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SunTrust Banks, Inc., et al., Order on Motion for Partial Judgment on the Pleadings

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Fulton County Superior Court

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SunTrust Banks, Inc., SunTrust Bank, SunTrust Investment Services, Inc., SunTrust Mortgage, Inc., SunTrust Robinson Humphrey, Inc., and SunTrust Robinson Humphrey Funding, LLC,	)	
Plaintiffs,	)	**Civil Action File No. 2014CV249230**
v.	)	
Certain Underwriters at Lloyd's London Subscribing to Policy Numbers, *et al.*	)	
Defendants.	)	

Order on Motion for Partial Judgment on the Pleadings

In its Amended Complaint filed September 3, 2014, SunTrust raises breach of contract claims and seeks declaratory judgment against various insurers (the "Defendant Insurers") that provided primary and excess coverage for professional liability. SunTrust asserts that the insurance providers must compensate it for losses resulting from 200 claims filed against it.

I. The Pleadings

a. The 200 Claims Against SunTrust

SunTrust asserts that the 200 claims fall into four categories of interrelated claims: (1) ARS Claims, (2) Underwriting Claims, (3) Foreclosure Claims, and (4) the DOJ HAMP Claim.[1] According to SunTrust's Amended Complaint, the DOJ HAMP Claim involves allegations that SunTrust did not properly administer the Home

[1] In its Original Complaint, SunTrust asserted that there were only three categories of claims—ARS Claims, Underwriting Claims, and the Mortgage Servicing Claims (which included the DOJ HAMP claim). The Amended Complaint splits the Mortgage Servicing Claims into two separate categories—the Foreclosure Claims and the DOJ HAMP Claim.

Affordable Modification Program ("HAMP"). HAMP was launched in 2009. Under HAMP, homeowners can refinance their loans owned by U.S. government agencies like Fannie Mae and Freddie Mac and serviced by banks like SunTrust to reduce their payments to 31% of their monthly gross income. On November 15, 2010, the U.S. Attorney's Office ("USAO") issued a subpoena (the "USAO Subpoena") asking SunTrust for information about two of its customers' mortgages dating back to January 1, 2000. The USAO Subpoena sought documents related to payment and invoicing information, the actual and beneficial owners of the loans, including servicers, originators, trustees, and custodians of the loans, applications for mortgage modification programs, and preparation or projections for foreclosure. The USAO Subpoena also asked for more general information related to SunTrust's implementation of HAMP, including guidelines, policies, and procedures for implementing the HAMP trial period and reports on customer admission into, rejection from, or completion of the program. After a four year investigation, the USAO and SunTrust entered into a Restitution and Remediation Agreement (the "Settlement Agreement"). The Settlement Agreement's Statement of Facts outlines allegations related to "complaints that [SunTrust] misled homeowners who sought mortgage relief from SunTrust through [HAMP]" from March 2009 through at least December 2010.

The Foreclosure Claims brought against SunTrust stem from mortgage foreclosures when SunTrust did not hold title, improper use of Mortgage Electronic Registration Systems (MERS), and failure to timely foreclose. SunTrust classifies the

Mosqueda claim,[2] the DOJ/AG National Mortgage Servicing claim, GSE Compensatory Fee Assessment Claims, and the Federal Reserve Foreclosure Consent Order and Amendment as related "Foreclosure Claims."

The Underwriting Claims (also known as the "Subprime" or "Credit Crisis Claims") stem from SunTrust's underwriting of subprime loans, disclosures to mortgage-backed securities ("MBS") investors and issuers, and investment in MBS. SunTrust classifies the GSE Repurchase/Indemnification Demands from agencies like Fannie Mae and Freddie Mac, Atl-A residential MBS claims, the DOJ-HUD FHA Loan Origination Claim, the DOJ Fair Lending Claim, Lehman Bros. Claims, the Metro Bank Arbitration, and ERISA claims as related "Underwriting Claims."

The 2010-2011 Insurers claim that they do not have sufficient evidence to agree with SunTrust's classification of purportedly related claims. The classification of the claims is critical because SunTrust and the Defendant Insurers dispute when coverage for the claims was triggered and, as a result, which policies cover the claims.

b. The Insurance Policies

All of the primary insurance policies relevant to this case provide "claims made" coverage, not occurrence coverage. Under "claims made" policies, a claim is insurable when SunTrust is first put on notice of the claim or the likelihood of a claim against it, not when the wrongful act occurred. Additionally, all of the primary policies include provisions under which interrelated claims are aggregated and considered a single loss.

[2] The *Mosqueda* claim was a lawsuit filed against SunTrust alleging wrongful foreclosure. SunTrust asserts that this claim was the first of the related claims it calls "Foreclosure Claims."

That single loss would be covered by the policy in effect when the first claim of the interrelated claims was noticed.

Primary coverage was provided by Lloyd's from 2005-2006, 2006-2007, and 2007-2008 (with all policies starting on October 1) and by Indian Harbor for 2010-2011. The 2010-2011 Indian Harbor Policy, in Section 4 of the General Terms and Conditions, states that:

> [A]ll Claims that arise from. . .Wrongful Acts[3] or Wrongful Employment Acts that are logically or causally connected by reason of any fact, circumstance, situation, transaction or event, shall be considered a single Claim, and shall be subject to only one retention amount, irrespective of the number of claimants. Such Claims shall be deemed to be first made on the date the first such Claim is made or deemed to be made pursuant to Section 15 of the General Terms and Conditions Section of this policy, regardless of whether such date is before or during the Policy Period.

See also Section V.(2) of the Coverage Section of the policy mirroring the language found in Section 4 of the General Terms and Conditions) (collectively, the "Interrelatedness Clauses"). The Policy also bars coverage for any claim:

> based on or arising out of any actual or alleged facts, circumstances or situations in respect of which the Insured, prior to the inception date of this policy, has given written notice under any policy providing the same type of coverage as this coverage section and of which this coverage section is a renewal or replacement.

Indian Harbor's Financial Institution Professional Liability, § C.VI. (A) (the "Prior Notice Exclusion").

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[3] The Indian Harbor policy defines "Wrongful Act" as "any actual or alleged act, omission, misstatement, or misleading statement, committed by any Insured, or by any person for whom the Insured is legally responsible in the rendering of or failure to render Professional Services or the performance of Lending Acts."

The excess insurer policies in effect in 2010-2011[4] have a "follow form" provision that incorporates most of the Indian Harbor provisions, including the Interrelatedness Clauses and the Prior Notice Exclusion.

c. The First Notice of Claim for Each Purported Category of Related Claims.

SunTrust asserts that a May 31, 2006 Cease and Desist Letter from the SEC triggered coverage for the ARS Claims. This is not disputed. Next, SunTrust asserts that a subpoena from the New York Attorney General on May 10, 2007 ("NYAG Subpoena") triggered coverage for the Underwriting Claims. The NYAG Subpoena requested a broad range of documents from SunTrust related to the placement of borrowers in prime and sub-prime mortgage loans, the payment of commissions to employees, appraisers, brokers, and real estate agents, promises to refinance, and verification of borrower's income. SunTrust asserts the filing of the *Mosqueda* claim for wrongful foreclosure on September 17, 2008 triggered coverage for the Foreclosures Claims. Finally, SunTrust asserts that the USAO Subpoena triggered coverage for the DOJ HAMP claim.[5] As a result, SunTrust's position is that the ARS Claims fall under the 2005-2006 policies, the Underwriting Claims fall under the 2006-2007 Policies, the Foreclosure Claims fall under the 2007-2008 policies, and the DOJ HAMP Claim falls under the 2010-2011 policies.

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[4]The 2010-2011 excess insurers include: ACE GM (Lloyd's Syndicate 2488); ACE; Axis Insurance; Chubb; St. Paul Mercury; Hartford; and US Specialty. While three other insurers provided excess coverage during this policy period (Axis Specialty Limited, Alterra, and AWAC), these insurers have been dismissed without prejudice by SunTrust due to alternative dispute resolution provisions.
[5] The NYAG Subpoena and the USAO Subpoena are attached to the Complaint; the *Mosqueda* Complaint is not.

For the purposes of this Motion, SunTrust's main argument is that the DOJ HAMP Claim could not have been noticed by the events triggering the Underwriting Claims or the Foreclosure Claims because the HAMP program was not established at the time those events occurred. In contrast, the Defendant Insurers under the 2010-2011 policies (the "2010-2011 Insurers") argue that the DOJ HAMP Claim is potentially interrelated to the Underwriting Claims and the Foreclosure Claims, and therefore could be covered under prior policies. The 2010-2011 Insurers assert that discovery is required to determine if the Wrongful Acts giving rise to the DOJ HAMP Claim is "logically or causally connected by reason of any fact, circumstance, situation, transaction or event" to Wrongful Acts that form the basis of the prior claims. In their Answers, the 2010-2011 Insurers denied SunTrust's assertion in Paragraph 85 of its Complaint that the "allegations of the DOJ HAMP Claim are based solely on SunTrust's implementation of the HAMP program and have nothing to do with the mortgage origination and securitization conduct that is the basis for the Underwriting Claims."

II. Legal Standard for Judgment on Pleadings

SunTrust seeks a determination as a matter of law that the DOJ HAMP Claim is not interrelated with the other claims, and asks for entry of an Order establishing that the DOJ HAMP Claim is not barred by the prior notice exclusion in the 2010-2011 Policies; are not interrelated to the 2007 NYAG Subpoena; and are properly governed by the 2010-2011 Policies. Judgment on the pleadings in favor of the plaintiff is proper when undisputed facts in the pleadings entitle the plaintiff to judgment as a matter of law. *Rolling Pin Kitchen Emporium. Inc. v. Kaas*, 241 Ga. App. 577, 577(2) (1999); *see*

also Ga. Farm Bureau Mut. Ins. Co. v. Croft, 322 Ga. App. 816, 817 (2013) (a motion for judgment on the pleadings should be denied unless there has been "a complete failure to state a defense to the plaintiff's claims and, based on the undisputed facts found in the pleadings, the plaintiff is entitled to judgment as a matter of law."). "[A]ll well-pleaded material [factual] allegations of the opposing party's pleading are to be taken as true, and all [factual] allegations of the moving party which have been denied are taken as false." *Rolling Pin Kitchen Emporium Inc.* at 577(2) (citing *Morgan v. Wachovia Bank*, 237 Ga. App. 257, 258(2) (1999)). The Court may consider exhibits to the complaint or answer. *Lapolla Indus. Inc. v. Hess*, 325 Ga. App. 256, 262 (2013).

III. Law and Analysis

In Georgia, "[a]ny ambiguities in the contract are strictly construed against the insurer as drafter of the document, any exclusion from coverage sought to be invoked by the insurer is likewise strictly construed, and insurance contracts are to be read in accordance with the reasonable expectations of the insured where possible." *ALEA London Ltd. v. Woodcock*, 286 Ga. App. 572, 576 (2007) (citations omitted). "Where an insurance contract provision is clear and unambiguous, its interpretation is a matter for the court." *First Specialty Ins. Corp. v. Flowers*, 284 Ga. App. 543, 545 (2007) (quoting *Southern v. Sphere–Drake Ins. Co.*, 226 Ga. App. 450, 451 (1997). "[I]f the policy exclusions are unambiguous they must be given effect even if beneficial to the insurer and detrimental to the insured. *Id.* Here, the terms of the policies are clear and unambiguous. If a new claim is interrelated to a prior claim because it "arise[s] from the same Wrongful Act or Wrongful Employment Act or Wrongful Acts or Wrongful

Employment Acts that are logically or causally connected by reason of any fact, circumstance, situation, transaction or event" it is covered under the policy in effect when the first claim was noticed. If a new claim is "based on or arising out of any actual or alleged facts, circumstances or situations" in the prior claim, the current insurer's policy bars coverage for that new claim.

SunTrust cites a line of persuasive cases in which courts have determined interrelatedness questions on motions for judgment on the pleadings. For example, in a case brought against an insurer in the U.S. District Court for the Southern District of New York, the court found that claims brought by investment clients of a failed bank (the Kingsley claims) against former board members of that bank were not interrelated with claims brought earlier by the FDIC because they lacked a sufficient factual nexus. See *Glascoff v. OneBeacon Midwest Ins. Co.*, No. 13 Civ. 1013(DAB), 2014 WL 1876984 (S.D.N.Y. May 8, 2014). The Kingsley claims asserted that the board did not properly oversee Antonucci, the bank's President, CEO, and a director, and failed to provide sound corporate governance. *Id.* at *3. The FDIC claims asserted that the board did not act on allegations of improper conduct by Antonucci and failed to supervise or direct the business of the bank in compliance with the law and regulatory authorities. *Id.* at *2. The court noted that, "broadly construed," the claims were "interrelated to the extent that they all involve allegations of wrongdoing of one sort or another and relate, in some way to the demise of the company," but noted that the factual overlap was "tenuous at best." *Id.* at *6. The Court noted that "it would be hard to envision, given the broad and generalized allegations in the FDIC Claim, how any subsequent claim against Plaintiffs

would not be deemed an Interrelated Wrongful Act" which would provide more insurance coverage than the plaintiff board members bargained for. *Id.* at *7. SunTrust also relies on the *Zahler* decision out of the same court. See *Zahler v. Twin City Fire & Ins. Co.*, No. 04 Civ. 10299(LAP), 2006 WL 846352 (S.D.N.Y. Mar. 31, 2006). In the *Zahler* case, the court did a side-by-side comparison of two complaints—a securities fraud class action arising out of alleged misstatements in public filings made by company officers that misled investors regarding the company's financial health and an ERISA class action bringing claims that the same officers breached their fiduciary duties by making those same misstatements. *Id.* at *1-2. The court determined as a matter of law that the ERISA litigation was "predicated on alleged wrongful acts that are identical or closely related to those alleged in the Securities Litigation" and therefore the claims were interrelated for purposes of insurance "claims made" coverage. *Id.* at *8. SunTrust also relies on cases in which the Defendant Insurers have themselves sought and have been granted a judgment as a matter of law as to the interrelatedness of claims. See, e.g. *Fed. Ins. Co. v. Raytheon Co.*, 426 F.3d 491 (1st Cir. 2005) (affirming trial court's granting of the motion for judgment on the pleadings filed by Federal, a defendant in the instant case, and finding substantial factual overlap between securities litigation and ERISA case).

In contrast, Indian Harbor cites "claims made" insurance coverage cases in which the Courts allowed discovery before deciding whether claims were interrelated on summary judgment. See *Simpson v. Creasy v. Continental Cas. Co.*, No. CV409-202, 2012 WL 5389818 (S.D. Ga. Oct. 31, 2012) (deciding on summary judgment that claims

against an attorney by former client were related to prior claims as the allegations were logically and causally stemming from the attorney's common underlying course of conduct in representing his client in a range of business endeavors); *Philadelphia Indem. Ins. Co. v. ACGO Corp.* No. 1:10-cv-4148-TWT, 2012 WL 1005030 (N.D. Ga. Mar. 23, 2012) (deciding on summary judgment that claims brought against a warranty provider were previously noticed when equipment manufacturer threatened lawsuit if warranty provider did not pay pending warranty claims); *Brecek & Young Advisors, Inc*, No. 09-2516-JAR, 2011 WL 1060955 (D. Kan. Mar. 21, 2011) (finding on summary judgment that 26 claims were related because they all alleged that company did not supervise Ohio brokers that were churning or flipping annuities during a certain time period).

As made clear by the cases cited by both parties, the Court must compare the facts and circumstances underlying both the prior claims and the current claims to determine interrelatedness. The 2010-2011 Insurers primarily argue primarily that the Court should first allow discovery into the facts underlying the claims made prior to the Indian Harbor policy's issuance so it can determine whether the DOJ HAMP Claim is interrelated to prior claims. Indian Harbor notes that it did not receive prior notice of claims that went to the prior primary carrier, Lloyds, and therefore cannot determine the factual basis of the prior Foreclosure Claims and Underwriting Claims until it has had an opportunity to conduct discovery into all 200 claims. The 2010-2011 Insurers argue that they cannot tell if the DOJ HAMP Claim and prior claims "arise from the same Wrongful Act . . . that are logically or causally connected by reason of any fact, circumstance,

situation, transaction or event," and discovery is necessary to uncover any factual nexus that may exist between claims. The Court agrees that discovery into the prior claims' underlying "facts, circumstances, and situations" is warranted before an interrelatedness determination can be made.

SunTrust argues that the HAMP DOJ Claim cannot be interrelated to prior Wrongful Acts under any set of facts that could be discovered because the HAMP program was not in existence until 2009, and therefore, they could not have had prior notice of violations of HAMP during prior policy years. However, without the prior claims before the Court, it is impossible to say at this stage in the litigation if the DOJ HAMP Claim is logically or causally connected through any fact, circumstance or situation to prior claims. The fact that SunTrust's more recent wrongful acts violate the requirements of the newly enacted HAMP program does not preclude the possibility that the facts and circumstances underlying these wrongful acts and the prior wrongful acts are logically or causally connected. The only information about the prior wrongful acts included in the pleadings is the NYAG Subpoena which requests a very broad range of documents related to SunTrust's mortgage servicing and underwriting. Without more information about the prior claims, it is impossible at this stage in the litigation to determine interrelatedness.

Even without the benefit of discovery, Indian Harbor relies on the pleadings to show that there is enough evidence of common facts and circumstances to prevent an interrelatedness determination based solely on the pleadings. First, Defendant Insurers point out that they denied the allegation in the complaint that the DOJ HAMP Claim is

"based solely on SunTrust's implementation of the HAMP program." Next, Defendant Insurers note that SunTrust, in its Original Complaint, asserted that the DOJ HAMP Claim involved systemic mortgage servicing problems that were logically or causally connected to the claims brought in the *Mosqueda* Claim which SunTrust now classifies as a Foreclosure Claim. Finally, Defendant Insurers point to statements in the exhibits to the pleadings to show that the DOJ HAMP Claim is related to the prior claims. For instance, Defendant Insurers point out that the NYAG Subpoena requested a broad range of documents related to loan servicing in general, and wrongful acts in loan servicing were again at issue in the DOJ HAMP Claim. Because all denied allegations of the moving party are taken as false as a matter of law, the Court cannot say that the DOJ HAMP Claim is unrelated to prior claims that Defendant Insurers would more generally classify as "credit crisis claims." See *Rolling Pin Kitchen Emporium Inc., supra*. Further, since the Court will allow discovery and since Defendant Insurers are not moving for a determination as a matter of law that the claims are interrelated, there is no reason at this time to discuss any purported evidence of interrelatedness within the pleadings and exhibits thereto.

IV. Conclusion

In sum, Defendant Insurers are entitled to discovery as to the prior governmental investigations and claims before this Court can determine the interrelatedness of the DOJ HAMP Claim to prior claims. The motion for Partial Judgment on the Pleadings is **DENIED.**

SO ORDERED this 6th day of October, 2015.

ALICE D. BONNER, Senior Judge
Superior Court Business Case Division
Atlanta Judicial Circuit
(With permission by Judge John J. Goger)