IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Action No. 15-cv-00555-REB-KMT

MUSCLEPHARM CORPORATION,

Plaintiff,

v.

LIBERTY INSURANCE UNDERWRITERS, INC.,

Defendant.

ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT

Blackburn, J.

The matters before me are (1) **Plaintiff MusclePharm Corporation's Motion for Summary Judgment on Coverage** [#36],[1] filed January 13, 2016; and (2) **Defendant Liberty Insurance Underwriters, Inc.'s Motion for Summary Judgment** [#39], filed January 13, 2016.[2] I grant defendant's motion, deny plaintiff's motion, and dismiss plaintiff's claims.

I. JURISDICTION

I have jurisdiction over this matter pursuant to 28 U.S.C. § 1332 (diversity of citizenship).

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[1] "[#36]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's electronic case filing and management system (CM/ECF). I use this convention throughout this order.

[2] The issues raised by and inherent to the cross-motions for summary judgment are fully briefed, obviating the necessity for evidentiary hearing or oral argument. Thus, the cross-motions stand submitted on the papers.

II. STANDARD OF REVIEW

Summary judgment is proper when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. **FED. R. CIV. P.** 56(a); ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A dispute is "genuine" if the issue could be resolved in favor of either party. ***Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.***, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); ***Farthing v. City of Shawnee***, 39 F.3d 1131, 1135 (10th Cir. 1994). A fact is "material" if it might reasonably affect the outcome of the case. ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); ***Farthing***, 39 F.3d at 1134.

A party who does not have the burden of proof at trial must show the absence of a genuine fact issue. ***Concrete Works, Inc. v. City & County of Denver***, 36 F.3d 1513, 1517 (10th Cir. 1994), ***cert. denied***, 115 S.Ct. 1315 (1995). By contrast, a movant who bears the burden of proof must submit evidence to establish every essential element of its claim or affirmative defense. ***See In re Ribozyme Pharmaceuticals, Inc. Securities Litigation***, 209 F.Supp.2d 1106, 1111 (D. Colo. 2002). In either case, once the motion has been properly supported, the burden shifts to the nonmovant to show, by tendering depositions, affidavits, and other competent evidence, that summary judgment is not proper. ***Concrete Works***, 36 F.3d at 1518.[3] All the evidence must be

[3] However, the fact that the parties have filed cross-motions for summary judgment does not necessarily indicate that summary judgment is proper. ***See Atlantic Richfield Co. v. Farm Credit Bank of Wichita***, 226 F.3d 1138, 1148 (10th Cir. 2000); ***James Barlow Family Ltd. Partnership v. David M. Munson, Inc***., 132 F.3d 1316, 1319 (10th Cir. 1997); ***see also Buell Cabinet Co. v. Sudduth***, 608 F.2d 431, 433 (10th Cir. 1979) ("Cross-motions for summary judgment are to be treated separately; the denial of one does not require the grant of another.").

viewed in the light most favorable to the party opposing the motion. ***Simms v. Oklahoma ex rel Department of Mental Health and Substance Abuse Services***, 165 F.3d 1321, 1326 (10th Cir.), ***cert. denied***, 120 S.Ct. 53 (1999).

III. ANALYSIS

Plaintiff MusclePharm Corporation ("MusclePharm") was insured under Executive Advantage Policy Number DONYAALV1W002 (the "Policy"), issued by defendant Liberty Insurance Underwriters, Inc. ("Liberty"), for the period January 6, 2013, to January 6, 2014. MusclePharm claims to be entitled to coverage under the Policy for attorney fees and costs it incurred in responding to an SEC investigation. Liberty has provided coverage for a portion of these expenditures, but has refused to indemnify MusclePharm for the majority of them.[4] By this lawsuit, MusclePharm asserts claims against Liberty for breach of contract and statutory and common law bad faith breach of insurance contract.

The Policy consists of several "Insuring Agreements," two of which are at issue here. Section 1.2 of the Policy, entitled "**Insured Organization Reimbursement**," provides, relevantly:

> The Insurer shall pay on behalf of the **Insured Organization** all **Loss** which it is permitted or required by law to indemnify the Insured Persons as a result of a **Claim** first made during the **Policy Period** or **Discovery Period**, if applicable, against the **Insured Persons** for a **Wrongful Act** which takes place before or during the **Policy Period**.

[4] More than $1.3 million in legal and related expenses allegedly was incurred on behalf of the corporation itself, as to which Liberty has never provided coverage under the Policy. The company also allegedly expended more than $1.7 million on behalf of its directors and officers, as to which Liberty acknowledged coverage commencing February 13, 2015, but not before.

(**Def. Motion App.**, Shah Aff., Exh. A § 1.2 at L550; **Plf. Motion App.**, Exh. 5 § 1.2 at MC_1285). Section 1.3, entitled "**Securities Action Liability**," provides coverage to the corporation itself, as follows:

> The Insurer shall pay on behalf of the **Insured Organization** all **Loss** which it shall become legally obligated to pay as a result of a **Securities Action** first made during the **Policy Period** or **Discovery Period**, if applicable, against the **Insured Organization** for a **Wrongful Act** which takes place before or during the **Policy Period**.

(**Def. Motion App.**, Shah Aff. Exh. A § 1.3 at L550; **Plf. Motion App.**, § 1.3 Exh. 5 at MC_1285.)

Of particular relevance to these motions are the Policy terms "Claim" and "Wrongful Act." Section 25.3 of the Policy, as amended by Endorsement No. 26, defines a "Claim" as:

> (a) a written demand for monetary or non-monetary relief against an **Insured Person** or, with respect to Insuring Agreement 1.3, against the **Insured Organization**; including a request to toll the statue of limitations;
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> (b) a civil or criminal judicial proceeding or arbitration against an **Insured Person** or, with respect to Insuring Agreement 1.3, against the **Insured Organization**;
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> (c) a formal administrative or regulatory proceeding against an **Insured Person**;
>
> (d) a formal criminal, administrative, or regulatory investigation against an **Insured Person** when such **Insured Persons'** receives [sic] a Wells Notice or target letter in connection with such investigations;
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> . . . .

> including any appeal therefrom. A **Claim** will be deemed first made on the earliest date any **Insured Person** is arrested by a foreign policing authority or any **Insured** receives a written demand, request to toll the statute of limitations, complaint, indictment, notice of charges, Wells Notice, or order of formal investigation in such **Claim**.

(**Def. Motion App.**, Shah Aff., Exh. A at L591; **Plf. Motion App.**, Exh. 5 at MC_1326.)

The term "Wrongful Act" is defined in section 25.20 of the Policy, as amended by Endorsement No. 7, which provides:

> "Wrongful Act" means:
>
> (a) any actual or alleged error, misstatement, misleading statement, act, omission, neglect, or breach of duty, actually or alleged committed or attempted by the **Insured Persons** in their capacities as such or in an **Outside Position**, or, with respect to **Insuring Agreement 1.3**, by the **Insured Organization**[.]

(**Def. Motion App**., Shah Aff., Exh. A at L569; **Plf. Motion App.**, Exh. 5 at MC_1304.)

On May 16, 2013, MusclePharm received a letter from the SEC's Division of Enforcement advising that the agency was conducting an inquiry into the company's operations and requesting the voluntary production of a number of different categories of documents. (***See* Def. Motion App.**, Shah Aff., Exh. C at L13-21.) The letter did not specify any actual or suspected violation of the securities laws, nor implicate any specific individual director or officer. Indeed, it explicitly provided that the Commission's inquiry "should not be construed as an indication that the Commissioner or its staff believes any violation of law has occurred, nor should you consider it an adverse reflection upon any person, entity, or security." (***Id.***, Shah Aff., Exh. C at L11.) By email dated June 20, 2016, MusclePharm forwarded the SEC's request to Liberty,

specifying, "[i]f the [SEC's] letter does not arise to the level of a claim, then the insured would like to have this considered a notice of circumstance."[5] (***Id.***, Exh. C at L1.)

On July 8, 2013, while Liberty was still considering this request, MusclePharm received from the SEC an "Order Directing Private Investigation and Designating Officers to Take Testimony" (the "Order" or the "July 8 Order"). The Order stated that the SEC had "information that tends to show" various "possible violation[s]" of the federal securities laws by MusclePharm and/or its officers and directors. (**Def. Motion App**., Shah Aff. Exh. E at L55-57; **Plf. Motion App.**, Exh. 1 at MC_697-699.) It directed "that a private investigation be made to determine whether any persons or entities have in engaged in, or are about to engage in, any of the reported acts or practices or any acts of practices of similar purport or object," and authorized agency officers to subpoena witnesses and evidence and take depositions, among other powers. (**Def. Motion App.**, Shah Aff. Exh. E at L57-58; **Plf. Motion App.**, Exh. 1 at MC_699-700.) MusclePharm forwarded the July 8 Order and a July 20, 2013, document subpoena to Liberty on August 21, 2013.

On September 18, 2013, Liberty denied the claim as to both the May 16 letter request and the July 8 Order. Liberty maintained the SEC's investigation at either point

[5] The "Notice of Circumstance or Wrongful Act" provision of the policy allows the insured, during the policy period, to report in writing and as particularly specified in the Policy, "any circumstance or **Wrongful Act** that reasonably may be expected to give rise to a **Claim**," such that "any **Claim** subsequently arising from such circumstance or **Wrongful Act** shall be deemed under this Policy to be a **Claim** made during the **Policy Period** in which the circumstance or **Wrongful Act** was first duly reported to the Insurer." (***See* Def. Motion App.**, Shah Aff., Exh. A, § 8 at L553; **Plf. Motion App.**, Exh. 5 § 8 at MC_1288.)

did not amount to a "Claim" against an "Insured Person" because no "Wells Notice"[6] or target letter had been issued in connection with the investigation. (**Def. Motion App**., Shah Aff. Exh. G at L49; **Plf. Motion App**., Exh. 21 at MC_1397.) Although MusclePharm subsequently requested reconsideration of Liberty's determination (**Plf. Motion App.**, Exh. 22 at 2), Liberty continued to maintain that coverage was not available under the Policy (***id.***, Exh. 23 at MC_1406). Liberty only acknowledged coverage after two former MusclePharm officers were served Wells Notices on February 13, 2015. (**Def. Motion App.**, Shah Aff. Exh. P; **Plf. Motion App.**, Exh. 24.) MusclePharm now seeks reimbursement from Liberty under the Policy of the more than $3 million it allegedly paid in complying with the July 8 Order.[7]

Under Colorado law, "[a]n insurance policy is a contract, which should be interpreted consistently with the well-settled principles of contractual interpretation." ***Allstate Insurance Co. v. Huizar***, 52 P.3d 816, 819 (Colo. 2002). As with any contract, the primary goal in interpreting a contract of insurance is to effectuate the intent of the parties. ***Union Insurance Co. v. Houtz***, 883 P.2d 1057, 1061 (Colo. 1994); ***Simon v. Shelter General Insurance Co.***, 842 P.2d 236, 239 (Colo. 1992). Accordingly, the terms of the policy are given their plain and ordinary meanings unless the policy itself indicates the parties intended otherwise. ***Bohrer v. Church Mutual Insurance Co.***,

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[6] A "Wells Notice" is a notification "that the SEC's Enforcement Division is close to recommending to the full Commission an action against the recipient and [which] provides the recipient the opportunity to set forth his version of the law or facts." ***SEC v. Orr***, 2012 WL 1327786 at *3 (D. Kan. Apr. 17, 2012) (citations and internal quotation marks omitted).

[7] Pursuant to the July 8 Order, the SEC issued 21 subpoenas – twelve seeking documents and nine seeking testimony – to MusclePharm and various of its current and former employees. MusclePharm hired seventeen law firms and consulting firms to represent and advise the company and its employees.

965 P.2d 1258, 1261-62 (Colo. 1998); ***Chacon v. American Family Mutual Insurance Co.***, 788 P.2d 748, 750 (Colo. 1990). Policy provisions that are clear and unambiguous should be enforced as written. ***Chacon***, 788 P.2d at 750; ***Kane v. Royal Insurance Co. of America***, 768 P.2d 678, 680 (Colo. 1989).

The Policy here obligates Liberty to pay for loss resulting from a "Claim" for (that is, because of) a "Wrongful Act." Liberty maintains the SEC's investigation did not constitute a "Claim" as that term is defined in the Policy prior to the issuance of the Wells Notices. In addition, it argues the investigation did not allege a "Wrongful Act" within the meaning of the Policy. Because I find the latter argument persuasive, I do not address the former.

To rehearse, a "Wrongful Act" is defined under the Policy in relevant part as "any actual or alleged error, misstatement, misleading statement, act, omission, neglect, or breach of duty, actually or alleged committed or attempted . . ." (**Def Motion App**., Shah Aff., Exh. A at L569; **Plf. Motion App.**, Exh. 5 at MC_1304.) MusclePharm insists that the July 8 Order constituted an allegation of one or more types of the enumerated categories of wrongdoing set forth in the Policy. The Policy does not define the term "alleged," however. The court thus looks to the plain and ordinary meaning of that term. ***Bohrer***, 965 P.2d at 1261-62.

The adjective "alleged" is defined variously as "declared or stated to be as described; asserted," **Dictionary.com** (available at http://www.dictionary.com/browse/alleged) (last accessed July 26, 2016), or "accused of having done something wrong or illegal but not yet proven guilty; said to have happened but not yet proven," **Merriam-**

Webster Dictionary (available at http://www.merriam-webster.com/dictionary/alleged) (last accessed July 26, 2016). Black's Law Dictionary defines the term as "'asserted to be true as described' or 'accused but not yet tried.'" ***Employers' Fire Insurance Co. v. ProMedica Health Systems, Inc***., 524 Fed. Appx. 241, 247 (6th Cir. 2013) (quoting **Black's Law Dictionary** at 87 (9th ed. 2009)).[8]

Given these definitions, an alleged error or omission must involve a positive assertion that the implicated error or omission is believed to have actually occurred, even if still subject to proof. Such is not the import of the SEC's July 8 Order. Instead, the Order states the Commission has information "that "*if true* tends to show" various "*possible* violation[s]" of the securities laws which "*may have*" occurred. (**Plf. Motion App.**, Exh. 1 at MC_0697-0969 (emphases added).) Indeed, the Order's very purpose was to authorize the SEC to investigate further and determine whether these hypothetical violations in fact did occur. (***See* Def. Motion App.**, Shah Aff. Exh. E at L57; **Plf. Motion App.**, Exh. 1 at MC_699 (ordering "that a private investigation be made *to determine whether* any persons or entities have in engaged in, or are about to engage in, any of the reported acts or practices or any acts of practices of similar purport or object") (emphasis added).)

If such provisional language were not in itself sufficient, every page of the Order contained the following explicit recitation:

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[8] Relatedly, an "allegation" is "a statement saying that someone has done something wrong or illegal," **Merriam-Webster Dictionary** (available at http://www.merriam-webster.com/ dictionary/allegation) (last accessed July 26, 2016), or "'the act of declaring something to be true' or 'something declared or asserted as a matter of fact, esp. in a legal pleading; a party's formal statement of a factual matter as being true or provable, without its having yet been proved,'" ***ProMedica Health Systems***, 524 Fed. Appx. at 247 (quoting **Black's Law Dictionary** at 86 (9th ed. 2009)).

> [I]t should be understood that the Commission has not determined whether any of the persons or companies mentioned in the order have committed any of the acts described or have in any way violated the law.

(***Id.***, Exh. 1 at MC_0696-0700.) Likewise, the subpoenas the SEC issued for documents and testimony specified the investigation "should not be construed as an indication by the Commission or its staff that any violation of law has occurred, nor as a reflection upon any person, entity, or security." (***See* Def. Motion App.**, Mattessich Aff., Exh. B-1 at MC_0726-0727; Exh. B-2 at MC_0886.) These disclaimers plainly evidence that the SEC was not averring violations *had* occurred; it sought only to determine *whether* they had. ***See ProMedica Health Systems***, 524 Fed. Appx. at 247-48; ***RSUI Indemnity Co. v. Desai***, 2014 WL 4347821 at *5 (M.D. Fla. Sept. 2, 2014). Nor was inevitable that an investigation necessarily would lead to charges against MusclePharm or any of its officers or directors. ***ProMedica Health Systems***, 524 Fed. Appx. at 248.[9] Given all these contingencies, the July 8 Order cannot be construed to constitute an allegation of wrongdoing sufficient to invoke coverage under the Policy.

Although MusclePharm cites caselaw to the contrary and attempts to distinguish Liberty's authority, I am not persuaded. MusclePharm places overmuch (indeed, exclusive) reliance on ***National Stock Exchange v. Federal Insurance Co.***, 2007 WL 1030293 (N.D. Ill. March 30, 2007). Analyzing language essentially identical to that found in the Policy here, the ***National Stock Exchange*** court held, "[b]ecause the term

[9] Nor is there any evidence that the SEC investigation entailed any type of concrete restriction on MusclePharm's business in the interim. ***Cf. Weaver v. Axis Surplus Insurance Co.***, 2014 WL 5500667 at *12 (E.D.N.Y. Oct. 30, 2014) (attorney general letter directing insured to cease and desist all offers and sales of suspected product asserted "wrongful act" within coverage of policy, "even if the allegations later proved to be untrue"), ***aff'd***, 639 Fed. Appx. 764 (2nd Cir. March 7, 2016).

'Wrongful Act' as defined in the policy includes acts allegedly committed or attempted, the scope of the term necessarily includes acts that *may have been* committed." ***Id.*** at *5 (emphasis in original). The court's completely unexamined conclusion is hardly self-evident and does not withstand scrutiny given this court's analysis of the plain meaning of the relevant term "alleged."

Relatedly, MusclePharm's facile dismissal of the Sixth Circuit's opinion in ***ProMedica Health Systems***, which is consistent with this court's determination in this regard, as distinguishable because it involved an FTC investigation is throughly unpersuasive. MusclePharm offers neither argument nor authority to substantiate its tacit assumption that there is any significant, much less material, difference between the investigatory processes of the two agencies which would render the court's legal analysis infirm, and the court's own research has found none.

For these reasons, I find and conclude that the July 8 Order did not allege a "Wrongful Act" within the meaning of the Policy. Liberty therefore had no duty to indemnify MusclePharm for the attorney fees and other costs it incurred prior to issuance of the Wells Notices on February 13, 2015. Accordingly, Liberty is entitled to summary judgment on MusclePharm's breach of contract claim.

MusclePharm's claims for statutory and common law bad faith breach of contract do not survive summary judgment either.[10] In general, the "determination of whether an insurer has breached its duties to the insured is one of reasonableness under the

[10] MusclePharm did not move for summary judgment on these claims in its own motion. Thus, its suggestion in its response to Liberty's motion that it is entitled to summary judgment on these claims is procedurally improper. ***See*** **D.C.COLO.LCivR** 7.1(d). For the same reason, its alternative suggestion that the court defer ruling on these matters pending resolution of a discovery dispute, presented only in response to Liberty's motion, is not properly before the court.

circumstances." ***Sipes v. Allstate Indemnity Co.***, 949 F.Supp.2d 1079, 1084-85 (D. Colo. 2013). "[T]he question is whether a reasonable insurer under similar circumstances would have denied or delayed payment of the claim." ***Id.*** at 1085. This is an objective standard. ***Id.***

The burden of proof differs slightly as between statutory and common law bad faith breach of insurance contract claims. ***See id.*** In considering a common law bad faith claim, an insurer's denial of a claim for benefits is not considered unreasonable if its coverage position was "fairly debatable." ***Id.***; ***Zolman v. Pinnacol Assurance***, 261 P.3d 490, 497 (Colo. App. 2011). That standard is plainly met here. Liberty clearly had a good faith basis, rooted in the language of the Policy and relevant caselaw, to deny coverage. Summary judgment therefore is appropriate as to this claim.

Although MusclePharm's burden of proof on its statutory claim is somewhat "less onerous," ***see Sipes***, 949 F.Supp.2d at 1085,[11] the evidence before me does not demonstrate a genuine dispute of material fact sufficient to bring such a claim before a trier of fact. Under the statute, an insurer's denial of benefits is unreasonable "if the insurer delayed or denied authorizing payment of a covered benefit without a reasonable basis for that action." § 10-3-1115(2), C.R.S. As there plainly was a reasonable basis for Liberty's denial of benefits, MusclePharm cannot sustain a viable bad faith claim under the statute either.

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[11] "Because the statutes at issue here, however, create a right of action that is different from the common law tort of bad faith breach of an insurance contract, the 'burden of proving th[e] statutory claim is less onerous than that required to prove a claim under the common law for breach of the duty of good faith and fair dealing.'" ***Sipes***, 949 F.Supp.2d at 1085 (quoting ***Kisselman v. American Family Mutual Insurance Co.***, 292 P.3d 964, 975 (Colo. App. 2011)). "Even if a defendant's denial was 'fairly debatable' in the common law context, that would not alone establish that the defendant's actions were reasonable as a matter of law under the statutes." ***Id.***

IV. ORDERS

THEREFORE, IT IS ORDERED as follows:

1. That **Plaintiff MusclePharm Corporation's Motion for Summary Judgment on Coverage** [#36], filed January 13, 2016, is denied;

2. That **Defendant Liberty Insurance Underwriters, Inc.'s Motion for Summary Judgment** [#39], filed January 13, 2016, is granted;

3. That plaintiff's claims are dismissed with prejudice;

4. That judgment with prejudice shall enter on behalf of defendant, Liberty Insurance Underwriters, Inc., and against plaintiff, MusclePharm Corporation, as to all claims for relief and causes of action asserted herein;

5. That the combined Final Pretrial Conference and Trial Preparation Conference set Thursday, August 18, 2016, at 10:00 a.m. is vacated;

6. That the jury trial scheduled to commence September 12, 2106, is vacated;

7. That defendant is awarded its costs, to be taxed by the clerk of the court in the time and manner required under Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1; and

8. That this case is closed.

Dated August 4, 2016, at Denver, Colorado.

BY THE COURT:

Robert E. Blackburn
United States District Judge