UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-62529-CIV-SMITH

AROUND THE CLOCK A/C
SERVICE, LLC,

Plaintiff,

v.

TRAVELERS CASUALTY AND SURETY
COMPANY OF AMERICA,

Defendant.
______________________________________/

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Defendant's Motion for Summary Judgment [DE 37], Plaintiff's Response in Opposition [DE 49], and Defendant's Reply [DE 53]. Also before the Court are Plaintiff's Motion for Summary Judgment [DE 33], Defendant's Response in Opposition [DE 45], and Plaintiff's Reply [DE 51]. For the reasons that follow, Defendant's Motion for Summary Judgment is granted, and Plaintiff's Motion for Summary Judgment is denied.

I. BACKGROUND[1]

A. Introduction

This matter involves an insurance dispute in which Plaintiff, Around the Clock A/C Services, LLC ("Plaintiff" or "Around the Clock"), seeks indemnity from Defendant, Travelers Casualty & Surety Company of America ("Defendant" or "Travelers"), under an Employment Practices Liability Insurance Policy.

[1] The Court omits record citations to facts the parties have not disputed.

In 1988, Leonard Pereira, his son Eric Pereira, and Steven Cartier formed Around the Clock, an air conditioning sales and service company. In 1992, Scott Davis joined Around the Clock and became its manager. Davis remained the manager at Around the Clock until late 2016, when he was terminated. In 2018, Davis sued Around the Clock and three of its Members — Leonard Pereira, Eric Pereira, and Steven Cartier — in Florida state court, seeking damages for claims of breach of contract and fraud, plus various forms of injunctive or equitable relief (the "Davis Lawsuit").

The lawsuit brought by Davis concluded with a confidential settlement agreement (the "Settlement Agreement").[2] The Settlement Agreement required, in part, that Around the Clock pay Davis a lump-sum confidential settlement payment (the "Settlement Payment") in exchange for global resolution and mutual release of all disputes, including all the claims raised in the state court litigation, claims that could have been raised, and any disputes related to any other agreements between the parties, or "any other matter" of any kind, including those under federal, state, or local law. The Settlement Agreement does not in any way seek to allocate the Settlement Payment among any of the claims. Travelers, with whom Around the Clock held an active employment practices liability insurance policy, agreed to contribute a portion of the total Settlement Payment. In the present lawsuit, Around the Clock seeks indemnity from Travelers for the entire Settlement Agreement.

B. The Davis Lawsuit

According to Davis's Second Amended Complaint [DE 1 at 61-86], Davis contemplated leaving Around the Clock to pursue a career in real estate, because Davis did not have a financial stake in the company. Davis alleged that he notified Leonard and Eric Pereira of his intent to leave Around the Clock, and, in response, Leonard and Eric Pereira promised Davis a ten percent (10%)

[2] The Settlement Agreement was filed under seal at DE 42-1.

Membership interest in Around the Clock if Davis agreed to stay with the company. Davis alleged that he decided to remain with Around the Clock based on the promise made by Leonard and Eric Pereira.

On October 28, 2011, Leonard Pereira, Eric Pereira, Steven Cartier, and Davis all signed an Amended Operating Agreement [DE 32-2 at 6-37] (the "2011 Amended Operating Agreement") to memorialize the promises made to Davis. The thirty-two-page 2011 Amended Operating Agreement defined the company's organization and corporate structure, including a description of its purpose, principal offices, tax status, overall corporate powers and obligations, and procedures upon dissolution. The 2011 Amended Operating Agreement included, as an exhibit, a list of corporate "Members" and their respective "Percentage Interest" — thirty percent to Leonard Pereira, thirty percent to Eric Pereira, thirty percent to Steven Cartier, and ten percent to Davis. (*See* 2011 Am. Operating Agreement at 37.) The 2011 Amended Operating Agreement unambiguously identifies Davis as a Member, entitled to "all items of income, gain, loss, deduction and credit . . . in accordance with [his] Percentage Interest[]." (*Id.* at 10, 12, 37.) The 2011 Amended Operating Agreement defines "Percentage Interest" as "the ratio in which the Members shall share profits and losses." (*Id.* at 8.) The 2011 Amended Operating Agreement also includes a provision entitled "Entire Agreement; Supersedes Other Agreements," which provides that: "This Agreement includes the entire agreement of the Members and their Affiliates relating to the Company and supersedes all prior contracts or agreements with respect to the Company, whether oral or written." (*Id.* at 33.)

According to Davis, in 2014, Leonard Pereira requested an amendment to the 2011 Amended Operating Agreement to provide Davis with an additional five percent Membership Interest in Around the Clock, effective upon Leonard Pereira's death. An "Amended and Restated Operating Agreement [DE 32-3 at 3-36] (the "2014 Amended Operating Agreement") was drafted,

and it included an assignment of an additional five percent total interest to Davis. There was, however, no evidence that the 2014 Amended Operating Agreement was ever signed. Davis alleged that, in 2016, Eric Pereira caused Davis to be terminated and refused to recognize Davis's Membership Interest in Around the Clock.

Davis's Second Amended Complaint included fifteen causes of action: (1) breach of the 2014 Operating Agreement against Around the Clock; (2) breach of the 2011 Operating Agreement against Around the Clock; (3) fraudulent misrepresentation against Around the Clock; (4) promissory estoppel against Around the Clock; (5) breach of fiduciary duty against Eric Pereira; (6) breach of the 2014 Operating Agreement against Eric Pereira; (7) breach of the 2011 Operating Agreement against Eric Pereira; (8) fraudulent misrepresentation against Eric Pereira and the Estate of Leonard Pereira; (9) promissory estoppel against Eric Pereira and the Estate of Leonard Pereira; (10) breach of the 2014 Operating Agreement against the Estate of Leonard Pereira; (11) specific performance of the 2014 Operating Agreement against the Estate of Leonard Pereira; (12) breach of the 2014 Operating Agreement against Steven Cartier; (13) breach of the 2011 Operating Agreement against the Estate of Leonard Pereira and Steven Cartier; (14) judicial dissolution of Around the Clock; and (15) accounting. (*See* DE 1 at 61-86). Prior to executing the Settlement Agreement, the state court dismissed the promissory estoppel claims, Counts IV and IX. (*See* DE 32-18.)

C. The Employment Practices Liability Policy

Around the Clock had a claims-made Employment Practices Liability Policy in place with Travelers for the period of November 11, 2016 to November 11, 2019 [DE 1 at 14-60] (the "Policy"). The Policy has limits of one million dollars available for indemnity and an additional one million dollars for defense liability. (Policy at 8.) The Policy provides, in relevant part, that:

> The Company will pay on behalf of the Insured, *Loss* for any *Employment Claim* first made during the Policy Period, or if exercised, during the Extended Reporting

> Period or Run-Off Extended Reporting Period, for a *Wrongful Employment Practice*.

(Policy at 31 (emphasis added).) The Policy defines the term "Loss" as follows:

> Loss means Defense Expenses and money which an Insured is legally obligated to pay as a result of a Claim, including settlements; judgments; back and front pay; compensatory damages; punitive or exemplary damages or the multiple portion of any multiplied damage award if insurable under the applicable law most favorable to the insurability of punitive, exemplary, or multiplied damages; prejudgment and postjudgment interest; and legal fees and expenses of a Claimant or Outside Claimant awarded pursuant to a court order or judgment. "Loss" does not include:
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> 1. civil or criminal fines; sanctions; liquidated damages other than liquidated damages awarded under the Age Discrimination in Employment Act or Equal Pay Act; payroll or other taxes; or damages, penalties or types of relief deemed uninsurable under applicable law;
>
> 2. future compensation, including salary or benefits, for a Claimant or Outside Claimant who has been or will be hired, promoted or reinstated to employment pursuant to a settlement, court order, judgment, award or other resolution of a Claim; or that part of any judgment or settlement which constitutes front pay, future monetary losses including pension and other benefits, or other future economic relief or the value or equivalent thereof, if the Insured has been ordered, or has the option pursuant to a judgment, order or other award or disposition of a Claim, to promote, accommodate, reinstate, or hire the Claimant or Outside Claimant to whom such sums are to be paid, but fails to do so;
>
> 3. medical, pension, disability, life insurance, Stock Benefit or other similar employee benefits, except and to the extent that a judgment or settlement of a Claim includes a monetary component measured by the value of:
>
>   a. medical, pension, disability, life insurance, or other similar employee benefits; or
>
>   b. Stock Benefits of an Insured Organization whose equity or debt securities are not publicly traded, including on a stock exchange or another organized securities market,
>
> as consequential damages for a Wrongful Act; or
>
> 4. any amount allocated to non-covered loss pursuant to Section III. CONDITIONS P. ALLOCATION of the Liability Coverage Terms and Conditions.

(Policy at 33.) The Policy defines the term "Claim" as "an Employment Claim or, if ITEM 5 of the declarations indicates that Third Party Coverage is applicable, a Third Party Claim." (Policy at 31.) The Policy defines the term "Employment Claim" as follows:

> Employment Claim means:
>
> 1. a written demand for monetary damages or non-monetary relief;
> 2. a civil proceeding commenced by service of a complaint or similar pleading;
> 3. a criminal proceeding commenced by filing of charges;
> 4. a formal administrative or regulatory proceeding commenced by the filing of a notice of charges, formal investigative order, service of summons or similar document, including a proceeding before the Equal Employment Opportunity Commission or any similar governmental agency; provided that in the context of an audit conducted by the Office of Federal Contract Compliance Programs, Employment Claim will be limited to a Notice of Violation or Order to Show Cause or written demand for monetary damages or non-monetary relief;
> 5. an arbitration, mediation or similar alternative dispute resolution proceeding if the Insured is obligated to participate in such proceeding or if the Insured agrees to participate in such proceeding, with the Company's written consent, such consent not to be unreasonably withheld; or
> 6. a written request to toll or waive a statute of limitations relating to a potential civil or administrative proceeding,
>
> against an Insured by or on behalf of or for the benefit of a Claimant, or against an Insured Person serving in an Outside Position by or on behalf of or for the benefit of an Outside Claimant, for a *Wrongful Employment Practice*; provided that *Employment Claim* does not include a labor or grievance arbitration or other proceeding pursuant to a collective bargaining agreement.

(Policy at 32 (emphasis added).) The Policy defines "Wrongful Employment Practice" as follows:

> Wrongful Employment Practice means any actual or alleged:
> 1. Discrimination;
> 2. Retaliation;
> 3. Sexual Harassment;
> 4. Workplace Harassment;
> 5. Wrongful Termination;
> 6. *breach of Employment Agreement*;
> 7. violation of the Family Medical Leave Act;
> 8. *employment-related misrepresentation*;
> 9. employment-related defamation, including libel or slander, or invasion of privacy;

10. failure or refusal to create or enforce adequate workplace or employment policies and procedures, employ or promote, including wrongful failure to grant bonuses or perquisites, or grant tenure;
11. *wrongful discipline, wrongful demotion, denial of training, deprivation of career opportunity, denial or deprivation of seniority, or evaluation*;
12. employment-related wrongful infliction of emotional distress; or
13. negligent hiring, supervision of others, training, or retention committed or allegedly committed by any Insured, but only if such act is alleged in connection with a Wrongful Employment Practice set forth in 1. through 12. above; provided that the Claim alleging the negligent hiring, supervision of others, training, or retention is brought by or on behalf of any Claimant or Outside Claimant.

(Policy at 36 (emphasis added).) The Policy defines the term "Employment Agreement" as "any express or implied employment agreement regardless of the basis in which such agreement is alleged to exist, other than a collective bargaining agreement." (Policy at 32.) The Policy's coverage is subject to two exclusions, each applicable to indemnity for "Loss" other than "Defenses Expenses," stating:

> EXCLUSIONS APPLICABLE TO LOSS, OTHER THAN DEFENSE EXPENSES
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> 1. The Company will not be liable for Loss, other than Defense Expenses, for any Claim seeking costs and expenses incurred or to be incurred to comply with an order, judgment or award of injunctive or other equitable relief of any kind, or that portion of a settlement encompassing injunctive or other equitable relief, including actual or anticipated costs and expense associated with or arising from an Insured's obligation to provide reasonable accommodation under, or otherwise comply with, the Americans With Disabilities Act or the Rehabilitation Act of 1973, including amendments thereto and regulations promulgated thereunder, or any similar or related federal, state or local law or regulation. (hereinafter "Exclusion B.1.").
>
> 2. The Company will not be liable for Loss, other than Defense Expenses, for any claim seeking severance pay, damages or penalties under an express written Employment Agreement, or under any policy or procedure providing for payment in the event of separation from employment; or sums sought solely on the basis of a claim for unpaid services. (hereinafter "Exclusion B.2.").

(Policy at 38.) The Policy describes the parties' allocation obligations, stating:

> ALLOCATION
>
> 1. If Duty-to-Defense coverage is indicated in ITEM 7 of the Declarations and there is a Claim under any Liability Coverage in which the Insureds who are afforded coverage for such Claim incur an amount consisting of both Loss that is covered by such Liability coverage and also loss that is not Covered by such Liability Coverage because such Claim includes both covered and uncovered matters or covered and uncovered parties, then such covered Loss and uncovered loss will be allocated as follows:
>
>   a. one hundred percent (100%) of Defense Expenses incurred by the Insureds who are afforded coverage for such Claim will be allocated to covered Loss; and
>
>   b. all loss other than Defense Expense will be allocated between covered Loss and uncovered loss based upon the relative legal and financial exposure of, and relative benefits obtained in connection with the defense and settlement of the Claim by the Insured Persons, the Insured Organization, and others not insured under such Liability Coverage. In making such a determination, the Insured Organization, the Insured Persons, and the Company agree to use their best efforts to determine a fair and proper allocation of all such amounts. In the event that an allocation cannot be agreed to, then the Company will be obligated to make an interim payment of the amount of Loss which the parties agree is not in dispute until a final amount is agreed upon or determined pursuant to the provisions of the applicable Liability Coverage and applicable law.

(Policy at 22.)

Around the Clock tendered Davis's Second Amended Complaint to Travelers, and Travelers determined that the fraudulent misrepresentation claims triggered potential coverage "insofar as they constituted [an employment]-related misrepresentation." Travelers determined that claims for breach of the two Operating Agreements were not covered for indemnity purposes because the 2011 Amended Operating Agreement and the 2014 Amended Operating Agreement were not "Employment Agreements" and, even if the two Operating Agreements were considered "Employment Agreements," coverage for all "Loss" other than "Defense Expenses" was excluded by Exclusion B.2. Travelers determined that coverage for all "Loss" other than "Defense

Expenses" was excluded for the equitable claims, including those for estoppel, specific performance, dissolution, and accounting, pursuant to Exclusion B.1. Travelers also determined that coverage for the breach of fiduciary duty claim was not covered because the claim did not allege a "Wrongful Employment Practice."

Travelers provided Around the Clock, and the individual defendants, with a defense to the Davis lawsuit. Around the Clock confirmed that the defense counsel appointed by Travelers, Attorney Sally Seltzer, was agreeable, adequate, and acted in Around the Clock's best interests. Around the Clock also had its own personal counsel, Attorney Elias Hilal, who was involved in all aspects of the litigation. Attorney Hilal had served as Around the Clock's corporate counsel for years and provided Plaintiff with "personal counsel advice with regard to Mr. Davis'[s] lawsuit."

Around the Clock initially denied the existence of either Operating Agreement, but Around the Clock eventually conceded the existences of the fully executed 2011 Amended Operating Agreement. Nevertheless, Around the Clock continued to maintain that Davis was never made a part owner of the company, and all defendants continued to deny liability for any of the alleged claims. Ultimately, Around the Clock decided to settle all claims. Around the Clock asked Travelers to indemnify Around the Clock for the settlement; however, Travelers declined to contribute any more than a portion of the total Settlement Payment. Travelers claimed that it did not owe anything other than a defense — which was provided — because the only potentially-covered claims (the fraudulent misrepresentation claims) did not have value. Travelers claimed further that it decided to contribute to the Settlement Payment "as a business decision to avoid defense expenses that [Travelers] would otherwise pay and also as a courtesy to the insured who was asking for Travelers to contribute towards the settlement." With full knowledge of Travelers's

position, and with the assistance and advice of its own counsel, Around the Clock decided to move forward with the settlement.

II. LEGAL STANDARD

A. Summary Judgment

Summary judgment is appropriate when "the pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247 (1986); *HCA Health Servs. of GA., Inc. v. Employers Health Ins. Co.*, 240 F.3d 982, 991 (11th Cir. 2001). Once the moving party demonstrates the absence of a genuine issue of material fact, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). The Court must view the record and all factual inferences therefrom in the light most favorable to the non-moving party and decide whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Allen v. Tyson Foods, Inc.,* 121 F.3d 642, 646 (11th Cir. 1997) (quoting *Anderson*, 477 U.S. at 251-52)). In opposing a motion for summary judgment, the non-moving party may not rely solely on the pleadings, but must show by affidavits, depositions, answers to interrogatories, and admissions that specific facts exist demonstrating a genuine issue for trial. *See* Fed. R. Civ. P. 56(c), (e); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). A mere "scintilla" of evidence supporting the opposing party's position will not suffice; instead, there must be a sufficient showing that the jury could reasonably find for that party. *Anderson,* 477 U.S. at 252*; see also Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990).

B. Florida Contract Law

The Court applies the substantive law of Florida as the forum state. *See Mid-Continent Cas. Co. v. Am. Pride Bldg. Co., LLC,* 601 F.3d 1143, 1148 (11th Cir. 2010). Under Florida law, interpretation of an insurance contract is a question of law to be decided by the court. *Mama Jo's, Inc. v. Sparta Ins. Co.,* 823 F. App'x 868, 878 (11th Cir. 2020) (citing *Dahl-Eimers v. Mutual of Omaha Life Ins. Co.*, 986 F.2d 1379, 1381 (11th Cir. 1993)). In determining coverage under an insurance policy, courts look at the policy in its entirety and are required to give "every provision its 'full meaning and operative effect.'" *State Farm Fire & Cas. Co. v. Steinberg*, 393 F.3d 1226, 1230 (11th Cir. 2004) (quoting *Hyman v. Nationwide Mut. Fire Ins. Co.*, 304 F.3d 1179, 1186 (11th Cir. 2002)). Florida law requires that the plain and unambiguous language of the policy controls. *See Swires Pac. Holdings, Inc. v. Zurich Ins. Co.,* 845 So. 2d 161, 165 (Fla. 2003). "If the language is unambiguous, it governs. If the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage, the insurance policy is considered 'ambiguous,' and must be 'interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy.'" *State Farm Fire & Cas. Co.*, 393 F.3d at 1230 (quoting *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000)). A party claiming coverage generally bears the burden of proof to establish that coverage exists. *Mama Jo's*, 823 F. App'x at 879 (citing *U.S. Liab. Ins. Co. v. Bove*, 347 So. 2d 678, 680 (Fla. 3d DCA 1997)).

III. DISCUSSION

The duty to indemnify is separate and apart from the duty to defend. An insurer's duty to defend depends solely on the allegations in the complaint and terms of the insurance policy. *J.B.D. Constr., Inc. v. Mid-Continent Cas. Co.,* 571 F. App'x 918, 926 (11th Cir. 2014) (citing *Nat'l Union Fire Ins. Co. v. Lenox Liquors, Inc.,* 358 So. 2d 533, 536 (Fla. 1977)). In contrast, "[t]he

duty to indemnify is dependent upon the entry of a final judgment, settlement, or a final resolution of the underlying claims." *Id.* at 927. "If the insured cannot demonstrate that it suffered a loss under the policy, the insurer has no duty to indemnify." *Id.* Thus, "whereas the duty to defend is measured by the allegations of the underlying complaint, the duty to indemnify is measured by the facts as they unfold at trial or are inherent in the settlement agreement." *Evanston Ins. Co. v. Europa Bldg. Assocs.,* No. 18-cv-80174-MIDDLEBROOKS, 2019 U.S. Dist. LEXIS 40941, at *9-10 (S.D. Fla. Jan. 15, 2019); *see J.B.D. Constr.,* 571 F. App'x at 927 ("An insurer's duty to indemnify is narrower than the duty to defend and must be determined by analyzing the policy coverage in light of the actual facts in the underlying case.").

A. The Settlement Agreement Does Not, and Plaintiff Cannot, Allocate the Lump-Sum Settlement Payment to Specific Claims

Florida law is well-settled in that the party seeking coverage for a settlement has the burden of proving that the settlement is covered under the insurance policy. *Horn v. Liberty Ins. Underwriters, Inc.*, 391 F. Supp. 3d 1157, 1164 (S.D. Fla. 2019). "If a lawsuit contains both covered and non-covered claims and damages, 'Florida law clearly requires the party seeking recovery . . . to allocate any settlement amount between covered and noncovered claims.'" *Id.* (quoting *Bradfield v. Mid-Continent,* 143 F. Supp. 3d 1215, 1245 (M.D. Fla. 2015)). The insured's inability to allocate precludes recovery against the insurer. *Id.*; *see Highlands Holdings, Inc. v. Mid-Continent*, 687 F. App'x 819, 820 (11th Cir. 2017) (holding that the insurer owed no duty to indemnify its insured for a settlement agreement because the insured could not prove how much it paid to settle any claims covered under its insurance policy.); *see also J.B.D. Constr.,* 571 F. App'x at 928 n.7 ("Under Florida law, [the insured] has the burden of allocating the settlement amount between covered and uncovered claims and the inability to do so precludes recovery."); *Keller Indus. v. Empl. Mut. Liab. Ins. Co.,* 429 So. 2d 779, 780 (Fla. DCA 1983) (affirming the lower court's refusal to award damages under the insurance contract based on a settlement entered into

by the insured because "as the party claiming coverage, [the insured] had the burden, which it failed to carry, to apportion damages and show that the settlement, or portions thereof, represented costs that fell within the coverage provisions of the policy.").

In this case, the Settlement Agreement was a global resolution and mutual release of all disputes. Around the Clock and Davis agreed to the lump-sum Settlement Payment in full settlement and satisfaction of claims relating to Davis's lawsuit, including all claims raised, or claims that could have been raised. The Settlement Agreement does not allocate any portion of the lump-sum Settlement Payment to any specific claims or causes of action. Moreover, Around the Clock acknowledged that it is incapable of allocating the lump-sum Settlement Payment to any specific claims covered under the Settlement Agreement. (*See* Depo. Eric Pereira [DE 31-1] at 82:23-83:13, 101:5-10, 126:17-127:20.) Accordingly, because Around the Clock is incapable of allocating the lump-sum Settlement Payment to any specific claims covered by the Settlement Agreement, Around the Clock must prove that each claim covered under the Settlement Agreement is also covered under the terms of the Policy. *See Highland Holdings,* 687 F. App'x at 820; *J.B.D. Constr.*, 571 F. App'x at 928 n.7; *Horn*, 391 F. Supp. 3d at 1164. If any one of the claims covered under the Settlement Agreement is not also covered under the Policy, the Plaintiff is precluded from recovery.

B. The 2011 Amended Operating Agreement is Not an Employment Agreement, and the Claims for Breach of the Same are Not Covered Under the Policy

The parties raise a number of arguments in support for their respective positions. However, because the 2011 Amended Operating Agreement is not an employment agreement, the claims based on breach of the Agreement were not covered by the Policy. Thus, the Court need not address the remaining arguments raised by the parties.

The parties dispute whether Davis's claims for breach of the 2011 Amended Operating Agreement are covered under the terms of Policy. Travelers contends that the 2011 Amended

Operating Agreement is not an "Employment Agreement," and therefore, Davis's claims for breach of the Operating Agreement are not covered under the terms of the Policy because such claims do not involve a "Wrongful Employment Practice." Upon review, the Court agrees that the 2011 Amended Operating Agreement is not an "Employment Agreement," and the claims for breach of the 2011 Amended Operating Agreement are not covered under the Policy.

The 2011 Amended Operating Agreement does not address any employment related matters but instead addresses matters such as the organization, membership, management, taxes, recordkeeping, and dissolution of the limited liability company. The 2011 Amended Operating Agreement does not address Davis's employment as a manager with Around the Clock. The only purported connection between the 2011 Amended Operating Agreement and Davis's employment is the alleged oral representation made to Davis, prior to the execution of the 2011 Amended Operating Agreement, that Davis would become a Member with an ownership interest in Around the Clock if he agreed to continuing working as a manager. No such condition was included in the terms of the 2011 Amended Operating Agreement. According to the express terms of the 2011 Amended Operating Agreement, Davis became a Member of Around the Clock, entitled to a ten percent Percentage Interest, upon the execution of the Agreement and his Capital Contribution. Nothing in the 2011 Amended Operating Agreement indicates that Davis's membership was dependent upon his continued employment. Importantly, the 2011 Amended Operating Agreement includes a provision entitled "Entire Agreement; Supersedes Other Agreements," which states: "This Agreement includes the entire agreement of the members and their Affiliates relating to the Company and supersedes all prior contracts or agreements with respect to the Company, whether oral or written." (2011 Am. Operating Agreement at 33.) Thus, any purported oral representation or condition precedent made outside the terms of the Operating Agreement is

irrelevant to Davis's claim for breach. Accordingly, the Court finds, as a matter of law, that the 2011 Amended Operating Agreement does not qualify as an "Employment Agreement."

Plaintiff attempts to overcome such a finding by arguing that the Davis lawsuit should be covered in its entirety because the lawsuit, as a whole, involves claims for employment related misrepresentations and a breach of an oral employment agreement. Plaintiff's argument is unavailing and misguided. In his Second Amended Complaint, Davis very clearly alleges multiple claims for breach of the 2011 Amended Operating Agreement, not for a breach of any purported oral employment agreement. Plaintiff seemingly ignores the claims actually alleged and seeks to create its own. Plaintiff cannot manufacture theories of liability and thereafter argue that Defendant is wrong for not having covered a cause of action that did not exist.

Plaintiff also argues that the claims for breach of the 2011 Amended Operating Agreement constitute a "deprivation of career opportunity, denial or deprivation of seniority or evaluation," and should therefore be covered under the Policy as a "Wrongful Employment Practice." The Court disagrees. The provision upon which Plaintiff relies for its argument clearly contemplates wrongful employment related actions. *See* Policy at 36 ("wrongful discipline, wrongful demotion, denial of training, deprivation of career opportunity, denial or deprivation of seniority, or evaluation"). As explained above, the 2011 Amended Operating Agreement does not, on its face, relate to Davis's employment as a member of Around the Clock. An individual is capable of holding an ownership interest in a business entity without necessarily being employed by the same business entity. Thus, Plaintiff's argument is unavailing.

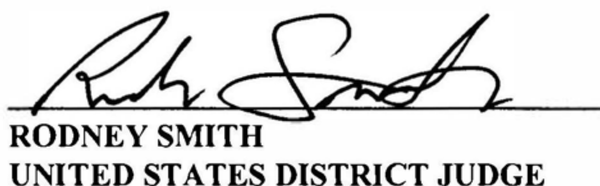
In conclusion, the Court finds, as a matter of law, that the 2011 Amended Operating Agreement is not an "Employment Agreement," and Davis's claims for breach of the 2011 Amended Operating Agreement are not covered under the terms of the Policy. The Settlement Agreement unambiguously resolves all claims brought by Davis — including his claims for breach

of the 2011 Amended Operating Agreement — in exchange for consideration, which includes a lump-sum Settlement Payment. Thus, the Settlement Agreement covers at least three claims that are not covered by the Policy — Davis' three claims for breach of the 2011 Amended Operating Agreement. The Settlement Agreement does not allocate the lump-sum Settlement Payment to specific covered and non-covered claims. Plaintiff has failed to satisfy its burden to allocate the Settlement Payment between covered and non-covered claims. Therefore, Plaintiff is precluded from recovery. Accordingly, it is

ORDERED that:

1. Defendant's Motion for Summary Judgment [DE 37] is **GRANTED**.
2. Plaintiff's Motion for Summary Judgment [DE 33] is **DENIED**.
3. All pending motions not otherwise ruled upon are **DENIED as moot**.
4. The Court will enter a separate judgment in accordance with Federal Rule of Civil Procedure 58.
5. This case is **CLOSED**.

DONE AND ORDERED in Fort Lauderdale, Florida on this 31st day of January, 2022.



RODNEY SMITH
UNITED STATES DISTRICT JUDGE

cc: Counsel of record