IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PERDUE FARMS, INC. and PERDUE FOODS, LLC,	*	
Plaintiffs,	*	
v.	*	**Civil Case No. 1:19-cv-01550-SAG**
NATIONAL UNION FIRE INS. CO. OF PITTSBURGH, PA,	*	
Defendant.	*	

* * * * * * * * * * * * * *

MEMORANDUM OPINION

Plaintiffs Perdue Farms, Inc. and Perdue Foods, LLC (collectively, "Perdue") filed this action against Defendant National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"), asserting breach of contract and seeking declaratory judgment. Perdue filed a Motion for Summary Judgment, ECF 76. National Union opposed Perdue's Motion and filed its own Cross Motion for Summary Judgment, ECF 80. Both National Union and Perdue filed oppositions to the other's summary judgment motion. ECF 81, 82. No hearing is necessary. *See* Loc. R. 105.6 (D. Md. 2018). For the reasons that follow, Perdue's motion will be granted and National Union's motion will be denied.

I. FACTUAL BACKGROUND

There is no substantive dispute over the facts at issue, which are summarized in Perdue's Complaint, ECF 1. Perdue Farms, Inc. and Perdue Foods, LLC, are growers and sellers of chickens and are located in Salisbury, Maryland. In 2016, Perdue obtained an insurance policy from National Union, which contained a sublimit for anti-trust claims of $15,000,000 (the "2016 Policy"). Perdue obtained a subsequent policy in 2017 from National Union with the same

conditions and coverage (the "2017 Policy"). During the term of the 2016 Policy, Perdue was sued in the United States District Court for the Northern District of Illinois by commercial and consumer purchasers of "broilers" (chickens raised for consumption) for violations of the Sherman Antitrust Act and other state law antitrust claims (the "Purchaser Actions"). Perdue reported the claim to National Union, and National Union agreed to indemnify Perdue under the 2016 Policy.

In 2017, various "growers" that raise chickens for Perdue filed a separate set of actions in the United States District Court for the Eastern District of Oklahoma (the "Grower Actions"). The complaint alleged violations of the Sherman Antitrust Act and other antitrust violations. Perdue promptly reported the claim to National Union under the 2017 Policy, since the lawsuit was filed during its effective dates. National Union denied coverage under the 2017 Policy, stating that the facts arose from the same facts as the Purchaser Actions and therefore the claims were related under the 2017 Policy's "Related Wrongful Act(s)" clause, such that coverage for both claims was limited to the 2016 Policy. Plaintiffs filed this declaratory judgment and breach of contract action in the Circuit Court for Wicomico County, Maryland and Defendant removed this matter to this Court.

The key contractual provisions are as follows. The 2017 Policy's clause regarding "Related Wrongful Act(s)" provides that National Union "shall not be liable" for any claim:

> . . . . alleging, arising out of, based upon or attributable to the facts alleged, or to the same or Related Wrongful Act(s) alleged or contained in any Claim which has been reported, or in any circumstances of which notice has been given, under any directors and officers liability policy of which this D&O Coverage Section is a renewal or replacement of in whole or in part or which it may succeed in time[.]

ECF 76-7 at 127. The 2017 Policy defines "Related Wrongful Act(s)" as:

> Wrongful Act(s) which are the same, related, or continuous, or Wrongful Act(s) which arise from a common nucleus of facts. Claims can allege Related Wrongful Act(s) regardless of whether such Claims involve the same or different claimants, Insureds or legal causes of action.

Id. at 14.

II. LEGAL STANDARDS

Both Perdue and National Union seek summary judgment under Rule 56(a) of the Federal Rules of Civil Procedure. Summary judgment is appropriate only "if the movant shows that 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). The moving party bears the burden of showing that there is no genuine dispute of material fact. *See Casey v. Geek Squad*, 823 F. Supp. 2d 334, 348 (D. Md. 2011) (citing *Pulliam Inv. Co. v. Cameo Props.*, 810 F.2d 1282, 1286 (4th Cir. 1987)). If the moving party establishes that there is no evidence to support the non-moving party's case, the burden then shifts to the non-moving party to proffer specific facts to show a genuine issue exists for trial. *Id.* The non-moving party must provide enough admissible evidence to "carry the burden of proof in [its] claim at trial." *Id.* at 349 (quoting *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1315-16 (4th Cir. 1993)). The mere existence of a scintilla of evidence in support of the non-moving party's position will be insufficient; there must be evidence on which the jury could reasonably find in its favor. *Id.* at 348 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986)). Moreover, a genuine issue of material fact cannot rest on "mere speculation, or building one inference upon another." *Id.* at 349 (quoting *Miskin v. Baxter Healthcare Corp.*, 107 F. Supp. 2d 669, 671 (D. Md. 1999)).

Additionally, summary judgment shall be warranted if the non-moving party fails to provide evidence that establishes an essential element of the case. *Id.* at 352. The non-moving party "must produce competent evidence on each element of [its] claim." *Id.* at 348-49 (quoting *Miskin*, 107 F. Supp. 2d at 671). If the non-moving party fails to do so, "there can be no genuine issue as to any material fact," because the failure to prove an essential element of the case "necessarily renders all other facts immaterial." *Id.* at 352 (quoting *Celotex Corp. v. Catrett*, 477

U.S. 317, 322-23 (1986); *Coleman v. United States*, 369 F. App'x 459, 461 (4th Cir. 2010) (unpublished)). In ruling on a motion for summary judgment, a court must view all of the facts, including reasonable inferences to be drawn from them, "in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

III. ANALYSIS

a. Disputes Regarding the Applicable Legal Standards

The substance of this dispute centers on only one issue: whether the Grower Actions are related to the earlier Purchaser Actions covered by the 2016 Policy, such that the Grower Actions are also covered under the 2016 Policy and not the 2017 Policy. Central to the resolution of this issue are two points of law on which the parties do not agree. First, the parties disagree about the scope of materials the Court should consider in determining whether the lawsuits stem from Related Wrongful Act(s). Second, the parties disagree as to who bears the burden to demonstrate that the Purchaser and Grower Actions are Related Wrongful Act(s). Both issues must be decided prior to delving into the scope of the relevant contractual provisions.

i. The Scope of the Materials Considered

Perdue asserts that the Court should only consider the pleadings in the Purchaser and Grower Actions to determine whether the two Actions are based on "Related Wrongful Act(s)." ECF 76-1 at 12-13. National Union, meanwhile, suggests that the Court should take a broader view and consider discovery materials from the two Actions as well. ECF 80-1 at 18-19. The "Related Wrongful Act(s)" provision uses the language of allegations and "Claims"—defining a "Claim" as a "complaint or similar pleading"—suggesting that only the pleadings are to be considered under the plain language of the 2017 Policy. *See* ECF 76-7 at 10, 127; *see also*

Northrop Grumman Corp. v. Axis Reinsurance Co., 809 F. App'x 80, 89 (3d Cir. 2020) (rejecting the consideration of "various statements made by the litigants" in the underlying claims to determine relatedness because "those statements [fell] beyond the four corners of the complaints and the policies"). This is the Court's first opportunity to assess the scope of the provision, and the prior statements and determinations cited by National Union, made in the separate context of discovery, do not alter its interpretation of the provision's language. *See infra* note 3. As such, the Court concludes that, per the 2017 Policy's own plain language, it may only consider the pleadings when determining whether the two Actions are Related Wrongful Act(s).

ii. The Burden

The parties also disagree as to which party bears the burden of proving relatedness in determining whether the Purchaser and Grower Actions are "Related Wrongful Act(s)." National Union, as the insurer, bears the burden of showing the applicability of policy exclusions. *See ACE Am. Ins. Co. v. Ascend One Corp.*, 570 F. Supp. 2d 789, 798 (D. Md. 2008); *see also Trice, Geary & Myers, LLC v. Camico Mut. Ins. Co.*, 459 F. App'x 266, 274 (4th Cir. 2011) (stating that, in Maryland, "[t]he burden is on the insurer, not the insured, to prove the applicability of an exclusion"). Perdue, meanwhile, bears the burden "of proving every fact essential to [its] right to recover" regarding the scope of the policy's coverage. *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Porter Hayden Co.*, No. CIV. CCB-03-3408, 2012 WL 734170, at *2 (D. Md. Mar. 6, 2012).

The Related Wrongful Act(s) provision is an exclusion because its purpose is to delineate claims that would otherwise be covered by the 2017 policy, but which are not ultimately covered because they relate back to the earlier 2016 policy. ECF 76-7 at 127; *see also ACE Am. Ins. Co.*, 570 F. Supp. 2d at 798 (deeming a similar "Interrelated Wrongful Acts" provision to be an exclusion). National Union suggests however, that, this dispute is instead governed by the

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.