IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Miami-Luken, Inc.,	:	Case No. 1:16-cv-876
	:	
Plaintiff,	:	
	:	Judge Susan J. Dlott
v.	:	
	:	
Navigators Insurance Company,	:	Order Granting Navigators Insurance
	:	Company's Motion for Summary Judgment
Defendant.	:	and Denying Miami-Luken, Inc.'s Motion
	:	for Summary Judgment

This matter is before the Court on cross motions for summary judgment. (Docs. 53, 54.)[1] The Court heard oral argument on February 27, 2018. For the reasons that follow, the Court will **DENY** Plaintiff's Motion and **GRANT** Defendant's Motion.

I. Background[2]

This insurance dispute stems from the denial of insurance coverage by Navigators Insurance Company[3] ("Navigators") to Miami-Luken Holding Company[4] ("Miami-Luken") for defense of an Order to Show Cause issued by the Drug Enforcement Administration ("DEA"). Navigators denied coverage under a Specific Litigation Exclusion ("SLE") of Miami-Luken's insurance policy. The facts are largely undisputed.

[1] Earlier-filed versions of these motions have been superseded by amended versions, filed pursuant to Court Order. (*See* January 4, 2018 Minute Entry).

[2] The Court has drawn the facts from Miami-Luken's Proposed Undisputed Facts (Doc. 53-1), Navigators's Response to Miami-Luken's Statement of Proposed Undisputed Facts (Doc. 56-1), Navigators's Statement of Proposed Undisputed Facts (Doc. 54-1), and Miami-Luken's Response to Navigators's Statement of Proposed Undisputed Facts (Doc. 55-1). The Court will only cite to the record for any disputed fact or pertinent contractual language.

[3] Navigators Management Company, Inc. was also originally a defendant in this action, but has since been dismissed, leaving Navigators Insurance Company as the sole Defendant. (Doc. 8.)

[4] Miami-Luken holds three subsidiary companies, including Miami-Luken, Inc. ("M-L"), a wholesale pharmaceutical distributor.

A. West Virginia Lawsuit

Prior to obtaining the insurance coverage from Navigators central to the instant litigation, on June 26, 2012, Miami-Luken, Inc. ("M-L") was one of many defendants named in an action brought by the Attorney General of West Virginia and others, captioned *State of West Virginia ex rel. Patrick Morrisey, et al. v. Amerisourcebergen Drug Corp., et al.*, Case No. 12-C-141 (Boone County Circuit Court, W. Va.) (the "West Virginia Lawsuit"). (Doc. 51-6 at PageID 1572.) The plaintiffs in the West Virginia Lawsuit alleged that the defendants were major distributers of controlled substances that contributed to the prescription drug abuse epidemic in West Virginia by oversupplying pharmacies in low-population cities with suspiciously large amounts of controlled substances—essentially, supplying "pill mills." (*Id*. at PageID 1575–76.) The plaintiffs brought the following causes of action: (1) injunctive relief for violations of responsibilities and duties under the West Virginia Uniform Controlled Substances Act; (2) damages resulting from negligence and violations of the West Virginia Uniform Controlled Substances Act; (3) violation of the West Virginia Consumer Credit and Protection Act—unfair methods of competition or unfair or deceptive acts or practices; (4) public nuisance; (5) negligence; (6) and unjust enrichment.

The plaintiffs alleged that M-L, for its part, engaged in acts and omissions by distributing controlled substances to pharmacies that were the subject of criminal investigations and prosecutions, including to Sav-Rite Pharmacy in Kermit, West Virginia, population 406, and Sav-Rite #2 in Crum, West Virginia, population 182. (*Id*. at PageID 1588.) They alleged that M-L also distributed to other so-called "pill mill pharmacies," including Trivillian's Pharmacy in Charleston, West Virginia and A+ Pharmacy in Barboursville, West Virginia, both of which were raided by drug agents with prosecutions of the owner and pharmacists. (*Id*. at PageID

1589.) The plaintiffs claimed that from 2007–2011, M-L distributed large quantities of narcotics and highly-abused drugs to West Virginia pharmacies, including hydrocodone tablets, alprazalom, diazepam, klonopin, and oxycodone, with a disparity between population and the amount of controlled substances being distributed. (*Id*. at PageID 1589–90.) They claimed that "the frequency of orders, the relative numbers of narcotics to non-narcotics which were being supplied, the existence of other distributors who were distributing controlled substances to the same customers, and the reputation of physicians and pharmacies as pill mills provided indicia of suspicious orders which [M-L] either purposely chose to ignore because of the financial benefits it was reaping or negligently failed to identify." (*Id*. at 1590–91.)

In their prayer for relief, the plaintiffs sought an array of damages, including: judgment; preliminary and permanent injunction; equitable relief; a jury trial to obtain losses sustained as the proximate result of the violation of the West Virginia Uniform Controlled Substances Act; damages sustained as the proximate result of nuisances created by the prescription drug abuse epidemic; damages and losses sustained as the proximate result of negligent marketing, promotion, and distribution of controlled substances in West Virginia; disgorgement of unjust enrichments; civil penalties for repeated and willful violation of the West Virginia Code § 46A-7-111; pre and post-judgment interest; costs and attorneys' fees; other relief, including reimbursement of litigation costs and an award of fees; and punitive damages. (*Id*. at PageID 1633–34.)

B. Application for Insurance Coverage from Navigators

In July 2015, Miami-Luken's prior insurance carrier, Cincinnati Insurance Company, notified it that its Directors and Officers policy would not be renewed due to claims history.[5] (Knerr Dep., Doc. 52 at PageID 1785.) Miami-Luken used William Knerr, a Miami-Luken

[5] Cincinnati Insurance Company ("CIC") provided a defense to M-L for the West Virginia Lawsuit.

board member and insurance broker, to obtain replacement coverage in the amount of five million dollars, up from the one-million-dollar limit of its prior policy. Knerr approached Richard Bolan, a wholesale broker, regarding coverage for Miami-Luken.

As part of that process, on October 7, 2015, Dr. Joseph Mastandrea, Miami-Luken's Chief Executive Officer and Board Chairman, signed an ExecPro Proposal Form for a Directors', Officers', Insured Entity, and Employment Practices Liability Insurance Policy ("Application"). There is no dispute that Miami-Luken disclosed the West Virginia Lawsuit in the Application.

The Application asked:

> Is the undersigned or any Director or Officer proposed for this insurance aware of any fact, circumstance or situation involving the Company or its Subsidiaries, the Directors or Officers of the Company or its Subsidiaries, or the Plans of the Company or its Subsidiaries which he or she has reason to believe might result in any future Claim under the Policy to which this Proposal Form will be attached?

(Application, Doc. 51-10 at PageID 1657.) In response, Miami-Luken checked the box stating, "No." (*Id*.) Following that question, the Application stated:

> **IT IS AGREED THAT IF KNOWLEDGE OF ANY SUCH FACT, CIRCUMSTANCE OR SITUATION EXISTS, ANY CLAIM SUBSEQUENTLY ARISING THEREFROM SHALL BE EXCLUDED FROM COVERAGE.**

(*Id*.) (emphasis in original). Mastandrea certified that "to the best of his or her knowledge the statements set forth herein are true and correct and that reasonable efforts have been made to obtain sufficient information from each and every Director and Officer proposed for this insurance to facilitate the proper and accurate completion of this Proposal Form." (*Id*. at PageID 1659.)

Because Miami-Luken was seeking a five-million-dollar insurance limit, Navigators required it to complete a Higher Limit Warranty Agreement ("Warranty"), which was signed by Mastandrea on October 30, 2015. He marked "NO" in response to the question:

> Does any director or officer of Miami Luken Holding Company Inc and/or its subsidiaries have any knowledge or information of any act, error, omission or other circumstance which might reasonably be expected to give rise to claim under the proposed higher limits of insurance?

(Warranty, Doc. 52-17 at PageID 2044.) The form also included the following language:

> **IT IS UNDERSSTOOD AND AGREED THAT IF SUCH KNOWLEDGE OR INFORMATION EXISTS, WHETHER OR NOT DISCLOSED, ANY CLAIM ARISING THERFROM IS EXCLUDED FROM THIS PROPOSED INSURANCE**.

(*Id*.) (emphasis in original).

C. The Policy

In November 2015, Navigators issued a claims-based Policy, Number: PT15DOL321737IV (the "Policy"), to Miami-Luken for the policy period of November 1, 2015 to November 1, 2016. (Doc. 51-3; Doc. 1-1.) The Policy states that "the Insurer will have the right and duty to defend any **Claim** against any **Insured** covered under this Policy, even if the allegations in such **Claim** are groundless, false or fraudulent." (Doc. 1-1 at PageID 12 (emphasis in original).) A "Claim" is defined as:

1. A written demand for monetary or non-monetary relief made against any **Insured**;
2. Any written request for any **Insured** to toll or waive any potentially applicable statute of limitations; or
3. A civil, criminal, administrative or arbitration proceeding brought against any **Insured** seeking monetary or non-monetary relief and commenced by the service of a complaint or similar pleading, the return of an indictment or criminal information, or the receipt or filing of notice of charges or similar document.

(*Id*. at PageID 12–13 (emphasis in original).) Endorsement 11 to the Policy includes the SLE, which states:

> It is understood and agreed that **Section III., Exclusions** for all coverage parts is amended by adding the following:
>
> It is understood and agreed that the Insurer shall not be liable to make any payment for **Loss**, including **Costs of Defense** in connection with any **Claim**

> made against any **Insured** based upon, arising out of, relating to, directly or indirectly resulting from, or in consequence of, or in any way involving the following:
>
> Action brought by the Attorney General of the State of West Virginia
>
> or the same or substantially the same facts, circumstances or allegations which are the subject of or the basis for such proceeding(s).

(*Id*. at PageID 55 (emphasis in original).)

D. DEA Order to Show Cause

On November 23, 2015, the Drug Enforcement Agency ("DEA") served an Order to Show Cause on M-L as to why the DEA should not revoke its Certificate of Registration PM0031550 pursuant to 21 U.S.C. § 824(a)(4), deny any pending applications for renewal or modification of such registration, and deny any applications for any new DEA registrations, pursuant to 21 U.S.C. § 823(b)(1), (4), and (5) and 21 U.S.C. § 823(e)(1), (4), and (5) due to M-L's continued registration being inconsistent with the public interest as defined in 21 U.S.C. §§ 823(b) and (e). (Doc. 51-4 at PageID 1484.) The Order to Show Cause is based upon a "non-exhaustive" summary of facts, including:

> Over the course of several years, from as early as 2007 through 2015, [M-L] failed to maintain effective controls against the diversion of controlled substances into other than legitimate medical, scientific, and industrial channels and failed to operate a system to disclose suspicious orders of controlled substances, when it shipped controlled substances, particularly oxycodone and hydrocodone, to customers in the Appalachian tri-state region of southern Ohio, eastern Kentucky, and southern West Virginia.

(*Id*.) The Order to Show Cause asserts that M-L failed to maintain effective controls and report suspicious orders in distributing oxycodone and other controlled substances to A+ Care Pharmacy in Barboursville, West Virginia, Trivillians Pharmacy of Kunawha in Charleston, West Virginia, Family Discount Pharmacy in Mount Gay, West Virginia, Strosnider d/b/a Sav-Rite Pharmacy and Sav-Rite Pharmacy #2 in Kermit, West Virginia, Tug Valley Pharmacy in

Williamson, West Virginia, Colony Pharmacy in Beckley, West Virginia, Westside Pharmacy in Oceana, West Virginia, Little & Waddle d/b/a Medzone Pharmacy in Prestonburg, Kentucky, and Prime Pharmacy Group d/b/a Medi-Mart in Portsmouth, Ohio. (*Id*. at PageID 1484–1509.)

The DEA's Order to Show Cause was issued after the DEA had served twenty-two subpoenas on M-L. (Faul Dep., Doc. 51 at PageID 1269–70.) Each subpoena stated that a criminal investigation was being conducted and demanded information related to M-L's distribution of controlled and non-controlled substances to assist with enforcement of the Controlled Substances Act. (Subpoenas, Doc. 51-5.) Seven of the DEA subpoenas, issued from April 29, 2013 through June 2, 2015 and before Miami-Luken applied for the Navigators Policy, demanded information on Sav-Rite, Save-Rite #2, Trivillians, and A+ Care pharmacies. (*Id*.; Mink Dep., Doc. 48 at PageID 966.)

On February 5, 2016, the Chairman of the Board of Miami-Luken sent Navigators a letter enclosing the DEA Order to Show Cause and requesting assignment of a claims representative. On April 22, 2016, claims counsel for Navigators denied coverage.

E. Procedural History

This action was initiated on June 22, 2016 following Navigators' decision to deny coverage to Miami-Luken. Plaintiff seeks declaratory judgment and alleges breach of contract. On January 18, 2018, the parties filed cross motions for summary judgment. (Docs. 53, 54.) The Court held oral argument on February 27, 2018 and took the matter under advisement.

II. Law

A. Legal Standard

Federal Rule of Civil Procedure 56 governs motions for summary judgment. Summary judgment is appropriate if "there is no genuine issue as to any material fact and the movant is

entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant has the burden to show that no genuine issues of material fact are in dispute. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986); *Provenzano v. LCI Holdings, Inc.*, 663 F.3d 806, 811 (6th Cir. 2011). The movant may support a motion for summary judgment with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986). In responding to a summary judgment motion, the nonmoving party may not rest upon the pleadings but must "present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

A court's task is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. "[F]acts must be viewed in the light most favorable to the nonmoving party *only* if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (emphasis added); *see also E.E.O.C. v. Ford Motor Co.*, 782 F.3d 753, 760 (6th Cir. 2015) (*en banc*) (quoting *Scott*). A genuine issue for trial exists when there is sufficient "evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252; *see also Shreve v. Franklin Cnty., Ohio*, 743 F.3d 126, 132 (6th Cir. 2014) ("A dispute is 'genuine' only if based on *evidence* upon which a reasonable jury could return a verdict in favor of the non-moving party.") (emphasis in original) (citation omitted). Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3).

"Where the parties have filed cross-motions for summary judgment, the court must consider each motion separately on its merits, since each party, as a movant for summary judgment, bears the burden to establish both the nonexistence of genuine issues of material fact and that party's entitlement to judgment as a matter of law." *In re Morgeson*, 371 B.R. 798, 800–01 (B.A.P. 6th Cir. 2007).

III. Analysis

In moving for summary judgment, Navigators argues that the Policy is unambiguous and bars coverage of the DEA's Order to Show Cause. Even if it does not, Navigators argues that Miami-Luken made material misrepresentations in its Application and Warranty that preclude coverage. In opposition and in its cross motion for summary judgment, Miami-Luken contends that the DEA Order to Show Cause is a "Claim" that triggers coverage for defense costs incurred in connection with the DEA administrative proceeding, which is not barred by the SLE.[6] It denies making any material misrepresentations in its Application and Warranty.[7]

A. Interpretation of an Insurance Policy Under Ohio Law

Ohio law governs resolution of the substantive issues in this diversity jurisdiction. *Kusens v. Pascal Co., Inc.*, 448 F.3d 349, 360 (6th Cir. 2006). Under Ohio law, the

[6] At oral argument, Miami-Luken also raised new and contradictory arguments for the first time, surprising both the Court and defense counsel. For example, despite its position that the Policy is unambiguous in its motion practice, Miami-Luken argued for the first time at the hearing that the Policy *is* ambiguous. Defense counsel objected to the consideration of new arguments and asked that they be stricken, because he was prejudiced by them being raised at the last minute. The Court agrees that Navigators was prejudiced by having no opportunity to fully consider the arguments or conduct legal research. "It is well established that a moving party may not raise a new issue for the first time in its reply brief or at oral argument." *Probst v. Central Ohio Youth Ctr.*, 511 F. Supp. 2d 862, 871 (S.D. Ohio 2007); *see also NetJets Large Aircraft, Inc. v. United States*, 80 F. Supp. 3d 743, 765 (S.D. Ohio 2015) (refusing to consider new arguments raised for the first time in a reply brief). The Court will not consider Miami-Luken's new arguments.

[7] Miami-Luken asserted in its Application and Warranty that it was not aware of any fact, circumstance, or situation that might result in a future claim despite having been served DEA subpoenas as part of a criminal investigation. Navigators argues that the Sixth Circuit found similar misrepresentations sufficient to preclude coverage in *Hale v. Travelers Cas. & Sur. Co. of Am.*, 661 F. App'x 345, 348 (6th Cir. 2016). Miami-Luken disputes that it omitted material information. The Court need not rule on Navigators's alternative argument because, as set forth more fully herein, it finds that the SLE bars coverage.

interpretation of an unambiguous insurance contract presents a question of law. *Bondex Int'l., Inc. v. Hartford Accident and Indem. Co.*, 667 F.3d 669, 676 (6th Cir. 2011) (citing *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St. 3d 107, 652 N.E.2d 684, 686 (1995)).

General rules of contract interpretation apply to interpretation of insurance contracts. *Gomolka v. State Auto. Mut. Ins. Co.*, 70 Ohio St. 2d 166, 167, 436 N.E.2d 1347, 1348 (1982). "When confronted with an issue of contractual interpretation, the role of the court is to give effect to the intent of the parties to the agreement." *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 219, 797 N.E.2d 1256, 1261 (2003) (citing *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St. 3d 270, 273, 714 N.E.2d 898 (1999)). "We examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy." *Id.* (citing *Kelly v. Med. Life Ins. Co.*, 31 Ohio St. 3d 130, 509 N.E.2d 411, paragraph one of the syllabus (1987)). The Court must "look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy." *Id.* (citing *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St. 2d 241, 374 N.E.2d 146, paragraph two of the syllabus (1978)). "When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties." *Id.* (citing *Alexander*, 374 N.E.2d at paragraph two of the syllabus.) "As a matter of law, a contract is unambiguous if it can be given a definite legal meaning." *Id.* (citing *Alexander*.))[8]

The insurance company bears the burden of demonstrating that an insurance claim falls within an exclusion to coverage. *Bondex*, 667 F.3d at 677 (citing *Cont'l Ins. Co. v. Louis Marx & Co.*, 64 Ohio St. 2d 399, 415 N.E.2d 315, 317 (1980); *St. Marys Foundry, Inc. v. Emp'rs Ins. of Wausau*, 332 F.3d 989, 992–93 (6th Cir. 2003)). "Where the policy language sets forth the

[8] On the other hand, if a contract is ambiguous, the Court may then consider extrinsic evidence, and ambiguity is interpreted strictly against the drafter. *Id.*

relevant coverages and exclusions in unambiguous terms, we must apply the terms as written, according to their 'plain and ordinary meaning.'" *Id*. (citing *Cincinnati Indem. Co. v. Martin*, 85 Ohio St. 3d 604, 710 N.E. 2d 677, 679 (1999); *Monticello Ins. Co. v. Hale*, 114 F. App'x. 198, 201 (6th Cir. 2004)).

B. The SLE Bars Coverage

The parties assert that the Policy is unambiguous, and the Court agrees.[9] As was the case in *LaValley v. Virginia Surety Co., Inc.*, 85 F. Supp. 2d 740, 744 (N.D. Ohio 2000), the SLE in this case is clear, unambiguous, and specific in what it excludes.

The central dispute for the Court to resolve is whether the Claim for coverage of the Order to Show Cause is "based upon, arising out of, relating to, directly or indirectly resulting from, or in consequence of, or in any way involving" the "same or substantially the same facts, circumstances or allegations which are the basis or subject for" the "Action brought by the Attorney General of the State of West Virginia."[10] (Doc. 1-1 at PageID 55.) Thus, the SLE contemplates a comparison of the facts, circumstances *or* allegations of the two actions and whether they are the same *or* substantially similar.

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[9] As noted *supra*, Miami-Luken raised an argument that the Policy is ambiguous for the first time at the February hearing, but the Court will not consider the argument on its merits.

[10] As a refresher, the language of the SLE states:

> It is understood and agreed that **Section III., Exclusions** for all coverage parts is amended by adding the following:
>
> It is understood and agreed that the Insurer shall not be liable to make any payment for **Loss**, including **Costs of Defense** in connection with any **Claim** made against any **Insured** based upon, arising out of, relating to, directly or indirectly resulting from, or in consequence of, or in any way involving the following:
>
> Action brought by the Attorney General of the State of West Virginia
>
> or the same or substantially the same facts, circumstances or allegations which are the subject of or the basis for such proceeding(s).

(Doc. 1-1 at PageID 55 (emphasis in original).)

The West Virginia Lawsuit, detailed more fully *supra*, was an action brought by the Attorney General of West Virginia and others against M-L in 2012. The complaint alleges that M-L and others were major distributors of controlled substances that contributed to the drug abuse epidemic in West Virginia by oversupplying pill mills. On the other hand, the DEA Order to Show Cause gave M-L notice and an opportunity to show cause as to why its Certificate of Registration and other applications for DEA registrations should not be revoked for its alleged failure to maintain effective controls against the diversion of controlled substances from 2007–2015 in the Appalachian tri-state region of southern Ohio, eastern Kentucky, and southern West Virginia. Although the Order to Show Cause concerns a broader geographic area and timeframe, the West Virginia allegations within it concern many of the same pharmacies as those implicated in the West Virginia Lawsuit, the same controlled substances, and the same concern about failure to maintain controls on diversion of controlled substances. Thus, when considering whether the facts, circumstances, *or* allegations for the two actions are the same *or* substantially similar, the answer clearly is yes. At the very least, the facts or circumstances are substantially the same; arguably, so too are the allegations, but only one of three is required for the SLE to apply.

The Court must next consider whether the Claim for coverage of substantially the same facts, circumstances, or allegations as were the subject of the West Virginia Lawsuit is "based upon, arises out of, relates to, directly or indirectly results from, is in consequence of, or involves" the West Virginia Lawsuit. The answer is yes. The two contain overlapping supporting facts, circumstances, and allegations concerning the same issue such that the Court can easily conclude in the affirmative.

As Navigators points out, similar exclusions to the SLE have been found to be both unambiguous and applicable in like circumstances. In *LaValley*, a legal malpractice policy excluded "any claim arising from any circumstances of which notice has been given under any policy in effect prior to or at the inception of the policy." 85 F. Supp. 2d at 742–43. Finding the policy clear and unambiguous, the Court analyzed whether the prior claim arose from the same circumstances, and concluded in the affirmative. Although the claims in each case did not overlap perfectly, the two cases arose from the same general circumstances. *Id*. at 747. Pointing out facts that somewhat or partially distinguished the two cases was a "fruitless exercise." *Id*. Similarly, in *Realcomp II, Ltd. v. Ace Am. Ins. Co*., 46 F. Supp. 3d 736, 743–44 (E.D. Mich. 2014), the Court reviewed a similarly-worded exclusion of "any claim based upon, arising out of, in consequence of, or in any way involving: (1) Any prior and/or pending litigation as of the inception of this insurance [. . .]; or (2) Any fact, circumstance or situation underlying or alleged in such litigation." It found the exclusion to be unambiguous and the prior action to be based on the same facts, circumstances or situations as alleged in the new litigation. *Id*. at 744.

Miami-Luken raises several arguments against application of the SLE that the Court finds unpersuasive. First, Miami-Luken contends that the SLE applies only to the West Virginia Lawsuit itself or an addition to the West Virginia Lawsuit. The Court disagrees. The plain language of the SLE demonstrates this cannot be so, as it provides for excluding the "[a]ction brought by the Attorney General of the State of West Virginia ***or*** the same or substantially the same facts, circumstances or allegations which are the subject of or the basis for such proceeding(s)." (Doc. 1-1 at PageID 55 (emphasis added).) The inclusion of "or" makes clear

that the SLE is not limited to the West Virginia Lawsuit and, as here, was intended to preclude coverage for similar allegations as those raised by the West Virginia Lawsuit.[11]

Second, it argues that the SLE's heading, "Specific Litigation Exclusion," limits the SLE to civil "litigation." A "Claim" is defined as "[a] civil, criminal, or administrative or arbitration proceeding."[12] (Doc. 1-1 at PageID 12–13.) The heading of the SLE references only "litigation," and the only "litigation" specifically excluded is that which is identified as the "[a]ction brought by the Attorney General of the State of West Virginia." (*Id*. at PageID 55.) Thus, Miami-Luken contends that the SLE does not specifically exclude the Order to Show Cause, which is an administrative proceeding and covered "Claim." The Court disagrees. The Court does not read the policy so narrowly as Miami-Luken. The SLE makes no distinction between administrative proceedings and civil proceedings. Moreover, the Policy also includes a statement that "[t]he headings of the various sections of this Policy are intended for reference only and are not to form the parts of the terms and conditions of coverage." (*Id*. at PageID 20.) The Ohio Supreme Court has also stated that the title of an insurance policy is not determinative of the type of coverage provided. *See Hillyer v. State Farm Fire & Cas. Co.*, 97 Ohio St. 3d 411, 414, 780 N.E.2d 262, 265 (2002) ("We look at the contents of the policies for the type of coverage they provide.") Thus, by the terms of the Policy itself, the heading does not define the coverage.

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[11] Furthermore, limiting coverage to just the West Virginia Lawsuit defies logic as another insurance policy covered that claim.

[12] The full definition of "Claim" is:

> 1. A written demand for monetary or non-monetary relief made against any **Insured**;
> 2. Any written request for any **Insured** to toll or waive any potentially applicable statute of limitations; or
> 3. A civil, criminal, administrative or arbitration proceeding brought against any **Insured** seeking monetary or non-monetary relief and commenced by the service of a complaint or similar pleading, the return of an indictment or criminal information, or the receipt or filing of notice of charges or similar document.

(Doc. 1-1 at PageID 12–13) (emphasis in original).

Third, Miami-Luken argues that the Order to Show Cause is not based upon, does not arise out of, relate to, directly or indirectly result from, is not inconsequence of, or in any way involve the West Virginia Lawsuit. It argues that the two are different because they concern different plaintiffs and different harms. In so arguing, Miami-Luken contends the Court should disregard the *LaValley* and *Realcomp* cases because they were "prior notice" and "prior litigation" exclusions, not "specific litigation exclusions." The Court disagrees. The plain language of the SLE contemplates different parties or legal theories with the inclusion of "facts, circumstances, ***or*** allegations." And although Miami-Luken attempts to distinguish *LaValley* and *Realcomp*, the Court finds them relevant and helpful authority. As Navigators points out, these decisions are instructive because the courts excluded coverage for claims that "arose from" or were "based upon" the same facts, circumstances, or allegations of a prior claim; thus the courts conducted a similar comparison analysis as is required here.

Fourth, Miami-Luken argues that construing the SLE as broadly as Navigators argues would render any Claim it could conceivably bring excluded, because any similar proceeding against Miami-Luken could arguably be related to or involve distribution of controlled substances. It contends that enforcing such a broad exclusion would swallow up coverages, as in *Owens Corning v. National Union Fire Insurance Co. of Pittsburgh, PA.*, No. 97-3367, 1998 WL 774109 (6th Cir. 1997). In that case, the Sixth Circuit Court of Appeals reversed the district court's ruling that an asbestos exclusion barred coverage for a securities class-action suit in which the key allegation was that directors and officers of the company deceived investors regarding financial security of the company. *Id*. at *3–4. The Court of Appeals found the claim was not based upon and did not arise out of the use of asbestos to trigger the exclusion. *Id.* at *4–6. In construing whether the claim was "related to" the use of asbestos, the Court found that

the loose tie required to connect the claim to the exclusion would "effectively bar all shareholder derivative suits and class action suits under the Policy" because the business concerns the sale of asbestos and asbestos-containing products. *Id*. at *6. Thus, any lawsuit against the company could "relate to" asbestos, and, as such, the Court gave the language no effect. *Id.*

Finding coverage here would not effectively bar any suit brought against Miami-Luken. The connection between the facts and circumstances of the Order to Show Cause and West Virginia Lawsuit is not attenuated as was the connection between asbestos litigation and a derivative class-action suit in *Owens*. As described above, in this case, the facts and circumstances between the exclusion and Order to Show Cause overlap extensively and are substantially similar. Furthermore, as Navigators points out, Miami-Luken distributes non-controlled substances, over-the-counter medications, durable medical equipment, candy, and snack foods, operates a chain of retail pharmacies, and provides specialized software development and sales. (Faul Dep., Doc. 51 at PageID 1221, 1236; Doc. 53 at PageID 2081; Application, Doc. 51-10 at PageID 1655.) Unlike in *Owens*, where the entire business would "relate to" asbestos, here, the entire business does not "relate to" controlled substances. And in any event, the language of the SLE does not exclude all claims related to controlled substances – the exclusion is narrower and tied specifically to the West Virginia Lawsuit. Thus, the Policy provides coverage to Miami-Luken beyond its prescription drug business and is not illusory. *See Collins v. Auto-Owners Ins. Co.*, 80 N.E.3d 542, 552, 2017-Ohio-880, ¶ 28 (Ohio App. 2017) ("[W]here there is some benefit to an insured through an insurance policy, it is not illusory.")

Fifth, Miami-Luken argues that the allocation provision applies here. It provides:

> If a **Claim** made against any **Insured** includes both covered and uncovered matters, or is made against any **Insured** and others, the **Insureds** and the Insurer recognize that there must be an allocation between **Loss** and uninsured damages, settlement amounts and other liabilities in connection with such **Claim**. The

> **Insureds** and the Insurer will use their best efforts to agree upon a fair and proper allocation. If no agreement can be reached, the Insurer will advance **Costs of Defense** based on what it believes is a fair and a proper allocation until such time as the issue can be resolved.

(Doc. 1-1 at PageID 15) (emphasis in original). Miami-Luken argues that there is a dispute of material fact on the issue of allocation between insured claims and uninsured claims, because of a clear difference between the allegations in the West Virginia Lawsuit and the Order to Show Cause. That is, the Order to Show Cause is broader than the West Virginia Lawsuit. It contends that if the Complaint contains multiple allegations, but only one triggers the duty to defend, the insurer must defend the entire action. The Court disagrees, as so finding would be inconsistent with the very terms of the SLE. Finding that the SLE applies, there is no covered and uncovered matter for which allocation would apply under the Policy.

IV. Conclusion

This is a clear-cut case of insurance contract interpretation. The undisputed facts and application of the law establish that the SLE bars coverage here. As such, Defendant's Motion for Summary Judgment (Doc. 54) is **GRANTED**, and Plaintiff's Motion for Summary Judgment (Doc. 53) is **DENIED**.

IT IS SO ORDERED.

__s/Susan J. Dlott_____
Judge Susan J. Dlott
United States District Court