IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

GALLUP, INC.,	)	
	)	
Plaintiff,	)	
	)	
	)	C.A. No. N14C-02-136FWW
v.	)	
	)	
GREENWICH INSURANCE COMPANY,	)	
	)	
Defendant.	)	

Submitted: November 13, 2014
Decided: February 25, 2015

Upon Plaintiff's Motion for Judgment on the Pleadings
GRANTED, in part, DENIED, in part.
Upon Defendant's Cross Motion for Judgment on the Pleadings
DENIED.

ORDER

Brian M. Rostocki, Esquire and Diana Rabeh, Esquire, Reed Smith LLP, 1201 Market St., Suite 1500, Wilmington, Delaware, 19801; Carolyn H. Rosenberg, Esquire and Mark S. Hersh, Esquire, Reed Smith LLP, 10 S. Wacker Dr., 40th Floor, Chicago, Illinois 60606, Attorneys for Plaintiff.

Carmella P. Keener, Esquire, Rosenthal, Monhait & Goddess, P.A., 919 N. Market St., Suite 1401, Citizens Bank Center, Wilmington, Delaware 19801; Stacey L. McGraw, Esquire and Brandon D. Almond, Esquire, Troutman Sanders LLP, 401 9th St., N.W., Suite 1000, Washington, D.C. 20004-2134, Attorneys for Defendant.

WHARTON, J.

I. INTRODUCTION

The parties have submitted Cross Motions for Judgment on the Pleadings with regard to an insurance contract coverage dispute. The parties request that the Court resolve the dispute as a matter of law because the facts are undisputed and all of the remaining issues are questions of law. The parties request that the Court determine whether to apply Delaware or Nebraska substantive law to the matter. The parties also request that the Court interpret two provisions contained in the insurance contract, the "Loss" Provision and the Professional Services Exclusion, to determine whether Defendant must reimburse Plaintiff. Additionally, Plaintiff requests that the Court determine that two other provisions, the Contract Exclusion and the Allocation Provision, do not limit Plaintiff's recovery under the contract.

The Court treats Cross Motions for Judgment on the Pleadings procedurally similar to Super. Ct. Civ. R. 56 motions for summary judgment. But where only one party moves the Court to determine an issue, the Court applies traditional judgment on the pleading standards set forth in Super. Ct. Civ. R. 12(c). Therefore, on the "Loss" Provision and Professional Services Exclusion issues, the Court applies summary judgment standards and finds for the Plaintiff. Regarding the Contract Exclusion and Allocation Provision issues, the Court applies judgment on the pleadings standards and finds that Plaintiff fails to establish that no genuine issue of material fact exists such that Plaintiff is entitled to judgment as a matter of

law. Therefore, Plaintiff's Motion for Judgment on the Pleadings is **GRANTED**, in part, and **DENIED**, in part, and Defendant's Motion for Judgment on the Pleadings is **DENIED**.

II. FACTUAL AND PROCEDURAL CONTEXT

Greenwich ("Defendant") issued an insurance policy ("Policy") to Gallup ("Plaintiff") to cover the period of January 1, 2010 to January 1, 2011.[1] The Policy consists of three separate coverage parts: the Management Liability Company Reimbursement part ("Management Liability Part"), the Employment Practices Liability Coverage part ("EPL Part") and the Pension and Welfare Benefit Plan Fiduciary Liability Coverage part ("Pension Coverage Part").[2] The Policy provides for a $15 million aggregate limit to coverage under all three parts.[3]

Plaintiff was sued by a former employee and the United States government in a *qui tam* action and, to date, Defendant has reimbursed Plaintiff for approximately $8.7 million in connection with the *qui tam* litigation, leaving approximately $6.3 million remaining in potential coverage to exhaust the $15 million aggregate policy limit.[4] Plaintiff settled the remainder of the *qui tam* lawsuit for $10.58 million (the "Settlement") and sought reimbursement via the

[1] Jt. Facts., D.I. 22, ¶ 1.
[2] *See* D.I. 2, Ex. 1.
[3] *Id.*
[4] Jt. Facts at ¶ 18.

Policy to cover its remaining unreimbursed defense costs and part of the Settlement payment.[5] Defendant denied coverage under the Policy.[6]

On February 14, 2014, Plaintiff filed a Complaint in which Plaintiff requested declaratory relief that the Settlement is covered up to the maximum aggregate amount of coverage (Count I) and that Defendant breached the contract by refusing to pay Plaintiff up to the aggregate amount of the policy (Count II).[7] On April 17, 2014, Defendant denied the allegations set forth in the Complaint and pleaded thirty-six affirmative defenses and four counterclaims.[8] Defendant disclaims liability for the Settlement and seeks declaratory relief on the following grounds: Plaintiff's repayment of overcharges is not insurable loss under the Policy (Count I); the Policy's Professional Services Exclusion precludes coverage of the Settlement amount (Count II); the Policy's Breach of Contract Exclusion precludes coverage of the Settlement amount (Count III); and/or allocation prevents further payment because Defendant has paid what it is obligated to pay based upon that which it deems to be insurable loss as defined in the policy (Count IV).[9]

On May 21, 2014, Plaintiff filed an Answer to the Counterclaims and disputed Defendant's assertions.[10] On June 10, 2014, the Court approved the

[5] Jt. Facts at ¶ 20.
[6] Jt. Facts at ¶ 19.
[7] Compl., D.I. 1, ¶ 36-45.
[8] *See* Def.'s Answer & Countercls., D.I. 10.
[9] *Id.* at ¶ 43-63.
[10] *See* Pl.'s Answer, D.I. 14.

parties' stipulation to resolve the dispute as a matter of law by submitting cross motions for judgment on the pleadings.[11] The parties appeared before the Court for oral argument on November 13, 2014.

A. Relevant Policy Provisions

The Policy consists of three parts and has a maximum aggregate limit of liability of $15 million less a $250,000 retention fee.[12] Plaintiff is incorporated in Delaware and has a principle place of business in Nebraska. The Policy lists a Nebraska address and contains a Nebraska Amendatory Endorsement.[13] The Policy defines Loss for the three coverage parts as:

> "**Loss**"[14] means damages, judgments, settlements or other amounts (including punitive or exemplary damages where insurable by law) in excess of the Retention that the **Insured** is obligated to pay, including **Defense Expenses**, whether incurred by the Insurer or the **Insured**. **Loss** will not include:
>
> (1) the multiplied portion of any damage award;
> (2) matters which are uninsurable under the law pursuant to which this Policy is construed; and
> (3) fines, penalties or taxes imposed by law.[15]

The Management Liability Coverage Part contains the following provisions:

> a. The Insurer shall not be liable to make any payment for **Loss**, and shall have no duty to defend or pay **Defense**

[11] *See* Order, D.I. 24.
[12] *See* Policy, D.I. 2, at Ex. 1.
[13] *See* Policy, D.I. 2 Ex. 1, at Nebraska Amendatory Endorsement.
[14] Items in **Bold** appear in that manner in the Policy and are terms defined in the Policy.
[15] Policy, D.I. 2 Ex. 1, at General Terms and Conditions, § II.I.

Expenses, in connection with any **Claim** made against an **Insured**:…for any actual or alleged liability of the **Company** under any express contract or agreement[16] ("Contract Exclusion").

b. The Insurer shall not be liable to make any payment for **Loss**, and shall have no duty to defend or pay **Defense Expenses**, in connection with any **Claim** made against an **Insured**:

(A) brought about or contributed to in fact by any:

(1) intentionally dishonest, fraudulent or criminal act or omission or any willful violation of any statute, rule or law; or

(2) profit or remunerations gained by any **Insured** to which such **Insured** is not legally entitled;

as determined by a final adjudication in the underlying action or in a separate action or proceeding[17] ("Fraud/Ill-Gotten Gains Exclusion").

c. If both **Loss** covered by this Policy and loss not covered by this Policy are incurred…the **Insured** and the Insurer will use their best efforts to determine a fair and appropriate allocation of **Loss** between that portion of **Loss** that is covered under this Policy and that portion of **Loss** that is not covered under this Policy[18] ("Allocation Provision").

The Policy includes a Professional Services Exclusion as a separate but attached document to the contract which states that:

[16] *Id.* at Mgmt Liability and Co. Reimbursement Coverage, § III.G.
[17] *Id.*, at Mgmt Liability and Co. Reimbursement Coverage, § III.A(1).
[18] *Id.*, at General Terms and Conditions, § III.B(1).

> a. [T]he Insurer shall not pay Loss, including Defense Expenses, for Claims based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any actual or alleged act, error or omission in connection with the Insured's performance or failure to perform professional services for others for a fee, or any act, error, or omission relating thereto.[19]

B. Underlying Litigation and Payment Thusfar Under the Policy

A former employee of Plaintiff filed a *qui tam* complaint in 2009 alleging that Plaintiff violated the False Claims Act ("FCA") by "knowingly mischarging the Government by billing labor to a cost-based contract when the labor was actually performed to meet requirements on other fixed-price contracts, and obtaining contracts through improper influence."[20] The employee also sued for employment retaliation.[21] In 2012, the United States intervened with respect to the alleged FCA violations and for Plaintiff's recruitment of another employee.[22] In 2013, Plaintiff and the employee settled the retaliation claim and Defendant reimbursed Plaintiff for the full amount of that settlement which was approximately $8.7 million.[23] Plaintiff also settled with the U.S. Department of

[19] *Id.*, at Professional Services Exclusion.
[20] Lindley Compl., D.I. 2, Ex. 2, at 1.
[21] *Id.* at ¶¶ 73-83.
[22] U.S. Compl., D.I. 2, Ex. 3, at ¶ 2.
[23] Jt. Facts at ¶¶ 9-10.

Justice regarding the recruitment issue and paid a penalty for which it did not seek reimbursement from Defendant.[24]

In July 2013, Plaintiff and the United States Department of Justice executed the Settlement as to the final claims regarding violations of the FCA in which Plaintiff owed the U.S. $10.58 million plus interest.[25] The remaining claims for which the parties settled included counts for violation of the FCA, counts for civil penalties, breach of contract, unjust enrichment, mistake and breach of fiduciary duty.[26] The Settlement Agreement provided that each party was to pay its own legal costs.[27] Defendant has paid all but $600,000 of Plaintiff's Defense Expenses pursuant to the Policy which, including the various employment settlements, totals $8.7 million paid in the aggregate.[28] Defendant denied coverage under the Policy for the FCA Settlement.[29]

III. THE PARTIES' CONTENTIONS

In their respective motions, the parties ask the Court to address some of the same issues; however, Plaintiff requests that the Court address two additional issues. Both parties request that the Court determine whether Delaware or Nebraska substantive law applies; whether the Settlement is "Loss" as defined in

[24] *Id.* at ¶¶ 11-12.
[25] *Id.* at ¶¶ 13-14.
[26] *See* Jt. Facts, Ex. C, at ¶¶ 153-87.
[27] Jt. Facts at ¶¶ 15.
[28] *Id.* at ¶¶ 17-18.
[29] *Id.* at ¶ 19.

the Policy; and whether the Professional Services Exclusion precludes payment for the Settlement. Plaintiff additionally requests that the Court address whether the Contract Exclusion precludes coverage and whether the Allocation Provision applies.

A. Choice of Law

Plaintiff acknowledges that Delaware Courts apply the "most significant relationship" test in determining which substantive law to apply but contends that either Delaware or Nebraska law could apply in this case because the outcome would be the same.[30] Plaintiff asserts that "this Court need not decide whether Nebraska or Delaware law applies since there is no material difference between them on the substantive legal issues" and that "many of the key applicable legal principles in this case are hornbook principles of insurance policy construction that are applicable in all or virtually all states."[31]

Defendant contends that Nebraska substantive law applies.[32] Defendant asserts that where a company does business in a variety of jurisdictions, the Delaware courts look to the Restatement (Second) of Conflicts § 188 and weigh 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

[30] Pl.'s Opening Br., D.I. 23, at 3.
[31] *Id.*
[32] Def.'s Opening Br., D.I. 20, at 10.

the contract; and (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties."[33] Defendant argues that Nebraska law applies to the case because "in insurance contract disputes, Delaware courts also have held that the most significant factor in complex insurance cases is the principal place of business of the insured."[34] Additionally, Defendant argues that the Nebraska Amendatory Endorsement weighs heavily in favor of applying Nebraska law.[35]

B. Interpretation of Specific Contract Provisions

Both parties request that the Court interpret the language contained in the "Loss" Provision and the Professional Services Exclusion. Defendant contends that both the "Loss" Provision and the Professional Services Exclusion should be interpreted to preclude reimbursement for the Settlement and Plaintiff contends that the Settlement is fully covered under the Policy subject to the $15 million aggregate limit.

1. *"Loss" Provision*

The parties dispute whether the Settlement constitutes "Loss" as defined in the Policy. Defendant contends that the Settlement falls under the specifically

[33] *Id.*
[34] *Id.*
[35] Def.'s Reply Br., D.I. 30, at 2.

identified exceptions to "Loss" and Plaintiff contends that the Settlement meets the definition of "Loss" as defined in the Policy.

Defendant asserts that while the definition of "Loss" specifically includes "settlements" it also excludes "matters which are uninsurable."[36] Defendant contends that the Court must look at the Policy as a whole and consider public policy to interpret the "Loss" provision and argues that the exclusion trumps the broad inclusive language.[37] Defendant also contends that Plaintiff bears the burden of showing that the Settlement is "Loss."[38] Defendant asserts that Plaintiff cannot meet the burden because the remaining claims covered by the Settlement constitute either fines, penalties and multiplied damages or overpayment of money paid to Plaintiff.[39] Defendant asserts that the definition of "Loss" specifically excludes fines, penalties and multiplied damages and also contends that public policy precludes coverage for overpayment of funds because it would unjustly enrich Plaintiff.[40]

Defendant characterizes the amount of money paid under the Settlement as restitution and asserts that restitution is not "Loss" because it is uninsurable as a matter of public policy.[41] Defendant asserts that, when construing the type of relief

[36] Def.'s Opening Br., at 15.
[37] Def.'s Reply Br., at 28-29.
[38] Def.'s Opening Br., at 18.
[39] *Id.* at 20-21.
[40] *Id*.
[41] *Id.* at 25.

paid through the settlement, "the terms used in a settlement agreement are irrelevant to determining whether payments are uncovered restitution. To determine whether a settlement is covered, a court must consider the underlying allegations that led to the settlement."[42] Defendant contends that the underlying allegations were for a scheme of overbilling by Plaintiff that resulted in overpayment to Plaintiff and that the Settlement, in part, constituted return of the overpayments.[43] Therefore, Defendant argues, Plaintiff should not be reimbursed for that which Plaintiff was never entitled to receive.[44]

Additionally, Defendant concedes that the Fraud/Ill-Gotten Gains Exclusion operates to exclude reimbursement for money that Plaintiff received to which Plaintiff was not entitled.[45] Moreover, Defendant acknowledges that the Fraud/Ill-Gotten Gains Exclusion specifically requires that there be a final adjudication determining that Plaintiff is not entitled to the money.[46] Defendant acknowledged in its submission to the Court and at oral argument, that it has not alleged that a final adjudication has occurred.[47] Instead, Defendant conceded that it is relying on

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[42] *Id.* at 26.
[43] *Id.* at 20-25.
[44] *Id.*
[45] Def.'s Reply Br., at 8.
[46] *Id.* at 9.
[47] *See Id.* at 9 n.6

> If the Court nonetheless holds that the terms of the [Fraud/Ill-Gotten Gains Provision] control, [Defendant] will be entitled to prove in the present coverage action that [Plaintiff] committed fraud or gained remuneration to which it was not legally entitled. The exclusion states that such finding can be determined by a

the allegations of wrongdoing set forth in the underlying litigation regarding Plaintiff's billing practices.[48]

Finally, Defendant argues that if the Court finds that the Settlement is "Loss," then allocation is necessary as to the breach of contract claim because, unlike the Fraud/Ill-Gotten Gains Exclusion, the Contract Exclusion does not require a final adjudication.[49] Defendant asserts that allocation involves a factual determination that precludes granting Plaintiff's Motion in its entirety.[50]

Plaintiff acknowledges that "Loss" as defined in the Policy includes "settlements" but excludes uninsurable matters.[51] Plaintiff argues that, the inclusion of "settlements" in the definition of "Loss" functions as a grant of coverage that, under general insurance interpretation principles, should be construed broadly to include the Settlement.[52] By contrast, Plaintiff argues that the "uninsurability language in the Policy's definition of 'Loss' functions as an

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> "final adjudication in the underlying action or in a separate action or proceeding;"

Tr. 46: 16-20: "[Defense Counsel]: We are not saying that [Plaintiff] did this, but, theoretically, if the law were, and the policy language were, as [Plaintiff], indicates, [Plaintiff] could have willfully over charged with the knowledge that their insurance would pay for it."

[48] *See* Tr. 42: 10-15:

> [Defense Counsel]: Looking at the Complaint, looking at the Settlement Agreement, looking at [Plaintiff's] brief, there is nothing in any of those documents that identifies in any way the government could have been harmed, except by the over charges. So we would put to you that then it is fair to look at this as, this was a suit about over charges.

[49] Def.'s Reply Br., at 10.

[50] *Id.*

[51] Pl.'s Opening Br., at 12.

[52] *Id.*

exclusion, and thus must be strictly construed against [Defendant]."[53] Plaintiff asserts that "an insurer relying on public policy to deny coverage bears the burden of proof;" that uninsurability is a matter of public policy; and that "an insurer may refuse to pay an otherwise covered claim based on 'public policy' only in the 'clearest of cases' and only when there is 'virtual unanimity of opinion' regarding the public policy in question."[54]

Plaintiff contends that Defendant's characterization of the Settlement as restitution fails to meet these standards.[55] Plaintiff argues that classifying the Settlement as restitution necessarily requires a finding that Plaintiff participated in some wrongdoing because '"[a] restitution remedy is awarded at the conclusion of litigation once culpability is allocated."'[56] However, Plaintiff asserts that the settlement agreement contains no admission of wrongdoing by Plaintiff; it is against public policy to infer wrongdoing from a settlement agreement; and Defendant independently alleges no wrongdoing but, instead, relies derivatively on the U.S. government's allegations contained in the underlying Complaint to establish wrongdoing by Plaintiff.[57] Plaintiff also asserts that, based on the pleadings, Defendant has not established that Plaintiff "obtained funds from the

[53] *Id.* at 13.
[54] *Id.* at 12-13.
[55] *Id.* at 14.
[56] Pl.'s Reply Br., D.I. 31, at 12 (quoting *Virginia Mason Med. Ctr*., 2007 WL 3473683, at *4 (W.D. Wash. Nov. 14, 2007).
[57] Pl.'s Opening Br., at 13-18.

government to which it was never entitled, much less that the FCA Settlement represents the return of such funds."[58] Furthermore, Plaintiff asserts that Plaintiff received no ill-gotten gains because the government sought recovery for damages and not disgorgement of profits in the underlying litigation.[59]

Plaintiff further argues that the Policy contemplates a situation in which Plaintiff procures ill-gotten gains in the Fraud/Ill-Gotten Gains Exclusion.[60] Plaintiff asserts that the Exclusion does not apply because the Exclusion specifically requires a final adjudication that Plaintiff is not entitled to the money.[61] Plaintiff argues that, by definition, a settlement cannot be a final adjudication because "a settlement is a negotiated bargain between two parties who have foregone the finding of culpability."[62]

2. *Professional Services Exclusion*

Both parties dispute whether or not the Professional Services Exclusion precludes reimbursement under the Policy. Defendant claims that the Exclusion was purposefully drafted broadly to exclude coverage "in any way involving" Plaintiff's rendering of professional services and Plaintiff claims that the Exclusion does not preclude reimbursement.

[58] Pl.'s Reply Br., at 7.
[59] Pl.'s Opening Br., at 20-21.
[60] Pl.'s Opening Br., at 18-19.
[61] *Id.*
[62] Pl.'s Reply Br., at 12 (quoting *Virginia Mason*, 2007 WL 3473683, at *4).

Defendant acknowledges that exclusionary provisions are typically construed narrowly but urges that courts have applied broadly worded Professional Services Exclusion to preclude coverage.[63] Defendant asserts that under Nebraska law, the phrase "professional services" has been interpreted to require that the service "be such as exacts the use or application of special learning or attainments of some kind."[64] Defendant argues that the alleged fraudulent billing was not a single incident but, rather, was an "in-depth scheme alleged to have been developed and implemented by [Plaintiff's] upper management, which affected the entire performance of services"[65] and that because of the depth of the alleged fraud, "[c]reating inflated billing estimates, and managing projects in line with other, lower estimates, requires 'special learning,' unlike mere administrative or clerical tasks."[66]

Defendant alternatively argues that even if the Court determines that the billing scheme does not fall within the definition of "professional services" the specific broad language contained in the Exclusion is sufficient to preclude coverage.[67] Specifically, Defendant argues that the language of the Exclusion precludes liability for the Settlement because it

[63] Def.'s Reply Br., at 5.
[64] Def.'s Opening Br., at 13 (quoting *R.W. v. Schrein*, 264 Neb. 818, 823 (Neb. 2002)).
[65] Def.'s Reply Br., at 6.
[66] Def.'s Opening Br., at 13.
[67] *Id.* at 13-14.

> applies broadly to any claim 'based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any actual or alleged act, error, or omission in connection with the Insured's performance or failure to perform professional services for others for a fee, or any act, error, or omission relating thereto.'[68]

Therefore, Defendant asserts, that billing practices are "in any way involving" Plaintiff's rendering of professional services.[69]

Plaintiff characterizes the Professional Services Exclusion as a coverage exclusion, as opposed to a coverage grant, and asserts that under general insurance contract principles coverage exclusions are narrowly construed and the burden to prove exclusion lies with the insurer.[70] Plaintiff argues that the Professional Services Exclusion contained in the Policy should be construed narrowly so as not to prevent coverage because the underlying litigation was based upon alleged fraudulent billing and not upon the quality of the rendering of Plaintiff's professional services.[71] Additionally, Plaintiff argues that the Policy does not define "professional services" and, therefore, the definition is open to interpretation.[72] Plaintiff asserts that because the definition is unspecified, "courts consistently have construed professional services exclusions particularly narrowly

[68] *Id.* (quoting Policy, D.I. 2 Ex. 1, Professional Services Exclusion).
[69] *Id.*
[70] Pl.'s Opening Br., at 6.
[71] *Id.*
[72] *Id.* at 8.

to prevent the exclusions from 'swallowing' the coverage otherwise provided."[73] Plaintiff argues that broadly construing the language of the Exclusion would effectively leave Plaintiff with no conceivable coverage under the Policy which would render the Policy meaningless.[74]

C. Contract Exclusion

Plaintiff requests that the Court determine that the Contract Exclusion does not preclude reimbursement. Plaintiff argues that "[b]ecause the gravamen of the lawsuit against [Plaintiff] was for fraud or false claims, the one count for breach of contract cannot defeat coverage for the FCA Settlement."[75] Plaintiff argues that, therefore, the Contract Exclusion does not apply.[76]

Defendant contends that if the Court finds that the Settlement is "Loss" then the Contract Exclusion applies to at least a portion of the FCA Settlement because one of the underlying claims was for breach of contract.[77] Defendant argues that "[Plaintiff's] arguments about the government's lack of focus on [the breach of contract] count should be made, and factually tested, in an allocation assessment." Based upon the factual issue, Defendant asserts that judgment on the pleadings is inappropriate.[78]

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[73] *Id.* at 7.
[74] *Id.*
[75] *Id.* at 11.
[76] *Id.*
[77] Def.'s Reply Br., at 19-20.
[78] *Id.*

D. Allocation Provision

Plaintiff requests that the Court determine that the Allocation Provision does not apply. Plaintiff first argues that the settlement is covered "Loss" under the definition in the Policy.[79] Next, Plaintiff asserts that if the Court finds that the Contract Exclusion precludes reimbursement of some of the Settlement, then there is no basis for allocation because the damages that the Settlement covers are not divisible into specific causes of action but were intended to extinguish the remainder of claims in the underlying lawsuit.[80] Finally, Plaintiff argues that even if the Court determines that some of the Settlement is not reimbursable and that the amount attributable to each claims can be determined accurately, then at least $6.3 million, or the difference between the $15 million aggregate limit and the amount already paid by Defendant in connection with the underlying litigation, is attributable to covered "Loss.[81]" Therefore, Plaintiff asserts, there is no basis for an allocation of the Settlement as a matter of law.[82]

Defendant asserts that the Settlement is not covered "Loss."[83] Defendant argues that even if the Court finds that the Settlement is "Loss," then the Contract Exclusion precludes reimbursement of at least some of the Settlement.[84]

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[79] Pl.'s Opening Br., at 22-23.
[80] *Id.* at 24-25.
[81] *Id.*
[82] *Id.* at 26.
[83] Def.'s Reply Br., at 18.
[84] *Id.* at 19.

Defendant argues that allocation, a factually intense inquiry, would be necessary which precludes granting Plaintiff's Motion.[85]

IV. STANDARD OF REVIEW

Pursuant to Super. Ct. Civ. R. 12(c), "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Typically, the court views a motion for judgment on the pleadings in the light most favorable to the non-moving party[86] and grants the motion where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.[87] However, where the parties make cross-motions for judgment on the pleadings, the Court views that as a procedural scenario similar to that of summary judgment under Super. Civ. R. 56(h).[88] Super. Civ. R. 56(h) provides that

> [w]here the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.[89]

Because both parties have filed cross motions requesting that the Court address the choice of law, "Loss" and Professional Services Exclusion issues, the

[85] *Id.* at 20.
[86] *Blanco v. AMVAC Chem. Corp.*, 2012 WL 3194412, at *6 (Del. Super. Aug. 8, 2012).
[87] *Velocity Exp., Inc. v. Office Depot, Inc.*, 2009 WL 406807, at *3 (Del. Super. Feb. 4, 2009).
[88] *Silver Lake Office Plaza LLC v. Lanard & Axilbund, Inc.*, 2014 WL 595378, at *6 (Del. Super. Jan. 17, 2014).
[89] Super. Civ. R. 56(h).

Court will examine those particular issues according to Super. Civ. R. 56(h). Because Plaintiff additionally requested that the Court determine the Contract Exclusion and Allocation Provision issues, the Court will apply the traditional judgment on the pleadings standards.

V. DISCUSSION

A. Choice of Law Analysis is Not Necessary Because Defendant has Failed to Demonstrate a Conflict Between Delaware Law and Nebraska Law.

As the forum state, Delaware applies its choice of law rules.[90] Before deciding which state's substantive law applies, however, the Court must determine if there is a conflict between Delaware and Nebraska law as it relates to this action.[91] If the Court determines that there is no conflict between the substantive law of both jurisdictions, "the Court may apply general principles that are consistent with the law of either jurisdiction."[92] Defendant carries the burden to demonstrate that a choice of law conflict arises.[93]

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[90] *Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp*., 2005 WL 2436193, at *2 (Del. Super. Sept. 29, 2005).
[91] *Shook & Fletcher Asbestos Settlement Trust v. Safety Nat. Cas. Corp*., 909 A.2d 125, 128 (Del. 2006).
[92] *Sun-Times Media Group, Inc. v. Royal & Sunalliance Ins. Co. of Canada*, 2007 WL 1811265, at *9 (Del. Super. Apr. 9, 2007)(citing *Eon Labs Mfg., Inc. v. Reliance Ins. Co.*, 756 A.2d 889, 892 (Del. 2000)).
[93] *Id.* at *10.

Although Defendant urges the Court to apply the "most significant relationship"[94] test to determine that Nebraska law applies, Defendant has failed to meet its burden to show that there is a conflict between the relevant laws of Delaware and Nebraska. Defendant asserts that the Court should apply Nebraska law to interpret the phrase "professional services" and to determine that reimbursement for restitution offends public policy.

Defendant contends that Nebraska law interprets the phrase "professional services" as requiring some "special learning."[95] However, Defendant cannot show and the Court is unaware of Delaware law conflicting with Nebraska law on this issue. Where the Court has interpreted the phrase "professional services," a similar distinction has been made between that which is "nonprofessional" and that which is "professional services" based upon "trained judgment."[96] Defendant also asserts that in *Level 3 Communications, Inc. v, Federal Insurance Co*., 272 F.3d 908 (7th Cir. 2001), the 7th Circuit interpreted Nebraska law to preclude

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[94] *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 46-47 (Del. 1991)(In insurance coverage disputes, Delaware courts follow the Restatement (Second) of Conflict of Laws Section 188 and evaluate the contract in light of Section 6 to determine the most significant relationship.[94] Section 188 provides, in pertinent part, that:

> In the absence of an effective choice of law by the parties, the contacts to be taken into account ... include (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.)

[95] Def.'s Opening Br., at 13.

[96] *See, Delaware Ins. Guar. Ass'n v. Birch,* 2004 WL 1731139, at *5 (Del. Super. July 30, 2004)("the difference between nonprofessional and professional services depends upon whether 'trained judgment' was involved").

reimbursement for restitution.[97] However, in *Level 3*, the 7th Circuit does not expressly purport to interpret Nebraska law.[98] Additionally, as discussed in *infra* Section, V.B.1, Defendant has failed to establish that the Settlement is restitution; therefore, the Court need not reach this specific issue.

Because Defendant cannot show that either Delaware or Nebraska law speaks conclusively as to any of the issues before the Court, the Court need not choose a specific jurisdiction's law to apply. Instead, the Court will apply general principles of contract construction to address the parties' inquiries because issues of contract interpretation are specific to the language used and are highly factually sensitive inquiries.[99]

B. Defendant Fails to Establish that the "Loss" Provision and Professional Services Exclusion Preclude Reimbursement for the Settlement.

The interpretation of contract language is a question of law.[100] The burden lies with the Defendant to prove the applicability of any exclusion in coverage.[101] In both Delaware and Nebraska, courts have read exclusionary provisions narrowly

[97] Def.'s Opening Br., at 21 (citing *Level 3*, 272 F.3d at 910-11).
[98] *Level 3*, 272 F.3d at 910.
[99] *See, e.g., Eon Labs Mfg., Inc. v. Reliance Ins. Co.*, 756 A.2d 889, 892 (Del. 2000)(applying general principles of contract interpretation where no conflict of law exists); *Sun-Times Media Group*, 2007 WL 1811265, at *9(same).
[100] *Emmons v. Hartford Underwriters Ins. Co*., 697 A.2d 742, 745 (Del. 1997).
[101] *McLewin v. Hill*, 1998 WL 109840, at *8 (Del. Super. Feb. 18, 1998).

to give effect to the interpretation most beneficial to the insured.[102] Additionally, where the words are unambiguous, the court applies the plain meaning of words contained in the contract provision.[103] However, the Court stresses that "it is the obligation of the insurer to state clearly the terms of the policy"[104] and that "[c]onvoluted or confusing terms are the problem of the insurer...not the insured."[105] Moreover, the Court must interpret the contract as a whole so as not to render any provision meaningless.[106]

1. *The Settlement is "Loss" as Defined by the Policy.*

"Loss" is defined in the Policy as follows:

> "**Loss**" means damages, judgments, settlements or other amounts (including punitive or exemplary damages where insurable by law) in excess of the Retention that the **Insured** is obligated to pay, including **Defense Expenses**, whether incurred by the Insurer or the **Insured**. **Loss** will not include:
>
> (1) the multiplied portion of any damage award;
> (2) matters which are uninsurable under the law pursuant to which this Policy is construed; and
> (3) fines, penalties or taxes imposed by law.[107]

Defendant concedes that the Settlement is a "settlement" but asserts that it is also an "uninsurable matter" because the Settlement was for the return of money to

[102] *See Sun-Times Media Group*, 2007 WL 1811265, at *11; *Fireman's Fund v. Structural Sys. Tech., Inc.*, 426 F.Supp.2d 1009, 1023-24 (D. Neb. 2006).
[103] *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982).
[104] *Penn Mutual Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1149 (Del. 1997).
[105] *Id.* at 1150.
[106] *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001).
[107] Policy, D.I. 2 Ex. 1, at General Terms and Conditions, § II.I.

which Plaintiff was never entitled.[108] Defendant urges that the Court apply public policy to determine that reimbursement under the Policy would result in unjust enrichment for Plaintiff because restitution is an "uninsurable matter."[109]

Plaintiff contends that the Settlement is clearly "Loss" because the Policy explicitly defines "Loss" to include "settlements."[110] Plaintiff also claims that the Policy provides for the specific situation in which Plaintiff allegedly receives money to which it is not entitled because the Policy contains the Fraud/Ill-Gotten Gains Exclusion.[111] Plaintiff asserts that the Fraud/Ill-Gotten Gains Exclusion does not apply here because the Exclusion requires that there be a final adjudication in which it is determined that Plaintiff actually received money to which it was not entitled.[112] Plaintiff argues that without a final adjudication determining that Plaintiff received money to which is was not entitled, the Settlement cannot be characterized as restitution.[113] Furthermore, Plaintiff asserts that to infer that the Settlement is for restitution would contravene public policy.[114] Therefore, Plaintiff argues, the Settlement cannot be precluded on public policy grounds as a matter of law.

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[108] Def.'s Opening Br. at 20-22.
[109] *Id.* at 20-21.
[110] Pl.'s Opening Br., at 12.
[111] *Id.* at 18-19.
[112] *Id.*
[113] *Id.* at 20.
[114] *Id.*

The Court finds that the Settlement is "Loss" because the Policy explicitly defines "Loss" to include settlements.[115] Furthermore, the Fraud/Ill-Gotten Gains Exclusion helps inform the Court as to the intent of the parties. A Minnesota federal court interpreting Delaware law in *U.S. Bank National Ass'n, et al. v. Indian Harbor Insurance Co.*, 2014 WL 3012969 (D. Minn. Jul. 3, 2014), recently ruled that an insurance contract defining "loss" to include "settlements" and requiring that a similarly worded "ill-gotten gains" provision receive a final adjudication "shows not merely that the parties contemplated the possibility of coverage for restitution, but that they agreed coverage would exist unless the restitution was imposed by a final adjudication."[116] The *Indian Harbor* court reasoned that "[b]ecause the parties expressly excluded any restitution resulting from a final adjudication through the Ill-Gotten Gains Provision, they must have intended to include any restitution not resulting from a final adjudication (say, a settlement) within the definition of "Loss."[117] Here, the Court confronts a similar inquiry and agrees with the reasoning of the *Indian Harbor* court.

Defendant's attempt to construe the Settlement as offensive to public policy because it is for restitution is unpersuasive when considering the operation of the Fraud/Ill-Gotten Gains Exclusion within the Policy. The Exclusion provides that

[115] Policy, D.I. 2 Ex. 1, at General Terms and Conditions, § II.I.
[116] *Indian Harbor*, 2014 WL 3012969, at *3.
[117] *Id.* at *4.

> [t]he Insurer shall not be liable to make any payment for **Loss**, and shall have no duty to defend or pay **Defense Expenses**, in connection with any **Claim** made against an **Insured**:
>
> (A) brought about or contributed to in fact by any…
>
> (2) profit or remunerations gained by any **Insured** to which such **Insured** is not legally entitled;
>
> as determined by a final adjudication in the underlying action or in a separate action or proceeding.[118]

The Court finds that this provision shows that Defendant contemplated coverage for restitution and specifically decided that reimbursement for restitution would only be precluded upon a final adjudication that the money Plaintiff received was actually restitution. As the drafter of the Policy, Defendant could have precluded coverage of all settlements but it did not. Instead, Defendant drafted the Policy to explicitly include "settlements" under the definition of "Loss" subject to the Policy's other exclusions.

Additionally, because Defendant drafted the Fraud/Ill-Gotten Gains Exclusion to require a final adjudication and Defendant has not received a final adjudication that the Settlement is for restitution, the Court need not decide whether or not public policy prevents reimbursement. If the Court were to find that the Settlement is not for restitution then the Settlement is covered under the

[118] Policy, D.I. 2 Ex. 1, at Mgmt Liability and Co. Reimbursement Coverage, § III.A(1).

definition of "Loss" under the terms of the Policy. Alternatively, if the Court were to find that the Settlement is for restitution, the Fraud/Ill-Gotten Gains Exclusion requires that there be a "final adjudication in the underlying action or in a separate action or proceeding."[119]

Defendant has the burden to prove that the coverage should be excluded and has failed to satisfy that burden because Defendant conceded that there was no final adjudication in the underlying action. Furthermore, even if it were possible or probable that Defendant could obtain a final adjudication on the issue, at this stage Defendant has failed to allege sufficient facts to allow the Court to render a final adjudication.[120] Instead, Defendant merely relies on the allegations set forth in the U.S. Complaint to establish that the Settlement is for restitution.[121] The Court cannot determine that the Settlement is for restitution as a matter of law based upon that assertion alone. Therefore, Plaintiff's Motion regarding "Loss" is **GRANTED** and Defendant's Motion regarding "Loss" is **DENIED**.

2. *The Professional Services Exclusion Does Not Preclude Reimbursement under the Policy.*

The Professional Services Exclusion contained in the Policy provides that:

> [T]he Insurer shall not pay Loss, including Defense Expenses, for Claims based on, arising out of, directly or indirectly resulting from, in consequence of, or in any

[119] *Id.*
[120] *See supra* note 47.
[121] *See supra* note 48; Def.'s Opening Br., at 16-18.

> way involving any actual or alleged act, error or omission in connection with the Insured's performance or failure to perform professional services for others for a fee, or any act, error, or omission relating thereto.[122]

Defendant asserts that courts have held that the phrase "professional services" requires "special learning" and argues that the "in-depth double-accounting scheme" alleged to have occurred necessarily requires special learning such that it should be classified as "professional services."[123] Defendant alternatively argues that if the Court finds that Plaintiff's billing practices are not "professional services," then the Professional Services Exclusion precludes coverage because the breadth of the phrase "in any way involving" encompasses Plaintiff's billing practices.[124] Plaintiff argues that the alleged fraudulent billing is more clerical in nature and does not fall under the definition of "professional services."[125] Plaintiff also argues that to interpret the language of the provision as broadly as written effectively renders the Policy meaningless.[126] Plaintiff further contends that, because the Policy has not defined "professional services," the language is ambiguous and the exclusionary provision should be read narrowly to prevent the provision from "swallowing" all coverage under the Policy.[127]

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[122] Policy, D.I. 2 Ex. 1, at Professional Services Exclusion.
[123] Def.'s Opening Br., at 13.
[124] *Id.* at 13-14.
[125] Pl.'s Opening Br., at 6.
[126] *Id.*at 7.
[127] *Id.*at 8.

The Court finds that Plaintiff's billing practices are not "professional services." As drafter of the Policy, Defendant had the opportunity to specifically define "professional services" and failed to do so. Because the Policy does not define "professional services," the Court interprets the phrase narrowly and gives the meaning most beneficial to the Plaintiff.[128] The Court finds that Plaintiff's "professional service" is limited to polling and consulting services and does not include billing practices.[129] However, the inquiry does not end there. The Court must next determine whether the language preceding and following the phrase "professional services" includes Plaintiff's billing practices.

Defendant also contends that the alleged fraudulent billing is "in any way involving" Plaintiff's professional services.[130] Perhaps that is true if that phrase is read in isolation; however, the Court cannot ignore the remainder of the Professional Services Exclusion and its effect on the entire Policy.

Defendant drafted the Professional Services Exclusion to include several modifiers preceding the phrase "professional services:"

> [T]he Insurer shall not pay Loss, including Defense Expenses, for Claims based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any actual or alleged act, error or omission

[128] *See Sun-Times Media Group, Inc. v. Royal & Sunalliance Ins. Co. of Canada*, 2007 WL 1811265, at *11 (Del. Super. Apr. 9, 2007); *Fireman's Fund v. Structural Sys. Tech., Inc.*, 426 F.Supp.2d 1009, 1023-24 (D. Neb. 2006).
[129] *See* Lindley Compl., D.I. 2, Ex. 2, ¶ 9("For more than 70 years, [Plaintiff] has provided opinion polling and other consulting services").
[130] Def.'s Opening Br., at 13-14.

> in connection with the Insured's performance or failure to perform professional services for others for a fee…[131]

Additionally, following the phrase "professional services for others for a fee," Defendant included the clause "or any act, error, or omission relating thereto."[132] Although the provision as a whole is not the model of clarity, it is apparent that the phrase "or any act, error, or omission relating thereto" refers back to the phrase "Insured's performance or failure to perform professional services for others for a fee." Therefore, using the plain meaning of the language of the Exclusion, it appears to the Court that in drafting the Exclusion Defendant's intent was to exclude any claim as described by the long list of modifiers preceding "professional services" and to exclude any other act, error or omission related to Plaintiff's rendering of "professional services" that otherwise would not fit under one of the many phrases preceding the "professional services" phrase.

However, in drafting the language so broadly, the Court finds that virtually any aspect of Plaintiff's business would be "related" to rendering "professional services" which conceivably would preclude coverage for all claims made under the Policy. Other courts have commented that interpreting exclusionary provisions

[131] Policy, D.I. 2 Ex. 1, at Professional Services Exclusion.
[132] *Id.*

so broadly as to vitiate all coverage undermines the purpose of having an insurance policy.[133] The Court agrees.

Further support for this conclusion is found in Defendant's answer to a specific question at oral argument. When the Court asked Defendant what types of claims would not be excluded under the Professional Services Exclusion, Defendant asserted that the Policy would still cover claims under the EPL Part and Pension Coverage Part[134] and asserted that Plaintiff has other insurance policies under which it could seek reimbursement.[135] But, what is fatal to Defendant's argument is that the Professional Services Exclusion is not unique to the Management Liability Part but applies to all three parts of the Policy. Therefore, Defendant has failed to convince the Court that such broad exclusionary language results in any conceivable coverage under any part of the Policy. Even if the

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[133] *See Rob Levine & Assocs. Ltd. v. Travelers Cas. & Sur. Co. of Am*., 2014 WL 406509, at *4 (D.R.I. Feb. 3, 2014)(broad interpretation of a professional services exclusion would render insurance policy "meaningless and provide no coverage. The Court will not construe the contract to create such an absurd result."); *Great Am. Ins. Co. v. GeoStar Corp*., 2010 WL 845953, at *12 (E.D. Mich. Mar. 5, 2010)("professional E & O exclusions in D & O policies must be interpreted more narrowly to avoid negating the entire coverage scheme through the operation of an overly broad exclusion").

[134] *See* Tr. 36: 3-8:

> The Court: What is left?
>
> [Defense Counsel]: What is left. Well, this policy has an employment practices section, it's got fiduciary liability, there could be breach of duty issues and defense costs, things that [Plaintiff] is doing that don't, that aren't connected to professional services.

[135] *See* Tr. at 35: 3-6: "[Defense Counsel]: The D&O, [Management Liability Part], has a, has as Professional Services Exclusion that's very typical. [Plaintiff], like other companies, purchased an Errors and Omissions Policy for professional liability."

Professional Services Exclusion did not eviscerate the entire Policy, the Exclusion specifically swallows the Management Liability Part of the Policy.

The Court finds that the language of the Professional Services Exclusion is too broad to give meaningful effect to coverage under the Policy. Therefore, the Court finds that the Professional Services Exclusion does not preclude reimbursement and **GRANTS** Plaintiff's Motion and **DENIES** Defendant's Motion.

C. The Court Cannot Find that the Contract Exclusion is Inapplicable.

The Contract Exclusion states that "[t]he Insurer shall not be liable to make any payment for **Loss**, and shall have no duty to defend or pay **Defense Expenses**, in connection with any **Claim** made against an **Insured**:…for any actual or alleged liability of the **Company** under any express contract or agreement."[136] Plaintiff asserts that the breach of contract claim cannot be divorced from the other underlying claims set forth in the U.S. Complaint and argues that the Contract Exclusion does not apply because the gravamen of the action overall is not for breach of contract but for alleged fraud.[137] Defendant asserts that the breach of contract claim set forth in the U.S. Complaint that generated the Settlement

[136] Policy, D.I. 2 Ex. 1, at Mgmt Liability and Co. Reimbursement Coverage, § III.G.
[137] Pl. Opening Br. at 11 (citing *Church Mutual Ins. Co. v. United States Liability Ins. Co.*, 347 F. Supp. 2d 880, 889 (S.D. Cal. 2004)(breach of contract exclusion did not apply where gravamen of claim was for fraud); *Continential Cas. Co. v. County of Chester*, 244 F. Supp. 2d 403, 410 (D. Pa. 2003)(contact exclusion did not apply where "gist" of action sounded in tort)).

demonstrates that at least a portion of the Settlement was intended to satisfy the breach of contract claim.[138] Defendant argues that a factual uncertainty exists that cannot be resolved as a matter of law as to the amount of the Settlement attributable to the breach of contract claim.[139]

Viewing the facts in the light most favorable to Defendant,[140] the Court cannot find that the Contract Exclusion does not apply as a matter of law, particularly when Plaintiff acknowledges that one of the claims in the underlying litigation that generated the Settlement was for breach of contract. Therefore, Plaintiff has failed to establish that no genuine issue of material fact exists such that Plaintiff is entitled to judgment as a matter of law and Plaintiff's Motion is **DENIED** regarding the Contract Exclusion.

D. The Court Cannot Find that the Allocation Provision is Inapplicable.

The Allocation Provision contained in the Policy provides that

> [i]f both Loss covered by this Policy and loss not covered by this Policy are incurred…the Insured and the Insurer will use their best efforts to determine a fair and appropriate allocation of Loss between that portion of Loss that is covered under this Policy and that portion of Loss that is not covered under this Policy.[141]

[138] Def.'s Reply Br. at 19-20.
[139] *Id.*
[140] *Blanco v. AMVAC Chem. Corp.*, 2012 WL 3194412, at *6 (Del. Super. Aug. 8, 2012).
[141] Policy, D.I. 2 Ex. 1, at General Terms and Conditions, § III.B(1).

Plaintiff asserts that the Settlement is covered "Loss" and that there is no basis to find that some of the Settlement is not covered.[142] Plaintiff argues that it

> is seeking reimbursement for only about 60% of its $10.58 million settlement payment. Even if some part of the settlement payment were deemed uncovered, there is no reasonable interpretation of the facts under which less than 60% of the settlement payment would be uncovered. For example, even if some part of the settlement payment were attributable to the one breach of contract count and thus not covered, there is no reasonable argument that the breach of contract count would account for 40% of the settlement or anywhere near it.[143]

Defendant contends that the entire Settlement is not covered "Loss" because it is uninsurable.[144] Defendant asserts that if the Court determines that some of the Settlement is not covered "Loss," then a factual dispute remains as to the amount attributable to "Loss" and the amount to be excluded.[145]

Because the Court cannot determine that the Contract Exclusion does not apply, similarly, the Court cannot rule that the Allocation Provision does not apply as a matter of law. Therefore, Plaintiff has failed to establish that no genuine issue of material fact exists such that Plaintiff is entitled to judgment as a matter of law and Plaintiff's Motion is **DENIED** regarding the Allocation Provision.

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[142] Pl.'s Opening Br., at 22.
[143] *Id.*at 26.
[144] Def.'s Reply. Br., at 16-17.; *See also supra* Section V.B.1.
[145] Def.'s Reply. Br., at 19-20.

VI. CONCLUSION

The Court finds for the Plaintiff that the Settlement is a covered "Loss" and that the Professional Services Exclusion does not bar coverage. The Court further finds that Plaintiff has failed to carry its burden to demonstrate that that no genuine issue of material fact exists such that Plaintiff is entitled to judgment as a matter of law regarding the "Contract Exclusion" issue and the "Allocation Provision" issue. Therefore, the Court hereby **GRANTS**, in part, and **DENIES**, in part, Plaintiff's Motion for Judgment on the Pleadings and **DENIES** Defendant's Cross Motion for Judgment on the Pleadings.

IT IS SO ORDERED.

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/s/ Ferris W. Wharton, Judge