UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DIAMOND GLASS COMPANIES, INC.,	:	
	:	
Plaintiff,	:	
	:	06-CV-13105(BSJ)(AJP)
	:	
v.	:	**Order**
	:	
TWIN CITY FIRE INSURANCE COMPANY, and AXIS REINSURANCE COMPANY,	:	
	:	
Defendants.	:	

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

In this diversity case, plaintiff, Diamond Glass Companies, Inc. (“Diamond”), has filed this suit against defendants Twin City Fire Insurance Company (“TCFI”) and AXIS Reinsurance Company (AXIS) (collectively “Defendants” or the “Insurers”), seeking (1) a declaration that Diamond is entitled to insurance coverage for expenses incurred in connection with an ongoing federal grand jury investigation and (2) breach of contract damages based on Defendants’ denial of coverage. Defendants have moved pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the Complaint for failure to state a claim upon which relief may be granted. Diamond opposes this motion and has moved pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment. For the reasons set forth below, Defendants’ motion to dismiss the Complaint is GRANTED

and Diamond's motion for summary judgment is, accordingly, DENIED.

FACTUAL BACKGROUND

The following facts are taken from the allegations set forth in the Complaint, as well as documents referred to and relied upon in the Complaint.[1] Diamond is a glass replacement company headquartered in Kingston, Pennsylvania. TCFI issued Diamond a Private Choice Encore! Insurance Policy, number 00 KB 0226139-05 (the "Policy") effective from September 30, 2005 to September 30, 2006. (Compl. ¶ 1; *see also* Declaration of Mitchell P. Hurley ("Hurley Decl."), Ex. 1). Defendant Axis issued Diamond an excess coverage policy. The Policy had two parts: one providing Directors, Officers and Entity Liability Coverage (the "D&O Policy") and another providing Employment Practices Liability Coverage. In the instant litigation, Diamond asserts coverage solely under the D&O Policy for expenses incurred responding to a federal grand jury investigation.

On November 17, 2005, Diamond learned of a government investigation into its business practices when the federal grand jury sitting in the United States District Court for the Middle District of Pennsylvania issued a subpoena to Diamond's

[1] In determining the instant motion, the Court may consider the Policy and other documents attached to or relied upon in the Complaint. *See Gryl ex rel. Shire Pharmaceuticals Group PLC v. Shire Pharmaceuticals Group PLC*, 298 F.3d 136, 140 (2d Cir. 2002); *see also Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-54 (2d Cir. 2002).

Custodian of Records, commanding the Custodian to produce documents to and appear and testify before the grand jury. (Compl. ¶ 33-34). On November 18, 2005, Diamond's Vice President for Information Technology was served a grand jury subpoena to appear and testify before the grand jury. (Compl. ¶ 35). He testified before the grand jury on November 22, 2005. To date, at least 20 current and former employees of Diamond have been interviewed by federal investigators or testified before the grand jury. (*Id.*). Diamond was also served with a search warrant allowing FBI agents to conduct a search of its headquarters and to seize various business records and electronic data storage devices. (Compl. ¶ 33).

On December 6, 2005, Diamond notified TCFI and AXIS of this grand jury investigation and provided the Insurers with copies of the grand jury subpoenas to Diamond's Custodian of Records and its Information Technology employees. (Compl. ¶ 36). Diamond also notified the Insurers that it had hired the firm of Latham & Watkins to represent Diamond in connection with the grand jury investigation. (*Id.*). Diamond requested that the Insurers acknowledge receipt of Diamond's claim and provide written coverage analysis as soon as possible. On December 22, 2005, AXIS acknowledged receipt of Diamond's claim regarding the grand jury investigation and stated that the claim was

"currently under review." On May 15, 2006 TCFI acknowledged receipt of Diamond's claim. TCFI stated that:

> Because an actual Claim has not been made against Diamond Triumph or an Insured Person, we are presently treating this matter as a notice of a potential claim under Section VIII.B of the policy. Please immediately notify this office if there be any further activity with regard to this matter...Please be advised that any defense costs incurred by Diamond Triumph defending any possible future Claim, prior to notifying [TCFI] that a claim has been made, will not be the subject of coverage under the Policy.

(Compl. ¶ 52). On July 26, 2006 AXIS informed Diamond that it concurred with TCFI's coverage position. (Compl. ¶ 53).

RELEVANT TERMS OF THE POLICY

The D&O Policy insures Diamond and covered managers and employees against litigation liability or specific assertions of potential liability incurred within the scope of their employment. (*See* Hurley Decl., Ex. 1). The scope of the coverage is defined in the Insuring Agreements. The Insuring Agreements, which establish the framework for all of the rights and obligations set forth in the D&O Policy read in pertinent part as follows:

> **Insuring Agreements**
>
> ***
>
> (B) Corporate Reimbursement
> The Insurer shall pay **Loss** on behalf of an **Insured Entity** that such **Insured Entity** has...indemnified the Insured Persons resulting from an **Insured Person Claim**...for a **Wrongful Act** by the **Insured Persons**.
>
> (C) Entity Liability

> [T]he Insurer shall pay **Loss** on behalf of an **Insured Entity** resulting from an **Entity Claim** first made against such **Insured Entity** during the **Policy Period**...for a **Wrongful Act** by the **Insured Entity**.

(Hurley Decl., Ex 1 at 1)(emphasis in original). Accordingly, each Insuring Agreement requires four elements that must be satisfied before coverage is triggered: (1) a Wrongful Act (2) by an Insured (3) giving rise to a Claim (an Insured Person or and Entity Claim) (4) that results in covered Loss. The definitions for Entity Claim and Insured Person Claim read as follows:

> **"Entity Claim"** means any:
> (1) written demand for monetary damages or non-monetary relief commenced by the receipt of such demand; [or]
> (2) civil proceeding commenced by the service of a complaint or similar pleading; or
> (3) criminal proceeding, or formal administrative or regulatory proceeding commenced by the return of an indictment, filing of a notice of charges, or similar document;
> against an **Insured Entity**...
>
> ***
> **"Insured Person Claim"** means any:
> (1) written demand for monetary damages or non-monetary relief commenced by the receipt of such demand;
> against an **Insured Person**
>
> **"Insured Person Claim"** also means a formal civil, criminal, administrative, or regulatory investigation commenced by the service upon or other receipt by an **Insured Person** of a written notice from an investigating authority specifically identifying such **Insured Person** as a target individual against whom formal charges may be commenced.

(Compl. ¶¶ 11,15); *see also* Hurley Decl., Ex. 1, D&O Policy at 2 & Ex. 1, Endorsements at 1-2 (amendments to definitions).

DISCUSSION

I. Legal Standards

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 contract cases, New York applies a "center of gravity" test to determine which jurisdiction's law will apply. *Lazard Freres & Co.*, 108 F.3d at 1539. In the absence of any true conflict, however, New York's law will apply. *In re Allstate Ins. Co.*, 81 N.Y.2d 219, 223 (1993). Because the legal standards relevant to this motion are the same in New York and in Pennsylvania,[2] a conflict analysis is unnecessary.[3]

B. Motion to Dismiss

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief can be granted," a district court must accept the allegations contained in the complaint as true and draw all reasonable inferences in favor of the non-moving party.

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[2] Diamond is headquartered in Pennsylvania and the purported claims arose there.

[3] Plaintiff contends that to the extent that the Court finds the D&O Policy ambiguous, a choice of law analysis will be necessary because the two jurisdictions apply the doctrine of *contra proferentem* differently. (*See* Pl.'s Opp. at 24 fn 6). However, as explained throughout the opinion, the Court finds that the contract is unambiguous, rendering such analysis unnecessary.

Burnette v. Carothers, 192 F.3d 52, 56 (2d Cir. 1999). Under that standard, "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007) (citing *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994) (once a claim for relief has been stated, a plaintiff "receives the benefit of imagination, so long as the hypotheses are consistent with the complaint")). "The complaint, however, 'must include allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory.'" *Seneca Ins. Co. v. Kempner Ins. Co.*, No 02 Civ. 10088, 2004 WL 1145830, *3 (S.D.N.Y. May 21, 2004).

II. The Complaint Fails To Allege a "Claim" Under the Policy

Coverage under the policy attaches only if Diamond can allege that it provided timely notice of a Claim to the Insurers. However, as discussed below, Diamond has not alleged a claim as defined by the unambiguous terms of the Policy and, therefore, the Complaint is dismissed.

First, Diamond argues that the ongoing federal grand jury investigation is a criminal proceeding which satisfies the third definition of Entity Claim found in Endorsement 1 to the Policy. However, the Policy clearly and expressly requires "the return of an indictment, filing of a notice of charges or similar

document" as a condition of coverage for criminal proceedings. (Hurley Decl. Ex. 1, D&0 Policy at 2 (Section II(D)(3))). Here, the Complaint fails to allege the return or filing of any such document.[4] Accordingly, Diamond has not alleged coverage under Section II(D)(3) of the Policy.

Diamond's second theory of coverage is that the grand jury subpoenas and search warrant which were allegedly served upon it constitute "demands for non-monetary relief," entitling Diamond to coverage under Sections II(D)(1) and II(F)(1) of the Policy. In support of this proposition, Diamond primarily relies on the unpublished decision in *Minuteman International v. Great American Insurance Co.*, No. 03 Civ. 6067, 2004 WL 603482, *7 (N.D.Ill. March 22, 2004). The court in Minuteman held that "[a] demand for "relief" is a broad enough term to include a demand for something due, including a demand to produce documents or appear to testify." *Id*. However, this Court does not agree with the conclusion reached by the *Minuteman* court. Rather, based on the ordinary and accepted meaning of the word

[4] Diamond, relying on Strunk & White's *The Elements of Style*, argues that "criminal proceeding" is not modified by the later clause because it is grammatically set apart by a comma and the word "or." (*See* Pl.'s Opp. at 18). However, this argument is unavailing because such an interpretation would read the phrase "commenced by an indictment" right out of the Policy. Administrative and regulatory proceedings are not commenced by the return of an indictment; criminal proceedings are. It is therefore, nonsensical to uncouple the phrase "criminal proceeding" from the modifier "commenced by return of an indictment." Nor does the Court find Diamond's argument with respect to the definition of Insured Entity Claim in the original policy as contrasted with the amended definition in Endorsement 1 persuasive. Accordingly, the Court finds that the Policy unambiguously requires the return of a charging instrument as a requisite to coverage for criminal proceedings.

"relief" and the context in which is it used in the Policy it is clear that investigative subpoenas and search warrants are not "demands for non-monetary relief."

In the context of a D&O liability policy, "the 'plain meaning' of 'relief' would fairly seem to be the meaning pertinent to such legal matters." *See Center for Blood Research, Inc. v. Coregis Ins. Co.*, 2001 WL 34088617, 2 (D.Mass. Nov.14, 2001). Black's Law Dictionary defines "relief" as "[t]he redress or benefit, esp. equitable in nature (such as injunction or specific performance), that a party asks of a court. Also termed *remedy*." Black's Law Dictionary at 1317 (8th ed. 2004); *see also Foster v. Summit Medical Systems, Inc.*, 610 N.W.2d 350, 354 (Minn. Ct. App. 2000)(*quoting* Black's Law Dictionary at 1293 (7th ed.1999)("In a legal context, the term "relief" refers to redress or benefit, especially equitable redress such as an injunction or specific performance."). Similarly, "remedy" means "[t]he means of enforcing a right or preventing or redressing a wrong; legal or equitable relief." *Id*. at 1320. Grand jury subpoenas and search warrants do not fit within this meaning of the term "relief" or fall within a reasonable reading of the use of the term in the context of the Policy.

Indeed, settled principles of contract construction militate against the interpretation adopted by Minuteman and

urged by Diamond. A court may not adopt a reading of a contract that would "produce a result that is absurd, commercially unreasonable, or contrary to the reasonable expectations of the parties." *See In Re Lipper Holdings, LLC*, 1 A.D.3d 170, 171 (N.Y.App.Div. 2003). Interpreting "demand for non-monetary relief" to include any investigative subpoena would require Defendants to insure Diamond's costs responding to *any* subpoena, notwithstanding the absence of any assertion of civil or criminal liability against Diamond or any of its directors or officers. Such a result would be absurd. D&O liability insurance policies are intended to protect insureds from potential liability based on allegations of wrongdoing or other breaches of duty; they are not means of holding insureds harmless from costs associated with any participation in the legal system. Accordingly, the Complaint fails to allege a demand for monetary damages or non-monetary relief and, therefore, fails to state a claim under Section II(D)(1) or (II)(F)(1)of the D&O Policy.

Lastly, Diamond makes a final argument for coverage under the "target" prong of the Insured Person Claim. (Compl. ¶ 16). Diamond contends that the target provision is triggered whenever an Insured Person is "commanded to testify before the grand jury" or "told that they are 'subjects' within the scope of the grand jury investigation." (Pl.'s Br. at 23). The Court

disagrees. The Policy clearly and expressly limits coverage to individuals who have received "written notice" that they are "a target individual against whom formal charges may be commenced." (Hurley Decl., Ex. 1, D&O Policy at 2). Thus, even if the Complaint sufficiently alleged that any Insured Person was actually a target (which it does not), there would still be no Claim because the Policy clearly and explicitly requires "written notice" specifically identifying an Insured Person as "a target individual against whom formal charges may be commenced." The Complaint fails to allege that any Insured Person has received such "written notice." Accordingly, Diamond has failed to state a claim under the target provision of the Policy.

CONCLUSION

For these reasons, Defendants' motion to dismiss Diamond's Complaint is granted in its entirety. Accordingly, Diamond's motion for summary judgment is also DENIED. This order thus resolves the following motions: documents 18 and 24 in docket number 06-cv-13105.

SO ORDERED:

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
August 18, 2008