UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:23-CV-01218-CAS (AFMx)	Date	June 20, 2023
Title	SKYE BIOSCIENCE, INC. V. PARTNER RE IRELAND INSURANCE DAC		

Present: The Honorable	CHRISTINA A. SNYDER	
Catherine Jeang	Not Present	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (IN CHAMBERS) - MOTION TO DISMISS (Dkt. 15, filed on APRIL 17, 2023)

I. INTRODUCTION

On February 17, 2023, plaintiff Skye Bioscience, Inc. ("Skye") filed this action against defendant PartnerRe Ireland Insurance DAC ("PartnerRe"), bringing claims for (1) breach of contract; (2) tortious breach of the implied covenant of good faith and fair dealing; and (3) declaratory relief. Dkt. 1 ("Compl."). Skye is a biopharmaceutical company incorporated in Nevada and with its principal place of business in California. Id. ¶ 4. PartnerRe is an insurance company based in Dublin, Ireland. Id. ¶ 5. PartnerRe issued an insurance policy to Skye for the period of December 31, 2018, to December 31, 2020. Id. ¶ 6. Skye's allegations arise out of PartnerRe's refusal to reimburse Skye for costs Skye incurred defending a lawsuit filed by a former Skye employee. See generally, Compl. The Court has subject matter jurisdiction to hear this case pursuant to 28 U.S.C. § 1332 based on complete diversity of citizenship between the parties and because the amount in controversy exceeds $75,000. Id. ¶ 2.

On April 17, 2023, PartnerRe filed a motion to dismiss Skye's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Dkt. 15 ("MTD"). On May 10, 2023, Skye filed an opposition to PartnerRe's motion to dismiss. Dkt. 16 ("Opp."). On May 26, 2023, PartnerRe filed a reply in support of its motion. Dkt. 17 ("Reply").

On June 12, 2023, the Court held a hearing on PartnerRe's motion to dismiss. PartnerRe's motion to dismiss is presently before the Court. Having carefully considered the parties' arguments and submissions, the Court finds and concludes as follows.

II. BACKGROUND

A. The Policy

PartnerRe issued an insurance policy referred to as Directors, Officers and Company Liability Policy No. B0621PNEMU000218 ("the policy") to Skye for the period of December 31, 2018, to December 31, 2020. Compl. ¶ 6. The policy was delivered to Skye in California. Id. ¶ 3. The policy provides that PartnerRe is obligated to pay $5,000,000 in aggregate, subject to a retention of $250,000 per claim, on behalf of Skye to cover losses "resulting from any Securities Claim first made against the Company during the [p]olicy [p]eriod for a Wrongful Act." Id. ¶¶ 6,7; dkt. 1-1 at 9. The policy defines a "Securities Claim" as follows:

> [A]ny demand or proceeding described in Clause II.B.1. against any of the Insureds. . . alleging any violation of the Securities Act of 1933, the Securities Exchange Act of 1934, rules or regulations of the Securities and Exchange Commission under either or both Acts, similar securities laws or regulations of any federal, state (including any blue sky laws), local or any foreign jurisdiction, any other laws, rules, regulations or statutes regulating securities or any common law arising out of, involving, or relating to the ownership, purchase, sale or distribution of or offer to purchase, sell or distribute any securities of the Company, including any debt or equity securities, whether on the open market or through a public or private offering.[1]

Dkt. 1-1 at 49. Wrongful Act is defined as "any actual or alleged act, error, omission, misstatement, misleading statement, neglect or breach of duty . . . by [Skye] involving a Securities Claim." Id. at 18.

B. Filing of the Cunning Lawsuit

On or about August 6, 2019, during the policy period, Skye received a demand letter from counsel for a former Skye employee, Wendy Cunning. Compl. ¶ 14. While employed at Skye, Cunning resided and worked in California, where Skye's principal place of business is located. Dkt. 1-2 ¶¶ 1, 7. In the demand letter, Cunning alleged that

[1] The definition of "Securities Claim" excludes administrative and regulatory proceedings. Dkt. 1-1 at 49.

she had been wrongfully terminated after she complained about Skye's misconduct, including various violations of federal securities laws. Compl. ¶ 14. She alleged that her termination amounted to retaliation in violation of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204 ("Sarbanes-Oxley") and other federal and state laws. Id. All of the events giving rise to Cunning's allegations occurred in Los Angeles County, including Skye's alleged misconduct, Cunning's reporting of the misconduct, and her termination. Dkt. 1-2 ¶ 7.

Cunning sought payment from Skye to compensate her for Skye's alleged misconduct. Compl. ¶ 14. On or about September 12, 2019, Skye reported Cunning's demand letter to PartnerRe, seeking coverage under the policy. Id. ¶ 15. According to Skye, PartnerRe acknowledged that Cunning's demand could be a covered claim under the policy. Id.

On April 16, 2021, Cunning filed a lawsuit (the "Cunning Lawsuit") against Skye in the United States District Court for the Central District of California. Id. ¶ 16. Her complaint reiterated the allegations in her demand letter and brought claims for relief for (1) violation of whistleblower protections under the Sarbanes-Oxley Act, 18 U.S.C. § 1514A *et seq.*; (2) retaliation under California Labor Code § 1102.5; (3) wrongful termination in violation of public policy; and (4) intentional infliction of emotional distress. Id. On November 29, 2021, Cunning filed a First Amended Complaint, which dropped her third and fourth claims but was otherwise substantially similar to the original complaint. Id. ¶ 18.

As relevant here, Cunning specifically alleged that Skye, through a former company director, engaged in "conduct – [including] misleading investors and insider trading – [that constituted] violations of [the Sarbanes-Oxley Act of 2002], securities laws and other possible legal violations." Id. ¶ 18. The complaint further states as follows:

> Plaintiff engaged in activity protected under [Sarbanes-Oxley] by complaining about and protesting [Skye's] conduct which she reasonably believed constituted a violation of [Sarbanes-Oxley], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal Law relating to fraud against shareholders and potential investors. These included but are not limited to, violating SEC Rule 10-b5, 17 CFR § 240.10b-5 (prohibiting misrepresentations or omissions made in connection with the sale of a security and prohibiting insider

> trading), and violating [Sarbanes-Oxley] sections 302, 15 U.S.C. § 7241 and 404, 15 U.S.C. § 7262 (prohibiting filing of financial reports with the SEC that contain material untrue or misleading statements).

Id., Exh. B ¶ 37.

C. PartnerRe's Denial of Coverage

Skye reported the Cunning Lawsuit to PartnerRe and sought coverage under the policy. Id. ¶ 20. Skye contended that the Cunning Lawsuit constitutes a Securities Claim alleging Wrongful Acts under the policy, and, therefore, losses resulting from it should be covered by PartnerRe. Id. ¶ 21. According to Skye, "PartnerRe unreasonably and incorrectly denied coverage" "based . . . on an unreasonably narrow interpretation of the phrase 'Securities Claim,' contrary to its duties under the [p]olicy and the law." Id.

Because PartnerRe denied coverage, Skye funded its own defense of the Cunning Lawsuit. Id. ¶ 23. As of the filing of Skye's complaint, Skye had paid approximately $1,443,205 in defense fees and costs. Id. On January 18, 2023, following a jury trial, a jury rendered a verdict in favor of Cunning, awarding her $4,853,460 in damages. Id. ¶ 25. The Cunning Lawsuit is ongoing, as the parties are filing post-trial motions, and Skye continues to incur legal fees and costs in connection with its defense. Id. ¶¶ 23, 25.

Skye alleges that, in addition to breaching its contractual duty to provide coverage, ParterRe "breached its implied covenant of good faith and fair dealing and acted in bad faith." Id. ¶ 36. Specifically, Skye alleges that PartnerRe failed to promptly conduct a full and thorough investigation of the Cunning Lawsuit; failed to inquire into bases that might support coverage; unreasonably failed and refused to honor its representations and promises; unreasonably asserted grounds for denying coverage contrary to the terms of the policy, the law, insurance customs and practice, and the facts; and gave greater consideration to its own interests than it gave to Skye's interests. Id. According to Skye, PartnerRe committed these acts "for the purpose of consciously withholding from Skye the rights and benefits to which it is and was entitled under the [p]olicy." Id. ¶ 37.

III. LEGAL STANDARD

A motion pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in a complaint. Under this Rule, a district court properly dismisses a claim if "there is a 'lack of a cognizable legal theory or the absence

of sufficient facts alleged under a cognizable legal theory.'" Conservation Force v. Salazar, 646 F.3d 1240, 1242 (9th Cir. 2011) (quoting Balisteri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988)). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). "[F]actual allegations must be enough to raise a right to relief above the speculative level." Id.

In considering a motion pursuant to Rule 12(b)(6), a court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from them. Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998). The complaint must be read in the light most favorable to the nonmoving party. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). However, "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009); see Moss v. United States Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) ("[F]or a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief."). Ultimately, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 556 U.S. at 679.

Unless a court converts a Rule 12(b)(6) motion into a motion for summary judgment, a court cannot consider material outside of the complaint (*e.g.*, facts presented in briefs, affidavits, or discovery materials). In re American Cont'l Corp./Lincoln Sav. & Loan Sec. Litig., 102 F.3d 1524, 1537 (9th Cir. 1996), rev'd on other grounds sub nom Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998). A court may, however, consider exhibits submitted with or alleged in the complaint and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999); see Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001).

As a general rule, leave to amend a complaint which has been dismissed should be freely granted. Fed. R. Civ. P. 15(a). However, leave to amend may be denied when "the

court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986).

IV. DISCUSSION

A. Breach of Contract Claim

1. Choice of Law

As set forth in full in Part IV.B.1 below, the policy contains a choice-of-law provision stating that the insurance policy "shall be governed by and construed in accordance with the laws of New York." Dkt. 1-1 at 1, 7. The parties agree that New York law applies to the breach of contract claim and that there is no conflict between New York and California law as to the breach of contract claim because New York and California law are materially similar in the relevant respects. See MTD at 7; Opp. at 11. See also Travelers Cas. Ins. Co. v. Geragos & Geragos, 2021 WL 1659844, at *3 (C.D. Cal. Apr. 27, 2021) (finding no "meaningful distinction" between California and New York rules for interpreting insurance policies). Accordingly, the Court analyzes interprets the policy under New York law.

2. Principles of Insurance Policy Interpretation and Duties of Insurers

"Insurance policies are contracts to which the ordinary rules of contractual interpretation apply." David Lerner Assocs., Inc. v. Philadelphia Indem. Ins. Co., 934 F. Supp. 2d 533, 540 (E.D.N.Y. 2013), aff'd 542 Fed. App'x 89 (2d Cir. 2013). Thus, "[a] court resolving a dispute over insurance coverage must start with the language of the policy. Hanover Ins. Co. v. Weirfield Coal, Inc., 474 F. Supp. 3d 564, 569 (E.D.N.Y. 2020). "[T]he precise contours of an insurer's duties . . . ultimately depend upon the specific text of the parties' policy." Harper Constr. Co., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 377 F. Supp. 3d 1134, 1142 (S.D. Cal. 2019). Under both New York and California law, the interpretation of an insurance policy is a question of law. See Waller v. Truck Ins. Exch., Inc., 11 Cal. 4th 1, 18 (1995); Hanover, 474 F. Supp. 3d at 569.

Courts must "give effect to the intent of the parties as expressed in the clear language of the [insurance] contract." Mount Vernon Fire Ins. Co. v. Belize NY, Inc., 277 F.3d 232, 236 (2d Cir. 2002). Contract language is to be interpreted "in light of 'common speech' and the reasonable expectations of a businessperson." Belt Painting

Corp. v. TIG Ins. Co., 100 N.Y. 2d 377, 383 (2003). Unambiguous provisions are given "their plain and ordinary meaning." Fed. Ins. Co. v. Am. Home Assurance Co., 639 F.3d 557, 567 (2d Cir. 2011). Where the language is "doubtful or uncertain in its meaning, any ambiguity will be construed in favor of the insured and against the insurer." Lee v. State Farm Fire & Cas. Co., 32 A.D. 3d 902, 904 (N.Y. 2006).

As is the case under California law, under New York law "[a]n insurer has distinct duties to indemnify and to defend its insured" in connection with claims covered by the governing policy. Atlantic Cas. Ins. Co. v. Value Waterproofing, Inc., 918 F. Supp. 2d 243, 252 (S.D.N.Y. 2013). "The duty to defend is broader than the duty to indemnify." Id. (citing Fieldston Prop. Owners Ass'n, Inc. v. Hermitage Ins. Co., Inc., 16 N.Y. 3d 257, 264 (2011). While the duty to defend "is measured against the allegations of pleadings," "the duty to [indemnify] is determined by the actual basis for the insured's liability to a third person." Servidone Const. Corp. v. Sec Ins. Co. of Hartford, 64 N.Y. 2d 419, 424 (1985). The duty to defend is thus "exceedingly broad." Century 21, Inc. v. Diamond State Ins. Co., 442 F.3d 79, 82 (2d Cir. 2006).

> Although the duty to defend will not be imposed through a strained, implausible reading of the complaint that is linguistically conceivable but tortured and unreasonable, a defense obligation may be avoided only where there is no possible factual or legal basis on which an insurer's duty to indemnify under any provision of the policy could be held to attach.

Id. at 82-83 (internal citations omitted). "If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be." Colon v. Aetna Life & Cas. Ins. Co., 66 N.Y. 2d 6, 8-9 (1985).

Here, Skye's breach of contract claim asserts that PartnerRe breached both its duty to defend and its duty to indemnify; however, the relief sought under the breach of contract claim is for $1,443,205 in damages, which appears to be the legal fees and costs incurred by Skye in defending the lawsuit. Compl. ¶ 42. In its opposition, Skye states that "under its breach of contract claim, Skye seeks an award of damages to compensate Skye's covered defense fees and costs incurred to date." Opp. at 26. At oral argument, counsel for plaintiff Skye clarified that the breach of contract claim seeks damages for the legal fees and costs incurred defending the Cunning Lawsuit to date. Plaintiff's counsel further explained that Skye intends to amend the claim for breach of contract based on

the losses ultimately sustained by Skye once there is a final resolution of the underlying action.

3. Interpretation of the Policy

Skye's complaint asserts a breach of contract claim against PartnerRe, arguing that PartnerRe violated the terms of the policy when it denied coverage for the Cunning Lawsuit, which Skye asserts qualifies as a Securities Claim because of Cunning's claim under § 1514A of Sarbanes-Oxley. PartnerRe contends that the breach of contract claim must be dismissed because the Cunning Lawsuit does not qualify as a Securities Claim. MTD at 9. According to PartnerRe, "a Section 1514A claim is fundamentally an employment claim for Cunning's alleged retaliatory wrongful termination," not a securities law claim. Id. In making this argument, PartnerRe points out that the elements of a § 1514A claim "focus on the employment relationship and adverse employment actions rather than on a substantive violation of securities laws."[2] Id. at 11. Additionally, PartnerRe contends, the relief afforded under § 1514A, which includes reinstatement of employment and backpay, constitutes employment remedies and not securities law remedies. Id. at 12. Finally, PartnerRe explains that it is the Department of Labor and the Occupational Safety and Health Administration, not the Securities and Exchange Commission, that interpret and administer § 1514A. Id.

Skye argues that the Sarbanes-Oxley Act is a "securities law," and, therefore, Cunning's claim under § 1514A of Sarbanes-Oxley qualifies as a Securities Claim under the policy. Opp. at 14. Specifically, Skye points to the fact that, following passage of Sarbanes-Oxley, Congress expanded the definition of "securities law" within the Securities Exchange Act of 1934 to expressly include Sarbanes-Oxley. Id. (citing 15 U.S.C. § 78c(47)). Skye contends that the question of whether § 1514A specifically regulates securities "is neither here nor there" because the policy's definition of Securities Claim "broadly encompasses all alleged violations of securities laws, and the Sarbanes-Oxley Act is indisputably a securities law." Opp. at 14

[2] "To prevail under [§ 1514A], an employee must prove by a preponderance of the evidence that (1) she engaged in protected activity; (2) the employer knew that she was engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action." Bechtel v. Admin. Rev. Bd., U.S. Dep't of Labor, 710 F.3d 443, 447 (2d Cir. 2013).

Skye further argues that even if § 1514A is not expressly covered as a securities law, it still falls within the Securities Claim definition because it is materially similar to a corresponding section in the Securities Exchange Act of 1934, and the policy defines Securities Claim to include "violations of the Securities Exchange Act of 1934 . . . [and] similar securities laws." Id. at 15.

PartnerRe counters that this argument fails when one takes into account the entire Securities Claim definition and its context. Reply at 4. The definition of Securities Claim, PartnerRe argues, uses the catch-all phrase "any other laws, rules, regulations or statutes regulating securities." Id. According to PartnerRe, this language indicates that the securities laws referenced in the definition must regulate securities. Id. Because §1514A does not regulate securities, PartnerRe contends, a claim brought pursuant to § 1514A does not qualify for coverage. Id.

For the purposes of a motion to dismiss, the Court finds that Skye has plausibly alleged that the Cunning Lawsuit is covered by the policy. As Skye argues, Sarbanes-Oxley is defined as a "securities law" in the Securities Exchange Act of 1934. See 15 U.S.C. § 78c(47) ("The term 'securities laws' means . . . the Sarbanes-Oxley Act of 2002"). Indeed, PartnerRe does not appear to dispute that Sarbanes-Oxley is a securities law. The Securities Claim definition refers only to laws, rules, and regulations, and the policy does not exclude specific sections from this definition. Other parts of the policy expressly omit from coverage claims brought under certain sections of laws, including Sarbanes-Oxley. See, e.g., Compl., Exh. A at 19 (excluding claims brought under "Section 304(a) of the Sarbanes-Oxley Act" and "Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act"). These omissions suggest that PartnerRe could have omitted § 1514A from coverage if it wished to limit the Securities Claim definition to particular sections of securities laws. And its failure to do so supports Skye's contention that Cunning's claim under Sarbanes-Oxley is covered by the policy. Any ambiguity created by the absence of references to particular sections of laws in the Securities Claim definition must be "construed in favor of the insured and against the insurer." Lee, 32 A.D. 3d at 904.

Furthermore, the Court finds persuasive Skye's contention that § 1514A of Sarbanes-Oxley is a securities law "similar" to the Securities Exchange Act of 1934, in light of the clear similarities between § 1514A and § 78u-6(h). Section 78u-6(h) of the Securities Exchange Act of 1934 seeks to protect whistleblowers, providing that "[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in

any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower." 15 U.S.C. § 78u-6(A). Protected activities include "providing information to the [SEC]," "assisting in any investigation . . . of the [SEC]," and making "disclosures that are required or protected under the Sarbanes-Oxley Act [or] any other law, rule or regulation subjection to the jurisdiction of the [SEC]." Id.

This provision closely tracks § 1514A, under which companies may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee" to "provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of . . . any rule or regulation of the [SEC], or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a). The clear similarity between § 1514A and § 78u-6(h) further supports Skye's interpretation of the policy.

At oral argument, counsel for defendant PartnerRe argued that interpreting the Securities Claim definition to encompass claims for wrongful termination under § 1514A would turn the Securities Claim provision into an EPL policy, which would be contrary to the reasonable expectations of the contracting parties. The Court does not find this argument to be persuasive. The conclusion that a § 1514A claim falls under the Securities Claim definition does not implicate all wrongful termination claims. Section 1514A protects against adverse employment actions taken in retaliation against employees who report and assist with the investigation of fraud and/or violations of securities laws and regulations. And § 1514A is a component of Sarbanes-Oxley, which, as discussed above, is defined by Congress as a "securities law." In other words, a claim under § 1514A is a specific kind of employee action that is uniquely tied to securities laws and regulations. Concluding that such an action falls under the Securities Claim definition here would not turn the Securities Claim provision into an EPL policy that encompasses all kinds of employment actions. Moreover, if insurers wish to exclude § 1514A claims from coverage, they can draft narrower policy provisions, which expressly state that such claims are excluded, as PartnerRe has done here in other parts of the policy.

Additionally, the Court notes that the policy expressly states that an exclusion denying coverage of claims for "actual or alleged sickness, disease, death, false arrest,

false imprisonment, damage to or destruction of tangible property . . . or, except to the extent the Claim or Investigation is for an Employment Practice Violation, for bodily injury, assault, battery, invasion of privacy, mental anguish, emotional distress, libel, slander or defamation," shall not apply to coverage of Securities Claims. Dkt. 1-1 at 17-18. This language suggests that a claim qualifying as a Securities Claim may be brought to recover for a wide range of personal injuries, including injuries characteristic of an Employment Practice Violation. Otherwise, such a carve out from the exclusion would be superfluous.

Further, at the motion to dismiss stage, the Court does not find that the "regulating securities" language in the policy renders Skye's interpretation implausible. Some courts have interpreted similar language narrowly to conclude that policies only cover claims "specifically directed towards securities, such as the sale, or offer for sale, of securities." In re Verizon Ins. Coverage Appeals, 222 A.3d 566, 574 (Del. 2019). See also Kollman v. Nat'l Union Fire Ins. Co., 2007 WL 2344825, at *3 (D. Or. Aug. 13, 2007), aff'd, 542 F. App'x 649 (9th Cir. 2013) (finding that claim for breach of contract, which involved securities transactions, did not constitute "Securities Claim" because it did not allege violation of "any rule, statute, or regulation relating to securities"). But the policies in these cases were distinct because they defined "Securities Claim" to apply to only alleged violations of "any federal, state, local or foreign regulation, rule or statute regulating securities." In re Verizon, 222 A.3d at 573-73; Kollman, 2007 WL 2344825, at *2. In other words, they did not include the additional category of "securities laws or regulations of any federal, state . . . local or any foreign jurisdiction" "similar" to "the Securities Act of 1933, the Securities Exchange Act of 1934, [or] rules or regulations of the Securities and Exchange Commission under either or both Acts." Furthermore, these cases did not involve claims under Sarbanes-Oxley. PartnerRe's argument ignores that Congress expressly defines Sarbanes-Oxley as a "securities law" in the Securities Exchange Act of 1934. See 15 U.S.C. § 78c(47). Indeed, while § 1514A serves to protect employees from wrongfully termination, it indisputably serves the additional purpose of preventing securities laws violations.

In short, at this stage, the Court is not prepared to conclude that the policy does not cover the Cunning Lawsuit.[3] In particular, to the extent that PartnerRe has a duty to

[3] Skye additionally argues that the Cunning Lawsuit is a Securities Claim because, even if it does not include claims brought under a securities law, the complaint includes

defend under the policy, Skye has plausibly alleged that PartnerRe breached its duty given the "exceedingly broad contours of an insurer's duty to defend" under New York law. Century 21, 442 F.3d at 82 (internal quotation marks omitted). At least for the purpose of a motion to dismiss, this is not a case "where there is 'no possible factual or legal basis' on which an insurer's duty to indemnify under any provision of the policy could be held to attach," so as to support a finding of no defense obligation. Id. (quoting Servidone Constr. Corp. v. Security Ins. Co., 64 N.Y. 2d 419, 424 (1985)).

At oral argument, counsel for defendant argued, for the first time, that there is no duty to defend under this policy—only a duty to indemnify and a duty to pay for defense costs. PartnerRe argued that the duty to pay for defense costs is narrower than the duty to defend, and, therefore, PartnerRe is only required to reimburse defense costs for claims that are actually covered.

Under New York law, "the same allegations that trigger a duty to defend trigger an obligation to pay defense costs." Travelers Prop. Cas. Corp. v. Winterthur Intl., 2002 WL 1391920, at *6 (S.D.N.Y. June 25, 2002). Thus, an insurer is required to pay the insured's defense expenses "[i]f the complaint contains any facts or allegations which bring the claim even potentially within the [policy]." Lowy v. Travelers Property and Cas. Co., 2000 WL 526702, at *2 (S.D.N.Y. May 2, 2000) (quoting Fitzpatrick v. Am. Honda Motor Co., 78 N.Y. 2d 61, 65-66 (1991)). "Both an insurer's duty to defend and to pay defense costs under liability insurance policies must be construed broadly in favor of the policyholder." Fed. Ins. Co. v. Kozlowski, 792 N.Y.S. 2d 397, 403 (2005) (internal citation omitted).

However, ultimately, the insurer "ha[s] a duty to reimburse defense costs for claims that are established to be covered . . . and not for claims only potentially falling within the policy's coverage." Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178, 1219 (2d Cir. 1995). Thus, generally under a "policy calling for the reimbursement of defense expenses, . . . 'insurers are required to make contemporaneous interim advances of defense expenses where coverage is disputed, subject to recoupment in the event it is ultimately determined no coverage was afforded.'" Kozlowski, 792

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allegations that securities laws were violated. See Opp. at 13. The Court does not address this alternative argument in light of its conclusion that Skye has plausibly alleged that Sarbanes-Oxley is a securities law covered by the policy.

N.Y.S. 2d at 403 (2005) (quoting Nat'l Union Fire Ins. Co of Pittsburgh, Pa. v. Ambassador Group, 556 N.Y.S. 2d 549 (1990)).

PartnerRe appears to be arguing that its duty to reimburse defense costs was so narrow that it was not obligated to reimburse Skye for defense costs incurred in connection with claims that were only potentially covered. Because the duty to pay defense costs is triggered by the same allegations in a complaint that would trigger a duty to defend, see Travelers Prop., 2002 WL 1391920, at *6, the Court is not persuaded by PartnerRe's argument. If there is only a duty to reimburse defense costs and no duty to defend, PartnerRe would ultimately not be liable for defense costs incurred litigating a claim that is not covered by the policy and could recoup any defense costs paid to Skye. See Kozlowski, 792 N.Y.S. 2d at 403; Petroterminal de Panama, S.A. v. Houston Cas. Co., 114 F. Supp. 3d 152, 158 n.2 (S.D.N.Y. 2015) (explaining that insurer would be entitled to recoup advances paid to defend against claims not covered by the policy). But, even so, PartnerRe had a broad obligation to pay defense costs as incurred for claims that were potentially covered. Thus, at this stage, even absent a duty to defend, PartnerRe's duty is not so narrow that it would warrant dismissal of Skye's breach of contract claim.[4]

Accordingly, the Court concludes that dismissal of Skye's breach of contract claim would be improper.

B. Claim for Tortious Breach of the Duty of Good Faith and Fair Dealing

1. Choice of Law

The choice-of-law provision in the policy states:

[4] Counsel for defendant additionally argued that, under the terms of the policy, defense costs and other losses are subject to allocation based on whether they arise from a claim covered by the policy as opposed to one that is not covered. To the extent that the policy provides for allocation, this position appears reasonable; however, because PartnerRe has not reimbursed Skye for any of the costs incurred defending the Cunning Lawsuit, this contention does not lead to the conclusion that Skye has failed to state a claim for breach of contract. The Court will consider the allocation question, which pertains to the amount of damages for which PartnerRe may be liable, at a later stage, as appropriate.

> Item N: . . . This Insurance shall be governed by and construed in accordance with the laws of New York, each party agrees to submit to the exclusive jurisdiction of any competent court within the United States of America.

Dkt. 1-1 at 1, 7. The policy further states as follows:

> Except with respect to the insurability of damages under Clause II.O., any dispute involving this Policy shall be resolved by applying the law of the state designated in Item N. of the Declarations.

Id. at 31.

PartnerRe contends that, based on this provision, New York law governs the claim for tortious breach of the duty of good faith and fair dealing. MTD at 6. Skye contends that California law should apply because this provision only applies to interpretation of the policy and, in any event, it should not be enforced as to this claim due to a conflict of laws. Opp. at 21-22.

Having carefully reviewed the parties' arguments, the Court concludes that the choice-of-law provision should not be enforced as to the claim for tortious breach of implied covenant of good faith and fair dealing. As an initial matter, PartnerRe has not set forth any case law supporting its contention that this choice-of-law provision applies to tort claims as well as claims for breach of contract. Even if PartnerRe could show that tort claims fall within the scope of the policy, it has not met its burden of showing that applying New York law would be reasonable here, where, as set forth in the background above, it appears that New York does not have a substantial relationship to the parties or the transaction at issue in this case, and there does not appear to be any other reasonable basis for choosing New York law. Finally, even if PartnerRe had met its burden on reasonableness, the Court concludes that the choice-of-law provision should not be enforced due to a fundamental conflict between New York and California law and the Court's finding that California has a materially greater interest in resolution of Skye's tort claim.

a. Legal Standard

A "federal court sitting in diversity ordinarily must follow the choice-of-law rules of the State in which it sits." Alt. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Tex., 571 U.S. 49, 65 (2013). California applies the choice-of-law principles set forth in Restatement (Second) of Conflict of Laws § 187. Under this approach, the Court must

"first determine either: (1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law." Nedlloyd Lines B.V. v. Superior Ct., 3 Cal. 4th 459, 464-66 (1992). If the party seeking to enforce the choice of law provision can meet either of the above tests,

> the court must next determine whether the chosen state's law is contrary to a fundamental policy of California. If there is no such conflict, the court shall enforce the parties' choice of law. If, however, there is a fundamental conflict with California law, the court must then determine whether California has a materially greater interest than the chosen state in the determination of the particular issue.

Pitzer Coll v. Indian Harbor Ins. Co., 8 Cal. 5th 93, 101 (2019) (internal quotation marks omitted). "The party advocating application of the choice-of-law provision has the burden of establishing a substantial relationship between the chosen state and the contracting parties." Pulte Home Corp. v. Am. Safety Indemnity Co., 268 F. Supp. 3d 1091, 1095 (S.D. Cal. 2017) (internal quotation marks omitted). "The burden then shifts to the party opposing application to show that application would violate a fundamental policy of California." Id. (internal quotation marks omitted).

b. Scope of the Choice-of-Law Provision

As a preliminary matter, it is not clear to the Court from the language of the choice-of-law provision that it is intended to apply to claims for tortious breach of the duty of good faith and fair dealing.

The Court "must examine the choice-of-law clause to determine 'whether the advocate of the clause has met its burden of establishing that the various claims . . . fall within its scope." Triton Engineering v. Crane Co., 2013 WL 12136597, at *2 (C.D. Cal. Feb. 21, 2013) (quoting Washington Mutual Bank, FA v. Superior Court, 24 Cal. 4th 906, 916 (2001)). "The scope of a choice-of-law clause in a contract is a matter that ordinarily should be determined under the law designated therein." Triton, 2013 WL 12136597, at *2 (quoting Washington Mutual, 24 Cal. 4th at 916, n.3)). Accordingly, the Court looks to New York law to determine the scope of the choice-of-law provision.

New York case law demonstrates "a reluctance on the part of New York courts to construe contractual choice-of-law clauses broadly to encompass extra-contractual causes

of action." Finance One Public Co. Ltd. v. Lehman Bros. Special Financing, Inc., 414 F.3d 325, 334 (2d Cir. 2005). "Under New York law, tort claims are outside the scope of contractual choice-of-law provisions that specify what law governs construction of the terms of the contract;" however, "[p]resumably a contractual choice-of-law clause could be drafted broadly enough to reach such tort claims." Id. at 335. Thus, New York courts have found that choice-of-law provisions stating that "this agreement" is to be governed by the laws of New York do not apply to tort claims arising out of or relating to the contract at issue. See Valley Juice Ltd. v. Evian Waters of France, Inc., 87 F.3d 604, 611 (2d Cir. 1996); Starr Indem. & Liability Co. v. Am. Claims Mgmt. Inc., 2015 WL 2152816, at *2 (S.D.N.Y. May 7, 2015). On the other hand, language expressly stating that New York law applies to controversies "arising out of or relating to" the contract may be sufficiently broad to cover tort claims. Turtur v. Rothschild Registry Int'l, Inc., 26 F.3d 304 (2d Cir. 1994).

PartnerRe has not identified any case law supporting its argument that this provision covers tort claims and therefore has not met its burden of establishing that Skye's tort claim falls within the provision's scope. And it appears to the Court that the choice-of-law provision does not expressly cover such claims. The language in Item N. refers only to "This Insurance" and does not specifically state that New York law governs all disputes arising out of or relating to the contract. Under the contract interpretation principles set forth above, language stating that "[t]his [i]nsurance" is governed by New York law is likely too narrow to cover tort claims arising out of or relating to the insurance policy. See Starr Indem., 2015 WL 2152816, at *2 (concluding that a choice-of-law clause pertaining only to "this Agreement" and "not to all conflicts that are related to or arising out of the Agreement" did not apply to tort claims). The statement in the policy that "any dispute involving this Policy shall be resolved by applying [New York law]" is broader and arguably closer to the "arising out of" and "related to" language deemed sufficient to encompass extracontractual claims. However, in light of the narrow language in Item N. and "New York courts' reluctance to read choice-of-law clauses broadly," PartnerRe has not shown that the provision is intended to encompass claims like Skye's claim for tortious breach of the implied covenant of good faith and fair dealing. Finance One, 414 F.3d at 335.

c. Substantial Relationship or Reasonable Basis for Applying New York Law

Even if PartnerRe had established that the tort claim falls within the scope of the choice-of-law provision, it has not met its burden of establishing a substantial relationship with New York or another reasonable basis for applying New York law. See Nedlloyd, 3 Cal. 4th at 466. "A state has a 'substantial relationship' with parties that are domiciled, reside, or are incorporated in the state, and such relationship also provides a 'reasonable basis' for a contractual provision requiring application of the state's laws." Tutor-Saliba Corp. v. Starr Excess Liability Ins. Co., Ltd., 2015 WL 13285089, at *3 (C.D. Cal. Apr. 23, 2015). Here, neither Skye nor PartnerRe is domiciled, resides, or is incorporated in New York. As set forth above, PartnerRe is a foreign corporation based in Ireland. Skye is based in California and incorporated in Nevada. Accordingly, it appears that the parties do not have a substantial relationship with New York. Furthermore, PartnerRe has failed to identify any facts demonstrating that applying New York law would otherwise be reasonable. And no such facts are apparent to the Court given that none of the conduct at issue in this case occurred in New York and the policy insures Skye's business activities, which are based in California.

Because PartnerRe has failed to meet its burden on this test, "that is the end of the inquiry, and the [C]ourt need not enforce the parties' choice of law." Nedlloyd, 3 Cal. 4th at 466. However, even if the Court concluded that choosing New York law would be reasonable here, as explained below, enforcement of the choice-of-law provision would still be inappropriate due to a fundamental conflict between California and New York law and California's materially greater interest in resolution of this dispute.

d. Fundamental Conflict of Law

The Court thus considers whether, assuming a reasonable basis for the choice-of-law provision, applying New York law would be contrary to a fundamental policy of California. Courts in California and New York reviewing similar New York choice-of-law provisions have concluded that California and New York law conflict regarding the availability of a claim for tortious breach of the duty of good faith and fair dealing in the insurance context. See Tutor-Saliba, 2015 WL 13285089, at *4 (concluding that California and New York law conflict regarding the availability of a tort remedy for breach of the implied covenant in an insurance policy); Harris v. Provident Life and Acc. Ins. Co., 310 F.3d 73, 81 (2d Cir. 2002) (same). And, based on this conflict, courts have determined that such choice-of-law provisions should not be enforced as to claims for

breach of implied covenant of good faith and fair dealing. See Tutor-Saliba, 2015 WL 13285089, at *4; Tri-Union Seafoods, LLC v. Starr Surplus Lines Ins. Co., 88 F. Supp. 1156, 1166-70 (S.D. Cal. 2015) (refusing to enforce New York choice-of-law provision as to claim for breach of implied covenant of good faith and fair dealing against insurer). See also Gomez v. Great-West Life & Annuity Ins. Co., 2022 WL 16700669 (S.D. Cal. Nov. 3, 2022) (applying California law to claim for breach of implied covenant of good faith and fair dealing notwithstanding insurance policy's Illinois choice-of-law provision because Illinois does not recognize such claims in the insurance context).

California and New York law conflict regarding the availability of a claim for breach of the implied covenant of good faith and fair dealing in the insurance context because "New York law . . . does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled." Harris, 310 F.3d at 81. Thus, under New York law, the plaintiff must allege breach of "a duty to [the] plaintiff that existed independently of the insurance contract." Binder v. Nat'l Life of Vermont, 2003 WL 21180417, at *5 (S.D.N.Y. May 20, 2003). "[I]n California, unlike in New York, '[i]n insurance cases there is a well-developed history recognizing a tort remedy for a breach of the implied covenant' where the insurer acted 'unreasonably or without proper cause.'" Harris, 310 F.3d at 81 (quoting Careau & Co. v. Sec. Pac. Bus. Credit, 222 Cal. App. 3d 1371, 1395 (1990)). "Thus, there is an actual conflict between the law of New York and the law of California" in this area. Harris, 310 F.3d at 81. See also Tutor-Saliba, 2015 WL 13285089, at *4 (concluding that California and New York law conflict regarding the availability of a tort remedy for breach of the implied covenant in an insurance policy).

Furthermore, California courts have recognized that the availability of a tort action against an insurer for breach of the implied covenant of good faith and fair dealing constitutes a fundamental policy of California. See Phan v. Great-West Life and Annuity Ins. Co., 2013 WL 12133645, at *3 (C.D. Cal. Apr. 30, 2013) (concluding that California has a fundamental policy of recognizing bad faith tort actions in the insurance context); Gomez, 2022 WL 1670069, at *4 (collecting cases "recogniz[ing] that remedies for insurance bad faith constitutes a fundamental policy of California."). See also Foley v. Interactive Data Corp., 47 Cal. 3d 654, 684 (1988) ("[I]n the context of insurance contracts . . . , for a variety of policy reasons, [California] courts have held that breach of the implied covenant will provide the basis for an action in tort.").

This fundamental policy is reflected in California courts' "well developed judicial history" of permitting bad faith tort remedies with respect to insurance contracts while refusing to extend similar tort remedies to other kinds of contracts. Foley, 47 Cal. 3d at 684.; Phan, 2013 WL 12133645, at *3. Additionally, the California Supreme Court has made clear that "tort recovery in this particular context is considered appropriate for a variety of policy reasons" given that "[u]nlike most other contracts for goods or services, an insurance policy is characterized by elements of adhesion, public interest, and fiduciary responsibility." Cates Constr., Inc. v. Talbot Partners, 21 Cal. 4th 28, 44 (1999). "Based on the[] various and unique policy considerations underpinning [the availability of a bad faith tort claim in the insurance context]" courts have found that the tort "implicates a substantial and thus fundamental public policy in California." Tri-Union Seafoods, LLC v. Starr Surplus Lines Ins. Co., 88 F. Supp. 3d at 1170; Gomez, 2022 WL 16700669, at *3.

Based on the foregoing, it appears to the Court that there is a fundamental conflict between New York law and California law regarding the availability of a claim for breach of the implied covenant of good faith and fair dealing in the insurance context. Specifically, New York's requirement that a plaintiff allege a duty independent of the insurance contract is contrary to California's fundamental policy of recognizing a tort remedy for breach of an insurance contract where an insurer has acted unreasonably or without cause. See Harris, 310 F.3d at 81.

Other courts in California reaching this same conclusion have refused to apply New York law to claims against insurers for breach of the implied covenant of good faith and fair dealing notwithstanding New York choice-of-law provisions in the insurance policies. For example, in Tutor-Saliba, the court considered whether New York law or California law should govern plaintiffs' claim against their insurer for breach of implied covenant of good faith and fair dealing where the insurance policy contained a choice-of-law provision stating that New York law should apply. 2015 WL 13285089, at *2-4. The court observed that unlike California law, New York law does not recognize a claim for bad faith absent an independent duty to the insured and concluded that the recognition of this tort claim is a fundamental policy of California. Id. at *4. Accordingly, the court went on to consider whether California had a materially greater interest in resolution of the issue and, concluding that it did, refused to enforce the choice-of-law provision. Id.

Likewise, in Tri-Union Seafoods, the court applied California choice-of-law principles to determine whether New York law governed a bad faith tort claim against an

insurer in light of the policy's choice-of-law provision stating that New York law shall apply. 88 F. Supp. 3d at 1160-70. Based on an analysis of the policy considerations supporting the availability of a bad faith tort remedy in the insurance context, the court found that "New York law is contrary to a fundamental policy in California." Id. at 1170. Because the court concluded that California had a materially greater interest in resolution of the issues raised by the plaintiffs, the Court found that California law should apply. Id.

e. Materially Greater Interest

Having found that New York law conflicts with a California fundamental policy here, as similarly found in the above cases, the Court must next consider whether California has a materially greater interest in plaintiff's claim for breach of the implied covenant of good faith and fair dealing in this case. See Nedlloyd, 3 Cal. 4th at 466. "If California has a materially greater interest than [New York], the choice of law shall not be enforced." Id. To determine whether California has a materially greater interest, the court must analyze the following factors: "(1) the place of contracting; (2) the place of negotiation of the contract; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties." Ruiz v. Affinity Logistics Corp., 667 F.3d 1318, 1324 (9th Cir. 2012).

Based on the information currently before the Court, there is no apparent connection with New York that would establish that New York has a materially greater interest in this issue. Rather, Skye has identified numerous considerations that support California's connection to the bad faith claim. Specifically, Skye has always had its headquarters in California. The policy was delivered to Skye in California and insures Skye for its business activities, which are based in California. Cunning resided and worked for Skye in California, and all of the events underlying the Cunning Lawsuit took place in California. These events include Skye's alleged misconduct, such as its alleged violations of securities laws, Cunning's reporting of that misconduct, and the termination of Cunning's employment. Furthermore, the Cunning Lawsuit was filed and litigated in the Central District of California. All of these considerations support a finding that California has a materially greater interest in this issue. PartnerRe, which is a foreign corporation based in Ireland, has not set forth any facts indicating a connection to New York.

Under these circumstances, the Court finds that California has a materially greater interest in this issue and concludes that the choice-of-law provision should not be

enforced with respect to Skye's claim for breach of the implied covenant of good faith and fair dealing. See Tutor-Saliba, 2015 WL 13285089, at *4 (finding that California had materially greater interest than New York where insured was California corporation, the insured project was in California, the facts giving rise to the underlying lawsuit occurred in California, the underlying lawsuit was litigated in California, and the contract was negotiated in California, even though the insurer was located in New York at the time of contracting).

In short, even assuming that the choice-of-law provision encompasses the tort claim and that there is a reasonable basis for the parties' choice of law, applying New York law here would conflict with a fundamental policy of California, and California has a materially greater interest in resolution of this issue. Accordingly, the Court will analyze the sufficiency of plaintiff's claim for tortious breach of the duty of good faith and fair dealing pursuant to California law.

2. Availability of Tort Remedy in this Case Assuming that California Law Applies

Skye asserts that, under California law, it has adequately stated a claim for bad faith because it "alleges that PartnerRe failed 'to promptly conduct a full and thorough investigation of the Cunning lawsuit' and gave 'greater consideration to its own interests than it gave to Skye's interests.'" Opp. at 25 (quoting Compl. ¶ 36). According to Skye, "these allegations are textbook examples of bad faith under California law." Opp. at 25.

PartnerRe argues that these boilerplate allegations, without any detail regarding how or what it failed to investigate, are insufficient. Reply at 8. Additionally, PartnerRe contends, the argument that fact investigation was deficient is "nonsensical" here, where the dispute rests on interpretation of the policy's language. Id. PartnerRe also argues that, under California law, an insurer's denial of coverage does not amount to bad faith where there exists a genuine dispute regarding the meaning of the insurance policy. Id. Even if its interpretation is wrong, PartnerRe contends that it took a reasonable position regarding a genuine dispute and therefore did not act in bad faith. Id.

"In order to establish a breach of the implied covenant of good faith and fair dealing under California law, a plaintiff must show: (1) benefits due under the policy were withheld; and (2) the reason for withholding benefits was unreasonable or without proper cause." Guebara v. Allstate Ins. Co., 237 F.3d 987, 992 (9th Cir. 2001) (internal

citations omitted). "The key to a bad faith claim is whether or not the insurer's denial of coverage was reasonable." Id. "[A]n insurer cannot reasonably and in good faith deny payments to its insured without fully investigating the grounds for its denial." Frommoethelydo v. Fire Ins. Exch., 42 Cal. 3d 208, 215 (1986).

At this stage, the Court finds that Skye has adequately alleged that PartnerRe breached the implied covenant of good faith and fair dealing when it refused to reimburse Skye for the costs of the Cunning Lawsuit. For the purpose of a Rule 12(b)(6) motion, the Court must accept as true the material allegations in the complaint, as well as all reasonable inferences to be drawn from them. Pareto, 139 F.3d at 699. As set forth above, Skye has plausibly alleged that the policy covers the Cunning Lawsuit and that PartnerRe has refused to reimburse Skye for defense costs, despite its broad obligation to do so. It has also alleged that PartnerRe failed to promptly conduct a full and thorough investigation of the Cunning Lawsuit; failed to inquire into bases that might support coverage; unreasonably failed and refused to honor its representations and promises; unreasonably asserted grounds for denying coverage contrary to the terms of the policy, the law, insurance customs and practice, and the facts; and gave greater consideration to its own interests than it gave to Skye's interests.

At oral argument, counsel for PartnerRe argued that the absence of a duty to defend under the policy supports dismissal of the tort claim because PartnerRe only had an obligation to reimburse defense costs for a claim that is actually covered by the policy. At this stage, the Court concludes that the complaint adequately states a claim for tortious breach of the implied covenant of good faith and fair dealing under California law, in light of the allegations set forth above. However, the Court recognizes that, given the unique nature of the policy and the absence of a duty to defend, PartnerRe may ultimately only be liable for costs incurred defending claims that are actually covered and that this more limited obligation may bear on Skye's claim for tortious breach of the implied covenant of good faith and fair dealing at a later stage of this litigation.

C. Claim for Declaratory Relief

Skye's claim for declaratory relief seeks (1) "a declaration from the Court that PartnerRe is obligated to reimburse Skye for the defense fees and costs it incurred in defense of the [Cunning Lawsuit]" and (2) "a declaration from the Court that PartnerRe is obligated to indemnify Skye for any settlement or judgment in the [Cunning Lawsuit]." Compl. ¶ 44.

PartnerRe makes numerous arguments as to why Skye's claim for declaratory relief fails, none of which are persuasive because they misread Skye's allegations. In its breach of contract claim, Skye seeks reimbursement for fees and costs that it has incurred defending the Cunning Lawsuit to date. In its declaratory relief claim, Skye seeks a declaration that PartnerRe has a duty to pay Skye's defense fees and costs accrued from this date forward as well as a duty to indemnify Skye for any settlement or final judgment after appeal that is based on a claim covered by the policy. Skye may certainly seek a declaration that, if the Cunning Lawsuit results in a final judgment that implicates Sarbanes-Oxley, PartnerRe will have an obligation to indemnify Skye. The Court finds this claim to be clear and concludes that it should not be dismissed.

V. CONCLUSION

In accordance with the foregoing, the Court **DENIES** PartnerRe's motion to dismiss.

IT IS SO ORDERED.

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