Direct Purchasers' Action**

The Second Amended Complaint in the Direct Purchasers' Class Action alleges that Offutt personally took a number of steps to participate in the price-fixing conspiracy:

¶ 142: Ron Offutt and R.D. Offutt are affiliated with the Potato Marketing Association of North America ("PMANA"), an organization that generates potato marketing data. PMANA provides potato marketing data to

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<sup>55</sup> *Constr. Mgmt. Sys. Inc. v. Assurance Co. of America*, 23 P.3d 142, 144–45 (Idaho 2001).

<sup>56</sup> *Id.* at 145.

<sup>57</sup> *Black v. Fireman's Fund American Ins. Co.*, 767 P.2d 824, 830 (Idaho 1989).

<sup>58</sup> Doc. #1-1, Twin City Ins. Policy, p. 71, Endorsement 11.

<sup>59</sup> *Id.* at p. 19.

<sup>60</sup> *Id.* at p. 21.

Defendant UPGA which is used to facilitate the potato supply reduction and price fixing scheme alleged herein.

¶ 143: Ron Offutt and R.D. Offutt were...aware of UPGI's anticompetitive objectives and eventually agreed to join these efforts.

¶ 145: R.D. Offutt agreed to join UPGI at the same time that R.D. Offutt, under Ron Offutt's control, entered into a joint venture with United II to participate in another aspect of the supply control scheme as alleged herein.

¶ 148: Ron Offutt and R.D. Offutt were aware that UPGI and United II desired to create the dehydration joint venture in order to further manipulate the fresh potato supply. R.D. Offutt, under Ron Offutt's control, consciously facilitated that potato market manipulation by entering into the joint venture with United II.

¶ 149: Ron Offutt addressed United II members on November 12, 2007, at the first United II shareholder meeting. Offutt told United II members that, with regard to dynamic changes facing the potato industry, such as oversupply, "you can sleep better tonight because you're a part of a bigger organization that will help solve those challenges and problems." Offutt understood and touted that, due to R.D. Offutt's participation in the joint venture, membership in United II would enable the growers to offload fresh potatoes to the dehydration market and thereby address "challenges" facing the fresh potato market.<sup>61</sup>

The Second Amended Complaint only mentions Offutt in connection to Idahoan Foods one time – to name him as a director of Idahoan Foods. The complaint generally notes that any reference to acts of the defendants "means that the Defendants engaged in the act, deed or transaction by or through their officers, directors, agents, employees or representatives while they were actively engaged in the management, direction, control or transaction of Defendants' business or affairs."<sup>62</sup>

Reading these allegations broadly, it is apparent that the only claims against Offutt stem from his involvement in the conspiracy as chairman of R.D. Offutt Co. The

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<sup>61</sup> Doc. #1-2, Direct Purchasers' Class Action.

<sup>62</sup> Id. at ¶ 164.

Second Amended Complaint does not specifically allege that Offutt took any action in his capacity as director of Idahoan Foods, only that he held a position on the board of directors.<sup>63</sup>

Rather, the acts that Offutt allegedly performed in furtherance of the conspiracy, are alleged to have been performed in his capacity as chairman of R.D. Offutt Co.: (1) he and R.D. Offutt Co. agreed to join UPGI's anticompetitive efforts;<sup>64</sup> (2) he entered into a joint venture with United II to create Idahoan Foods;<sup>65</sup> and (3) he touted to United II members that R.D. Offutt Co.'s participation in the joint venture would allow them to offload fresh potatoes to the dehydration market.<sup>66</sup> It is clear from these allegations that the Direct Purchasers' allegations against Offutt are for his role as chairman of R.D. Offutt Co., not for any role he played in his capacity as director of Idahoan Foods.

Offutt contends that two specific paragraphs allege a "Wrongful Act." Offutt claims that when he told United II members that they could "sleep better" because they were part of a bigger organization, the "bigger organization" was Idahoan Foods.<sup>67</sup> He asserts that he was acting in his capacity as director of Idahoan Foods when he made this statement, and it constitutes a Wrongful Act within the meaning of the policy.<sup>68</sup>

The context of the allegation belies this contention. The statement Offutt points to appears among the other allegations about Offutt's actions in his capacity as chairman of R.D. Offutt Co. In the very same paragraph, the plaintiffs allege that Offutt "touted that, due to R.D. Offutt's participation in the joint venture," United II members

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<sup>63</sup> Id. at ¶ 157.

<sup>64</sup> Id. at ¶ 143.

<sup>65</sup> Id. at ¶¶ 145, 148.

<sup>66</sup> Id. at ¶ 149.

<sup>67</sup> Id. at ¶ 149.

<sup>68</sup> Doc. #26, Offutt Mem. for Sum. J., p. 15; Doc. #1-1, Twin City Ins. Policy, p. 21.

would benefit by gaining access to the dehydration market.<sup>69</sup> Read in context, this paragraph of the Second Amended Complaint alleges that Offutt spoke at the first United II shareholder meeting in his capacity as chairman of R.D. Offutt Co. about Idahoan Foods – the joint venture R.D. Offutt Co. created with United II – not on behalf of Idahoan Foods.

Offutt also argues that the Second Amended Complaint alleges that he committed a Wrongful Act, because it states that all acts by Idahoan Foods were performed by its directors.<sup>70</sup> He turns to Paragraph 164 of the Second Amended Complaint:

All Defendants are collectively referred to herein as “Defendants.” Whenever in this Complaint reference is made to any act, deed, or transaction of the Defendants, the allegation means that the Defendants engaged in the act, deed, or transaction by or through their officers, directors, agents, employees or representatives while they were actively engaged in the management, direction, control or transaction of Defendants’ business or affairs.<sup>71</sup>

Based on this statement, Offutt believes that any allegation against Idahoan Foods is made against him as a director of Idahoan Foods. As a result, he claims that the Second Amended Complaint alleges Wrongful Acts that entitle him to defense costs.<sup>72</sup>

Paragraph 164 does not imply that all allegations against Idahoan Foods are attributable to Offutt personally – only that a corporation, a legal fiction, must act through its agents. The Direct Purchasers’ Second Amended Complaint, even construed broadly, simply does not allege any Wrongful Act committed by Offutt, as required to trigger coverage under the Twin City Policy.

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<sup>69</sup> Doc. #1-2, Direct Purchasers’ Class Action, ¶ 149.

<sup>70</sup> Doc. #26, Offutt Mem. for Sum. J., p. 16.

<sup>71</sup> Doc. #1-2, Direct Purchasers’ Class Action, ¶ 164.

<sup>72</sup> Doc. #26, Offutt Mem. for Sum. J., p. 16.

B. Indirect Purchasers' Action

The claims in the Indirect Purchasers' Action largely mirror the claims of the Direct Purchasers' Action, and like the Direct Purchasers' Action, there is no mention of any act that Offutt committed in his capacity as director of Idahoan Foods.<sup>73</sup> In fact, the Indirect Purchasers' Action does not mention Offutt at all in its allegations against Idahoan Foods – not even the fact that Offutt was a director of Idahoan Foods.<sup>74</sup> The only allegations against Offutt relate to his role as chairman of R.D. Offutt Co.<sup>75</sup>

As with the Direct Purchasers' Action, Offutt relies on a general statement of agency to attempt to prove that the Indirect Purchasers' Action alleges that he committed a Wrongful Act. Paragraph 160 of the Indirect Purchasers' Action provides:

The acts alleged to have been done by the Defendants were performed by their respective officers, directors, agents, employees or representatives while actively engaged in the management, direction, control or transaction of the Defendants' business affairs.<sup>76</sup>

This argument fails for the same reasons discussed in Part II.A supra – it is merely an axiom of corporate law, not an allegation that Offutt personally committed a Wrongful Act in his capacity of director of Idahoan Foods.

C. Associated Wholesaler Grocers' Action

Each allegation against Idahoan Foods in the Associated Wholesaler Grocers' Action appears verbatim in the Second Amended Complaint of the Direct Purchasers' Action.<sup>77</sup> In fact, the only difference between the two complaints is that the Direct

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<sup>73</sup> See Doc. #1-3, Indirect Purchasers' Class Action, ¶¶ 130–34 (discussing the role Idahoan Foods played in the conspiracy).

<sup>74</sup> See *id.*

<sup>75</sup> Doc. #1-3, Indirect Purchasers' Class Action, ¶¶ 142, 143, 146.

<sup>76</sup> *Id.* at ¶ 160.

<sup>77</sup> Doc. #1-4, AWG Action ¶¶ 131–140.

Purchasers' Second Amended Complaint includes two paragraphs missing from the Associated Wholesaler Grocers' Complaint that allege that Idahoan Foods is owned and controlled as an instrumentality of the conspiracy.<sup>78</sup> Because these two complaints are identical in substance, Offutt's claim that the Associated Wholesaler Grocers' Action alleges a "wrongful act" fails for the same reason discussed in Part II.A supra.

D. Conclusion

None of the underlying lawsuits alleges that Offutt committed a "wrongful act" as defined in the Twin City Policy. Twin City therefore has no duty to advance the costs Offutt incurs defending the underlying lawsuits, because no possibility of coverage exists. Twin City's Motion for Summary Judgment on this issue is GRANTED. Offutt's Motion for Summary Judgment on this issue is DENIED.

**III. DUAL SERVICE EXCLUSION**

Even if the underlying lawsuits alleged that Offutt committed a "wrongful act" within the scope of the policy, the duty to advance defense costs would be barred by the "Dual Service Exclusion":

The Insurer shall not pay Loss...of an Insured Person based upon, arising from, or in any way related to such Insured Person's service, at any time, as a director, officer, trustee, regent, governor or equivalent executive or as an employee of any entity other than an Insured Entity....<sup>79</sup>

None of the complaints identifies any act that Offutt committed in the scope of his position as director of Idahoan Foods. The only allegations against Offutt relate to

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<sup>78</sup> Doc. #1-2, Direct Purchasers' Class Action, ¶¶ 162–63.

<sup>79</sup> Doc. #1-1, Twin City Policy, p. 23.

his position as chairman of R.D. Offutt Co., and therefore they fall squarely within the Dual Service Exclusion.<sup>80</sup>

#### **IV. ILLUSORY COVERAGE DOCTRINE**

Finally, Offutt argues that the illusory coverage doctrine requires Twin City to provide him coverage. He claims that the Twin City Policy would violate public policy if construed to exclude the application of the duty to advance defense costs. Under Idaho law, a policy that provides only illusory coverage is void as against public policy.<sup>81</sup> A policy is illusory when “it appears that if any actual coverage does exist it is extremely minimal and affords no realistic protection to any group or class of injured persons.”<sup>82</sup> When an insurance policy is illusory, a court may void the policy, or enforce the policy if voiding the policy would defeat the purpose of the statute.<sup>83</sup>

The Twin City Policy provides meaningful coverage for directors and officers of Idahoan Foods. It only excludes coverage when the directors are sued for actions relating to their service for another company.<sup>84</sup> The Dual Service Exclusion applies not to mere membership on another board, but to lawsuits alleging that the defendant committed an act related to his service on another board.<sup>85</sup> This exclusion does not entirely exclude coverage for directors. It merely limits coverage.

Under this policy, Offutt has coverage if he is sued for his actions as a director of Idahoan Foods. He has no coverage under the policy when he is sued for his actions as

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<sup>80</sup> See Continental Casualty Co. v. Adams, 2003 WL 22162379 at \*10 (M.D. Pa. Sept. 12, 2003) (the purpose of a dual service exclusion is “to avoid coverage where a claim against a named insured in any way involves actual or alleged conduct of individual insureds as agents of an uninsured entity”).

<sup>81</sup> Nat’l Union Fire Ins. Co. of Pittsburgh v. Dixon, 112 P.3d 825, 829 (Idaho 2005).

<sup>82</sup> Martinez v. Idaho Counties Reciprocal Mgmt. Program, 999 P.2d 902, 907 (Idaho 2000).

<sup>83</sup> Id. at 907–08.

<sup>84</sup> Doc. #1-1, Twin City Policy, p. 19.

<sup>85</sup> Id.

