SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN PART 60

Justice

CARFAX, INC.,

Plaintiff,

-against-

ILLINOIS NATIONAL INSURANCE COMPANY,

Defendant.

INDEX NO. 655198/2016

MOTION SEQ. 001

The following papers, numbered 1 to __ were read on this motion.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

It is hereby ORDERED that the motion of defendant Illinois National Insurance Company (National) to dismiss the complaint and for a declaration that National does not have a duty to defend plaintiff Carfax, Inc. (Carfax) as alleged in its complaint is decided in accordance with the attached Decision, Order & Judgment of today's date.

Dated: 5-16-17

Marcy Friedman, J.S.C.

MARCY S. FRIEDMAN, J.S.C.

1. Check one: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. Check as appropriate:.....Motion is: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

CARFAX, INC.

Plaintiff,

– against –

ILLINOIS NATIONAL INSURANCE COMPANY,

Defendant.

Index No.: 655198/2016

DECISION, ORDER & JUDGMENT

This action arises out of an insurance coverage dispute between plaintiff-insured Carfax, Inc. (Carfax) and its insurer, defendant Illinois National Insurance Company (National). National has refused to defend Carfax in an underlying federal antitrust lawsuit brought against Carfax by approximately 469 auto-dealers. (See Maxon Auto Enterprises, Inc. v Carfax, Inc., SD NY, Index No. 13-CV-2680 [hereinafter the Maxon Litigation].) In its first cause of action, Carfax seeks a declaratory judgment that National is obligated to defend Carfax in the Maxon Litigation. (Compl., ¶¶ 40-49.) In the second cause of action, Carfax seeks to recover its defense costs in that litigation as damages for National's alleged breach of contract. (Id., 50-57.) National now moves to dismiss the complaint with prejudice, pursuant to CPLR 3211 (a) (1), based on the terms of the relevant insurance policies, and for a declaratory judgment that it has no duty to defend Carfax in the Maxon Litigation.

The three "Special Risk Protector" policies at issue were sold by National to Carfax's parent company, non-party R.L Polk & Co. (hereinafter the Policies). (Compl., Exhs. B-D.) Each Policy contains a "Media Content Coverage Section" which requires National "to defend a

Suit for a Wrongful Act, even if the Suit is groundless, false or fraudulent." (See e.g., Policy No. 01-880-23-21, Media Content Coverage Section, § 1 [Compl., Exh. D] [emphasis omitted].) The term Wrongful Act is defined, in pertinent part, as "any act . . . in connection with Material . . . that results solely in: . . . (4) defamation, libel, slander, product disparagement or trade libel or other tort related to disparagement or harm to character or reputation; including, without limitation, unfair competition, emotional distress or mental anguish in connection with such conduct." (Id., § 2 [k] [4] [emphasis omitted].) Each Policy also contains an exclusion covering, among other things, claims "alleging, arising out of, based upon or attributable to any: . . . (4) antitrust violations, restraint of trade, unfair competition, or violations of the Sherman Act, Clayton Act or the Robinson-Patman Act, as amended; provided, however, that this exclusion shall not apply to unfair competition as referenced in subparagraph[] . . . (4) of the definition of Wrongful Act," quoted above. (Id., § 3 [f] [4] [emphasis omitted].)

The Maxon Litigation is based upon Carfax's alleged monopolization of the sale of vehicle history reports (VHRs). As described in the Second Amended Complaint filed in the Maxon Litigation (the Maxon Complaint or Complaint):

> "Carfax has unlawfully acquired and maintained its market power in VHRs through an anticompetitive scheme involving exclusivity agreements with numerous major players in the auto industry. Through the exclusive agreements that are part of this scheme, Carfax requires the Plaintiff auto dealers to purchase Carfax VHRs on every used car sold in 37 of 40 Certified Pre-Owned ('CPO') auto sales programs of domestic and foreign-based auto manufacturers, and every used car that Plaintiff auto dealers list for sale on the two largest websites providing classified used automotive listings, Autotrader.com and Cars.com."

(Maxon Compl., at 6.) Based upon these allegations, the Complaint pleads causes of action for "exclusive dealing arrangements under section 3 of the Clayton Act" (15 USC 14) (First Claim), "agreements in unreasonable restraint of trade under section 1 of the Sherman Act" (15 USC 1)

(Second Claim), "monopolization under section 2 of the Sherman Act" (15 USC 2) (Third Claim), and "attempted monopolization under section 2 of the Sherman Act" (Fourth Claim). (Maxon Compl., ¶¶ 551-595 [capital letters omitted].)

In moving to dismiss, National argues that the Policies conclusively demonstrate that it owes no duty to defend Carfax in the Maxon Litigation. Carfax contends that National owes a duty to defend because the Maxon Litigation pleads a claim for disparagement. (See Pl.'s Memo. In Opp., at 9-12.)

As both parties have relied upon Michigan law in briefing this motion, the court will apply Michigan law in determining whether National owes a duty to defend Carfax in the Maxon Litigation. (See Def.'s Memo. In Supp., at 11-13; Pl.'s Memo. In Opp., at 8-9 & n 7.) Under Michigan law, "[i]f the allegations of a third party against the policyholder even arguably come within the policy coverage, the insurer must provide a defense." (American Bumper & Mfg. Co. v Hartford Fire Ins. Co., 452 Mich 440, 451 [1996], rehg denied 453 Mich 1204; Polkow v Citizens Ins. Co. of Am., 438 Mich 174, 178 [1991], rehg denied 439 Mich 1202 [same]; Vitamin Health, Inc. v Hartford Cas. Ins. Co., 2017 WL 1325263, * 2 [6th Cir, Apr. 11, 2017, No. 16-1724] [same, applying Michigan Law].) "The duty to defend cannot be limited by the precise language of the pleadings. The insurer has the duty to look behind the third party's allegations to analyze whether coverage is possible." (American Bumper & Mfg. Co., 452 Mich at 452.) "An insurer has a duty to defend, despite theories of liability asserted against the insured that are not covered under the policy, if there are any theories of recovery that fall within the policy." (Hastings Mut. Ins. Co. v Mosher Dolan Cataldo & Kelly, Inc., 497 Mich 919, 920 [2014].)[1]

[1] Neither party has pointed to any differences between Michigan law and New York law governing the duty to defend. (See Automobile Ins. Co. of Hartford v Cook, 7 NY3d 131, 137 [2006] [applying New York law and

Even applying these liberal principles to the terms of the Policies, and affording Carfax all reasonable inferences arising from the allegations of the Maxon Complaint, the court concludes that National has no duty to defend Carfax in that litigation. The only claims pleaded by the plaintiff auto-dealers in the Maxon Litigation are antitrust claims based on the Clayton and Sherman Acts, which are expressly excluded from coverage under the Policies. (See Policy No. 01-880-23-21, Media Content Coverage Section, § 3 [f] [4].) The Maxon Complaint makes limited, sporadic references to "stigmatization" and "disparagement" in the context of pleading antitrust violations. (See Maxon Compl., at 6-7.) The Complaint does not plead a tort related to disparagement or a theory of recovery based upon disparagement.

More particularly, in the preliminary statement describing Carfax's anticompetitive scheme, the Maxon Complaint alleges that, "[b]y contractually committing . . . websites to include hyperlinks to Carfax VHRs and to exclude VHRs of any other provider, Carfax has stigmatized any listing without such a link in the eyes of consumers who infer that the absence means that the car has a blemished history." (Id., at 6.)[2] The Complaint does not, however, allege that the plaintiff auto-dealers published listings without Carfax VHRs and were thereby "stigmatized." Rather, it repeatedly alleges that the auto-dealers were effectively forced, by Carfax's alleged anticompetitive scheme, to purchase VHRs from Carfax at inflated prices. (See e.g., id., ¶¶ 481-482, 502, 512, 522, 531, 538.) It is this anticompetitive injury, rather than disparagement, that forms the basis of the Maxon Litigation.[3] Put another way, the Complaint

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holding that "an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest a reasonable possibility of coverage" (internal quotation marks, citation, and ellipsis omitted)].)

[2] The preliminary statement of the Maxon Complaint also alleges, in equally conclusory fashion, that Carfax "utilizes its inflated revenues to disparage and falsely malign dealers in order to mislead consumers into believing its VHRs are necessary and accurate." (Id., at 7.)

[3] Carfax acknowledges that the federal district court dismissed the plaintiff auto-dealers' Clayton Act claims on September 24, 2014. (Aff. of Julie A. Ortmeier [Vice President and General Counsel of Carfax] In Opp., ¶ 7.) On

does not plead facts that support a reasonable inference that the plaintiff auto-dealers sustained damages due to disparagement—e.g., damages for loss of sales due to damage to the plaintiff auto-dealers' reputations—as opposed to damages for anticompetitive injury—e.g., damages as a result of plaintiffs being forced to purchase Carfax's allegedly inferior VHRs at unduly high prices.

In similar circumstances, Courts have held that the insurer had no duty to defend. (See National Union Fire Ins. Co. of Pittsburgh v Alticor, Inc., 2007 WL 2733336, * 6 [6th Cir, Sept. 19, 2007, Nos. 05-2479, 06-2538], affg 2005 WL 2206461 [WD Mich, Sept. 12, 2005, No. 1:05-CV-15] [holding under Michigan law that insurer had no duty to defend where the allegations of disparagement were made only in an effort to support plaintiffs' claim for damages because of antitrust injury]; S. Bertram, Inc. v Citizens Ins. Co. of Am., 657 Fed Appx 447, 480-481 [6th Cir, Aug. 26, 2016, No. 15-2552]; compare Ruder & Finn Inc. v Seaboard Surety Co., 52 NY2d 663, 672 [1981], rearg denied 54 NY2d 753 [holding under New York law that insurer had the duty to defend a federal action, where the complaint by its terms pleaded a cause of action for restraint of trade, but alleged grievous financial losses due to product disparagement].)

In sum, the court holds that the Maxon Litigation does not constitute a lawsuit for a Wrongful Act—i.e., "any act . . . in connection with Material . . . that results solely in . . . defamation, libel, slander, product disparagement or trade libel or other tort related to disparagement or harm to character or reputation . . . ." (Policy No. 01-880-23-21, Media Content Coverage Section, § 2 [k] [4].) Rather, the Maxon Complaint is based solely upon

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September 30, 2016, the district court also awarded Carfax summary judgment "on the remaining Sherman Act claims in the Maxon [Litigation]." (Id.) Carfax does not dispute that, as a result of these decisions, the entire Maxon Complaint has been dismissed, without consideration of any claim or theory of recovery for disparagement. (See Maxon Opinion & Order, dated Sept. 30, 2016, No. 13-cv-2680, at 4-5 [SD NY] [decision on motion for partial summary judgment, which the district court considered "subject to the condition that a grant of partial summary judgment [for Carfax] would lead to dismissal of the case . . . ."].) The plaintiff auto-dealers have appealed the district court's decision on the Sherman Act claims to the U.S. Court of Appeals for the Second Circuit. (Id., ¶ 9.)

Clayton and Sherman Act violations and seeks to recover for antitrust injuries, not for disparagement. As the allegations in the Maxon Litigation do not arguably fall within the Policies' coverage, the instant complaint will be dismissed with prejudice.

The court has considered Carfax's remaining arguments and finds them to be unavailing. It is accordingly hereby

ORDERED that the motion of defendant Illinois National Insurance Company (National) to dismiss the complaint and for a declaration that National does not have a duty to defend plaintiff Carfax, Inc. (Carfax) "as alleged in its complaint" is granted to the following extent:

It is ADJUDGED and DECLARED that National does not have a duty to defend Carfax in the action captioned Maxon Auto Enterprises, Inc. v Carfax, Inc. (SD NY, Index No. 13-CV-2680); and it is further

ORDERED that the complaint is dismissed, in its entirety, with prejudice.

This constitutes the decision and order of the court.

Dated: New York, New York
May 16, 2017

MARCY FRIEDMAN, J.S.C.