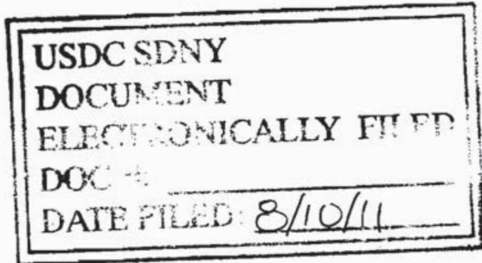
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREENMAN-PEDERSEN, INC., Plaintiff,	:	10 Civ. 2777 (BSJ)
v.	:	**Memorandum and Order**
TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, Defendant.	:	

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE



Plaintiff Greenman-Pedersen, Inc. ("GPI" or "Plaintiff") filed a complaint against Travelers Casualty and Surety Company of America ("Travelers") for breach of contract and declaratory relief arising out of Travelers' alleged failure to provide indemnification for losses incurred by Plaintiff as a result of wrongful acts of individuals acting in their capacity as officers of GPI's subsidiary, GPI Southeast ("GPISE"). Travelers bring this motion to dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the following reasons, Travelers' Motion to Dismiss is GRANTED.

BACKGROUND[1]

GPI, the insured, is a New York corporation with its principal place of business in Babylon, New York. All of the common shares of GPI are held in trust by the GPI Employee Stock Ownership Trust for the benefit of participants in the GPI Employee Stock Ownership Plan. (Compl. ¶11) GPISE is a Florida corporation and is a wholly-owned subsidiary of GPI. (Compl. ¶10)

On October 27, 2006, GPISE acquired certain assets of Berryman & Henigar, Inc. ("B&H"), a Florida engineering corporation, pursuant to the terms of a written Asset Purchase Agreement. (Compl. ¶14) In accordance with the terms of the Asset Purchase Agreement, certain executives of B&H were expected to accept employment in similar capacities at GPISE, including Doug Dycus ("Dycus") and Mark Stokes ("Stokes"). (Compl. ¶15) Dycus and Stokes each subsequently accepted employment as Vice President at GPISE following the acquisition of B&H. (Id.)

Following the closing of the Asset Purchase Agreement, in June 2008, GPI and GPISE discovered that B&H and its officers, including Dycus and Stokes, made numerous material misrepresentations of fact and failed to disclose certain

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[1] The following facts are drawn from the Complaint, unless otherwise noted, and are assumed true for the purposes of this motion.

material facts concerning the operations and financial performance of B&H before B&H was acquired by GPISE. (Compl. ¶16) GPI alleges that, following their acceptance of employment as officers of GPISE, Dycus and Stokes continued to fail to disclose this negative and harmful information to GPI and GPISE in material breach and neglect of their fiduciary duties as officers. (Id.) GPI claims that, as a result, GPISE was required to expend substantial costs in order to successfully complete ongoing projects, thereby suffering substantial injuries and loss to their professional reputation and goodwill, resulting in further losses of revenues and profits of GPISE. (Compl. ¶17)

On or about August 11, 2008, GPI and GPISE commenced an action in the Supreme Court of the State of New York asserting claims for breach of contract, fraud in the inducement, fraudulent misrepresentation, and other causes of action against B&H, Dycus and Stokes, and other defendants. (Compl. ¶22) That complaint was styled Greenman Pedersen, Inc. v. Berryman & Henigar, Inc., No. 08-29678 (the "2008 GPI Lawsuit"). (Rogoski Dec. Ex. 2) The 2008 GPI Lawsuit was removed to this Court. Upon dismissal of the claims supporting federal question jurisdiction, that action was remanded to state court. See Greenman-Pedersen, Inc. v. Berryman & Henigar, Inc., No. 09 Cv. 0167(TPG), 2009 WL 2523887 (S.D.N.Y. Aug. 18, 2009).

Approximately one year after filing the 2008 GPI Lawsuit, GPI sought payment from Travelers under the terms of the D&O liability policies issued by Travelers for the losses arising from this alleged wrongful conduct.[2]

Travelers provided coverage to GPI from February 1, 2008 through February 1, 2009, and from February 1, 2009 through February 1, 2010, under two policies of Private Company Directors and Officers Liability insurance (the "Policies"). (Compl. Exs. A & B) The Policies provide liability insurance, with a policy limit of $1,000,000, for a covered "Loss," incurred by an "Insured Person" or an "Insured Organization," arising out of any "Wrongful Acts" committed by an "Insured Person," for which a "Claim" is made during the applicable policy period, as the terms are defined in the Policies. The Policies also contain an "Insured vs. Insured" exclusion by which Claims brought by or on behalf of an Insured against a co-Insured are excluded. The Policies exempt from the "Insured vs. Insured" exclusion any "Security Holder Derivative Claim" or "Security Holder Derivative Demand." (Compl. Ex. A)

On August 6, 2009, GPI made a demand upon Travelers for indemnification and payment in connection with a "Security Holder Derivative Claim," purportedly brought by GPI, in a

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[2] In their Complaint in the instant action, Plaintiffs state, "The Verified Complaint in the [2008 GPI Lawsuit] . . . contained a detailed description of the Wrongful Acts of Dycus and Stokes which form the basis for the Claims which are the subject of this action." (Compl. ¶22)

letter issued by GPI's attorneys, Sinnreich, Rosakoff & Messina, LLP. (Compl. ¶24, Ex. C) In the August 6, 2009, Claim Letter, GPI asserted that (1) GPI and GPISE were covered "Insureds" as defined in the Policies; (2) both Dycus and Stokes were "Insured Persons" as defined in the Policies; (3) the wrongful acts of Dycus and Stokes constituted breaches and neglect of their duties as officers and employees of GPISE and therefore constituted Wrongful Acts as defined in the Policies; (4) the Security Holder Derivative Claim asserted by GPI, as the sole security holder of GPISE, is a covered claim under the Polices and is not subjected to the "Insured vs. Insured" exclusion; and (5) GPI and GPISE suffered losses as the result of the Wrongful Acts of Dycus and Stokes in an amount exceeding the $1,000,000 policy limits of the Policies.

By a letter dated September 14, 2009, Travelers declined coverage for the August 6, 2009 Claim. (Compl. Ex. D) Travelers' basis for denying that Claim was that the 2008 GPI Lawsuit merely "set forth in greater detail the same general allegations against the same defendants as the allegations brought forward as a Security Holder Derivative Claim in the August 6, 2009 Demand Letter." As such, Travelers construed the August 6 Claim Letter as constituting the same claim as that brought in the 2008 GPI Lawsuit. Because the complaint filed in 2008 was an action filed by GPI, the Security Holder Derivative

Claim asserted by GPI in its 2009 Claim Letter "could not have been effectuated without the approval, consent and assistance of the board of directors, officers, members of the board of managers or the functional equivalent" of GPI, and, accordingly, the Policies provided no coverage for the claim asserted.

On November 23, 2009, the law firm of Sinnreich, Kosakoff & Messina issued a second claim letter setting forth: (1) a request for reconsideration of Travelers' declination of GPI's Security Holder Derivative Claim, as sole shareholder of GPISE; (2) a Security Holder Derivative Claim on behalf of Peter Greenman, as a security holder of GPI; (3) a Security Holder Derivative Claim on behalf of Joseph A. Greenman, as a participant and interest holder of the GPI Employee Stock Ownership Trust; (4) a Claim on behalf of Joseph A. Greenman, as an individual insured under the policy; and (5) a Security Holder Derivative Claim on behalf of Steve B. Greenman, in his capacity as sole trustee of the GPI Employee Stock Ownership Trust. (Compl. Ex. E) By letter dated January 4, 2010, Travelers declined GPI's request for reconsideration and denied coverage for the additional claims set forth in the November 23 Claim Letters. Travelers again asserted that the Claims arose out of the same factual nexus as the 2008 GPI Lawsuit and the August 6 Letter, and therefore constituted a single claim that was barred by the "Insured vs. Insured" exclusion.

Subsequently, GPI filed the instant action against Travelers.[3] Before the Court is Travelers Motion to Dismiss. For the following reasons, the Motion is GRANTED.

LEGAL STANDARD

A. Governing Law

In a diversity action, this Court applies the choice-of-law principles applied by the New York state courts. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941); Lazard Freres & Co. v. Protective Life Ins. Co., 108 F.3d 1531, 1538 (2d Cir. 1997). In a contract action, New York applies a "center of gravity" test to determine which jurisdiction's law will apply. Id. at 1539. Under the "center of gravity" test, Florida law would ordinarily apply as the Policies were executed in Florida

[3] The instant Complaint alleges nine causes of action: (1) breach of contract for Travelers' denial of coverage for the Security Holder Derivative Claim by GPI; (2) breach of contract for Travelers' denial of coverage for the Security Holder Derivative Claim by Peter Greenman; (3) breach of contract for Travelers' denial of coverage for the Security Holder Derivative Claim by Joseph Greenman; (4) breach of contract for Travelers' denial of coverage for the claim by Joseph Greenman as an Individual Insured; (5) breach of contract for Travelers' denial of coverage for the Security Holder Derivative Claim by Steve Greenman in his capacity as sole trustee of the GPI ESOT; (6) declaratory judgment adjudging and decreeing that GPI is entitled under the Polices to insurance coverage in the Policy amount of $1,000,000; (7) declaratory judgment that Travelers' declination of coverage on the basis that said claims could not have been effectuated without the approval, consent and assistance of the board of directors, officers, members of the board of managers or the functional equivalent of GPI renders the coverage under the Policies illusory and unenforceable as a matter of law; (8) judgment that, to the extent that the Policies do not provide insurance coverage to GPI for the Wrongful Acts of its officers, the policies did not express the actual intention of the parties at the time the policies were underwritten; and (9) judgment that Travelers falsely represented to GPI that the Policies would provide valid insurance coverage to GPI for the Wrongful Acts of its officers and employees. (Compl. ¶¶ 43-80)

by a Florida insurance broker, GPISE is a Florida Corporation, and, though GPI is a New York Corporation, GPI's principal address as listed in the Policies is located in Florida. Because the legal standards relevant to this motion are the same in both New York and Florida, a conflict analysis is unnecessary and New York law will apply. See Diamond Glass Cos. V. Twin City Fire Ins. Co., No. 06 CV 13105, 2008 WL 4613170 at *3 (S.D.N.Y. Aug. 18, 2008); In re Allstate Ins. Co., 81 N.Y.2d 219, 223 (1993).

B. Motion to Dismiss Standard

Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only a short and plain statement of the claim showing that the pleader is entitled to relief in order to give the defendant fair notice of what the ... claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation marks omitted). "In ruling on a motion to dismiss for failure to state a claim upon which relief may be granted, the court is required to accept the material facts alleged in the complaint as true." Frasier v. Gen. Elec. Co., 930 F.2d 1004, 1007 (2d Cir. 1991) (citation omitted). "[T]he complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." Chambers v. Time Warner, Inc., 282 F.3d 147 (2d Cir. 2002) (internal quotation marks and

citation omitted). A court is required to read a complaint generously, drawing all reasonable inferences from its allegations in favor of the plaintiff. See Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972).

A plaintiff must simply assert "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1940. Legal conclusions masquerading as facts need not be accepted as true by the Court. Twombly, 550 U.S. at 556-57.

Under both New York and Florida law, the interpretation of an insurance policy is a matter of law for the court to decide and, unless otherwise defined by the policy, words and phrases are to be understood in their plain, ordinary, and popularly understood sense, rather than in a forced or technical sense. See Sphinx Int'l, Inc. v. Nat'l Union Fire Ins. Co., 412 F.3d 1224, 1229-30 (11th Cir. 2005); Int'l Multifoods Corp. v. Commercial Union Ins. Co., 309 F.3d 76, 83 (2d Cir. 2002).

DISCUSSION

In the instant action, Plaintiff attempts to convert its Officers and Directors Liability Insurance Policy into a policy

that provides first-party coverage for what amount to business losses. The Policies at issue provide only liability insurance coverage to GPI, its subsidiaries, and Insured Persons for claims made against them by third parties, including shareholder derivative claims.[4] As there is no claim against any Insured that would give rise to liability coverage under the Policies, this action must be dismissed.

The Court's review of the Policies and the Complaint in the instant action indicates that the wrongful conduct at issue largely consists of pre-asset purchase misrepresentations and omissions by Dycus and Stokes. Once they became officers of GPISE, Dycus and Stokes merely failed to reveal their prior wrongdoing. The fraud-based claims arising out of these misrepresentations are already being litigated by GPI in the 2008 GPI Lawsuit. Recovery for claims being litigated in that action are clearly barred from recovery by the "Insured vs. Insured" exclusion contained in the Policies.[5] In the instant

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[4] The Polices provide that the Company shall pay on behalf of:

A. the Insured Persons Loss for Wrongful Acts, except for Loss which the Insured Organization pays to or on behalf of the Insured Persons as indemnification;

B. the Insured Organization Loss for Wrongful Acts which the Insured Organization pays to or on behalf of the Insured Persons as indemnification; and

C. the Insured Organization Loss for Wrongful Acts resulting from any Claim first made during the Policy Period . . . .

(Compl. Ex. A)

[5] The "Insured vs. Insured" exclusion provides that:

A. This Liability Coverage shall not apply to, and the Company shall have not duty to defend or to pay, advance or reimburse Defense Expenses for, any Claim:

action, Plaintiff attempts to circumvent the "Insured vs. Insured" exclusion and seek compensation from Travelers up to the policy limit by fashioning the instant claims in the guise of "Security Holder Derivative Claims" that seek compensation for Dycus' and Stokes' failure to disclose their prior fraud once they assumed fiduciary duties as officers of GPISE.[6]

A close reading of the Claim Letters, however, reveals that there are no actual "Security Holder Derivative Claims" pending against Dycus and Stokes or any other insured that would implicate the Policies. The August 6 Claim Letter, while

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* * *

> 10. by or on behalf of, or in the name or right of, any Insured; provided, that this exclusion shall not apply to:
>
> (a) any Security Holder Derivative Claim or Security Holder Derivative Demand; . . .

(Compl. Ex. A)

It is of note that "Insured vs. Insured" exclusions arose to "prevent collusive suits in which an insured company might seek to force its insurer to pay for the poor business decisions of its officers or managers." Twp. of Center v. First Mercury Syndicate, Inc., 117 F.3d 115, 119 (3d Cir. 1997). The purpose of an "Insured vs. Insured" exclusion is to prevent "turning liability insurance into business-loss insurance." Bodewes v. Ulico Cas. Co., 336 F. Supp. 2d 263, 272 (W.D.N.Y. 2004). Courts have cautioned that allowing such claims would transform liability insurance into casualty insurance as "the company would be able to collect from the insurance company for its own mistakes, since it acts through its directors and officers." Biltmore Assocs., LLC v. Twin City Fire Ins. Co., 572 F.3d 663, 669 (9th Cir. 2009). Though these considerations are relevant background to the instant action, under Florida law a court must apply the plain language of the policy, regardless of its underlying purpose. See, e.g., Sphinx Int'l, 412 F.3d at 1229-30 (11th Cir. 2005); Powersports, Inc. v. Royal & Sunalliance Ins. Co., 307 F. Supp. 2d 1355, 1358-59 (S.D. Fl. 2004).

[6] The Policies define "Security Holder Derivative Claim" as:

> any Claim brought on behalf of, or in the name or right of, the Insured Organization by one or more security holders of the Insured Organization in their capacity(ies) as such, but only if such Claim is brought and maintained without the assistance, participation or solicitation of any member of the board of directors, officer, member of the board of managers, or a functional equivalent thereof."

(Compl. Ex. A)

purporting to be a "Security Holder Derivative Claim," is actually just a demand upon Travelers for payment of its policy limit. Similarly, the November 23 Claim Letters simply renew that demand and make additional demands. It appears undisputed that there is no pending litigation against Dycus and Stokes. (Def. Reply Mem. at 5-6) Plaintiff has simply not pled that that there is any Claim pending against any Insured that would give rise to liability insurance coverage.

Indeed, under these circumstances, it is nonsensical to portray the August 6 and November 23 Letters as Security Holder Derivative Claims.[7] A "Derivative Action" is commonly defined as a "suit by a beneficiary of a fiduciary to enforce a right belonging to the fiduciary," such as "a suit asserted by a shareholder on the corporation's behalf against a third party (usually a corporate officer) because of the corporation's failure to take some action against the third party." Black's Law Dictionary 509 (9th ed. 2009). The rationale for a derivative litigation disappears in circumstances where a corporation is already prosecuting an action against its former officers. Plaintiff admits that the 2008 GPI Lawsuit asserts virtually identical claims against Dycus and Stokes for the very

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[7] It is of note that Florida law requires a shareholder to make a demand upon the board of directors as a condition of bringing a derivative action and the Complaint in a derivative action must allege with particularity that the demand was refused or ignored. Fla. Stat. Ann. § 607.07401(2) (West 2003). The Court does not reach whether GPI has met these requirements.

same wrongful acts alleged in August 6 and November 23 Claim Letters.[8] There is no logical reason for GPI or any shareholder to make a demand that GPISE file an additional action against Dycus and Stokes when GPI was already pursuing litigation against them at the time that the Claim Letters were issued, except as an artifice to implicate the coverage of the Policies. In sum, Plaintiffs have not sufficiently pled any Claim pending against GPI or any Insured Persons that could give rise to coverage under the Policies. As a result, the action must be dismissed.

Plaintiff's contention that the policy coverage is illusory also fails. Such "Insured vs. Insured" exclusions have been repeatedly upheld as unambiguous and enforceable. See, e.g., Sphinx Int'l, 412 F.3d 1224. GPI also fails to properly plead its claims for the harsh remedy of rescission based upon mutual mistake and fraud as Plaintiff makes no allegation that Travelers included the "Insured vs. Insured" exclusion in the

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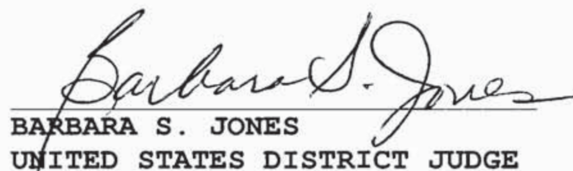
[8] The August 6 Claim Letter states that, "[t]he Complaint [in the 2008 GPI Lawsuit] clearly describes critical omissions by Mr. Dycus and Mr. Stokes (and several other B&H officers) that occurred both prior to and after the closing on October 27, 2006." (Compl. Ex. C) (emphasis added). The November 23 Claim Letters also incorporate the allegations of Wrongful Acts committed by Dycus and Stokes as set forth in the August 6 Claim Letter. (Compl. Ex. E) Even in the instant Complaint GPI admits that, "On or about August 11, 2008, GPI and GPISE commenced an action in the Supreme Court of the State of New York, Country of Suffolk[,] . . . asserting claims for breach of contract, fraud in the inducement, fraudulent misrepresentation and other causes of action against B&H, Dycus, Stokes and other defendants. The Verified Complaint in the [2008 GPI Lawsuit] . . . contained a detailed description of the Wrongful Acts of Dycus and Stokes which form the basis for the Claims which are the subject of this action." (Compl. ¶ 22) (emphasis added).

Policies notwithstanding the parties' agreement to the contrary nor has Plaintiff pled the fraud with the particularity required by Rule 9(b).

CONCLUSION

For the reasons set forth above, Travelers Motion to Dismiss is GRANTED. The Clerk of Court is instructed to close the case.

SO ORDERED:



BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
August 9, 2011