IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-00362-MEH

DENVER INVESTMENT ADVISORS, LLC,

Plaintiff,

v.

ST. PAUL MERCURY INSURANCE COMPANY,

Defendant.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Michael E. Hegarty, United States Magistrate Judge.

In this "duty to defend and indemnify" action, Plaintiff Denver Investment Advisors, LLC ("DIA") seeks damages from Defendant St. Paul Mercury Insurance Company ("Travelers") for Travelers' alleged failure to pay insurance benefits with respect to two underlying claims against DIA. At a conference before the Court on May 4, 2017, the parties expressed their interest in moving for summary judgment on the issue of whether insurance coverage existed for the claims before proceeding with discovery in the case. The Court stayed the action, and the present motions followed. The Court finds no genuine issues of material fact exist as to DIA's second, third, and fourth claims for relief; however, factual issues exist as to a portion of DIA's first claim for relief and, thus, the Court will grant in part and deny in part the cross motions.

FINDINGS OF FACT

Cross-motions for summary judgment are examined under the usual Rule 56 standards, *Saieg v. City of Dearborn*, 641 F.3d 727, 733-34 (6th Cir. 2011), with the court viewing all facts and

reasonable inferences in the light most favorable to the nonmoving party.[1] *See Edwards v. Briggs & Stratton Ret. Plan*, 639 F.3d 355, 359 (7th Cir. 2011).

1. DIA is a Denver-based limited liability company that manages investment assets for clients. Affidavit of Glenn T. Rippey, May 25, 2017 ("Rippey Aff.") ¶ 5. DIA's clients entrust DIA to invest their assets in stocks, bonds, and other financial investment vehicles. *Id.*

2. Travelers issued its SelectOne for Investment Adviser and Funds Insurance Policy No. ZPL-14T25283-12-N2 (the "2012 Policy") to DIA for the policy period of October 31, 2012 to October 31, 2013. ECF No. 46-1. Travelers also issued its SelectOne for Investment Adviser and Funds Insurance Policy No. ZPL-61M18413-14-N2 (the "2014 Policy") to DIA for the policy period of October 31, 2014 to October 31, 2015. ECF Nos. 46-2, 46-3.

3. On August 27, 2013, an attorney representing several retired members of DIA sent a demand letter to the Management Committee of DIA seeking damages for amounts allegedly due to the claimants for breach of contract, by changing the method in which the "Aggregate Payout Limit" (set forth in a governing Operating Agreement described below) may be calculated and by creating "false retirements" (the "Beserra Claim"). ECF No. 49-1. That is, "[s]tarting around 2007, certain active Members of DIA began to partially withdraw with respect to small percentages of their Membership Economic Interest" and "[a]s a result of these partial retirements by active Members of DIA, the Earnout Payments going to the active Members instead of the true retired Members, including Claimants, grew from 20% to over 50% of the aggregate Earnout Payments." Beserra Amended Arbitration Demand ¶¶ 94, 99, 107, 113, ECF No. 49-3. The claimants also alleged that DIA breached its fiduciary duty to them in numerous ways, including failing to act with the utmost

[1]Unless otherwise cited, these facts are undisputed.

care to avoid self-dealing at the expense of the claimants. *Id.* ¶ 143(g).

4. After arbitration of the claims by an American Arbitration Association ("AAA") panel, the panel issued a final award in favor of the claimants concluding that (1) "DIA breached § 12.5.8 of the Operating Agreements in effect before the retirement of Claimants . . . when it applied the 50% Rule amendment to determine their shortfall payments. . . . DIA further breached by failing to pay [Claimants] their tangible capital accounts at the time of their last earnout payments."; and (2) "DIA's disproportionate and methodical use of partial retirements and/or reductions for its incumbent members of less than .8% had the effect of severely compromising the ability of all of the Claimants to receive their shortfall payments and the repayment of their tangible capital accounts," which was "inconsistent with the reasonable expectations of the Claimants and constituted a contractual breach of the actual and implied duties of good faith in the Operating Agreements signed by all of the Claimants." Final Award, ECF No. 49-5 at 14, 17.

5. The panel awarded damages of $7,791,526.25, plus interest of $2,768,812, and claimants' attorney's fees and costs of $2,335,328.37, as well as AAA costs and fees of $135,919.46, for a total of $13,031,586.88. *Id.* at 21-22.

5. Thereafter, DIA and the remaining claimants entered into a settlement agreement for the exact amounts awarded by the panel.

6. DIA incurred $1,268,429.00 in defense costs for the Beserra Claim, which Travelers refused to pay. Rippey Aff. ¶¶ 10, 27-28.

7. In September 2015, the same attorney who represented the Beserra claimants made a second demand to DIA on behalf of four additional former members of DIA (the "Kidd Claim"). October 2015 email correspondence between Kris Kostolansky and DIA's defense counsel, ECF No. 49-6.

8. After discussions and negotiations failed to resolve the Kidd Claim, two of the four claimants filed an arbitration demand against DIA on January 20, 2016. ECF No. 49-7. The Kidd claimants made substantially similar allegations as the Beserra claimants and brought claims for breach of contract and breach of fiduciary duty against DIA. *Id.*

9. Shortly after the Kidd Arbitration Demand was filed, the parties agreed to settle the Kidd Claim for $3,800,000. Rippey Aff. ¶ 16. Of that amount, $3,051,715.05 was for damages and the remaining $748,284.95 was for interest and the claimants' attorney's fees. *Id.*

10. DIA incurred approximately $332,000.00 in defense costs in connection with the Kidd Claim. Rippey Aff. ¶ 17.

11. The 2012 and 2014 insurance policies at issue in this case ("Policies") each include a "General Terms, Conditions and Limitations" section, as well as two Insuring Agreement Sections pertinent here: (1) the Management Liability Insuring Agreement for Privately Held Investment Advisers and Private Equity Firms (the "Management Liability Insuring Agreement") (ECF No. 46-1 at 38-42; ECF No. 46-2 at 34-35; ECF No. 46-3 at 1-3); and (2) the Employment Practices Liability Insuring Agreement (the "EPL Insuring Agreement") (ECF No. 46-1 at 44-46; ECF No. 46-3 at 4-6). 12. The Policies contain a number of endorsements that modify, amend, or replace certain provisions of the foregoing sections; however, the relevant provisions of the Policies are largely the same.

13. The Management Liability Insuring Agreements have limits of liability of $10 million and the EPL Insurance Agreements have limits of liability of $1 million. ECF 46-1 at 18; 46-2 at 16.

14. The "Company Liability Coverage Part" of the Management Liability Insuring Agreement provides as follows:

> **Company Liability Coverage**
>
> The Insurer shall pay on behalf of the Company Loss for which the Company becomes legally obligated to pay on account of any Claim first made against the Company during the Policy Period or, if exercised, the Additional Extended Discovery Period, for a Management Practices Act taking place before or during the Policy Period.

ECF No. 46-1 at 38.

15. The term "Wrongful Act" noted generally in the Policies[2] is defined in the Management Liability Insuring Agreement to mean "Management Practices Act," which in turn is defined as follows:

> **Management Practices Act** means:
>
> > (a) any error, misstatement, misleading statement, act, omission, neglect, or breach of duty actually or allegedly committed or attempted by any Insured Person in their capacity as such, or in an Outside Position or, with respect to the Company Liability Coverage, by the Company; or
> >
> > (b) any matter claimed against the Insured Persons solely by reason of their serving in such capacity or in an Outside Position;
>
> provided that Management Practices Act does not include any Employment Practices Act, Fiduciary Act, or Errors and Omissions Act.
>
> * * *

Id. at 39-40.

16. Paragraph 9 of the "Exclusions Applicable to All Coverages of This Insuring Agreement" provides that Travelers "shall not be liable for Loss on account of any Claim made against any

[2] "**Principal Coverage and Benefits**. Under your claims-made policy, we'll pay on behalf of the Insureds Loss (up to the limits of coverage that apply) as respects their legal liability arising from any Claim for any Wrongful Act. Defense Costs are included in Loss." ECF No. 46-1 at 8; 46-2 at 7.

Insured" . . . "for dividends or distributions of profits of the Company; provided that this exclusion shall not apply to Defense Costs." *Id.* at 40, 42.

17. Paragraph 1 of the "Exclusions Applicable to Company Liability Coverage" provides that Travelers "shall not be liable under the Company Liability Coverage for Loss on account of any Claim made against the Company":

> for liability of the Company under any contract or agreement, either oral or written; provided that this exclusion shall not apply to the extent that the Company would have been liable for such Loss in the absence of such contract or agreement; . . .

Id. at 42.

18. The EPL Insuring Agreement's sole Coverage Part provides as follows:

> **Employment Practices Liability Coverage**
>
> The Insurer shall pay on behalf of the Insureds Loss for which the Insureds become legally obligated to pay on account of any Claim first made against them, individually or otherwise, during the Policy Period, or, if exercised, the Additional Extended Discovery Period, for an Employment Practices Act taking place before or during the Policy Period, provided that such Claim is brought by or on behalf of any federal, state, provincial or local governmental body, or any Employee, or Director or Officer.

Id. at 44.

19. "Employment Practices Act" is defined as "any actual or alleged":

> * * *
>
> (d) wrongful discharge or termination, whether actual or constructive;
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> * * *
>
> related to the actual or prospective employment of any person by the Company and: (i) committed or attempted by any of the Insureds, in their capacity as such, or (ii) for which any of the Insureds are held legally liable, in their capacity as such, or related to the actual or prospective employment of any person by any entity in which any Director or Officer services in an Outside Position and committed or attempted by such Director or Officer in their capacity in such Outside Position.

* * *

Id. at 44–45.

20. The Policies define "Claim" to include

> (a) a written demand against any Insured for monetary damages;
>
> * * *
>
> (d) an arbitration proceeding against any Insured, which shall be deemed commenced by such Insured's receipt of an arbitration petition;
>
> * * *

Id. at 23.

21. Each Policy contains an "Allocation" provision providing:

> If on account of any Claim . . . the Insureds incur an amount consisting of both Loss covered by this Policy and loss not covered by this Policy because the Claim includes both covered and uncovered matters, the Insureds and the Insurer shall allocate such amount between covered Loss and uncovered loss, including any defense costs and judgments, using their best efforts to determine a fair and proper allocation of all such amounts based upon the relative legal exposures of the parties to covered and uncovered matters.

Id. at 28.

22. The Policies also state that the "Insurer shall advance, on behalf of the Insureds, Defense Costs which the Insureds have incurred in connection with Claims made against them, before disposition of such Claims, provided that to the extent that it is finally established that any such Defense Costs are not covered under this Policy, the Insureds . . . agree to repay the Insurer such Defense Costs." *Id.* at 28.

23. As referenced above, the Beserra and Kidd Claims arose from allegations related to an "Amended and Restated Operating Agreement" executed by DIA and its members, including the

claimants ("Operating Agreement").[3]

24. Section 12 of the Operating Agreement, particularly subsections 12.4 and 12.5, pertained to the withdrawal of members from DIA and accompanying payments that would result therefrom. Section 12.4 provided as follows:

> **12.4 WITHDRAWAL OF MEMBER**. A Member is eligible to withdraw at any time, as long as such withdrawal does not constitute a breach of this Operating Agreement or any existing employment contract between the Member and the Company. A Member's Resignation3 or Retirement4 shall be a withdrawal from the Company. The Withdrawing Member's Membership Economic Interest and other Membership Rights will be terminated and the Withdrawing Member shall be entitled to the Earnout Payments according to the Member's Membership Earnout Interest as described in Section 12.5. A Member may partially withdraw and work a reduced work schedule with the prior consent of and upon terms determined by the Management Committee.

ECF No. 46-4 at DIA 00000200.

25. Section 12.5 provided for payment of certain amounts to withdrawn/former members as follows, in pertinent part:

a. Section 12.5.6 provided for "Earnout Payments" to be made over sixteen quarters post-withdrawal, "calculated by multiplying the Member's Membership Earnout Interest or the reduction in the Member's Membership Earnout Interest by that period's Excess Earnings";

b. Section 12.5.7 defined "Excess Earnings" as 45% of DIA's total quarterly revenue, to the extent that total quarterly revenue exceeded $6.25 million; and proportionately

[3]It is undisputed that the Operating Agreement at issue in the Beserra Claim was dated February 21, 1999; Travelers provided a copy of this Agreement at ECF No. 46-4. According to the Arbitration Demand, the Kidd Claim involved two versions of the Agreement, April 15, 2002 and January 1, 2003 (ECF No. 49-7); however, copies of these later Agreements were not provided. Accordingly, to the extent necessary, the Court will assume that the Agreements' provisions at issue in this case are identical in all material respects.

lower than 45% to the extent total quarterly revenue was less than $6.25 million;

c. Section 12.5.8 established an Aggregate Payout Limit, which placed a cap on the total amount of Earnout Payments that could be made in a given quarter of 20% of DIA's total quarterly revenue;

d. Section 12.5.9 established the process by which "Shortfall Payments" would be paid, where such payments reflected Earnout Payments that would have been paid in prior quarters but for exceeding the Aggregate Payout Limit during that quarter;

e. Section 12.5.10 provided for the return of the balance of a withdrawn member's Tangible Capital Account (containing the capital contribution of that member) at the time of the Final Earnout Payment; and

f. Section 12.5.11 stated that "[t]he Recipient of Earnout Payments shall have no Membership Economic Interest, no Membership Voting Interest and no other Membership Rights, including the ability to participate in the Company's profits or management in any way, except to receive the Earnout Payment as described in this Agreement."

Id. at DOA 00000201-202.

26. The Beserra Claimants focused on the following Amendments to the Operating Agreement in alleging DIA breached the Agreement:

a. The May 1, 2000 Amendment. After four of the six Claimants withdrew, the active members of DIA amended the Operating Agreement to exclude from the computation of quarterly revenue for use in the calculation of Earnout Payments and Shortfall Payments revenues from other businesses acquired by DIA. ECF No. 49-3, ¶ 58.

b. The May 1, 2001 Amendments. These amendments changed the Aggregate Payout Limit to "the lesser of: (i) twenty percent (20%) of the Company's total quarterly revenue or (ii) 50% of the cash to be distributed from Net Cash from Operations after payment of the base compensation to the Members [the 'Net Cash Cap']." *Id.* ¶¶ 50-51. The amendments also indicated that the cash to be distributed from an acquired business would not be considered. *Id.* ¶ 61.

c. The October 9, 2006 and January 1, 2007 Amendments. The 2006 amendment changed the timing of the payment of the former members' Tangible Capital Account from the final Earnout Payment (*i.e.*, the end of the initial 48-month period) to the final Shortfall Payment; however, the 2007 amendment reinstated the original timing of the payment to the final Earnout Payment. *Id.* ¶¶ 34, 36.

27. These Claimants alleged that "DIA's use of the Net Cash Cap since 2002, instead of the Revenue Cap, . . . diverted approximately $10.1 million that was available to pay Earnout Payments and Shortfall Payments, much of which would have been paid to Claimants." *Id.* ¶ 53.

28. The Beserra Claimants also alleged that they had not received the majority of the Tangible Capital Account balance payments, even with the January 1, 2007 Amendment that revoked the changes made in the October 9, 2006 Amendment. *Id.* ¶¶ 37-39.

29. Finally, as set forth above, the Beserra Claimants alleged DIA created "false retirements":

> By incrementally reducing small percentages of certain Members' Membership Economic Interest under the guise of, among other things, partial retirement or singling out for reduction, as opposed to actually retiring and thereby causing a Withdrawal from DIA with respect to their entire Membership Economic Interest at once under Section 12.4, existing Members of DIA began to retire over time, stagger their withdrawals and thereby timed their Earnout Payments so that they would be less susceptible to being limited by the Revenue Cap or the Net Cash Cap, allowing them to be paid in full and avoid having large amounts of their Earnout Payments to be deferred.

Id. ¶ 97.

30. DIA provided timely notice of the Bessera Claim to Travelers. Travelers responded to the notice on December 13, 2013, informing DIA of several coverage exclusions that might apply to the allegations, inviting additional information from DIA to consider in its analysis, refusing to pay any benefits at that time, and reserving its rights under the Policies. ECF No. 49-11.

31. After DIA received the amended arbitration demand in Bessera and sent it to Travelers, Travelers responded with another letter on April 1, 2014, again informing DIA of several coverage exclusions that likely applied to the allegations, inviting additional information from DIA to consider in its analysis, refusing to pay any benefits at that time, and reserving its rights under the Policies. ECF No. 49-12.

32. Throughout arbitration of the Bessera Claim, DIA cooperated with Travelers and provided the company with all of the documents and information it requested.

33. By letter dated September 8, 2014, Travelers stated it "continued to believe that there is no coverage for this matter," again described the several exclusions and invited additional information from DIA to consider, and concluded, "it appears to us that the uncovered causes of action, those relating to the breach of the Operating Agreement particularly, are where most of the Insured's legal exposure is. . . . this would mean that most of the defense costs related to this matter would not be covered." ECF No. 49-13.

34. Even after Travelers denied coverage for the Bessera Claim, DIA continued to keep Travelers informed about the status of the arbitration and continued to request that Travelers contribute to the payment of DIA's defense costs. Rippey Aff. at ¶ 27.

35. DIA provided timely notice of the Kidd Claim to Travelers in letters dated November 10,

2015 and November 16, 2015, cooperated with Travelers, and provided Travelers with all of the documents and information it requested.

36. By letter dated December 2, 2015, Travelers denied coverage for the Kidd Claim. ECF No. 49-16. The primary coverage defenses raised by Travelers in its denial letter were substantially similar to those it raised for the Bessera Claim:

> In summary, it is Travelers position that coverage is not implicated under the Policy's Management Liability Insuring Agreement in the first instance because the Kidd Matter does not constitute a "Claim" for a "Wrongful Act." (Coverage is also unavailable under the remaining Insuring Agreements for the reasons set forth above l.) Alternatively, even if the Kidd Matter does seek relief for a "Wrongful Act" of the Insured – rather than DIA's alleged failure to pay amounts due under contract – the Kidd Matter would be deemed "first made" at the time of the original Penland Arbitration, which was prior to the Policy Period. Because the Policy was issued on a "claims made" basis, this would likewise serve as a complete bar to coverage. In addition, the Kidd Matter is plainly seeking a finding of liability for amounts owed under contract, such that coverage is otherwise unavailable as per Exclusion 1. Finally, Claimants are not seeking to recover a covered "Loss," and this serves as an additional reason as to why coverage is not available.

Id.

37. Thereafter, the Kidd Claimants filed a demand for arbitration in January 2016 and executed a settlement agreement with DIA in March 2016.

38. Travelers refused to pay any of the defense costs DIA incurred or any part of the Kidd settlement. Rippey Aff. at ¶ 32.

LEGAL STANDARDS

A motion for summary judgment serves the purpose of testing whether a trial is required. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1185 (10th Cir. 2003). The Court shall grant summary judgment if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show there is no genuine issue of material fact, and the moving party is entitled to judgment as a

matter of law. Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The moving party bears the initial responsibility of providing to the Court the factual basis for its motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "The moving party may carry its initial burden either by producing affirmative evidence negating an essential element of the nonmoving party's claim, or by showing that the nonmoving party does not have enough evidence to carry its burden of persuasion at trial." *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 979 (10th Cir. 2002). Only admissible evidence may be considered when ruling on a motion for summary judgment. *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir. 1985).

The non-moving party has the burden of showing there are issues of material fact to be determined. *Celotex*, 477 U.S. at 322. That is, if the movant properly supports a motion for summary judgment, the opposing party may not rest on the allegations contained in his complaint, but must respond with specific facts showing a genuine factual issue for trial. Fed. R. Civ. P. 56(e); *Scott v. Harris*, 550 U.S. 372, 380 (2007) ("[t]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.") (emphasis in original) (citation omitted); *see also Hysten v. Burlington Northern & Santa Fe Ry.*, 296 F.3d 1177, 1180 (10th Cir. 2002). These specific facts may be shown "'by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves.'" *Pietrowski v. Town of Dibble*, 134 F.3d 1006, 1008 (10th Cir. 1998) (quoting *Celotex*, 477 U.S. at 324). "[T]he content of summary judgment evidence must be generally admissible and . . . if that evidence is presented in the form of an

affidavit, the Rules of Civil Procedure specifically require a certain type of admissibility, *i.e.*, the evidence must be based on personal knowledge." *Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114, 1122 (10th Cir. 2005). "The court views the record and draws all inferences in the light most favorable to the non-moving party." *Pepsi-Cola Bottling Co. of Pittsburg, Inc. v. Pepsico, Inc.*, 431 F.3d 1241, 1255 (10th Cir. 2005).

ANALYSIS

Here, DIA seeks an order for summary judgment in its favor on its first two claims for relief for Travelers' breach of contract for failure to defend or advance defense costs for the Beserra Claim (Claim One) and for the Kidd Claim (Claim Two). Conversely, Travelers seeks an order finding it has no duty to indemnify DIA for the amounts awarded or paid to settle in, and no duty to advance or reimburse defense costs incurred by DIA in connection with, the Beserra Arbitration and the Kidd matter. It is undisputed that the subject Policies were in effect at the time of the Beserra and Kidd Claims and that DIA complied with its obligations under the Policies. The question remains, then, whether the evidence demonstrates genuine issues of material fact as to whether the Policies' "Exclusions" apply to justify Travelers' denial of coverage for indemnification of amounts paid and/or advancement of defense costs.

I. Advancement of Defense Costs

Because both motions focus on this issue, the Court will commence its analysis of whether Travelers owes DIA a duty to defend or to advance defense costs under the subject Policies. As set forth in the briefs, the parties agree that Colorado law applies to the Court's analysis and interpretation of the Policies.

A. "Duty to Defend"

Under Colorado law, courts adhere to the "four corners rule" or "complaint rule" in which they determine the duty of an insurer to defend an insured in an underlying lawsuit by comparing the terms of the insurance policy with the allegations made against the insured in the underlying complaint. *DISH Network Corp. v. Arch Specialty Ins. Co.*, 659 F.3d 1010, 1015–16 (10th Cir. 2011). "In the duty to defend context, the 'complaint rule' operates to cast a broad net, such that when the underlying complaint alleges any facts or claims that might fall within the ambit of the policy, the insurer must tender a defense." *Id.* at 1015 (quoting *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 301 (Colo. 2003)).

An insurer disputing such duty has "a heavy burden to overcome in avoiding the duty to defend, such that the insured need only show that the underlying claim may fall within policy coverage; the insurer must prove it cannot." *Cyprus*, 74 P.3d at 301 (internal quotation and citation omitted). Thus, to defeat its duty to defend, "an insurer must establish 'there is no factual or legal basis on which the insurer might eventually be held liable to indemnify the insured.'" *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 829 (Colo. 2004) (quoting *Hecla Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1089 (Colo. 1991)).

However, the insurer "has no duty to defend if the claims asserted in the complaint are clearly excluded from coverage." *Lopez v. Am. Family Mut. Ins. Co.*, 148 P.3d 438, 439 (Colo. App. 2006). Typically, then, if there is no duty to defend a claim, there is no duty to indemnify for amounts paid under it. *City of Arvada v. Colo. Intergovernmental Risk Sharing Agency*, 988 P.2d 184, 187 (Colo. App. 1999), *aff'd*, 19 P.3d 10 (Colo. 2001).

With respect to interpretation of insurance policies in Colorado, the Tenth Circuit instructs:

> In construing the terms of an insurance policy, Colorado law mandates that the court apply ordinary principles of contract interpretation. *Cyprus*, 74 P.3d at 299. Policy terms "are to be interpreted as understood by an ordinary person, not by one engaged in the insurance business." *Allstate Ins. Co. v. Juniel*, 931 P.2d 511, 516 (Colo. App. 1996). Further, the court should, if possible, give effect to the reasonable expectations of the insured. *Regional Bank of Colorado, N.A. v. St. Paul Fire & Marine Ins. Co.*, 35 F.3d 494, 497 (10th Cir. 1994) (applying Colorado law); *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 828 (Colo. 2004) (stating that the four corners rule "protects an insured's reasonable expectation of a defense"). Any ambiguity in a policy must be construed against the insurer and in favor of coverage. *Chacon v. Am. Family Mut. Ins. Co.*, 788 P.2d 748, 750 (Colo. 1990). Ambiguity exists where a policy term admits of more than one reasonable interpretation. *Hoang v. Assurance Co. of Am.*, 149 P.3d 798, 801 (Colo. 2007).

DISH Network Corp., 659 F.3d at 1016.

At the outset, Travelers argues that the plain language of the Policies establishes they are not "duty to defend policies" but, rather, "advancement policies." Mot. 28 n.5. The Policies provide:

> **Duty of the Insureds to Defend**
>
> It shall be the duty of the Insureds, and not the duty of the Insurer, to select defense counsel and defend any Claim covered by any Insuring Agreement under this Policy.
>
> The Insurer shall have the right, and shall be given the opportunity, to effectively associate with the Insureds in defending any Claim, and shall be consulted in advance by the Insureds regarding (a) the selection of appropriate defense counsel, (b) substantive defense strategies, including decisions regarding the filing and content of substantive motions, and (c) settlement negotiations.
>
> Subject to the Allocation and Limits of Liability and Retentions sections, the Insurer shall advance, on behalf of the Insureds, Defense Costs which the Insureds have incurred in connection with Claims made against them, before disposition of such Claims, provided that to the extent that it is finally established that any such Defense Costs are not covered under this Policy, the Insureds, severally according to their respective interests, agree to repay the Insurer such Defense Costs.

ECF Nos. 46-1 at 28; 46-2 at 25. DIA does not dispute that the Policies contain language placing the duty to defend on it, the Insured, rather than on the Insurer, Travelers. The language is clear and free from ambiguity. DIA cites no case law (and the Court has found none) supporting a proposition

that such language might be improper or against public policy in Colorado; rather the cases cited above involve typical circumstances in which courts must simply determine whether the underlying allegations fit within the coverage or exclusion language of the subject policy. *See, e.g., DISH Network Corp.*, 659 F.3d at 1013 ("[a]ll of the policies [at issue] promise to defend and indemnify Dish against claims alleging 'advertising injury'"); *Cyprus*, 74 P.3d at 302 ("The insurance policies require the Insurers to pay for Cyprus' liability for damages on account of property damage resulting from a loss."). The Court finds that the plain language governs and that I need not engage in the "duty to defend" analysis described above. *See Sherwood Constr. Co., Inc. v. Am. Home Assurance Co.*, No. CIV-09-1395-HE, 2011 WL 6012605, at *5 (W.D. Okla. Dec. 1, 2011) (finding that, under the plain language of the policy, the defendant insurer "had the right but not the duty to defend any insured against a covered claim.").

DIA cites to *Aspen Ins. UK, Ltd. v. Fiserv, Inc.*, No. 09-cv-02770-CMA, 2010 WL 5129529 (D. Colo. Dec. 9, 2010) for its proposition that "there are no material differences between a duty to defend and a duty to advance defense costs" and, thus, argues this Court should follow *Aspen* and apply the *Hecla* analysis. The Court will not do so for the following reasons. First, although the *Aspen* court (as here) addressed a policy which provided the insurer had no duty to defend, this Court respectfully disagrees with its application of the *Hecla* analysis as supported by citation to non-binding law. *See id.*

Second, the non-binding opinion, also cited by DIA, *Julio & Sons Co. v. Travelers Cas. & Sur. Co. of Am.*, 591 F. Supp. 2d 651 (S.D.N.Y. 2008), applied Texas law to the court's analysis of a "non-duty-to-defend" policy to determine whether the insurer had a duty to advance defense costs and determined that the "eight-corner rule" (determining coverage from the four corners of the

pleading and the four corners of the insurance policy) applied. *Id.* at 660. *Julio & Sons* makes clear that Texas' "eight-corner rule" and Colorado's "four-corner rule" are not the same; *Hecla* instructs that if the underlying complaint "alleges any facts or claims that *might* fall within the ambit of the policy," the insurer must tender a defense. However, under Texas law, an insurer is obligated to defend only if the allegations would "give rise to" any claim within the policy's coverage, and "'arise out of' means that there is simply a 'causal connection or relation', which is interpreted to mean that there is but for causation." *Id.* at 661 (citation omitted). Thus, Texas and Colorado analyses are not the same.

Third, *Aspen* cites a District of Colorado case, *Am. Econ. Ins. Co. v. Schoolcraft*, 551 F. Supp. 2d 1235, 1239 (D. Colo. 2007), for the proposition that "[w]hen an insurer refuses to provide a defense to its insured, Colorado law requires the application of [the] 'traditional duty to defend analysis . . . .'" To the extent the *Aspen* court intended the proposition to apply to a "non-duty-to-defend" policy, such as here and in *Aspen*, this Court notes that there is no indication in *Schoolcraft* that the policy expressly discharged the insurer's duty to defend; rather, the insurer in *Schoolcraft* originally agreed to provide a defense under the subject policy, then later determined "the factual allegations in the underlying complaint clearly [fell] within the professional services exclusion" of the policy. *Id.* at 1239–40. In this regard, the circumstances in *Schoolcraft* are distinguishable from those in *Aspen*.

Finally, where, as here, the plain language of the Policies places the duty to defend on the insured, rather on the insurer, the policy reasons for applying a *Hecla* analysis are diminished. *See Hecla*, 811 P.2d at 1090 ("Determining the duty to defend based on the allegations contained within the complaint *comports with the insured's legitimate expectation of a defense*, and prevents the

insurer from evading coverage by filing a declaratory judgment action when the complaint against the insured is framed in terms of liability coverage contemplated by the insurance policy.") (citation omitted) (emphasis added).

Consequently, the Court will proceed to determine whether Travelers owed DIA a duty to advance defense costs under the plain language of the Policies.

B. Duty to Advance (or Reimburse) Defense Costs

Travelers asserts that the "Allocation" provision in both Policies "contemplates that certain components of a 'Claim' may be covered, while others may not":

> If on account of any Claim the Insureds who are covered for such Claim under this Policy incur . . . an amount consisting of both Loss covered by this Policy and loss not covered by this Policy because the Claim includes both covered and uncovered matters, the Insureds and the Insurer shall allocate such amount between covered Loss and uncovered loss, including any defense costs and judgments, based upon the relative legal exposures of the parties to covered and uncovered matters.

Id. DIA agrees; in responding to Travelers' motion concerning a duty to indemnify, DIA cites to the Allocation provision in arguing that the Policies provide coverage in "mixed claims," such as here where the claimants alleged both contractual claims (not covered) and tort claims (covered) in the underlying arbitration. DIA Resp, ECF No. 56 at 16; *see also* Travelers' Mot. 28 n.5 ("The relevant inquiry is directed to each cause of action in the underlying matter; if one cause of action is potentially covered but another is not, an allocation of defense costs is required under the "Allocation" section of the Policy's [sic] General Terms and Conditions.").

Curiously, DIA does not acknowledge that the "advancement of defense costs" set forth in the Policies is expressly "subject" to the Allocation provision. *See* ECF Nos. 46-1 at 28; 46-2 at 25. Rather, DIA argues that Travelers should advance all defense costs, whether for covered or uncovered claims, because under the law cited above, the claims involved allegations that were

"potentially covered." DIA Resp. 22–23; *see also* DIA Mot. 12–15. Again, in light of the Policies' clear language placing the duty to defend on the insured, rather than on the insurer, the Court finds it would be improper here to engage in a "duty to defend" analysis pursuant to *Hecla* and its progeny.

Thus, to determine whether Travelers is obligated to advance defense costs to DIA under the plain language of the Policies, the Court must evaluate first whether the Beserra and Kidd Claims are "Claims" for which DIA was covered under the Policies and, if so, whether the Claims consisted of "both Loss covered by this Policy and loss not covered by this Policy because the Claim includes both covered and uncovered matters." ECF Nos. 46-1 at 28; 46-2 at 25.

First, it is undisputed for purposes of the present motions that DIA is an "Insured" as defined by the Policies and that it cooperated with Travelers as required by the Policies. As pertinent here, a "Claim" is defined as "an arbitration proceeding against any Insured, which shall be deemed commenced by such lnsured's receipt of an arbitration petition." ECF Nos. 46-1 at 23; 46-2 at 20. The undisputed facts establish that DIA sent timely notices to Travelers of its receipt of the Beserra and Kidd arbitration demands. Accordingly, the Court finds no dispute of material fact concerning whether the Beserra and Kidd Claims are "Claims" for which DIA was covered under the subject Policies.

Second, the Policies define "Loss" as "Damages, judgments, settlements and Defense Costs." ECF No. 46-1 at 24; ECF No. 46-2 at 21. For this analysis, "Defense Costs" means "that part of Loss consisting of reasonable and necessary costs, charges, fees (including attorneys' fees, document production fees, experts' fees and mediators' or arbitrators' fees) and expenses . . . incurred in defending a Claim, and the premium for appeal, attachment or similar bonds." ECF No. 46-1 at 23;

ECF No. 46-2 at 20. Whether DIA's stated defense costs arise from "both covered and uncovered matters" under the Policies is hotly contested here.

Travelers argues "numerous courts have concluded that no coverage is available for an insured's payment of a preexisting contractual obligation because such amounts do not constitute a 'loss' resulting of a 'wrongful act.'" Travelers' Mot. 29. In other words, Travelers contends that the claimants' alleged damages in the underlying arbitration consisted exclusively of a "preexisting contractual obligation" and, thus, the Claims were not covered in the first instance pursuant to the Policies' exclusion in the Management Liability Insuring Agreement:

> **Exclusions Applicable to Company Liability Coverage**
>
> The Insurer shall not be liable under the Company Liability Coverage for Loss on account of any Claim made against the Company:
>
> 1. for liability of the Company under any contract or agreement, either oral or written; provided that this exclusion shall not apply to the extent that the Company would have been liable for such Loss in the absence of such contract or agreement;
>
> * * *

ECF No. 46-1 at 42; ECF No. 46-3 at 3. In addition, Travelers asserts that, because the Claims did not involve allegations of "wrongful discharge or termination," coverage under the EPL Insuring Agreement was not implicated. Further, Travelers contends coverage is unavailable under the "moral hazard doctrine" which provides that "a matter solely seek[ing] to recover amounts owed under a voluntarily undertaken contractual obligation is not covered under a liability policy." Travelers' Mot. 30. Finally, Travelers argues that coverage is not available because the Claims are identical to one made in 2002 ("Penland Arbitration") and, thus, were not "first made during the policy period."

DIA contends that the Bessera and Kidd allegations comprise "Management Practices Acts,"

particularly "misleading statements" and "breach of [fiduciary] duty," which are covered under the Management Liability Insuring Agreement. DIA Mot. 13–15. Also, DIA asserts the allegations concerning "false" or "partial" retirements by DIA members constitute wrongful "actual or constructive terminations" covered by the EPL Insuring Agreement. Further, DIA argues that the Penland Arbitration does not have a "common nexus" nor any similarities with the Claims at issue here, as required by the Policies' "first made" limitation. In addition, DIA states that the contract exclusion provision in the EPL Insuring Agreement specifically excepts "defense costs" and the contract exclusion provision in the Management Liability Insuring Agreement does not apply to this particular case involving breach of fiduciary duty claims. Finally, DIA contends the "moral hazard" doctrine is not, and should not be, the law in Colorado.

1. "First Made" During the Policy Period

The Court finds that genuine issues of material fact exist as to whether the Beserra and Kidd Claims are the same or similar to the Penland Arbitration, such that they are time-barred under the Policies' "first made" language. "The determination of whether a claim was made within the period of . . . coverage depends on the construction of the provisions in the insurance policy based on principles of contract interpretation." *Nat'l Cas. Co. v. Great Sw. Fire Ins. Co.*, 833 P.2d 741, 744 (Colo. 1992). The Policies provide:

> **Limits of Liability and Retentions**
>
> For the purposes of this Policy, all Claims arising out of the same Wrongful Act and all Interrelated Wrongful Acts of the Insureds shall be deemed one Claim, and such Claim shall be deemed to be first made against the Insureds on the date the earliest of such Claims is first made against them, regardless of whether such date is before or during the Policy Period.

ECF Nos. 46-1 at 23; 46-2 at 23. Travelers argues that review of a paragraph in Beserra's Amended

Demand for Arbitration (a copy of which was not attached to its motion) reveals that the Beserra and Penland Arbitrations arose out of the same "Wrongful Acts" and, since the Kidd Claims are substantially similar to the Beserra Claims, all Claims arose out of the same "Wrongful Act," *i.e.*, the amendment to the Operating Agreement including a "Net Cash Cap." Travelers' Mot. 32–34. DIA counters that the Penland Arbitration "involved one limited issue—whether Penland was entitled to voting rights after he entered into a November 9, 2000 retirement agreement with DIA." DIA's Resp. 21.

DIA attached a copy of the Penland Arbitration and Award, as well as the Beserra Amended Arbitration Demand. ECF Nos. 49-2 at 234–238; 49-3. In the Demand, the Claimants alleged:

> 80. As a result of DIA's amendment to Section 12.5.8 of the Operating Agreement, on June 17, 2002 Mr. Penland, a Claimant here, made a demand for arbitration to DIA for amounts he would have received in Earnout Payments prior to June 17, 2002, but for the amendment to the Operating Agreement and the application of the Net Cash Cap during those quarters.
>
> 81. The arbitrator entered an Order and Award on September 20, 2002 (the "Penland Opinion"), finding that Mr. Penland's retirement contract specifically stated that the relationship between Penland and DIA would be governed by the Amended and Restated Operating Agreement dated May 1, 2000, including subsequent amendments. Exhibit K.
>
> 82. Therefore, the arbitrator found Mr. Penland was bound by the amendments in the May 1, 2001 Operating Agreement and the amendment to Section 12.5.8.

ECF No. 49-3. According to the Arbitration Order, the arbitrator found (1) "Withdrawn members do not have a right to notice or vote as provided in 12.4 of the operating agreement"; and (2) Penland's "letter offer" was "a contract setting forth the retirement and economic benefits he is to receive" and "further provides that the terms . . . will govern his relationship with the Company from and after the date of the letter." ECF No. 49-2 at 234–235.

The parties did *not* provide a copy of Penland's "demand for arbitration" referenced in

paragraph 80 of the Claimants' Arbitration Demand. The Court does not agree with the parties that it can determine from the evidence provided whether the Beserra and Kidd Claims arose out of the same Wrongful Act alleged by Penland in 2002; neither paragraph 80 from the Beserra Arbitration Demand nor the Penland Arbitration Order provide enough information to determine whether Penland's Claim and the Beserra and Kidd Claims are the "same" as required by the Policies. The Court will deny Travelers' motion for summary judgment as to this defense.

2. Contract Exclusion Provisions

First, the Court agrees that the plain language of the EPL Insuring Agreement excepts defense costs from its contract exclusion provision; therefore, to the extent the Beserra and/or Kidd Claims fall under the coverage provisions of the EPL Insuring Agreement, the contract exclusion provision will not apply to exclude coverage.

However, the contract exclusion provision of the Management Liability Insurance Agreement does not except defense costs; thus, the Court must analyze whether it applies. DIA contends that the underlying breach of fiduciary duty and "concealment" claims are "tort-based" and, thus, not excluded. Therefore, to the extent the Claims' allegations give rise to tort-based claims, which no party disputes are otherwise covered under the Management Liability Insurance Agreements, the contract exclusion provision will not apply to exclude coverage.

a. Breach of Fiduciary Duty Claims

Travelers argues that "breach of fiduciary duty" Claims brought against DIA are, in fact, contract claims excluded by the provision. Travelers Mot. 22–23. In determining whether the Beserra and Kidd Claims for breach of fiduciary duty arose out of the underlying Operating Agreement, the Court finds instructive the Colorado Supreme Court's opinion in *Town of Alma v.*

AZCO Constr., Inc., 10 P.3d 1256, 1262 (Colo. 2000) (en banc) in which the court analyzed the source and contours of the "economic loss rule." The court found that "the essential difference between a tort obligation and a contract obligation is the source of the duties of the parties." *Id.* ("The key to determining the availability of a contract or tort action lies in determining the source of the duty that forms the basis of the action.").

> The question, thus, is not whether the damages are physical or economic. Rather the question of whether the plaintiff may maintain an action in tort for purely economic loss turns on the determination of the source of the duty [the] plaintiff claims the defendant owed. A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie. A breach of a duty *arising independently* of any contract duties between the parties, however, may support a tort action.

Id. (quoting *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85, 88 (1995)) (emphasis in original). Pertinent to this Court's analysis, the *Town of Alma* court went on to recognize that the "tort" of "breach of fiduciary duty" is "expressly designed to remedy pure economic loss" and that any confusion arising from application of the economic loss rule in such instance can be avoided "by maintaining the focus on the source of the duty alleged to have been violated." *Id.* at 1263. Applying these principles to the case at bar, the court found that the alleged breach of duty arose from the services contract (water system installation) and the alleged damages for cost of repair and replacement of water lines were the subject of the contract and not supported by an independent duty of care. *Id.* at 1264.

More recently, the Colorado Court of Appeals was asked to determine whether a "breach of contract" claim actually sounded in tort and, thus, was barred by the Colorado Governmental Immunity Act ("CGIA"). *Casey v. Colo. Higher Educ. Ins. Benefits Alliance Trust*, 310 P.3d 196 (Colo. App. 2012). Also finding *Town of Alma* instructive, the court of appeals acknowledged the

boundary between contract law and tort law and noted, "[c]ourts determine the side of the boundary upon which a claim belongs by finding 'the source of the duty that forms the basis for the action,' rather than by evaluating whether damages are economic or physical. *Id.* at 202. The *Casey* court found that "[c]ourts consider three factors to determine the source of the duty: Is the relief sought in tort the same relief sought for breach of contract? Is there an established common law duty of care? Does the tort duty differ from the contractual duty?" and noted, "even a duty separately recognized under tort law is not independent if it is also imposed under the parties' contract because courts assume that sophisticated parties can include the potential cost of breach of contractual duties in contracts they negotiate." *Id.* (citations omitted).

With these legal principles in mind, the Court finds that the allegations raised in the Beserra and Kidd breach of fiduciary duty claims sound in contract rather than in tort. For the Beserra Claim, the plaintiffs alleged in the original Demand for Arbitration, from which Travelers would have been placed on notice of its purported obligation to advance defense costs under the Policies, the following:

> 49. Subsequently, on June 25, 2001, DIA held a meeting with the retired Members of DIA the purpose of which was to explain to them the amendment to Section 12.5.8 and provide an update on the financial condition of DIA.
>
> 50. At the meeting, the DIA Management Committee circulated to the retired Members, a copy of a June 18, 2001 opinion letter from the law firm of Moye, Giles, O'Keefe, Vermeirc & Gorrell, LLP, which addressed the purported legality of the amendment to Section 12.5.8 (the "MG Opinion").
>
> 51. DIA's Management Committee claims to have relied on the MG Opinion to justify the amendment to Section 12.5.8 to the retired Members of DIA.
>
> 52. As a result of DIA's amendments to its Operating Agreement, Mr. Penland, a Claimant here, made a demand for arbitration to DIA for amounts he would have received but for the amendment to the Operating Agreement.

> 53. The arbitrator entered an Order and Award on September 20, 2002 (the "Penland Opinion"), finding that Mr. Penland's retirement contract specifically stated that the relationship between Penland and DIA would be governed by the Amended and Restated Operating Agreement dated May 1, 2000, including subsequent amendments.
>
> 54. Therefore, the arbitrator found Mr. Penland was bound by the amendments in the May 1, 2001 Operating Agreement and the amendment to Section 12.5.8. Exhibit F.
>
> 55. The arbitrator, however, expressly found that the "contract entered into by DIA and Penland as to his retirement did not affect other retired members of DIA" because "[t]heir retirements vest[ed] on the date of retirement and subsequent amendments would not change their benefits." (*Id.* p. 3 (emphasis added).)
>
> 56. The Penland Opinion was dated September 20, 2002. At no time did DIA disclose the Arbitration Order and Award to the other Claimants. Rather, DIA kept the opinion quiet and continued to hope that the Claimants would rely on the MG Opinion even though that opinion was contradicted by an arbitrator's unambiguous ruling.
>
> * * * *
>
> 106. The Managers and Members of DIA owe the Claimants a common law fiduciary duty and duty of care not to usurp, misappropriate, abscond with and debase the rights of the Claimants. This duty includes the disclosure of arbitration decisions adverse to DIA, but beneficial to the Claimants, and the disclosure that the MG Opinion had been superseded by the decision of an arbitrator. This duty also includes acting with the utmost care to avoid self-dealing at the expense of the rights of the Claimants.
>
> 107. The actions of the Managers and Members of DIA have breached these duties and caused damage and injury to Claimants.
>
> 108. These breaches have caused and will continue to cause injury and damage to Claimants and, therefore, DIA and the Managers and Members are jointly liable.

ECF No. 46-5. Additionally, the Beserra Claimants sought recovery not only for "monies due" under the Operating Agreement, but also for "emotional distress caused by Respondents[‘] tortious conduct." *Id.* at 14. Thus, not all relief sought by the Beserra Claimants for breach of contract is

the same relief sought in tort.[4]

However, the parties cite, and the Court has found, no "established" common law fiduciary duty in Colorado by members of an LLC to its ***retired*** members. Colorado's courts have acknowledged the fiduciary duties that LLC members and managers owe to the company (*see Long v. Cordain*, 343 P.3d 1061, 1068 (Colo. App. 2014) (finding plaintiff stated a claim for relief on behalf of the LLC by alleging an LLC member breached fiduciary duties of good faith and loyalty)) and that partners in LLC law firms owe to each other (*see LaFond v. Sweeney*, 345 P.3d 932, 939 (Colo. App. 2012), *aff'd*, 343 P.3d 939 (Colo. 2015) (recognizing that members of LLC law firms, as "partners," owe each other fiduciary duties)). In fact, in a recent decision, the Colorado Supreme Court cited *LaFond* for the proposition that "members of an LLC owe each other fiduciary duties" in support of its holding that for purposes of determining the enforceability of a charging order, a membership interest is located in the state in which the LLC was formed. *JPMorgan Chase Bank, N.A. v. McClure*, 393 P.3d 955, 959–60 (Colo. 2017). However, the Court has found no "established" common law duty of care owed by an LLC or its members and/or managers to the LLC's retirees.[5]

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[4]The same is not true for the Kidd Claimants; in Kidd, the claimants sought damages only for "Shortfall Payments" under the Operating Agreement. ECF No. 49-7 at 13. In addition, the allegations reflect no duty of care separate from that arising under the Operating Agreement. *See infra*.

[5]In Colorado, a "fiduciary" is a person who has a duty, created by his or her undertaking, to act primarily for the benefit of another in matters within the scope of that relationship. *Brodeur v. Am. Home Assur. Co.*, 169 P.3d 139, 151 (Colo. 2007). Facially applying this definition to the Claimants' allegations, the Court perceives that an LLC's members and/or managers, in their roles as members and/or managers, do not serve as "fiduciaries" to the LLC's retirees without the creation of a separate duty. *See Destefano v. Grabrian*, 763 P.2d 275, 289 (Colo. 1988) ("Liability for breach of fiduciary duty is not dependent solely upon agreement or contract

Rather, it appears that any "fiduciary" duty owed by DIA or its members and managers to the retired Claimants arose from the subject Operating Agreement, which governs the "withdrawal" (resignation or retirement) of its members, defines the parameters of compensation owed to withdrawing members, and sets forth how amendments to the Operating Agreement become effective. Op. Agmt. §§ 12.4, 12.5, and 20.8, ECF No. 46-4. Although Claimants' allegations assert that DIA owed them a "common law fiduciary duty and duty of care" (ECF No. 46-5), the allegations are centered on the Claimants' "rights" (*id.*) which, according to the information presented here, arise only under the Operating Agreement. *See id.*; *see also* Kidd Arbitration Demand ECF No. 49-7 at 11.

Accordingly, the Court finds as a matter of law that, even assuming coverage under the Management Liability Insuring Agreement, the Beserra and Kidd allegations reflect that DIA's "fiduciary duties" to its retired members arose from the Operating Agreement, rather than from any independent duty necessary for a tort claim. In other words, DIA "would [not] have been liable for [breach of fiduciary duty] in the absence of such contract or agreement." ECF No. 46-1 at 42; ECF No. 46-3 at 3. Thus, the contract exclusion provision applies to exclude coverage for the advancement of defense costs in Beserra and Kidd for "liability arising out of the breach of fiduciary duty" (ECF No. 56 at 6) under the Management Liability Insuring Agreement.

b. "Concealment" Claims

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between the fiduciary and the beneficiary *but results from the relation itself*.") (emphasis added). Interestingly and mindful of the allegations of "self interest" here, the Colorado Limited Liability Act, in defining the "duties" owed by an LLC's members and managers to the company, provides: "A member . . . or a manager does not violate a duty or obligation to the limited liability company solely because the member's or manager's conduct furthers the member's or manager's own interest." Colo. Rev. Stat. § 7-80-404(4).

The only other claim alleged on behalf of the Beserra Claimants that may be labeled "tort-based" is the "Concealment" claim which, in Colorado, does not require the existence of a "fiduciary duty." Rather, to succeed on a claim for concealment, a plaintiff must allege the defendant concealed or failed to disclose a material fact with the intent of creating a false impression of the actual facts in the mind of the plaintiff and that the plaintiff take a course of action he or she might not take if he or she knew the actual facts, and the plaintiff's reliance in taking such action was justified, but it caused the plaintiff damages. *See BP Am. Prod. Co. v. Patterson*, 263 P.3d 103, 109 (Colo. 2011). A defendant has a duty to disclose material facts if he or she knew about them and, later, learned the material facts were no longer true, but knew the plaintiff was acting under the impression that the facts were true. CJI-Civ. 4th 19:5 (2016). In addition to the Beserra factual allegations set forth above, the Claimants alleged in both the original and amended demands for arbitration:

> 114. The information contained in the Penland Opinion was material information that should have been disclosed to Claimants.
>
> 115. Other than Claimant Penland, the Claimants were unaware of and had no knowledge of the Penland Opinion.
>
> 116. DIA and all John Doe Managers and Members with knowledge of the Penland Opinion had a duty to disclose the content of that opinion to Claimants.
>
> 117. DIA and all John Doe Managers and Members with knowledge of the Penland Opinion concealed the Penland Opinion from Claimants intending that Claimants take no action with respect thereto and hoping that the Claimants would, instead, rely on the MG opinion (which was contrary to the actual facts).
>
> 118. The Claimants took no action with respect to the Penland Opinion because they did not know of it and relied on the false impression created by the MG opinion.
>
> 119. Claimants' actions were justified.
>
> 120. Claimants' reliance on the false impression created by the concealment

caused injury and damage to the Claimants.

ECF No. 46-5; ECF No. 49-3 (¶¶ 147–153). Applying the *Casey* factors, the Court finds these allegations sound in tort, rather than in contract. First, the Beserra Claimants sought non-contract damages for emotional distress; second, as set forth above, there is an established common law duty of care; and, third, the tort duty here (duty to disclose known material facts) differs from any duties set forth in the Operating Agreement.

Therefore, the Court concludes that coverage for the advancement of defense costs was available under the Management Liability Insuring Agreement to DIA for its defense of the Concealment claim in the Beserra matter.

3. EPL Insuring Agreement

As set forth above, the contract exclusion provision of the EPL Insuring Agreement specifically excepts defense costs; thus, to determine whether Travelers owed DIA the duty to advance defense costs under the EPL Insuring Agreement, the Court must analyze whether the Claimants' allegations give rise to an "Employment Practices Act."

The Beserra Claimants alleged generally that "[s]tarting around 2007, certain active Members of DIA began to partially withdraw with respect to small percentages of their Membership Economic Interest" and "[a]s a result of these partial retirements by active Members of DIA, the Earnout Payments going to the active Members instead of the true retired Members, including Claimants, grew from 20% to over 50% of the aggregate Earnout Payments." ECF No. 49-3 (¶¶ 94, 99, 107, 113). The Kidd Claimants did not expressly characterize this practice as "partial"or "false" retirements, but rather alleged:

> 34. By incrementally reducing small percentages of a Member's Earnout Interest, incumbent Members protect their future Earnout Payments to the detriment of retirees.

> Incumbent Members now stagger their withdrawals and thereby time their Earnout Payments so that they are less susceptible to being limited by the Aggregate Payout Limit, thus allowing them to move to the front of the line (Earnout Payments are paid before Shortfall Payments), be paid in full, and avoid having large amounts of their Earnout Payments deferred to Shortfalls.
>
> * * * *
>
> 37. The increased participation by incumbent Members in the Earnout Payment class has diverted money that would have been used to pay the Shortfall Payments due to Claimants.
>
> * * * *
>
> 41. In essence, over the years the incumbent Members quietly adopted a practice of accelerating Eamout Payments for themselves while slowing down the Shortfall Payments due to Claimants and all other truly retired Members.
>
> 42. The result of this manipulation is that despite having significant portions of their Eamout Payments diverted to Shortfalls, years later Claimants have not received a single Shortfall Payment, while incumbent Members received Eamout Payments on top of their salaries, bonuses, and profit sharing.

ECF No. 46-11.

DIA asserts the allegations concerning "false" or "partial" retirements by DIA members constitute wrongful "actual or constructive terminations" covered by the EPL Insuring Agreement. The Policies define an Employment Practices Act (pertinent here) as a "wrongful discharge or termination, whether actual or constructive . . . related to the actual or prospective employment of any person by the Company and: (i) committed or attempted by any of the Insureds, in their capacity as such or (ii) for which any of the Insureds are held legally liable, in their capacity as such." ECF No. 46-1 at 44–45; ECF No. 46-3 at 4–5.

The Court finds that the plain language of the Policies does not encompass or contemplate the practice alleged to be unlawful by the Beserra and Kidd Claimants. That is, an "actual" discharge or termination of employment means that an employer has affirmatively ended the

employee's employment. *See Crawford Rehab. Servs., Inc. v. Weissman*, 938 P.2d 540, 546 (Colo. 1997) (Colorado is an employment at-will state, which means that an employer may terminate the employment relationship for any reason or without reason, and without legal liability). A "constructive" discharge or termination occurs when "deliberate action on the part of an employer makes or allows the employee's working conditions to become so difficult or intolerable that a reasonable person in the employee's position would have no other choice but to resign." *Koinis v. Colo. Dep't of Pub. Safety*, 97 P.3d 193, 196 (Colo. App. 2003) (citing *Wilson v. Bd. of Cnty. Comm'rs*, 703 P.2d 1257 (Colo. 1985)). The alleged "partial retirements" in Beserra and Kidd consist of members' *voluntary* reductions in Membership Earnout Interest; even if sanctioned by DIA, these reductions do not constitute a *non-voluntary* discharge or termination of employment, as recognized by Colorado law.

Therefore, the Court concludes that coverage for the advancement of defense costs was not available under the EPL Insuring Agreement to DIA for its defense of the Beserra and Kidd Claims.

In sum, the Court finds as a matter of law that the Policies provided coverage for the advancement of defense costs to DIA for the Concealment claim alleged in the Beserra matter, but not for any other claims alleged in the Beserra and Kidd matters. According to the Allocation provision in the Policies, since DIA incurred defense costs for both covered and uncovered matters, the amount owed for such costs is to be "allocat[ed] . . . between covered Loss and uncovered loss . . . based upon the relative legal exposures of the parties to the covered and uncovered matters." ECF No. 46-1 at 28. The Court agrees with DIA that the"relative legal exposures of the parties" are issues that cannot be determined as a matter of law in the current proceeding. Consequently, the cross motions are granted in part and denied in part, and DIA's first claim for relief is dismissed in

part except with respect to the underlying Concealment claim in the Beserra matter and DIA's second claim for relief is dismissed.

II. Indemnification for Amounts Paid

In Colorado, the duty to indemnify relates to the actual liability imposed and, thus, typically cannot be determined until the resolution of the underlying claims. *Cyprus*, 74 P.3d at 300–01 ("The duty to indemnify relates to the insurer's duty to satisfy a judgment entered against the insured."). Thus, to determine an insurer's duty of indemnification, "the first step [of the analysis] must be the final version of the complaint, for if no colorable claim is made that would invoke indemnification coverage, then the presumption is that no such coverage exists." *Id.* at 301. Thereafter, "the court must look to the facts as they developed at trial and the ultimate judgment." *Id.* In the event of a settlement, "a trial court could review other matters in arriving at a conclusion as to whether some portion or all of the settlement would be properly subject to indemnification." *Id.* "Extrinsic evidence may assist the trial court in determining whether and to what extent actual liability, as represented by a verdict or settlement, is covered by an existing policy." *Id.* at 301–02.

DIA clarifies in its response to Travelers' motion that it "seeks indemnification from Travelers only for . . . (1) Loss for liability arising out of the breach of fiduciary duty; (2) Loss for attorneys' fees and costs paid to the underlying claimants; and (3) prejudgment interest." Travelers argues it has no duty to indemnify amounts paid in either the Beserra or Kidd matters.

A. Liability for Breach of Fiduciary Duty

As set forth above, the Court finds the allegations asserted in the Beserra and Kidd claims for breach of fiduciary duty sound in contract, rather than in tort, and coverage for the advancement of defense costs was excluded by the contract exclusion provision of the Management Liability

Insuring Agreement. Travelers contends that the same provision excludes coverage for damages awarded and paid in settlement. Pursuant to *Cyprus*, I must now proceed to look past the arbitration demands and review relevant "extrinsic evidence" (to the extent it has been produced) to determine whether coverage is available for "Loss for liability arising out of the breach of fiduciary duty."

1. Beserra Claim

For the Beserra Claim, the parties have produced copies not only of the original and amended arbitration demands, Operating Agreement, and Policies, but also of the Claimants' arbitration brief and the Interim and Final Arbitration Awards. In their brief, the Claimants summarized their claims as follows:

> The Claimants' claims stem from three primary breaches of contractual and fiduciary duties by DIA: (1) the Amendment to the February 1, 2001 Operating Agreement that retroactively changed the way in which Earnout and Shortfall payments would be calculated as applied to pre-May 2001 retirees; (2) failure to pay Claimants' Capital Accounts when due; (3) manipulation of Earnout and Shortfall Payments by active Members to turn a pool of money earmarked for retirees into another source of compensation for incumbents.

ECF No. 46-6 at 3. The Claimants then argued why DIA was liable for breach of contract, breach of the duty of good faith and fair dealing, breach of fiduciary duty, "account stated," and concealment. *Id.* Notably, the Claimants focused on their contractual damages and did not mention any recovery for emotional distress. *See id.*

In the Interim Award opinion, the panel concluded that DIA breached the Operating Agreement by applying an amendment, not agreed to by the Claimants, which effectively reduced their retirement payments *and* by failing timely to pay the Claimants their capital accounts. ECF No. 46-7 at 13. In addition, the panel found that DIA breached its "contractual" duty of good faith and fair dealing by changing the way earnout and shortfall payments would be calculated and by

imposing "a methodology for granting reductions and partial retirements to incumbents that would be to [the Claimants'] substantial financial detriment." *Id.* at 14–15. However, the panel also determined that "DIA's failure to distribute the [Penland Opinion] did not constitute a breach of any duties to Claimants. DIA's actions in failing to disclose the decision do not support additional liability." *Id.* at 16. As to "damages," the panel found the "Claimants are entitled to damages that compensate them for these breaches of contract, including contractual breaches of the duties of good faith and fair dealing." *Id.* at 18. In the actual "Award," the panel set forth the damages and prejudgment interest calculations, as well as an award of attorney's fees and costs, and instructed the Claimants to provide the amounts calculated and attorney's fees requested to the panel by a certain date. *Id.* at 20–21. Further, the panel concluded, "This Interim Award resolves all claims and defenses which have been submitted to this arbitration for resolution. All other claims and defense[s] brought in this arbitration which have not been specifically addressed are denied." *Id.* at 22.

The Final Award's analysis is nearly identical to that of the Interim Award, including the findings quoted above. *See* ECF No. 46-9. The panel proceeded to make findings concerning attorney's fees, costs, and expenses based on the information further provided by the parties. *Id.* at 19–21. The actual "Final Award" included a description of all amounts awarded to the Claimants, a deadline for payment of the award, and the statement, "This Final Award resolves all claims and defenses which have been submitted to this arbitration for resolution. All other claims and defenses brought in this arbitration which have not been specifically addressed are denied." *Id.* at 21–23.

This extrinsic evidence reveals first that the panel made no findings as to the Claimants' breach of fiduciary duty claims; rather, it specifically addressed, and found DIA liable for, only the claims for breach of contract and breach of good faith and fair dealing. The panel then expressly

denied "all other claims and defenses brought in this arbitration which have not been specifically addressed."

DIA contends that the panel's language in both its Interim and Final Awards—"The damages to which Claimants are entitled are the same damages we would award under any other theory of liability"—suffice to demonstrate that "DIA faced legal exposure for breach of fiduciary duty, as well as for breach of contract." DIA Resp. 19. While this may be true, it is not sufficient that DIA "faced legal exposure" for an indemnification analysis; the question is whether DIA was held liable for a breach of fiduciary duty. *See* Management Liability Insuring Agreement, ECF No. 46-1 at 38 ("The Insurer shall pay on behalf of the Company Loss *for which the Company becomes legally obligated to pay* on account of any Claim . . . for a Management Practices Act taking place before or during the Policy Period."). The panel's specific findings and a review of the decision as a whole, as set forth above, reveal that DIA was not legally obligated to pay the Claimants for a breach of fiduciary duty; rather, the panel simply determined that it need not proceed to adjudicate the breach of fiduciary duty (and other) claims because the damages sought by the Claimants—which, at that point, were contractual and did not include compensatory (emotional distress) damages—would have been the same under the Claimants' other theories of liability. *See* ECF No. 46-9.

2. Kidd Claim

In addition to copies of the arbitration demand and subject Policy, the "extrinsic evidence" provided by the parties for the Kidd Claim include copies of correspondence between DIA and Travelers regarding the matter, as well as a copy of the settlement agreement. The correspondence reflects DIA's arguments as to why coverage was available under the Policy for advancement of defense costs and indemnification and Travelers' counter arguments as to why the Kidd Claims were

not covered. *See* ECF Nos. 49-14, 49-15, 49-16. The subsequent arbitration demand alleges claims for breach of fiduciary duty and breach of contract, both of which, the Court has already determined, sound in contract. *See* ECF No. 49-7. The settlement agreement reveals nothing about the Kidd Claims except for the recital, "WHEREAS, a dispute arose between DIA and Claimants whereby each Claimant has alleged, among other things, that DIA improperly delayed payment of certain retirement benefits owed to him or her (the "Dispute"), which payments in the aggregate amount to $3,051,715.05." ECF No. 46-12. The Court finds that the extrinsic evidence proffered by the parties for the Kidd Claim do not change, and actually may bolster, this Court's ruling that the Kidd Claims "reflect that DIA's 'fiduciary duties' to its retired members arose from the Operating Agreement, rather than from any independent duty necessary for a tort claim." *See supra*.

Thus, the Court concludes that no genuine issues of material fact exist as to whether Travelers owed DIA a duty of indemnification for "Loss for liability arising out of the breach of fiduciary duty."

B. Loss for Attorney's Fees, Costs, and Prejudgment Interest

DIA is correct that, according to the Policies, "Damages" includes "prejudgment and postjudgment interest and legal fees and expenses awarded pursuant to a court order or judgment" and "Damages" are a form of "Loss." ECF No. 46-1 at 23–24. However, for the same reasons set forth herein, the Court finds as a matter of law that the Loss for which DIA was legally obligated to pay—attorney's fees, costs, and prejudgment interest paid to the Claimants—arose from Claims that are excluded by the contract exclusion provision of the Management Liability Insuring Agreement "for liability of the Company under any contract or agreement," which, here, is the subject Operating Agreement. *See* ECF No. 46-1 at 42. The Court further finds that the Interim and

Final Awards demonstrate DIA would not have been liable for such Loss absent the Operating Agreement. *See id.* Accordingly, Travelers' motion for summary judgment will be granted as to DIA's third and fourth claims for relief.

CONCLUSION

Based on the entire record and for the reasons stated above, the Court **grants in part and denies in part** Travelers' Motion for Summary Judgment [filed May 26, 2017; ECF No. 44] and DIA's Motion for Summary Judgment on the First and Second Claim for Relief [filed May 26, 2017; ECF No. 48] as follows. The Court finds that genuine issues of material fact exist as to whether the Beserra and Kidd Claims were "first made" under the subject Policies. The Court further finds that Travelers owed DIA a duty to advance defense costs for the Concealment claim brought against DIA by the Beserra Claimants, and genuine issues of material fact exist as to the amount and allocation of such defense costs under the Policies. However, no genuine issues of material fact exist demonstrating that Travelers owed DIA a duty to advance defense costs for the Kidd Claim or to indemnify DIA for amounts paid pursuant to court order in the Beserra matter or paid in settlement in the Kidd matter.

Therefore, DIA's first claim for relief is dismissed except as to the advancement of defense costs for the Concealment claim, and its second, third, and fourth claims for relief are dismissed. Neither motion addressed DIA's fifth claim for relief and, thus, the claim will proceed as it applies to the remaining first claim for relief.

ORDERED and DATED at Denver, Colorado, this 24th day of July, 2017.

BY THE COURT:

Michael E. Hegarty

Michael E. Hegarty
United States Magistrate Judge