DOCKET NO. 21-11758

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

Continental Casualty Company and Valley Forge Insurance,

Plaintiffs-Appellants,

v.

Winder Laboratories, LLC, and Steven Pressman,

Defendants-Appellees/Cross-Appellants

On Appeal from the United States District Court for the
Northern District of Georgia, Civil Action No. 2:19-cv-00016-RWS

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February 22, 2022

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1, counsel for Defendants-Appellees/Cross-Appellants certifies that the following have an interest in the outcome of this appeal:

1. Adams, Kristin M.
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3. American Property Casualty Insurance Association
4. American Casualty Company of Reading, Pennsylvania
5. Boyd, Nicholas
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8. Caplan Cobb LLC
9. CNA Coverage Litigation Group
10. CNA Financial Corporation
11. Cobb, James
12. Colaizzi, Roger Anthony
13. Complex Insurance Claims Litigation Association
14. Concordia Pharmaceuticals, S.A.R.L.
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SUMMARY OF THE ARGUMENT

In its cross appeal, Winder seeks review of the district court's ruling that the Insurers had no duty to defend the *Concordia* Action following the Fourth Amended Complaint because any basis for coverage was subject to the Policies' failure-to-conform exclusion. That ruling was incorrect, as the Insurers have a duty to defend the *Concordia* Action for several reasons. First, the Fourth Amended Complaint triggers coverage under the Policies because it alleges as a basis for the contributory false-advertising claim that Winder copied Concordia's product labels. That allegation triggers the Policies' "advertising idea" coverage, which is not subject to the failure-to-conform exclusion.

Second, Concordia's contributory false-advertising claim triggers coverage under the Policies' provision covering injuries arising from publications that "disparage[] a person's or organization's goods, products or services." Dkt. 1-1 at 109. The failure-to-conform exclusion does not apply to this basis for coverage because Concordia's contributory false-advertising claim is premised on (1) advertisements made by the third-party Drug Databases—not by Winder—and (2) true statements about Winder's products.

In response, the Insurers make a series of arguments that ignore many of Concordia's allegations and misapply Georgia law. The Insurers argue that Concordia's label-copying allegations do not trigger coverage because (1) the

focus of Concordia's complaint was on Winder's misrepresentations about its products, not on label copying; (2) there is no causal connection between the label copying and the alleged harm; and (3) the labels do not constitute an advertising idea. But in the Fourth Amended Complaint, Concordia alleged in detail that Winder copied its product labels from Concordia and, as a result, those labels contained misleading statements that induced the Databases to link Winder's products with Concordia's. The copied labels are thus a crucial aspect of the contributory false-advertising claim that has a direct causal connection to Concordia's alleged injury. Likewise, Concordia's product labels constitute advertising ideas under Eleventh Circuit law. As is demonstrated by Concordia's allegations, those labels included ideas about how to attract consumers by highlighting certain beneficial aspects of Concordia's products.

With respect to the failure-to-conform exclusion, the Insurers argue that Winder's reading of the exclusion is internally inconsistent. But the Insurers' argument assumes that Winder is talking about the exclusion in the context of a claim that triggers coverage under the advertising-idea provision. That is simply not the case. Indeed, the failure-to-conform exclusion is only relevant to the other bases for coverage.

Next, the Insurers argue that the exclusion still applies because Concordia's injury arises only from Winder's misrepresentations about its products—not from

the Databases' advertisements—and Winder's statements qualify as an "advertisement" under the Policies. But under Georgia law, Concordia's claim arises from *both* Winder's statements and the Databases' advertisements. The failure-to-conform exclusion does not apply to either action, as one involves true statements about Winder's products and the other is a third-party advertisement. None of Concordia's arguments prevail here, and the district court erred in granting judgment on the pleadings.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The district court's grant of judgment on the pleadings is subject to *de novo* review, not review for an abuse of discretion.

As an initial matter, the Insurers attempt to insulate the district court's decision from review by arguing that, simply because Winder filed a motion for reconsideration, the district court's grant of judgment on the pleadings is reviewed for an abuse of discretion, not *de novo*. Insurers' Reply and Cross-Response ("Resp. Br.") at 12. But this Court has never held that an abuse-of-discretion standard applies whenever a party appeals after moving for reconsideration below.[1]

[1] The Insurers cite only one case for this point. Resp. Br. at 12 (citing *Blackburn v. Shire US Inc.*, 18 F.4th 1310, 1316 (11th Cir. 2021)). *Blackburn* does not support the Insurers' argument, as it applied a *de novo* standard to the aspect of the appeal concerning the district court's grant of summary judgment, and applied an abuse-of-discretion standard only to the portions of the appeal that directly challenged the district court's refusal to reconsider its prior orders and grant additional opportunities to amend the complaint. *Id.* at 1317-18.

To the contrary, this Court only applies an abuse-of-discretion standard when a party is directly challenging an order on a motion for reconsideration. For example, in *Corwin v. Walt Disney Company*, the appellant separately enumerated error with (i) the district court's grant of summary judgment and (ii) its subsequent denial of a motion for reconsideration. 475 F.3d 1239, 1248-49 (11th Cir. 2007). In reviewing the summary judgment order, the Court applied a *de novo* standard of review. *Id.* at 1252. It only applied an abuse-of-discretion standard when addressing the appellant's separate arguments regarding the motion for reconsideration. *Id.* at 1255; *see also Fisher v. PNC Bank, N.A.*, 2 F.4th 1352, 1355 (11th Cir. 2021) (applying *de novo* standard to district court's dismissal of complaint, despite its subsequent denial of a motion for reconsideration); *Statton v. Fla. Fed. Jud. Nominating Comm'n*, 959 F.3d 1061, 1062 (11th Cir. 2020) (same); *Garcon v. United Mut. of Omaha Ins. Co.*, 779 F. App'x 595, 600 (11th Cir. 2019) (applying *de novo* standard to arguments concerning grant of judgment on the pleadings and abuse-of-discretion standard to arguments concerning denial of reconsideration); *Horsley v. Rivera*, 292 F.3d 695, 700 (11th Cir. 2002) (applying *de novo* standard to denial of judgment on the pleadings, despite subsequent denial of a motion for reconsideration).

Here, Winder's enumerations of error concern only the merits of the district court's grant of judgment on the pleadings, not the district court's denial of

Winder's motion for reconsideration. Winder's Principal and Response Brief ("Winder's Br.") at 2, 45; *see also id.* at 47 n.20. Consequently, a *de novo* standard applies. *Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1335 (11th Cir. 2014).

II. Concordia's claims based on allegations of label copying trigger coverage under the Policies' personal-and-advertising-injury provision.

As explained in Winder's principal brief, Concordia's contributory false-advertising claim triggers coverage under the Policies' "advertising idea" provision because the claim is premised on allegations that Winder copied Concordia's product labels. Winder's Br. at 47-51. The Insurers' arguments to the contrary are unavailing, and this Court should reverse the district court's grant of judgment on the pleadings, as this single basis for coverage means that the Insurers have a duty to defend the entire *Concordia* Action. *S. Tr. Ins. Co. v. Mountain Express Oil Co.*, 351 Ga. App. 117, 121 (2019).

A. Winder raised its arguments about Concordia's label-copying allegations in response to the Insurers' motion for judgment on the pleadings.

Initially, the Insurers assert that Winder's argument about Concordia's label-copying allegations "was not advanced until Winder's motion for reconsideration." Resp. Br. at 43. But Winder actually raised its argument in response to the Insurers' motion for judgment on the pleadings, devoting three pages of its brief to a discussion of Concordia's label-copying allegations. Dkt. 41 at 19-21 (arguing

that the "alleged use of Concordia's labels and package inserts is sufficient to trigger the 'Personal and Advertising Injury' provision"). The district court addressed the label-copying argument in its initial order, Dkt. 54 at 7, and in its reconsideration order, it acknowledged that Winder had previously raised this argument. Dkt. 65 at 5. The Insurers are thus wrong that Winder's label-copying argument is "subject to review only for the district court's abuse of discretion in determining that Winder did not identify a clear error of law or fact in its initial opinion." Resp. Br. at 44. Instead, this Court must consider this issue *de novo*. *Supra* at Part I.

B. Concordia's contributory false-advertising claim was premised on the label-copying allegations.

On the merits, the Insurers argue that Winder is attempting to "shoe-horn" isolated allegations about label copying into Concordia's contributory false-advertising claim. Resp. Br. at 44. According to the Insurers, that claim is actually "focuse[d] squarely on Winder's false and misleading statements on its labels and inserts, not any alleged act of truthful copying." *Id.* at 45. But this argument twists Georgia law and ignores Concordia's actual allegations.

In Georgia, an insurer has a duty to defend a case if any claim in the case is based on any theory of liability that triggers coverage. *Mountain Express Oil Co.*, 351 Ga. App. at 121. That is the rule even if the case also includes other claims or theories of liability that are not covered. And it is the rule even if the theory of

liability that triggers coverage is itself meritless. For a coverage analysis, all that matters is whether the plaintiff in the underlying case seeks to hold the insured liable for alleged conduct that, at least in part, arguably or potentially is covered by the insurance policy. *See, e.g.*, *Elan Pharm. Rsch. Corp. v. Emps. Ins. of Wausau*, 144 F.3d 1372, 1375 (11th Cir. 1998) ("[A]n insurer must provide a defense against any complaint that, if successful, might potentially or arguably fall within the policy's coverage."); *id.* at 1375 ("[A]ny 'doubt as to liability and the insurer's duty to defend should be resolved in favor of the insured.'" (quoting *Penn-America Ins. Co. v. Disabled Am. Veterans, Inc.,* 268 Ga. 564, 565 (1997)); *City of Atlanta v. St. Paul Fire & Marine Ins. Co.*, 231 Ga. App. 206, 207 (1998) (holding that "insurer is justified in refusing to defend" only if the complaint "does not assert any claims upon which there would be insurance coverage").

A review of Concordia's allegations shows that its claims are premised at least in part on the allegation that Winder copied Concordia's product labels. In summarizing the bases for its contributory false-advertising claim, Concordia alleged that Winder furthered the Databases' false advertising by, among other things, "making ***false or misleading***, or false and misleading, representations about the products ***on their labels and product inserts***." *See* Case No. 2:16-cv-0004, Dkt. 299, Fourth Amended Complaint ("FAC") ¶ 134 (emphasis added). Earlier in

the Complaint, and as incorporated into the contributory false-advertising claim,[2] Concordia alleged that "the labels and package inserts for [Winder's products] have been copied from" Concordia's products and, as a result, "contain numerous false or misleading . . . representations." FAC ¶¶ 83, 85, 88. In other words, one of Concordia's theories of liability for its contributory false-advertising claim is the following: Winder copied Concordia's product labels, *id.* ¶¶ 83, 85; because they were copied, those product labels, while true, were misleading as applied to Winder's products, *id.* ¶ 88; and the misleading nature of the labels caused the Databases to falsely advertise Winder's products as generic equivalents of Concordia's products, *id.* ¶ 134.[3] This claim triggers coverage because it arises

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[2] The Insurers criticize Winder for relying on Concordia's incorporation of its label-copying allegations into its false-advertising complaint. Resp. Br. at 47. But this Court treats allegations incorporated by reference as though they were stated in the claim itself. *Gregory v. Miami-Dade Cnty., Fla.*, 719 F. App'x 859, 872 (11th Cir. 2017). And more to the point, Concordia expressly alleged that Winder's contribution to the Databases' false advertising stemmed from its product labels. FAC ¶ 134. Thus, Concordia's earlier allegations about label copying are highly relevant to its contributory false-advertising claim.

[3] These allegations also demonstrate that the district court was wrong when it ruled that the label-copying allegations were "in support of claims that have now been dismissed." Dkt. 54 at 7. While those allegations had also supported Concordia's dismissed false-advertising claim, paragraphs 131 and 134 of the Fourth Amended Complaint make clear that the label-copying allegations remained part of Concordia's contributory false-advertising claim. For this same reason, the Insurers' argument that coverage cannot be triggered by "allegations that have been dismissed and are improperly re-pled" is beside the point. Resp. Br. at 46.

from Winder's alleged use of Concordia's advertising idea. Dkt. 1-1 at 108-09. Under Georgia law, Concordia's assertion of a potentially covered claim means that the Insurers are obliged to defend the entire *Concordia* Action. *Elan Pharm. Rsch. Corp.*, 144 F.3d at 1375.

The Insurers attempt to escape this conclusion by arguing that the "focus" of Concordia's contributory false-advertising claim was on falsehoods in Winder's labels, "not any alleged act of truthful copying" about the product labels. Resp. Br. at 45; *see also id.* at 39 (arguing that the claim was premised solely on "allegations that Winder misrepresented the quality of its product").[4] According to Appellants, Concordia in fact could not have successfully alleged its claim if it were based on true statements about Winder's products. Resp. Br. at 45. Notably, the Insurers cite no law to support their position that this Court may consider only the "focus" of a claim when evaluating coverage. And as a factual matter, the Insurers' characterization of Concordia's contributory false-advertising claim is wrong.

The Insurers repeatedly ignore that Concordia was careful to alternately allege that, depending on which of Concordia's theories prevailed, Winder's representations to the Databases were either (i) false, (ii) true but misleading, or

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[4] The Insurers make this same exact argument with respect to the application of the failure-to-conform exclusion to allegations that Winder made true, but misleading, statements in order to induce the Databases' false advertising. *Compare* Resp. Br. at 44-47 *with id.* at 36-40. Winder's discussion of these points here therefore addresses the Insurers' arguments from both sections of its brief.

(iii) both false and misleading. *E.g.*, FAC ¶ 88 (alleging that labels "contain numerous ***false or misleading, or false and misleading***, representations" (emphasis added)); *id.* ¶ 134 (same).[5] Despite the Insurers assertions to the contrary, Concordia's complaint actually puts forth a theory that Winder contributed to the Databases' false advertising by making representations about its product that were true, but were nonetheless misleading in context. According to Concordia, those true representations were misleading precisely because Winder had improperly copied its labels verbatim from Concordia's products. *Id.* ¶¶ 82-88.[6]

Similarly, the Insurers are wrong in arguing that true statements about Winder's products could not properly support a contributory false-advertising

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[5] Throughout their brief, the Insurers quote Concordia's allegations that Winder made "false or misleading" statements and then construe those statements as alleging only that Winder made "misrepresentations" and "affirmatively misled" the Databases. *E.g.*, Resp. Br. at 40-41; *id.* at 45 (characterizing allegation that Winder made "false ***or*** misleading, or false and misleading" statements as "focus[ing] squarely on Winder's false ***and*** misleading statements," not on true statements (emphasis added)). This incorrect reading of Concordia's allegations underlies a number of the Insurers' arguments here. This Court should reject the Insurers' misconstruction of the Fourth Amended Complaint.

[6] Those same allegations contradict the Insurers' assertion that Concordia alleged only that the copied labels were "***false*** as to Winder's products." Resp. Br. at 47. Concordia plainly alleged that the copied labels contained true statements about Winder's products that, by themselves, could support a contributory false-advertising claim. FAC ¶¶ 82-88, 134.

claim. Resp. Br. at 39 (arguing that "Winder could not be liable without having made misrepresentations to the databases"); *id.* at 46 ("[Concordia's] contributory false advertising claim escaped dismissal only on the basis that it alleged active misrepresentation by Winder."). The Insurers rely on *Estée Lauder* for the idea that a contribution to false advertising must be more than "mere passive knowledge of a third party's misrepresentations." *Duty Free Americas, Inc. v. Estée Lauder Cos.*, 797 F.3d 1248, 1278 (11th Cir. 2015).[7] While this may be true in the abstract, it does not support the Insurers' next logical leap that Winder must therefore have "made misrepresentations to the databases." Resp. Br. at 39; *id.* at 45. Rather, as the district court ruled in the *Concordia* Action, Concordia could prove that Winder contributed to the Databases' false advertising by making true statements that were "misleading when considered in their full context." Case No. 2:16-cv-00004-RWS, Doc. 78 at 16 (citing *Estée Lauder Cos.*, 797 F.3d at 1277); *see also id.* ("[L]iteral falsity is not the only way to satisfy this element" of

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[7] *Estée Lauder* held that continuing to sell a product to a distributor, despite knowing the distributor was engaged in false advertising, was not enough to state a claim for contributory false advertising. 797 F.3d at 1279. By contrast, Concordia alleges here that Winder submitted information to the Databases to induce them to link Winder's products with Concordia's as a generic replacement. This is a far cry from the passive sales at issue in *Estée Lauder*.

contribution to false advertising.).[8] As it relates to the question of coverage, the copying of Concordia's labels is a fundamental aspect of Concordia's contributory false-advertising claim, and the claim therefore triggers coverage under the Policies' "advertising idea" provision.

The Insurers next argue that the contributory false-advertising claim did not trigger coverage because "there is 'no causal connection between the purported advertising activity and [the plaintiff's] injuries.'" Resp. Br. at 47 (quoting *McGregor v. Columbia Nat. Ins. Co.*, 298 Ga. App. 491, 497 (2009)). But of course, Concordia expressly alleged a causal connection between the advertising activity (i.e., the copied product labels) and the false advertising that allegedly injured Concordia. According to Concordia, Winder's improperly copied labels "contain[ed] numerous false or misleading . . . representations," and ***"[b]ased upon the representations on the products' labels and package inserts***," Winder's and Concordia's products "have become 'linked' . . . in the Drug Databases." FAC ¶¶ 88-89 (emphasis added).

The causal connection that Concordia alleges is quite distinct from the situation at issue in *McGregor*. There, the plaintiff in the underlying case had

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[8] The Insurers' assertion that the district court ruled in the underlying case "that the contributory false advertising claim escaped dismissal only on the basis that it alleged active misrepresentation by Winder," Resp. Br. at 46, is directly contradicted by the district court's order. Case No. 2:16-cv-00004-RWS, Doc. 78 at 16-17.

alleged that he was damaged because the insured "made false and misleading statements in [the insured's] advertising and promotional materials." 298 Ga. App. at 497. The court found that "such actions simply do not constitute 'misappropriation of advertising ideas or style of doing business'" such that they would trigger coverage. *Id.* Notably, too, the plaintiff in *McGregor* "[did] not allege that [the insured] misappropriated [*plaintiff's*] advertising ideas." *Id.* (emphasis in original). For these reasons, the court found that there was no coverage. *Id.* at 498. By contrast, Concordia alleged here that Winder misappropriated Concordia's advertising ideas and that such misappropriation caused the Databases' false advertising, resulting in harm to Concordia. FAC ¶¶ 83, 85, 88, 89, 134. The causal chain laid out in Concordia's allegations is clear and triggers coverage under the Policies.

C. Concordia's product labels constituted an "advertising idea."

This Court has held that an "advertising idea" is "any idea or concept related to the promotion of a product to the public." *Hyman v. Nationwide Mut. Fire Ins. Co.,* 304 F.3d 1179, 1188 (11th Cir. 2002). "'The plain and ordinary meaning of 'advertising idea' generally encompasses an idea for calling public attention to a product or business, especially by proclaiming desirable qualities so as to increase sales or patronage.'" *Trailer Bridge, Inc. v. Ill. Nat. Ins. Co.*, 657 F.3d 1135, 1143

(11th Cir. 2011) (quoting *Am. Simmental Ass'n v. Coregis Ins. Co.,* 282 F.3d 582, 587 (8th Cir. 2002)).

The Insurers argue that, even if Concordia's false-advertising claim was based on allegations of label copying, there still would be no coverage because "the alleged label-copying is not [a] use of Concordia's 'advertising idea.'" Resp. Br. at 48. Once again, Concordia's actual allegations refute this point. In its Fourth Amended Complaint, Concordia alleged specific examples of the type of assertions that Winder supposedly copied from Concordia's labels, including that the drug:

- "has been reviewed and classified by FDA," FAC ¶ 83;
- was "available in an elixir form," *id.* ¶ 84; and
- was "indicated for use as [an] adjunctive therapy in the treatment of irritable bowel syndrome (irritable colon, spastic colon, mucous colitis) and acute enterocolitis," *id.* ¶ 87.

Each of these assertions in the labels reflects Concordia's ideas of how best to "proclaim[] desirable qualities" about their products "so as to increase sales or patronage." *Trailer Bridge, Inc.*, 657 F.3d at 1143. In Concordia's judgment, these were the best features of its product to highlight so that its customers would choose to stock its products as a treatment for irritable bowel syndrome. Thus,

Concordia's labels contain advertising ideas.[9] *See P.J. Noyes Co. v. Am. Motorists Ins. Co.*, 855 F. Supp. 492, 494-95 (D.N.H. 1994) (finding that product name "Dustfree Precision Pellets" constituted an advertising idea).

The Insurers argue that drug labels cannot contain advertising ideas because they provide "information that is merely descriptive" and "a company's merely informational notice to the public is not an 'advertisement.'" Resp. Br. at 48. While Concordia's labels contain some purely descriptive information, the statements highlighted above go beyond mere descriptions. They instead emphasize preferred treatment options and beneficial aspects of the products that would appeal to potential customers and help customers choose Concordia's products over others. The fact that Concordia's labels also include descriptive

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[9] Concordia's allegations regarding statements in the allegedly copied labels also demonstrate why *E.S.Y., Inc. v. Scottsdale Ins. Co.*, 139 F. Supp. 3d 1341, 1356 (S.D. Fla. 2015), is on point here. The *E.S.Y.* court distinguished between product labels (i) that contained descriptive information about the product but also "presumably had the additional function of attracting consumers" and (ii) those that were not intended to attract consumer attention (i.e., a "plain white tag" or a "small price sticker"). *Id.* at 1355. The Insurers contend that Concordia's labels are "informational label[s]" that cannot contain advertising ideas. Resp. Br. at 51. But Concordia's allegations show the opposite. Like the labels in *E.S.Y.*, Concordia's labels were meant to attract consumers by highlighting desirable features of the product (such as FDA review and classification and being available in elixir form) and by communicating about the product's best treatment use. Such labels constitute advertising ideas. *Hyman,* 304 F.3d at 1188; *Trailer Bridge, Inc.*, 657 F.3d at 1143.

information is irrelevant, given that the labels' other aspects constitute ideas about how best to market the products.

The Insurers next argue that there is no coverage for the *Concordia* Action because "copying a product and then advertising it (as opposed to copying an idea about how to advertise to the public) does not trigger coverage." Resp. Br. at 48-49. This argument is beside the point. Winder's coverage arguments are not premised on Winder's advertisement of a product that allegedly copied Concordia's product. Instead, coverage is triggered because Concordia alleged that Winder copied Concordia's product *labels*, which themselves constitute advertising ideas.

For the same reason, the cases that the Insurers cite to support this argument are inapposite. Each case involved an insured who copied the technical design of a product and then advertised that product to consumers. *See Laney Chiropractic & Sports Therapy, P.A. v. Nationwide Mut. Ins. Co.*, 866 F.3d 254, 260-61 (5th Cir. 2017) ("[T]he Underlying Complaint alleges . . . that [the insured] unlawfully used a patented product (ART) and then advertised the product on its website. Because, without more, taking and then advertising another's product is different from taking another's 'advertising idea,' the Underlying Complaint does not allege that [the insured] used ART's 'advertising idea.'"); *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 748 (3d Cir. 1999) ("[T]he [underlying]

complaint does not allege that [the insured] misappropriated methods of gaining customers; it alleges that [the insured] misappropriated information about the manufacture of dipper buckets and then advertised the resulting product.”).[10] None of those cases concern the situation at issue here, where the insured allegedly misappropriated the underlying plaintiff's advertising ideas by copying its product labels verbatim.

In sum, Concordia's label-copying allegations trigger coverage for the use of another's advertising idea. Because no exclusions apply, Winder's Br. at 51 n.23, the Insurers had an obligation to defend the entire *Concordia* Action.

III. The Policies' failure-to-conform exclusion does not apply to Concordia's contributory false-advertising claim.

The district court's ruling on the Insurers' motion for judgment on the pleadings was wrong for another independent reason. In granting judgment to the Insurers, the district court incorrectly assumed that Concordia's Fourth Amended Complaint "is based entirely upon allegations that Winder and Pressman

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[10] Insurers also cite *Novell, Inc. v. Federal Insurance Co.*, 141 F.3d 983 (10th Cir. 1998), arguing that it rejected coverage under an "identical policy provision" because "the plaintiff never alleged that the policyholder attempted to mimic the outward appearance of his product." Resp. Br. at 49. But *Novell* concerned only coverage for the "'misappropriation of . . . [a] style of doing business'"—not for the use of an advertising idea. 141 F.3d at 986. Further, *Novell* referenced mimicking a product's outward appearance not in relation to any advertising-idea analysis, but merely to note that the underlying case did not include a claim for misappropriation of trade dress. *Id.* at 987. *Novell* is irrelevant to this case.

misrepresented the quality of their B-Donna and Phenohytro drugs." Dkt. 54 at 5-6. Winder's arguments on the failure-to-conform exclusion each rebut that false assumption.[11] Winder's Br. at 52-55. In actuality, Concordia's contributory false-advertising claim alleges at least two theories of liability that trigger coverage under the Policies and are not based on misrepresentations about the quality of Winder's products. Accordingly, this Court should reverse the district court's grant of judgment on the pleadings.

A. Winder's position regarding the failure-to-conform exclusion is internally consistent, and the Insurers' argument to the contrary is premised on a misreading of the Policies.

The Insurers first accuse Winder of making an "internally contradictory" argument about the failure-to-conform exclusion. Resp. Br. at 33. According to the Insurers, "[i]f Winder were correct that statements on the drug databases are not 'your advertisement' for purposes of the Failure-to-Conform Exclusion, then there would be no coverage to begin with" under the Policies. *Id.* at 33-34. The Insurers further assume that "Winder argues only one basis for coverage: Concordia alleges that Winder copied its 'advertising idea[,]'" and that basis

[11] This is also the reason that Appellants are wrong that an abuse-of-discretion standard applies here. Resp. Br. at 31-33. A *de novo* standard of review applies because Winder's arguments on appeal are aimed at an error in the district court's order granting judgment on the pleadings, not in its reconsideration order. *Supra* at Part I. Further, even if a higher standard of review applies here, the district court's ruling is premised on a manifest error of fact regarding the allegations in Concordia's complaint. This alone justifies reversing the order.

"applies only if the alleged injury arose from Winder's own advertisements." Resp. Br. at 34. According to the Insurers, if the failure-to-confirm exclusion does not apply because the alleged injury did not arise from Winder's advertisements, then coverage cannot be triggered either. But this argument is nonsensical, as it is premised on a misreading of both Winder's brief and of the Policies.

Winder does not argue only a single basis for coverage here. Rather, Concordia's contributory false-advertising claim triggers coverage in this case in multiple ways. *E.g.*, Winder's Br. at 51 n.22; *id.* at 52-57. The first, as laid out above, is by alleging that Winder used Concordia's advertising idea when it copied Concordia's product labels. FAC ¶¶ 83-88, 134. This theory of liability triggers coverage under subsection (f) of the Policy's definition of "Personal and advertising injury," which provides coverage for injuries arising out of "[t]he use of another's advertising idea in your 'advertisement.'" Dkt. 1-1 at 108-09.

Concordia's contributory false-advertising claim also triggers coverage because it alleges harm flowing from the Databases' false advertisements, which represented Winder's products as equivalent substitutes for Concordia's products. FAC ¶¶ 89-95, 134-35. These allegations trigger coverage under subsection (d) of the Policy's definition of "personal and advertising injury," which covers injuries arising out of "[o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or

organization's goods, products or services." Dkt. 1-1 at 108-09; *see also* Winder's Br. at 51 n.22.[12]

This second basis for coverage under subsection (d) is the premise of Winder's arguments regarding the failure-to-conform exclusion. Indeed, the failure-to-conform exclusion categorically does not apply where coverage is triggered by the alleged use of another's advertising idea. Winder's Br. at 51 n.23; *see also* Dkt. 54 at 7 (noting that "claims trigger[ing] coverage under this section of the policy . . . fall outside of the [failure-to-conform] exclusion as an advertising idea"). If, on appeal, Winder were only arguing that coverage existed because Concordia alleged the use of their advertising idea, Winder would have no reason to address the failure-to-conform exclusion at all.

[12] The Insurers assert that Winder waived the arguments in footnote 22 of its brief, along with those in footnote 25, because "Winder's cursory footnotes are insufficient to present them for appellate review." Resp. Br. at 51-52. Winder's footnotes 22 and 25—both of which contain multiple citations to the record or authority—explain that when the parties are discussing the failure-to-conform exclusion, the basis for coverage is an injury arising out of a publication that disparages another's product. Dkt. 1-1 at 109. The district court (correctly) assumed that Concordia's claims triggered this basis for coverage and only addressed the application of the exclusion. Dkt. 54 at 5. On appeal, Winder only takes issue with the district court's incorrect ruling that coverage was excluded. And notably, the Insurers do not argue that the district court's assumption of coverage was wrong. Winder's footnotes 22 and 25 are more than sufficient to explain its position regarding coverage, and Winder has not waived any arguments here. *See N.L.R.B. v. McClain of Georgia, Inc.*, 138 F.3d 1418, 1422 (11th Cir. 1998).

Because Winder's arguments regarding the failure-to-conform exclusion are premised on coverage being triggered under subsection (d) of the "personal or advertising injury" provision, the Insurers' points about the interaction of the exclusion with the "advertising idea" provision are irrelevant. There is no inconsistency in Winder's argument, and there can be no argument that the contributory false-advertising claim does not trigger coverage under subsection (d) of the policies. The only issue before this Court is whether the failure-to-conform exclusion bars such coverage.

B. The failure-to-conform exclusion does not apply to Concordia's contributory false-advertising claim.

1. Concordia's claim arises out of both Winder's true statements to the Databases and the Databases' allegedly false advertising of Winder's product.

The Insurers argue that the injury alleged in Concordia's contributory false-advertising claim stems not from the Databases' advertisements, but from Winder's alleged misrepresentations to the Databases. Resp. Br. at 36-40. According to the Insurers, the failure-to-conform exclusion thus applies because Winder's products did not conform to Winder's misrepresentations about those products. But the Insurers improperly twist Georgia law to arrive at this conclusion.

The failure-to-conform exclusion prevents coverage where a personal or advertising injury "aris[es] out of the failure of goods, products or services to

conform with any statement of quality or performance made in your 'advertisement.'" Dkt. 1-1 at 101. Under Georgia law, "[c]laims arise out of the excluded conduct when 'but for' that conduct, there could be no claim against the insured." *Hays v. Georgia Farm Bureau Mut. Ins. Co.*, 314 Ga. App. 110, 114 (2012) (requiring courts to use "the 'but for' test traditionally used to determine cause-in-fact for tort liability" when policy exclusions use "arising out of" language).

The Insurers contend that the but-for cause of Concordia's injuries is Winder's representations to the Databases and, therefore, the failure-to-conform exclusion applies because the advertisement in question was made by Winder. Resp. Br. at 38. But this argument rests on the (incorrect) assumption that there can only be one but-for cause of Concordia's alleged injury. To the contrary, in applying the but-for test, Georgia courts have long recognized that there can be multiple factual causes of an injury. *Callahan v. Cofield*, 61 Ga. App. 780, 780 (1940) (rejecting defendant's argument that co-defendant was the sole but-for cause of plaintiff's injury and noting that an injury may have more than one cause); *see also Glisson v. Freeman*, 243 Ga. App. 92, 108 (2000).

Such is the case here. While it may be true that Concordia would not have suffered the alleged injury had Winder never submitted any information to the Databases, Concordia likewise would not have been injured had the Databases

never advertised Winder's product as equivalent to Concordia's. Thus, both Winder's and the Databases' alleged statements are but-for causes of Concordia's alleged harm, and Concordia's contributory false-advertising claim "arises out" of both.[13] Neither of these but-for causes are subject to the failure-to-conform exclusion, as explained below.

2. The failure-to-conform exclusion does not apply to the Databases' advertisements.

As Winder argued in its opening brief, the failure-to-conform exclusion requires that the relevant product fail to live up to statements about its quality in the ***insured's*** advertisement, not an advertisement by a third party such as the Databases. Winder's Br. at 52-54.[14] Thus, the exclusion cannot apply to the

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[13] This conclusion is supported by the case law cited by the Insurers. The *Landgale* decision notes that "[a] claim does not 'arise out of' a circumstance if, independent of that circumstance, the claim could still exist." Resp. Br. at 37 (quoting *Langdale Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Penn.*, 609 F. App'x 578, 588 (11th Cir. 2015)). Concordia could not state a claim for contributory false advertising without the allegations either that Winder made false or misleading representations to the Databases, or that the Databases falsely advertised Winder's product as a generic to Concordia's. *Estée Lauder Cos.*, 797 F.3d at 1277 (to establish contributory false advertising, the plaintiff must show (1) "that a third party in fact directly engaged in false advertising that injured the plaintiff" and (2) "that the defendant contributed to that conduct either by knowingly inducing or causing the conduct, or by materially participating in it").

[14] In its opening brief, Winder cited *Cincinnati Ins. Co. v. Crown Lab'ys, Inc.*, No. 2:08-CV-240, 2010 WL 11520005 at *9 (E.D. Tenn. Mar. 30, 2010) in support of its argument that the failure-to-conform exclusion does not apply where the

Databases' alleged advertisement that Winder's product was equivalent to Concordia's. Notably, Insurers make no argument to the contrary; they merely argue (contrary to Georgia law) that the alleged injury did not arise from the Databases' advertisement. Resp. Br. at 36-40. Because the alleged advertising injury arose from the Databases' statements about Winder's products, the failure-to-conform exclusion does not apply to this aspect of the contributory-false advertising claim.

3. The failure-to-conform exclusion does not apply to Winder's true statements to the Databases.

Likewise, the failure-to-conform exclusion does not apply to the second but-for cause of Concordia's harms: Winder's statements to the Databases about its own products. This is because Concordia alleges that Winder submitted *truthful* information about its products. Winder's products necessarily must have

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relevant advertisement was made by a third party, rather than the insured. Winder's Br. at 53-54. The Insurers' attempts to distinguish *Crown* are confusing and unpersuasive. First, the Insurers assert that the underlying plaintiff in *Crown* alleged that the insured contributed to false advertising by not correcting a marketer's misrepresentations about a product. Resp. Br. at 39. But *Crown* did not even involve a contributory false-advertising claim. Next, the Insurers argue that *Crown* found insurance coverage for a disparagement claim, which "unlike the use of an advertising idea relied upon by Winder here, did not require that the offending statement be made in the insured's advertisement." Resp. Br. at 39-40. But of course, Winder does not rely on the "advertising idea" provision for coverage with respect to this portion of its cross-appeal. And regardless of how it ultimately found coverage, the *Crown* court still rejected application of the failure-to-conform exclusion where the underlying claim was not based on the insured's advertisement. *Crown Lab'ys, Inc.*, 2010 WL 11520005, at *9.

conformed with true statements about its products, so the exclusion does not apply to this theory of liability. Winder's Br. at 55-56.

As they did in relation to the label-copying allegations, the Insurers once again argue that Concordia's complaint alleges only that Winder made active misrepresentations about its products to the Databases. Resp. Br. at 36-43. For the same reasons discussed above, Concordia alleged an alternative theory that Winder contributed to the Databases' false advertising by making true (but misleading) statements about its product. *Supra* at 9-12. Those statements are sufficient to support a claim for contributory false advertising. *Id.* In short, the Insurers wrongly construe Concordia's complaint as alleging only that Winder engaged in active misrepresentation about its products. Both the complaint itself and the district court's rulings in the underlying case show otherwise.[15]

The Insurers argue that "Winder cannot escape the operation of the Failure-to-Conform Exclusion by pointing to isolated allegations that some of its representations—which could not independently injure Concordia—were true." Resp. Br. at 43 (relying on *Westfield Ins. Co. v. Robinson Outdoors, Inc.*, 700 F.3d

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[15] There is likewise no merit to the Insurers' argument that the failure-to-conform exclusion applies because Winder's "misrepresentations—that Winder's drugs were generic, or therapeutically equivalent to, Concordia's[—]concerned a quality of Winder's drugs" with which the drugs did not conform. Resp. Br. at 41. This argument ignores the alternative theory of liability regarding true statements about Winder's products, on which Winder's failure-to-conform arguments are based.

1172, 1175 (8th Cir. 2012)). But as discussed above, Concordia's allegations regarding Winder's true statements were not isolated, nor were they insufficient to state a claim. The allegations are peppered throughout the complaint, and they support one of three viable alternative theories of liability for contributory false-advertising. *Supra* at 9-12.

Westfield does not alter these conclusions. In that case, the underlying plaintiff included a few background allegations about advertisements that the insured argued were literally true, and therefore outside the failure-to-conform exclusion. *Westfield Ins. Co.*, 700 F.3d at 1175. The court rejected this argument because the allegations "merely provide []background . . . , not an individual or separate basis for a claim." *Id*. By contrast, Concordia specifically alleged Winder's true statements to the Databases as a separate basis for its claim. FAC ¶ 134 (accusing Winder of making "false or misleading statements" to induce the Databases' false advertising).

Because Concordia's claim is premised in part on a theory that Winder made true statements to the Databases, the failure-to-conform exclusion does not apply, and the Insurers have a duty to defend the *Concordia* Action.

CONCLUSION

In its cross-appeal, Winder respectfully requests that this Court reverse the district court's grant of judgment on the pleadings to Insurers Continental Casualty Company and Valley Forge Insurance.

Respectfully submitted this 22nd day of February, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Rule 28.1(e)(2) and contains 6,419 words.

This 22nd day of February, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I caused a true and correct copy of the foregoing document to be filed with the clerk's office by this Court's CM/ECF system which will serve a true and correct copy of the same upon all counsel of record.

This 22nd day of February, 2022.

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