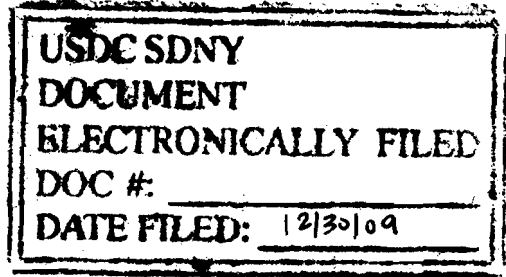


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X
MBIA, INC.,

Plaintiff,

-against-

FEDERAL INSURANCE CO. and
ACE AMERICAN INSURANCE CO.,

Defendants.
-----X

08 Civ. 4313 (RMB)

ORDER

I. Introduction

On May 21, 2008, MBIA, Inc. (“Plaintiff” or “MBIA”) filed an amended complaint against Federal Insurance Co. (“Federal”) and ACE American Insurance Co. (“ACE”) (collectively, “Defendants”), alleging breach of contract and seeking a declaratory judgment that Defendants are obligated to reimburse Plaintiff for legal fees and other related costs associated with regulatory investigations and derivative actions under two insurance policies, an Executive Liability and Indemnification Policy (No. 7023-4558) between Plaintiff and Federal, dated July 23, 2004 (“Federal Policy”), and an Integrated Excess Insurance Policy (No. DOX G21670029 001) between Plaintiff and ACE, dated August 24, 2004 (“ACE Policy”) (collectively, “Policies”). (Am. Compl., dated May 21, 2008, ¶¶ 1–4.)

On August 21, 2009, Plaintiff moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (“Fed. R. Civ. P.”), arguing, among other things, that the Policies contain broad language that covers “costs” Plaintiff has incurred in responding to: (1) the investigation commenced by the issuance of a subpoena on November 18, 2004 by the Office of the New York State Attorney General (“NYAG”); (2) the U.S. Securities and Exchange Commission (“SEC”) investigation and NYAG investigation of Plaintiff’s investment in Capital

Asset Holding GP, Inc. (“Capital Asset Transaction”) and Plaintiff’s exposure on notes issued by the US Airways 1998-1 Repackaging Trust (“US Airways Transaction”); (3) an Independent Consultant’s investigation that was required under settlements reached with the SEC and NYAG; and (4) two derivative actions brought by MBIA shareholders on November 9, 2005 and April 24, 2006, respectively. (Mem. in Supp. of Pl.’s Mot. for Summ. J., dated Aug. 21, 2009 (“Pl. Mot.”), at 15–25.)

On October 1, 2009, Defendants filed a cross-motion for summary judgment, arguing that the costs claimed by Plaintiff are not covered under the Policies because, among other reasons: (1) “NYAG subpoenas are not ‘orders’”; (2) MBIA produced documents relating to the Capital Asset and US Airways Transactions in response to “informal requests” by the SEC and NYAG that do not amount to Securities Claims under the Policies; (3) Plaintiff did not give Defendants “the opportunity to effectively associate” with Plaintiff regarding the Independent Consultant’s activities; and (4) regarding the derivative actions, the law firm of Dickstein Shapiro LLP (“Dickstein”) represented an entity called the Special Litigation Committee “which was not an Insured.” (Mem. in Supp. of Defs.’ Mot. for Summ. J. & in Opp’n to Pl.’s Mot. for Summ. J., dated Oct. 1, 2009 (“Defs. Mot.”), at 6–24 (emphasis omitted).)

On October 15, 2009, Plaintiff filed a reply. (Pl. Reply Mem. in Further Supp. of Mot. for Summ. J. & in Opp’n to Defs. Mot., dated Oct. 15, 2009 (“Pl. Reply”).) On October 29, 2009, Defendants filed a reply. (Reply in Supp. of Defs. Mot. & in Surreply to Pl. Reply, dated Oct. 29, 2009 (“Defs. Reply”).) The Court heard oral argument on December 22, 2009. (See Tr. of Proceedings, dated Dec. 22, 2009 (“Hr’g Tr.”).)¹ Also on December 22, 2009, ACE

¹ All parties acknowledge that no further proceedings (*i.e.*, beyond summary judgment) are appropriate or contemplated in the District Court. (See Hr’g Tr. at 2:7-16 (THE COURT: “[I]t is my understanding that both sides feel definitely that motions for summary judgment resolve all

submitted a declaration “as support of assertions of fact made . . . in oral argument,” (Second Supplemental Declaration of Alan Joaquin, dated Dec. 22, 2009, (“Second Suppl. Joaquin Decl.”)), to which Plaintiff submitted a response on December 24, 2009, (Response to Second Suppl. Joaquin Decl., dated Dec. 24, 2009, (“Pl. Resp.”).)

II. Background

On July 23, 2004, Plaintiff purchased the Federal Policy which provides “a \$15 million maximum aggregate limit of liability, inclusive of Defense Costs, for all Claims and Securities Claims” from February 15, 2004 to August 15, 2005 (“Policy Period”). (Pl. Statement of Undisputed Material Facts in Supp. of Pl.’s Mot., dated Aug. 21, 2009 (“Pl. 56.1”), ¶¶ 1–3; Defs.’ Response to Pl.’s 56.1 and Statement of Undisputed Material Fact in Supp. of Defs.’ Mot., dated Oct. 1, 2009 (“Defs. 56.1”), ¶¶ 1–3; Am. Compl. Ex. A (Federal Policy).) The Federal Policy defines a “Securities Claim” as “a formal or informal administrative or regulatory proceeding or inquiry commenced by the filing of a notice of charges, formal or informal investigative order or similar document” that “in whole or in part, is based upon, arises from or is in consequence of the purchase or sale of, or offer to purchase or sell, any securities issued by [Plaintiff].” (Pl. 56.1 ¶ 8; Defs. 56.1 ¶ 8; Am. Compl. Ex. A.)

On August 24, 2004, Plaintiff purchased the ACE Policy which provides “\$15 million in coverage above the Federal Policy limit” for the same losses covered under the Federal Policy. (Pl. 56.1 ¶¶ 11–15; Defs. 56.1 ¶¶ 11–15; Am. Compl. Ex. B (ACE Policy), at 3, 10 (“The term ‘Loss’ has the same meanings in this policy as are attributed to them in the respective Followed Policy [i.e., the Federal Policy].”))

the issues and that . . . no trial or . . . further proceeding is contemplated in the district court.” MR. SCHULMAN (for MBIA): “That is our position, your Honor, for Plaintiff.” MR. HENSLER (for Federal): “Correct”)

SEC and NYAG Investigations

On March 9, 2001, the SEC issued an Order Directing Private Investigation and Designating Officers to Take Testimony captioned “In the Matter of Certain Loss Mitigation Insurance Products (NY-6749)” (“Formal Order”). (Pl. 56.1 ¶ 16; Defs. 56.1 ¶ 16; Decl. of Christine Davis, dated Aug. 21, 2009 (“Davis Decl.”), Ex. 8 (Formal Order), at 1.) According to Defendants, loss mitigation products “transfer more limited risk to the Insured Companies than traditional insurance or reinsurance and often involve a retroactive insurance policy under which the insured pays a known loss in the first year of the policy, while paying premiums (which are, in actuality, loan repayments) over several years.” (Defs. Mot. at 12 (citations and internal quotations omitted).) Pursuant to the Formal Order commencing an investigation into loss mitigation products, the SEC issued subpoenas to Plaintiff on November 17, 2004 and December 8, 2004 that each compelled Plaintiff to produce, among other things, documents concerning “Non-Traditional Product[s],” defined as, among other things, “any product or service . . . transferring risk through an insurance transaction in which a material term relating to such risk transfer . . . is not reflected in the formal written contractual documentation for the transaction.” (Davis Decl. Exs. 9 & 11; Pl. 56.1 ¶¶ 17–19; Defs. 56.1 ¶¶ 17–19.)

On November 18, 2004 and December 15, 2004, the NYAG issued subpoenas to Plaintiff directing Plaintiff to produce, among other things, “[a]ll documents concerning all Non-Traditional Product transactions entered into by MBIA.”² (Davis Dec. Ex. 10 & 12; Pl. 56.1 ¶¶ 20–21; Defs. 56.1 ¶¶ 20–21.)

In response to the SEC and NYAG subpoenas, Plaintiff produced (the same) documents to each agency relating to Plaintiff’s purchase of reinsurance contracts in connection with the

² These are the same documents sought by SEC subpoenas described above.

liability it incurred when the Delaware Valley Obligated Group of the Allegheny Health, Education and Research Foundation (“AHERF”) filed for bankruptcy (“AHERF Transaction”). (See Pl. 56.1 ¶ 17; Defs. 56.1 ¶ 17; Defs. Counter-Statement of Fact (“Defs. 56.1 CSF”), ¶¶ 7–11; Decl. of Christopher Zaetta, undated (“Zaetta Decl.”), Ex. 5 (MBIA Form 10-Q, dated Mar. 31, 2006), at 36 (“While the subpoenas did not identify any specific transaction, subsequent conversations with the SEC and NYAG revealed that the investigation included the arrangement entered into by MBIA Corp. in 1998 in connection with the bankruptcy of the Delaware Valley Obligated Group, an entity that is part of AHERF.”).)

On March 30, 2005, the SEC issued another subpoena pursuant to the Formal Order, directing Plaintiff to produce, among other things, documents concerning “advisory fees,” “loss reserves,” and “credit default protection.” (Pl. 56.1 ¶¶ 25–26; Defs. 56.1 ¶¶ 25–26; Davis Decl. Ex. 14 at 36.) On the same day, the NYAG issued a subpoena requiring the production of the same documents. (See Pl. 56.1 ¶¶ 27–28; Defs. 56.1 ¶¶ 27–28; Davis Decl. Ex. 15 at 3.)

In the spring of 2005, Plaintiff, in an effort to minimize the “‘disproportional’ negative market impact from the [March 30, 2005] subpoenas,” asked regulators to forgo issuance of further subpoenas. Plaintiff agreed to comply voluntarily with informal requests for documents. (Pl. Mot. at 8; Pl. 56.1 ¶¶ 33–35; Defs. 56.1 ¶¶ 33–35; Zaetta Decl. Ex. 3 (Dep. of Ram Wertheim, dated Nov. 11, 2008 (“Wertheim Dep.”), at 74:10–75:2); Davis Decl. Ex. 4 (Dep. of John Hall, dated Nov. 21, 2008 (“Hall Dep.”), at 94:12–96:14).)

Independent Consultant

On October 28, 2005, Plaintiff executed an “Offer of Settlement” that it “submit[ted] in anticipation of cease-and-desist proceedings to be instituted against it by the [SEC].” (Second

Suppl. Joaquin Decl. Ex. 1.)³ In the Offer of Settlement, Plaintiff undertook to “retain, pay for, and enter into an agreement with an independent consultant . . . to conduct a comprehensive review of . . . MBIA’s accounting for, and disclosures concerning [the Capital Asset Transaction and] MBIA’s accounting for, and disclosure concerning [the US Airways Transaction].” (*Id.*) In January 2007, the SEC issued a Cease and Desist Order (“Cease and Desist Order”) accepting Plaintiff’s Offer of Settlement. (Pl. 56.1 ¶ 39; Defs. 56.1 ¶ 39; Davis Decl. Ex. 26 (Cease and Desist Order), at 1, 16.) Also in January 2007, “Plaintiff and the NYAG entered into an Assurance of Discontinuance (‘AOD’)” that settled the NYAG’s investigation of Plaintiff. (Pl. 56.1 ¶ 41; Defs. 56.1 ¶ 41; Davis Decl. Ex. 27 (AOD), at 31–33.) With regard to the Independent Consultant, both the Cease and Desist Order and the AOD incorporated nearly verbatim the provisions of the Offer of Settlement. (Pl. 56.1 ¶¶ 40, 42; Defs. 56.1 ¶¶ 40, 42; Second Suppl. Joaquin Decl. Ex. 1; Davis Decl. Exs. 26 at 16–20 & 27 at 31–37.) Plaintiff hired John Siffert (“Siffert”) of the law firm Lankler Siffert & Wohl LLP as the Independent Consultant. (Pl. 56.1 ¶¶ 43–44; Defs. 56.1 ¶¶ 43–44.) Siffert began working as Independent Consultant on May 12, 2006. (See Supplemental Decl. of Christopher Zaetta, dated Oct. 29, 2009 (“Suppl. Zaetta Decl.”), Ex. 13.)

Derivative Litigation(s)

In a letter, dated April 5, 2005, MBIA shareholder Robert Purvis (“Purvis”) “demanded that MBIA investigate alleged wrongdoing on the part of its officers and directors” in connection

³ The Court considers the Second Supplemental Joaquin Declaration and Plaintiff’s Response because they “were submitted in an attempt to clarify . . . arguments in light of questioning by the Court during the [December 22, 2009] hearing” and because Plaintiff “will suffer no prejudice from [ACE’s] delayed submission since it has had the opportunity to respond” Vt. Pub. Interest Research Group v. U.S. Fish & Wildlife Ser., 247 F. Supp. 2d 495, 505 (D. Vt. 2002); see also Warner Bros. Entm’t Inc. v. Ideal World Direct, No. 06 Civ. 4174, 2007 WL 3376901, *1 (S.D.N.Y. Nov. 13, 2007).

with the AHERF Transaction. (Pl. 56.1 ¶ 48; Defs. 56.1 ¶ 48; Am. Compl. ¶ 41.) By letter, dated September 27, 2005, MBIA shareholder J. Robert Orton (“Orton”) made a similar demand. (Pl. 56.1 ¶ 49; Defs. 56.1 ¶ 49.) “MBIA set up a Demand Investigation Committee . . . to investigate the allegations raised” by Purvis and Orton. (Pl. 56.1 ¶ 50; Defs. 56.1 ¶ 50.) The Demand Investigation Committee was composed of C. Edward Chaplin (“Chaplin”), Debra J. Perry, and Laurence H. Meyer, all of whom had been appointed to Plaintiff’s Board of Directors as outside directors after the AHERF Transaction in 1998. (Final Rep. of the Special Litigation Committee, dated Aug. 15, 2006 (“Final Rep.”), at 6–7.) On or about November 9, 2005, Purvis filed a derivative complaint in the Supreme Court of the State of New York, Westchester County (“Purvis Action”) against certain of MBIA’s directors and officers; and on or about April 24, 2006, Orton filed a similar derivative complaint in the Southern District of New York (“Orton Action”). (Pl. 56.1 ¶¶ 52–53; Defs. 56.1 ¶¶ 52–53.) Plaintiff formed a Special Litigation Committee (“SLC”) of Plaintiff’s Board of Directors composed principally of the (same) members of the Demand Investigation Committee.⁴ (Final Rep. at 13–14.) The SLC investigated the allegations made in the derivative actions and “determined that maintenance of the . . . derivative actions was not in the best interest of MBIA or its shareholders.” (Pl. 56.1 ¶¶ 54–55; Defs. 56.1 ¶¶ 54–55.) Dickstein Shapiro LLP (“Dickstein”) represented the SLC and, according to Plaintiff, also represented “MBIA through its representation of the SLC.” (Pl. 56.1 ¶ 56; Defs. 56.1 ¶ 56.) The Purvis Action was dismissed on December 12, 2006 and the Orton Action was dismissed on September 18, 2007. (Pl. 56.1 ¶¶ 57–58; Defs. 56.1 ¶¶ 57–58.)

Plaintiff contends that it “has spent \$29.5 million to date for the costs of defending and responding to the regulatory investigation[s] and follow-on litigation.” (Pl. 56.1 ¶ 59.) “To date,

⁴ Jeffery W. Yabuki, a 2005 appointee to Plaintiff’s Board of Directors, succeeded Chaplin on the SLC. (Final Rep. at 13–14.)

Federal has paid \$6.4 million to MBIA pursuant to the Federal Policy” (beyond Plaintiff’s \$2.5 million deductible). (Pl. 56.1 ¶ 60; Defs. 56.1 ¶ 60.)

III. Legal Standard

“Summary judgment is appropriate when ‘the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.’” Progressive Northern Ins. Co. v. Beltempo, No. 07 Civ. 4033, 2009 WL 1357947, at *2 (S.D.N.Y. May 14, 2009) (quoting Fed. R. Civ. P. 56(c)). “[A] party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). “When deciding cross-motions for summary judgment, the standard to be applied is the same as that for individual summary judgment motions and a court must consider each motion independent of the other.” 105 Street Assocs., LLC v. Greenwich Ins. Co., 507 F. Supp. 2d 377, 380 (S.D.N.Y. 2007) (citations and internal quotations omitted).

“[U]nder New York law, ambiguity does not exist ‘simply because the parties urge different interpretations.’” Hugo Boss Fashions, Inc. v. Fed. Ins. Co., 252 F.3d 608, 616 (2d Cir. 2001) (citation omitted). “Rather, ‘[t]he question of whether an insurance policy is ambiguous is a matter of law to be determined by the court.’” Id. at 616–17 (quoting Bd. of Mgrs. of Yardarm Condo. II v. Fed. Ins. Co., 669 N.Y.S.2d 332, 332 (2d Dep’t 1998)). “The tests to be applied in construing an insurance policy are common speech . . . and the reasonable expectation and purpose of the ordinary businessman.” Ace Wire & Cable Co. v. Aetna Cas. & Sur. Co., 60 N.Y.2d 390, 398 (1983). “[T]he rule of contra proferentem . . . generally provides that where an insurer drafts a policy ‘any ambiguity in the policy should be resolved in favor of the insured.’”

Morgan Stanley Group Inc. v. New England Ins. Co., 225 F.3d 270, 276 (2d Cir. 2000) (citation omitted).

For the reasons set forth below, Plaintiff and Defendants’ motions for summary judgment are each granted in part and denied in part.

IV. Analysis

Under New York’s choice of law rules, in deciding contract issues the Court will apply a “center of gravity” or “grouping of contacts” approach. See Brink’s Ltd. v. S. African Airways, 93 F.3d 1022, 1030 (2d Cir. 1996). Here, “Federal issued the Policy to MBIA in Connecticut, and the Policy has a Connecticut amendatory endorsement [and] MBIA has its principal place of business in New York” (Defs. Mot. at 6 n.3.) “This Court finds it unnecessary to determine whether New York or Connecticut has the ‘most significant contacts’ with the . . . insurance policies because we perceive no conflict between the laws of the two states.” Olin Corp. v. Ins. Co. of N.A., 762 F. Supp. 548, 558 (S.D.N.Y. 1991). “The rule in Connecticut, as in New York, is that courts are to apply the plain meaning of the words in a contract provision when the words are clear and unambiguous.” Id. “In the absence of substantive difference, . . . a New York court will dispense with choice of law analysis; and if New York law is among the relevant choices, New York courts are free to apply it.” IBM v. Liberty Mut. Ins. Co., 363 F.3d 137, 143 (2d Cir. 2004).

(1) NYAG Subpoena

Plaintiff argues that, among other things, “the initial subpoena that the NYAG served on MBIA in November 2004 . . . constitute[s] the ‘formal or informal investigative order or similar document’ [needed] to trigger coverage under the ‘Securities Claim’ definition.” (Pl. Mot. at 17 (quoting Am. Compl. Ex. A (Federal Policy).) Defendants argue, among other things, that the

“[d]efinition of a Securities Claim expressly retains the requirement of an ‘order’ to commence a Securities Claim ‘subpoena’ was not included in the definition.” (Defs. Mot. at 9 (quoting Am. Compl. Ex. A (Federal Policy).)⁵

“As always, [the Court] begin[s] with the terms of the contract itself to see if the intent of the parties can be gleaned without resort to extrinsic evidence.” Hugo Boss Fashions, 252 F.3d at 617; see also Hatalmud v. Spellings, 505 F.3d 139, 146 (2d Cir. 2007). “Securities Claims” under the Policies include “a formal or informal administrative or regulatory proceeding or inquiry commenced by the filing of a notice of charges, formal or informal investigative order or similar document.” (Pl. 56.1 ¶ 8; Defs. 56.1 ¶ 8; Am. Compl. Ex. A.)

The NYAG November 18, 2004 subpoena triggers coverage. It states, “WE HEREBY COMMAND YOU . . . that all business and excuses being laid aside, you deliver and turn over to the [NYAG] all documents and information requested in the attached Schedule . . .” and that Plaintiff’s “failure to deliver the documents and information requested in the attached Schedule . . . may subject [it] to prosecution” (Davis Decl. Ex. 10.) As Plaintiff (persuasively) argues, “an ordinary businessperson would view a subpoena as a ‘formal or informal investigative order’ based on the common understanding of these words.” (Pl. Reply at 7); see Ace Wire & Cable Co., 60 N.Y.2d at 398; see also Merriam-Webster’s Collegiate Dictionary (11th ed. 2008) (“Merriam-Webster’s”) (defining ‘order’ as a “command”); cf. Bowers v. Reutter, 951 F. Supp. 666, 671 (E.D. Mich. 1997) (“the subpoenas . . . are considered orders”); Jackson v. Brinker, 147 F.R.D. 189, 199 (S.D. Ind. 1993) (“[A] [F]ederal Rule 45

⁵ Defendants do not dispute that the subpoenas that were issued by the SEC pursuant to the Formal Order are covered under the Policies. (See Defs. 56.1 ¶ 17; see also Hr’g Tr. at 14:16-17 (MR. HENSLER: “[T]he 2001 Order, we agree that is a formal order.”).)

subpoena duces tecum satisfies [a] provision that ‘confidential information shall be disclosed . . . [u]pon the order of a court.’” (citation omitted)).

Even assuming, arguendo, that the November 18, 2004 subpoena were not an “order” (that commenced a formal or informal administrative or regulatory proceeding or inquiry), it is in the Court’s view a sufficiently “similar document” that triggers coverage under the Policies. (Pl. 56.1 ¶ 8; Defs. 56.1 ¶ 8.) While the Policies do not define similar document, “[w]here a contract does not define a term, that term is to be given its plain meaning that comports with the interpretation given by the average person.” Roth v. Blue Cross & Blue Shield of Cent. N.Y., Inc., No. 95 Civ. 1332, 1998 WL 690975, at *2 (N.D.N.Y. Sept. 29, 1998) (internal quotations, brackets and citation omitted); See Olin Corp. v. Certain Underwriters at Lloyd’s London, 468 F.3d 120, 128 (2d Cir. 2006) (“[W]here parties contest a term not defined in a contract, the court system must supply the answer.”); Ace Wire & Cable, 60 N.Y.2d at 398. To be ‘similar’ is to “hav[e] characteristics in common.” Merriam-Webster’s. The NYAG November 18, 2004 subpoena has characteristics in common with “a notice of charges, formal or informal investigative order” such as the Formal Order in that it (also) is a document that may be said to commence a regulatory investigation. See Sanborn v. Goldstein, 118 N.Y.S.2d 63, 64 (Sup. Ct. 1952) (“[u]nder New York law, the NYAG “commence[s] an investigation pursuant to Article 23-A of the General Business Law (Martin Act) . . . by service of a subpoena upon [a] plaintiff”); N.Y. Gen. Bus. Law §§ 351, 352(2); ACE Am. Ins. Co. v. Ascend One Corp., 570 F. Supp. 2d 789, 796 (D. Md. 2008) (“[T]he case law suggests that Subpoenas and Investigative demands may constitute Claims where they are issued by government investigative agencies related to an

investigation of the insured.”); (see Davis Decl. Ex. at 8 (Formal Order) at 3 (“The Commission . . . hereby[] ORDERS . . . that a private investigation be conducted . . .”).⁶

Summary judgment is granted to Plaintiff as to its claim for costs associated with responding to the NYAG November 18, 2004 subpoena and Defendants’ cross-motion is denied.

(2) SEC and NYAG Investigations of the Capital Asset and US Airways Transactions

SEC Investigation

Plaintiff argues, among other things, that the SEC “‘had the authority’ to investigate the US Airways and Capital Asset [T]ransactions, because the ‘investigations [were] pursuant to th[e] Formal Order’” (Pl. Mot. at 20 (quoting Hall Dep. at 60:13-18).) Defendants argue, among other things, that the Capital Asset and US Airways Transactions involved “traditional reinsurance,” not “Loss Mitigation Insurance Products” that were the subject of the Formal Order (see Davis Decl. Ex. 8 at 1), and that the SEC’s Formal Order “was never amended to include the Capital Asset and US Airways [T]ransactions.” (Defs. Mot. at 11, 13–14; see also Defs. 56.1 CSF ¶¶ 12–30.)

The Capital Asset and US Airways Transactions trigger coverage under the Policies. They have a “similar purport or object” as the AHERF Transaction which was to “avoid booking [a] loss as an insurance loss.” (Defs. Mot. at 3; see Defs. 56.1 CSF ¶¶ 18, 27.) The Formal Order related to “loss mitigation insurance products” as well as “any acts, practices, or courses of business of similar purport or object.” (Davis Decl. Ex. 8 at 1, 3.) Defendants acknowledge that

⁶ Defendants’ construction is unpersuasive because, among other reasons, if only “orders” trigger coverage, (see Defs. Mot. at 10), the phrase “similar document” would appear to be superfluous. (Pl. 56.1 ¶ 8; Defs. 56.1 ¶ 8.) “An interpretation of a contract that has the effect of rendering at least one clause superfluous or meaningless . . . is not preferred and will be avoided if possible.” LaSalle Bank Nat’l Ass’n v. Nomura Asset Capital Corp., 424 F.3d 195, 206 (2d Cir. 2005) (internal quotations and citations omitted); see also Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd., 230 F.3d 549, 558 (2d Cir. 2000).

the “purport and object” of the Capital Asset and US Airways Transactions was to not book a loss that may have been required to be booked. (Davis Decl. Ex. 8 at 1, 3; see Defs. 56.1 CSF ¶¶ 18 (as to the Capital Asset Transaction, Plaintiff “should . . . have booked [a] loss”); 27 (as to the US Airways Transaction, Plaintiff “booked [a] payment as an investment rather than an insurance loss”)); see Woolley v. United States, 97 F.2d 258, 262 (9th Cir. 1938) (“The Securities and Exchange Commission, as a fact-finding body, performs a function similar to that of a grand jury, ‘the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation.’” (quoting Blair v. United States, 250 U.S. 273, 282 (1919))).

Moreover, the Cease and Desist Order confirms that the SEC included the Capital Asset and US Airways Transactions as part of the investigation commenced by the Formal Order. The Cease and Desist Order directed Plaintiff to review, among other things, “MBIA’s accounting for, and disclosures concerning, its investment in Capital Asset Holdings GP, Inc.” and “its exposure on notes issued by the US Airways 1998-1 Repackaging Trust.” (Pl. 56.1 ¶¶ 41–42; Defs. 56.1 ¶¶ 41–42; Davis Decl. Ex. 26 at 1, 16–19, 31); see Consol. Mines of Cal. v. S.E.C., 97 F.2d 704, 708 (9th Cir. 1938) (analogizing SEC investigations to grand jury investigations and noting that “the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury’s labors, not at the beginning.”) (quoting Blair, 250 U.S. at 282); In re S.E.C., 84 F.2d 316, 318 (2d Cir. 1936), rev’d on other grounds, 299 U.S. 504 (1936). Defendants have offered no persuasive evidence to support their argument that the SEC ran a series of separate concurrent investigations.

Summary judgment is granted to Plaintiff as to its claim for costs associated with the SEC's requests for documents concerning the Capital Asset and US Airways Transactions and Defendants' cross-motion is denied.

NYAG Investigation

Defendants argue, among other things, that the NYAG's "oral requests for documents do not constitute 'formal or informal investigative order[s] or similar document[s],' " and, consequently, the NYAG's oral requests for documents relating to the Capital Asset and US Airways Transactions are not Securities Claims covered under the Policies. (Defs. Mot. at 18; see also Pl. 56.1 ¶ 36 ("MBIA produced documents to the . . . NYAG relating to the Capital Asset and US Airways transactions without the [NYAG] issuing formal subpoenas related to these transactions."); Defs. 56.1 ¶ 36.) Plaintiff argues, among other things, that "the lack of subpoenas for the US Airways and Capital Asset Transactions does not void coverage." (Pl. Mot. at 21.)

The NYAG's investigation of the Capital Asset and US Airways Transactions triggers coverage under the Policies. It was part of "a formal or informal administrative or regulatory proceeding or inquiry" and falls within the meaning of a Securities Claim. (Pl. 56.1 ¶ 8; Defs. 56.1 ¶ 8; Am. Compl. Ex. A.) Defendants point to no persuasive evidence to suggest that the NYAG's requests for documents relating to the Capital Asset and US Airways Transactions were part of separate investigations. See Celotex, 477 U.S. at 323 ("a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion"); Anderson, 477 U.S. at 248. The AOD, which made findings of fact and required that Plaintiff take certain actions as a result of the NYAG investigation, "related to MBIA's scheme to mask the earnings effect of a major loss suffered when [AHERF] defaulted on \$256 million of

bonds MBIA had insured,” and required Plaintiff also to review the Capital Asset and US Airways Transactions. (Pl. 56.1 ¶¶ 41–42; Defs. 56.1 ¶¶ 41–42; Davis Decl. Ex. 26 at 16–19.)

Summary judgment is granted to Plaintiff as to its claim regarding costs arising from the NYAG’s requests for documents relating to the Capital Asset and US Airways Transactions and Defendants’ cross-motion is denied.

(3) Independent Consultant

Defendants argue that the Policies do not cover costs associated with the Independent Consultant because, among other reasons, Plaintiff did not give Defendants “the opportunity to effectively associate” with Plaintiff regarding the Independent Consultant as the Policies require. (Defs. Mot. at 23.) Plaintiff argues, among other things, that “the Independent Consultant was discussed [with Defendants] before settlement was finalized.” (Pl. Reply at 14 (citing Davis Reply Decl. Ex. 6).)

With respect to the Independent Consultant, Plaintiff did not comply with the “right to associate” clauses of the Federal and ACE Policies, both of which provide that Defendants “have the right . . . and shall be given the opportunity to effectively associate with [Plaintiff] in the . . . settlement . . . of any Claim.” (Am. Compl. Exs. A § 9 & B § V.E.) On October 28, 2005, Plaintiff executed an Offer of Settlement in which it “undert[ook] to . . . retain, pay for, and enter into an agreement with an independent consultant.” (Second Suppl. Joaquin Decl. Ex. 1). And, on May 12, 2006, approximately four months before Plaintiff claims that Defendants were notified about the Independent Consultant, Siffert began his investigation of Plaintiff. See Mutual Ins. Co. v. Murphy, 630 F. Supp. 2d 158, 166 (D. Mass. 2009) (the “right to associate” clause in an insurance policy “grants [the insurer] the right, but not the obligation, to participate in the defense and settlement of the claim”); (see Suppl. Zaetta Decl. Ex. 13; see also Pl. 56.1 ¶¶

40, 42; Defs. 56.1 ¶¶ 40, 42; Second Suppl. Joaquin Decl. Ex. 1; Davis Reply Exs. 6–7; Davis Decl. Exs. 26 at 16–20 & 27 at 31–37; Hr’g Tr. at 21:18–24:20 (MR. JOAQUIN: “ACE was not, and neither was Federal, given any opportunity to participate in those settlement discussions, which we had a right to. . . . To permit coverage for the [I]ndependent [C]onsultant just writes those provisions out of the policy.”.) Thus, Plaintiff did not permit Defendants to effectively associate with it because it did not (even) inform Defendants about the Independent Consultant until at least ten months after it had committed to retaining the Independent Consultant. (See Second Suppl. Joaquin Decl. Ex. 1; Davis Reply Decl. Exs. 6–7.) Plaintiff’s conclusory assertion that it “timely notified ACE of the claims pending against it,” (Pl. Resp. ¶ 6), is contradicted by notes that Plaintiff submits from meetings that took place on September 10, 2006 and October 11, 2006, *i.e.*, months after Plaintiff undertook to “retain, pay for, and enter into an agreement with an independent consultant.” (Second Suppl. Joaquin Decl. Ex. 1; *see* Davis Reply. Decl. Exs. 6 & 7); *see Kulak v. City of N.Y.*, 88 F.3d 63, 71 (2d Cir. 1996).

Summary judgment is denied as to Plaintiff’s claim for costs associated with the Independent Consultant and Defendants’ cross-motion is granted.

(4) Derivative Litigation(s)

Plaintiff argues that the Policies cover the outstanding legal fees MBIA incurred in the derivative litigation because, among other reasons, “MBIA’s lead counsel at Dickstein has testified that ‘Dickstein represented nominal defendant MBIA through its representation of the SLC.’” (Pl. Reply at 15 (quoting Decl. of Donald Corbett, dated Aug. 19, 2009, ¶ 9).)

Defendants counter, among other things, that “[a] special litigation committee must engage in ‘independent decisionmaking,’” (Defs. Reply at 10 n. 10 (quoting *Frank v. LoVetere*, 363 F.

Supp. 2d 327, 333 (D. Conn. 2005)); “[t]herefore, Dickstein could not have represented the company ‘through’ its representation of the SLC.” (Defs. Reply at 10.)

In fact, Dickstein entered a notice of appearance as counsel for MBIA in the derivative actions and filed numerous papers, including motions to dismiss, as “Counsel for Nominal Defendant MBIA, Inc.” See Orton v. Brown, No. 06 Civ. 3146 (S.D.N.Y.), Docket Nos. 4, 31, 34 (“MOTION to Dismiss. Document filed by MBIA Inc. (Corbett, Donald [of Dickstein Shapiro LLP]”); see also Purvis v. Brown, No. 20099-05 (N.Y. Sup. Ct.); (MBIA Form 10-Q, dated Mar. 31, 2006, at 37).⁷ Dickstein (successfully) defended MBIA in both derivative actions. (See Pl. 56.1 ¶¶ 57–58; Defs. 56.1 ¶¶ 57–58.)

Even assuming, arguendo, that Dickstein represented the SLC, coverage would still be triggered. The SLC was composed exclusively of members of Plaintiff’s Board of Directors and “was vested with full and exclusive authority . . . to determine whether pursuit of the litigation was in the best interest of MBIA.” (Final Rep. at 6–14.) Plaintiff’s Board of Directors is “the governing body of [the] corporation,” Black’s Law Dictionary (5th ed. 1979), and the Committee to which certain decisionmaking had been delegated was part of the Board and part of Plaintiff’s governing body. And, in any event, Defendants appear to misconstrue the concept of “independent decisionmaking.” (Defs. Reply at 10 n. 10 ((quoting Frank, 363 F. Supp. 2d at 333).) “A director [appointed to a special committee] is independent when he is in a position to base [his] decision on the merits of the issue rather than . . . extraneous considerations or influences.” Strougo v. Bassini, 112 F. Supp. 2d 355, 362 (S.D.N.Y. 2000) (internal quotations and citations omitted). The SLC could readily reach independent decisions without being independent of Plaintiff. It was, as noted, composed of Plaintiff’s directors who had no

⁷ “Docket sheets are public records of which the court [can] take judicial notice.” Mangiafico v. Blumenthal, 471 F.3d 391, 398 (2d Cir. 2006).

connection to the allegations in the derivative litigations and were capable of basing their decision “on the merits.” Id.

Plaintiff’s motion for summary judgment on its claim that SLC legal costs incurred in connection with the derivative actions are covered under the Policies is granted and Defendants’ cross-motion for summary judgment is denied.

V. Conclusion & Order

For the reasons set forth above, Plaintiff’s motion for summary judgment [#48] is granted in part and denied in part and Defendants’ motion for summary judgment [#54] is granted in part and denied in part. The Clerk of Court is respectfully requested to close this case.

SO ORDERED.

Dated: New York, New York
December 30, 2009


RICHARD M. BERMAN, U.S.D.J.