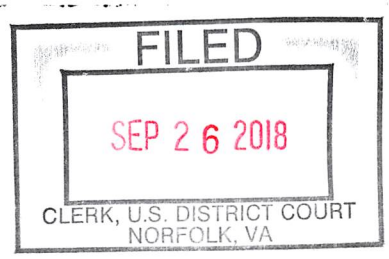
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division



ALPS PROPERTY & CASUALTY INSURANCE COMPANY, *f/k/a Attorneys Liability Protection Society, a Risk Retention Group,*

Plaintiff,

v. **Civil No. 2:17cv391**

PHILIP R. FARTHING, et al.,

Defendants.

OPINION & ORDER

This matter is before the Court on cross-motions for summary judgment. Plaintiff ALPS Property & Casualty Insurance Company ("ALPS" or "Plaintiff") filed its summary judgment motion against: (1) Defendants Philip R. Farthing ("Farthing") and Philip R. Farthing, P.C. ("Farthing, P.C.," and collectively with Farthing, the "Farthing Defendants"); and (2) Ivan L. Higgerson, Sr., Sandra H. Butt, Ivan L. Higgerson, Jr., Christie L. Pauley, Tara L. Greife, Leslie O. Erickson, and Elizabeth Metts Allen (collectively, the "Higgerson Defendants").[1] ECF No. 15. The Higgerson Defendants subsequently filed a cross-motion for summary

[1] Two of the Higgerson Defendants are sued both in their individual capacities and in their capacity as co-executor of the estate of Edith Higgerson. As outlined below, Edith Higgerson was the original plaintiff in the state court action that led to the filing of the instant federal case seeking to resolve the scope of insurance coverage.

judgment against ALPS. ECF No. 19. The Farthing Defendants have not filed a cross-motion seeking summary judgment, but they have filed an opposition to ALPS' summary judgment motion. ECF No. 22.

I. Factual and Procedural Background

The material facts in this case are not in dispute. Farthing is an attorney licensed in the Commonwealth of Virginia and he is the sole member of Farthing P.C., a professional corporation organized under the laws of Virginia. Farthing is the former trustee of the Ivan Higgerson Revocable Trust, the Ivan Higgerson Marital Trust, the Ivan Higgerson Family Trust, and the Irrevocable Life Insurance Trust Agreement of Ivan Higgerson (collectively, the "Higgerson Trusts"). Elizabeth Metts Allen ("Ms. Allen") is a licensed attorney in the Commonwealth of Virginia and is the current trustee of the Higgerson Trusts. With the exception of Ms. Allen, the Higgerson Defendants identified above are all beneficiaries, or contingent beneficiaries, of the various trusts. Edith Higgerson ("Mrs. Higgerson"), who passed away in early 2016, was also a trust beneficiary. ECF Nos. 16, 20.

In 2014, while Farthing was still serving as the trustee of the Higgerson Trusts, Mrs. Higgerson filed suit in the Circuit Court for the City of Chesapeake, Virginia, alleging both that Farthing was collecting excessive trustee fees and that he had engaged in mismanagement of trust assets, including excessive

stock trading.[2] ECF No. 1-1. A bench trial was conducted in November of 2016, and a letter opinion was issued by the state court in June of 2017. ECF No. 1-5. The letter opinion concluded that: (1) Farthing was liable for "breach of the prudent investor rule," based on Farthing's reckless "day trading" of stocks and trading on the margin, causing damages to the trusts of approximately $1,383,000; and (2) over the course of several years, Farthing had collected excessive trustee fees of approximately $770,000.[3] Id.

At all relevant times, Farthing was covered by a one-million dollar "Lawyer's Professional Liability Insurance" policy issued by ALPS. ECF No. 1-2 (hereinafter, the "Farthing Policy" or "Policy § ___"). Although ALPS provided the Farthing Defendants a defense in the underlying state court action, it did so under a reservation of rights. ALPS subsequently filed the instant federal action seeking a judgment establishing that: (1) pursuant to express policy language, coverage does not exist for any of the

[2] Mrs. Higgerson was in her early nineties when she filed suit, and she passed away in early 2016. An amended complaint was subsequently filed in state court by the executors of Mrs. Higgerson's estate, the other beneficiaries of the Higgerson Trusts, and Ms. Allen, who had then become the trustee of the Higgerson Trusts. ECF No. 1-3.

[3] The margin trading involved taking out loans to buy stock and pledging the entirety of trust assets as collateral for such loans. Such practice, coupled with Farthing's "rampant day trading," caused substantial losses to the trusts. As to the overbilling of trustee fees, the state court judge determined that nearly three out of every four dollars that Farthing collected from the trusts over the course of several years constituted an excessive fee. ECF No. 1-5, at 14.

damages awarded in the underlying suit, including the $1,383,000 in damages suffered by the Higgerson Trusts as a result of Farthing's day and margin trading, the excessive trustee fees, and the attorney's fees awarded to the Higgerson Defendants in the underlying suit;[4] and (2) ALPS is entitled to a declaration that it has no ongoing duty to defend the Farthing Defendants and is further entitled to recovery of the attorney's fees and costs that ALPS incurred in providing a defense to the state court action. ECF No. 1.

Both the Higgerson Defendants and the Farthing Defendants (collectively, "Defendants") oppose ALPS' assertion that Farthing's conduct is not covered by the attorney malpractice policy at issue. Both blocks of Defendants concede, however, that coverage does not extend to the $770,000 award for excessive trustee fees or the $101,000 attorney's fee award to the Higgerson Defendants in the underlying suit. Defendants therefore argue that policy coverage extends to the $1,383,000 in damages suffered by the trusts as a result of Farthing's day and margin trading, and the Higgerson Defendants' summary judgment motion seeks a declaratory judgment for the full policy amount of one million dollars. At the request of the parties, the Court held oral

[4] A state court opinion issued in July of 2017 awarded the Higgerson Defendants approximately $101,000 in attorney's fees and costs associated with the underlying state court suit. ECF No. 1-6

argument on the cross-motions, and a transcript of such hearing has been prepared. ECF No. 29. As reflected in such transcript, counsel agree that: (1) ALPS' duty to defend is governed by the policy language and the allegations in the amended complaint filed in the underlying state court action; (2) ALPS' duty to indemnify is governed by the policy language and the "litigated facts" in the underlying state court action; and (3) the parties have submitted all evidence that they want to be considered by this Court, no further discovery is necessary, and that the pending case should be resolved on the cross-motions for summary judgment. Hearing Tr. 94-99.

II. Standard of Review

A. Summary Judgment Standard

The Federal Rules of Civil Procedure provide that a district court shall grant summary judgment in favor of a movant if such party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[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." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247-48 (1986).

Although the initial burden on summary judgment falls on the moving party, once a movant properly files evidence supporting

summary judgment, the non-moving party may not rest upon the mere allegations of the pleadings, but instead must set forth specific facts in the form of exhibits and sworn affidavits illustrating a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986); Butler v. Drive Auto. Indus. of Am., Inc., 793 F.3d 404, 408 (4th Cir. 2015). When evaluating a summary judgment motion, "the relevant inquiry is '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.'" Garofolo v. Donald B. Heslep Assocs., Inc., 405 F.3d 194, 199 (4th Cir. 2005) (quoting Anderson, 477 U.S. at 251-52). In making such determination, "the district court must 'view the evidence in the light most favorable to the' nonmoving party." Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562, 568 (4th Cir. 2015) (quoting Tolan v. Cotton, 134 S. Ct. 1861, 1866 (2014)).

When confronted with cross-motions for summary judgment, "the court must review each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law." Rossignol v. Voorhaar, 316 F.3d 516, 523 (4th Cir. 2003) (internal quotation marks and citation omitted). As to each motion, the Court must resolve factual disputes and competing rational inferences in favor of the non-movant. Id.

B. Contract Interpretation under Virginia Law

It is undisputed that Virginia law governs the interpretation of the insurance policy at issue in this case. Under "well established" law in Virginia, "when the terms of a contract are clear and unambiguous, a court must give them their plain meaning." Pocahontas Mining Liab. Co. v. Jewell Ridge Coal Corp., 263 Va. 169, 173, 556 S.E.2d 769, 771 (2002) (citations omitted). In determining the "plain meaning" of contract terms, "the words used are given their usual, ordinary, and popular meaning." Id. at 173, 556 S.E.2d at 772. A contract term is not "ambiguous" merely because opposing parties disagree as to the proper interpretation; "[r]ather, ambiguity arises when [a contract's] language can be understood in more than one way or refers to two or more things at once." Id. at 173, 556 S.E.2d at 771.

Turning to Virginia law on the more narrow topic of insurance policy interpretation, the Virginia Supreme Court has explained as follows:

> Courts interpret insurance policies, like other contracts, in accordance with the intention of the parties gleaned from the words they have used in the document. Each phrase and clause of an insurance contract "should be considered and construed together and seemingly conflicting provisions harmonized when that can be reasonably done, so as to effectuate the intention of the parties as expressed therein."

TravCo Ins. Co. v. Ward, 284 Va. 547, 552, 736 S.E.2d 321, 325 (2012) (quoting Floyd v. Northern Neck Ins. Co., 245 Va. 153, 158,

427 S.E.2d 193, 196 (1993)). Because insurers ordinarily dictate the terms of insurance policies, Virginia law requires policy exclusions to be drafted "in language that clearly and unambiguously defines their scope," and if a coverage dispute arises, "the burden is upon the insurer to prove that an exclusion of coverage applies." Id. at 553, 736 S.E.2d at 325 (citations omitted); see Transcon. Ins. Co. v. RBMW, Inc., 262 Va. 502, 512, 551 S.E.2d 313, 318 (2001) ("Exclusionary language in an insurance policy will be construed most strongly against the insurer," and while "[r]easonable exclusions not in conflict with statute will be enforced, . . . it is incumbent upon the insurer to employ exclusionary language that is clear and unambiguous.") (citation omitted).

While an interpreting Court applies the plain meaning of disputed policy terms and seeks to harmonize seemingly conflicting policy provisions, "Virginia . . . adheres to the general rule that if an insurance policy 'is susceptible of two constructions, one of which would affect coverage and the other would not, the court will adopt that construction which will afford coverage.'" Cont'l Cas. Co. v. Burton, 795 F.2d 1187, 1190 (4th Cir. 1986) (quoting Lincoln National Life Ins. Co. v. Commonwealth Corrugated Container Corp., 229 Va. 132, 137, 327 S.E.2d 98, 101 (1985)); see Jefferson-Pilot Fire & Cas. Co. v. Boothe, Prichard & Dudley, 638 F.2d 670, 674 (4th Cir. 1980) ("[W]here two interpretations equally

fair may be made, the one which permits a greater indemnity will prevail." (citing Ayres v. Harleysville Mutual Casualty Co., 172 Va. 383, 2 S.E.2d 303 (1939)). Stated differently, "[w]here two constructions are equally possible, that most favorable to the insured will be adopted." PBM Nutritionals, LLC v. Lexington Ins. Co., 283 Va. 624, 634, 724 S.E.2d 707, 713 (2012) (quoting Copp v. Nationwide Mut. Ins. Co., 279 Va. 675, 681, 692 S.E.2d 220, 223 (2010)); see Granite State Ins. Co. v. Bottoms, 243 Va. 228, 234, 415 S.E.2d 131, 134 (1992) ("[D]oubtful, ambiguous language in an insurance policy will be given an interpretation which grants coverage, rather than one which withholds it.") (citation omitted). If, however, a policy exclusion "is not ambiguous, there is no reason for applying the rules of contra proferentem or liberal construction for the insured." Ward, 284 Va. at 553, 736 S.E.2d at 325 (quoting PBM Nutritionals, 283 Va. at 634, 724 S.E.2d at 713).

III. Discussion

"As is often true of insurance coverage disputes," here, the dispute between ALPS and the Defendants "does not involve any real disagreement as to the underlying facts." Attorneys Liab. Prot. Soc'y, Inc. v. Whittington Law Assocs., PLLC, 961 F. Supp. 2d 367, 370 (D.N.H. 2013). Rather, the outcome of this action turns "on the interpretation of the [Farthing] defendants' insurance policy, over which there is much disagreement." Id. at 370-71.

A. Coverage for Trustee Fees & Attorney's Fees

As noted above, both blocks of Defendants concede that the Farthing Policy does not provide coverage for the excessive trustee fees that Farthing collected from the trusts or for the attorney's fees awarded to the Higgerson Defendants in the underlying state court case. ECF No. 20, at 3; ECF No. 22, at 4. Agreeing with and adopting such concessions based on the clear and unambiguous provisions limiting the definition of the policy term "damages," see Policy §§ 2.6.1, 2.6.4, the Court holds that the Policy does not cover such fees, and summary judgment is therefore granted in favor of ALPS on this issue.[5]

B. Policy Coverage for Trust Investment Losses

As a result of Farthing's rampant day trading and unauthorized margin trading, the Higgerson Defendants were awarded over $1,383,000 as compensation for the loss in value of stocks held by the trusts. ECF No. 1-5, at 8. The state court opinion awarding such relief expressly found the absence of any factual circumstances warranting Farthing's risky investing approach, labeling Farthing's actions: (1) "not justified by any circumstances . . . enumerated at trial"; (2) "unauthorized"; (3) "contrary to the prudent investor rule"; (4) "breaches of . . . fiduciary duties"; and (5) "reckless." Id. at 8-9.

[5] The "Exclusions" section of the Policy also contains a provision excluding coverage for disputes over fees or costs. Policy § 3.1.9.

Relying on the state court's ruling, ALPS asserts that the investment losses suffered by the trusts fall outside of policy coverage for four independent reasons: (1) they are not "damages" as defined by the policy; (2) they did not result from "Professional Services" as defined by the policy, but rather, resulted from poor "investment advice"; (3) they are covered by an exclusion applicable to acts of "conversion, misappropriation, or negligent supervision" of funds or property; and/or (4) they are covered by an exclusion applicable to "dishonest . . . or intentionally wrongful or harmful act[s]."[6] As set forth below, the Court finds that Plaintiff has carried its burden to demonstrate that the exclusion governing "negligent supervision" of funds or property held or controlled by the insured applies to bar coverage in this case. As a result of such finding, the Court does not present a full analysis of the remaining arguments advanced by Plaintiff.

1. Relevant Policy Language

The insurance policy at issue provides coverage for all sums of money the insured becomes legally obligated to pay "as Damages" based on claims that "arise[] from or in connection with an act, error or omission in Professional Services that were or should

[6] ALPS advances a fifth argument in its summary judgment briefing; however, such argument appears to be limited to addressing the subset of damages involving overbilling of trustee fees and the Higgerson Defendants' recovery of attorney's fees in the underlying suit, and as noted in the preceding section, such issues were subsequently conceded by Defendants.

have been rendered by the Insured." Policy § 1.1.1(a). The Farthing Policy defines "Damages" as follows:

> 2.6 **Damages** means any monetary award by way of judgment or final arbitration, or any settlement; provided, however that **Damages** does not mean nor include:
>
> . . .
>
> 2.6.3 injunctive, declaratory, or other equitable relief, or costs or fees incident thereto;
>
> 2.6.4 restitution, reduction, disgorgement or set-off of any fees, costs, consideration or expenses paid to or charged by an **Insured**, or any other funds or property of any person or entity presently or formerly held or in any manner directly or indirectly controlled by an **Insured**; or
>
> 2.6.5 any injury or damage to, destruction of, loss of, or loss of use of any funds or property.

Id. at § 2.6 (emphasis added). The Policy defines "Professional Services" as follows:

> 2.24 **Professional Services** means:
>
> 2.24.1 services or activities performed solely for others as an **Attorney** in an attorney-client relationship on behalf of one or more clients applying the **Attorney**'s specialized education, knowledge, skill, labor, experience and/or training;
>
> . . .
>
> 2.24.3 services as administrator, conservator, guardian, executor, personal representative or trustee, so long as the **Insured** . . . is not a beneficiary of such estate or trust, and . . . is not receiving compensation other than fees for such services paid directly from such estate or trust;
>
> . . .
>
> **Professional Services** does not mean nor include:
>
> . . .

2.24.6 the rendering of investment advice in any context to any person including, but not limited to, advice concerning securities, real property, commodities, futures contracts or franchises; or

2.24.7 services as a broker, dealer, business manager, accountant, or real estate broker or agent.

Id. at § 2.24 (emphasis added).

The separately captioned "Exclusions" section of the Farthing Policy states as follows:

3.1 **THIS POLICY DOES NOT APPLY TO ANY CLAIM ARISING FROM OR IN CONNECTION WITH:**

3.1.1 Any dishonest, fraudulent, criminal, malicious, or intentionally wrongful or harmful act, error or omission committed by, at the direction of, or with the consent of an **Insured** . . . .

. . .

3.1.8 Any conversion, misappropriation, improper commingling or negligent supervision by any person of client or trust account funds or property, or funds or property of any other person held or controlled by an **Insured** in any capacity or under any authority, including any loss or reduction in value of such funds or property.

Policy § 3.1.8.

2. The Scope of Covered "Damages"

Plaintiff advances two arguments in support of its contention that the $1,383,000 in damages suffered by the Higgerson Trusts as a result of Farthing's day and margin trading were not "damages" as defined by the Policy. First, Plaintiff argues that such award constitutes "restitution" of funds or property previously held or controlled by Farthing. Policy § 2.6.4. Second, Plaintiff argues

such award was compensation for "any injury or damage to . . . or loss of . . . any funds or property." Id. § 2.6.5. This Court declines to squarely reach such arguments in light of the clear applicability of the "negligent supervision" exclusion.[7]

3. Additional Exceptions and Exclusions

a. "Investment Advice" & Intentionally Wrongful Acts

Similar to the definition of "damages," the Court finds that it is unnecessary to fully analyze the parties' detailed arguments regarding the "Investment Advice" exception to coverage contained within the definition of "Professional Services," or the

[7] The Court notes that "restitution" can take the form of legal or equitable relief, Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 212 (2002), and when a claim for restitution seeks legal relief in the form of a money judgment imposing personal liability on the defendant, it seeks compensation "for some benefit the defendant had received from [the plaintiff]." Id. at 213 (emphasis added) (citation omitted); see 42 C.J.S. Implied Contracts § 23 (2018) ("Restitution is predominantly the law of unjust enrichment. Unjust enrichment is usually a prerequisite for the enforcement of the doctrine of restitution and if there is no basis for unjust enrichment, there is no basis for restitution.") (footnotes omitted); see also Haines v. St. Paul Fire & Marine Ins. Co., 428 F. Supp. 435, 441 (D. Md. 1977) (distinguishing between "ancillary relief" to include the remedy of "disgorgement" in a securities action, which is available only if the defendant "has made a profit," with a "tort damage award" that is measured by the damage suffered by the plaintiff). This Court therefore questions whether the $ 1,383,000 award, which was not predicated in any way on unjust enrichment, qualifies as "restitution." Separately, the Court notes its substantial reservations regarding Plaintiff's proposed interpretation of the property damage exclusion set forth in § 2.6.5, a provision that is not limited to "tangible" property and is facially applicable regardless of whether the insured ever possessed or controlled the referenced property or funds. If Plaintiff's broad interpretation of this provision were adopted, it would risk swallowing the vast majority of the coverage provided by the Policy, including coverage for traditional legal services. However, the Court finds that it is unnecessary to define the precise contours of such arguably ambiguous provision, because even assuming, in Defendants' favor, that such limiting provision is inapplicable, the clearly worded, and far more circumscribed, "negligent supervision" exclusion applies to bar coverage in this case.

"dishonest . . . or intentionally wrongful or harmful act" exclusion in light of the clear applicability of the "negligent supervision" exclusion. That said, as discussed below, the existence of the "investment advice" exception in the Policy still bears on the interpretation of other relevant policy provisions because the Policy must be read as a whole.[8]

b. "Negligent Supervision"

i. Policy Exclusion is unambiguous and applicable

Although there are apparent flaws or, at a minimum, potential flaws in Plaintiff's attempt to defeat coverage by reliance on the several policy provisions discussed above, Plaintiff has carried

[8] Having conducted something less than a complete analysis of the scope and applicability of these two policy provisions, it appears that Defendants have the better argument as to each provision. First, Plaintiff seeks to broadly define the phrase "investment advice" to include the act of buying and selling stock on behalf of another person without providing any guidance or suggestion to that other person. Defendants, in contrast, assert that the term "advice" requires the act of giving guidance to another. Because Plaintiff's proposal appears to be, at best, an "equally possible" construction of such disputed term, it appears that the Court would be required to adopt the construction favoring the insured. PBM Nutritionals, LLC, 283 Va. at 634, 724 S.E.2d at 713; cf. Gonakis v. Medmarc Cas. Ins. Co., 722 F. App'x 529, 534 (6th Cir. 2018) (discussing policy language that, unlike the instant policy, expressly defined "investment advice" as including not only the commonly understood meaning of "recommending" the purchase of specific investments, but also "managing any investment; or buying or selling any investment for another.") (emphasis added). Second, as to the intentionally wrongful acts policy provision, it is undisputed that this Court's summary judgment ruling must be predicated on the findings of the state court in the underlying action, and here, although Farthing's investment activities were deemed "reckless," the state court judge stopped short of expressly finding that Farthing either: (1) was "dishonest" with beneficiaries regarding his aggressive investment activities; or (2) intentionally committed a wrongful or harmful act. While the Court recognizes the possibility that the trusts' losses could be deemed to "arise from or in conjunction with" dishonest "omissions" based on Farthing's failure to disclose his activities, the state court opinion makes no finding of "dishonesty."

its burden to demonstrate the applicability of the unambiguous policy exclusion applicable to claims arising out of the insured's "negligent supervision" of funds or property. Read in its entirety, such exclusion provides as follows:

> **THIS POLICY DOES NOT APPLY TO ANY CLAIM ARISING FROM OR IN CONNECTION WITH:**
> . . .
> Any conversion, misappropriation, improper commingling or negligent supervision by any person of client or trust account funds or property, or funds or property of any other person held or controlled by an **Insured** in any capacity or under any authority, including any loss or reduction in value of such funds or property.

Policy § 3.1.8.

The Court agrees with Plaintiff's representation at oral argument that the language "client or trust account funds or property" appears to be directed primarily at an attorney's conduct in the typical attorney-client setting when the attorney is handling client funds/property and/or is handling funds held in the lawyer's/law firm's own trust account. However, the policy language immediately following such statement clearly indicates that the exclusion extends beyond "client" property or a law firm trust account. Importantly, the exclusion clearly states that it applies to "funds or property of any other person held or controlled by an Insured in any capacity or under any authority." Id. (emphasis added). Accordingly, by its clear and express terms,

such provision facially applies to stock[9] "held or controlled" by an insured acting in the capacity of "trustee." Moreover, the express and unambiguous language of such provision indicates that the policy exclusion broadly applies to cover not just loss of funds or property but also "any . . . reduction in value of such funds or property." Id. (emphasis added). As a result, the only remaining question is whether Farthing's acts resulting in the trusts' stock-portfolio losing over $1,383,000 in value resulted from Farthing's "negligent supervision" of the funds/property held or controlled by Farthing on behalf of the trust. See St. Paul Fire & Marine Ins. Co. v. Llorente, 156 So. 3d 511, 513 (Fla. Dist. Ct. App. 2014) (finding that when the "attorney/escrow agent/fiduciary disbursed the funds before the preconditions to the release of those funds had been met there is no question that she failed to guard and keep safe the funds entrusted to her," and thus, the insurance policy exclusion applicable to "failure to

[9] "Funds" is not defined by the Farthing Policy, and neither party to this action has endeavored to provide a definition. The Court therefore adopts and applies the common meaning as reflected in Black's Law Dictionary: "1. A sum of money or other liquid assets established for a specific purpose"; and "2. (*usu. pl.*) Money or other assets, such as stocks, bonds, or working capital, available to pay debts, expenses, and the like." FUND, Black's Law Dictionary (10th ed. 2014). Such definition is not only consistent with the common understanding of such term but is also consistent with the use of the phrase "funds or property" in both the instant exclusion and in preceding policy provisions. Moreover, even if the word "funds" must be narrowly read to exclude "stock," the applicable policy language is "funds or property," and if stock does not qualify as a "fund," it would alternatively qualify as "property."

. . . safeguard funds held or to be held for others," barred coverage under the policy).

The term "negligent supervision" is not expressly defined in the Farthing Policy, and the parties do not cite any case law or other persuasive source in an effort to define the plain meaning of such term.[10] However, regardless of whether the Court endeavors to draw from common experience, or whether it turns to Black's Law Dictionary as a guide, the Court easily concludes that the "usual, ordinary, and popular meaning" of the term "negligent supervision" of funds/property includes the reckless investment of a stock portfolio in a manner that violates the prudent investor rule.

First, the precise contours of the ordinary meaning of the word "negligence" need not be considered in this case as Farthing's investment activities were expressly determined to be "reckless" breaches of his fiduciary duties during the underlying state court lawsuit. Such finding of recklessness establishes, as a matter of law, a lack of care that rises to, and exceeds, ordinary negligence. Additionally, the Court rejects Defendants' contention that § 3.1.8 is inapplicable merely because there was not a stand-alone cause of action alleging "negligence" or

[10] Typically, case law addressing the legal concept of "negligent supervision" involves the supervision of other people, not funds/property. However, the policy clause before this Court leaves no doubt that it excludes claims arising from the negligent supervision of funds or property held or controlled by the insured. Accordingly, the Court must interpret such term in the context of the language with which it appears.

"negligent supervision" in the underlying state court suit. As previously noted herein, it is undisputed that ALPS' duty to indemnify is governed by the policy language and the "litigated facts" in the underlying state court action. CACI Int'l, Inc. v. St. Paul Fire & Marine Ins. Co., 566 F.3d 150, 155 (4th Cir. 2009). Here, the litigated facts clearly establish that, even though Count One of the amended complaint in the state court action is styled as a breach of fiduciary duty, the nature of the breach as established through "litigated facts" was the reckless investment of trust assets. While the Court agrees with Defendants that the state court judgment cannot be interpreted as finding all of the facts necessary to conclude that Mr. Farthing also engaged in "conversion," the litigated facts clearly demonstrate "a legal duty on the part of [Farthing], breach of that duty, and . . . that such breach was the proximate cause of injury, resulting in damage to the [trusts]." Blue Ridge Serv. Corp. of Virginia v. Saxon Shoes, Inc., 271 Va. 206, 218, 624 S.E.2d 55, 62 (2006). As Defendants fail to demonstrate that insurance coverage turns on the precise phrasing of the legal claims in a complaint, as contrasted with the facts alleged and ultimately proven through litigation, the Court concludes that the underlying state court action unquestionably establishes Farthing's negligence.

As to the word "supervision," both common experience and a review of case law reveals that such concept is generally

understood as involving management and oversight over a person or property, and in ordinary parlance, "supervision" is used to describe the management of investments, to include stock portfolios. See Migdal v. Rowe Price-Fleming Int'l, Inc., 248 F.3d 321, 324 (4th Cir. 2001) (noting, in an appeal concerning "the organization and governance of mutual funds," that "[m]ost funds are externally managed—each fund contracts with an investment adviser to recommend and supervise the fund's investments") (emphasis added); In re Niessen's Estate, 489 Pa. 135, 141, 413 A.2d 1050, 1053-54 (1980) (discussing the "elaborate research analysis system" utilized by a corporate fiduciary to service its clients, including a "research department . . . established to supervise the trust investments" and "an individual manager . . . appointed to maintain constant supervision over each portfolio") (emphasis added).

Consistent with such ordinary understanding of the word "supervision," such term is defined in Black's Law Dictionary as "[t]he series of acts involved in managing, directing, or overseeing persons or projects." SUPERVISION, Black's Law Dictionary (10th ed. 2014). Importantly, the Virginia Court of Appeals has recently relied on both Webster's Dictionary and Black's Law Dictionary in a statutory analysis case, explaining as follows:

> Webster's Third New International Dictionary (2002) defines "supervise" as "coordinate, direct, and inspect continuously and at first hand the accomplishment of" and "oversee with the powers of direction and decision the implementation of one's own or another's intentions." Id. at 2296; see also Supervision, Black's Law Dictionary (10th ed. 2014) (defining it as "[t]he series of acts involved in managing, directing, or overseeing persons or projects").

Hutton v. Commonwealth, 66 Va. App. 714, 720, 791 S.E.2d 750, 753 (2016); see also Sec. Ins. Co. of Hartford v. Lubrizol Corp., No. 1:06cv215, 2008 WL 11344758, at *13 (E.D. Tex. Apr. 30, 2008) (relying on the Black's Law Dictionary definition of "supervision" when analyzing the terms of an insurance policy).

Accordingly, this Court finds that the Plaintiff has satisfied its obligation to draft a clear policy exclusion, and that the exclusion of coverage for the "negligent supervision" of property or funds entrusted to an insured in any capacity excludes coverage for Farthing's reckless mismanagement of the Higgerson Trusts' stock portfolio. See Whittington Law Assocs., 961 F. Supp. 2d at 372 (discussing a textually similar, earlier-in-time version of the same ALPS policy provision now before this Court, and finding its terms to be "clear and unambiguous as applied to the facts," in a case where the district court determined that the ALPS policy excluded coverage for losses resulting from "[a] scammer's misappropriation" of funds under the control of a law

firm);[11] cf. Dean Witter Reynolds, Inc. v. Hammock, 489 So. 2d 761, 766 (Fla. Dist. Ct. App. 1986) (affirming the trial court's denial of a post-trial motion in a case where the jury found that an investment account "had been negligently supervised" and "churned" and that the account owner "had been misled with regard to the possible losses attendant upon daytrading in silver futures"); Black v. Cleveland Tr. Co., No. 42033, 1981 WL 10206, at *4 (Ohio Ct. App. Feb. 12, 1981) (reversing the trial court's grant of summary judgment in favor of a trustee on a claim that such trustee "failed to supervise and negligently supervised the trust assets" based on allegations that certain securities were "improperly purchased, improperly sold, or improperly permitted to remain without active trading for excessive periods, resulting in losses to the trust").[12] The Court therefore finds that Plaintiff carries

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[11] The controlling policy provision in Whittington excluded coverage for "any conversion, misappropriation or improper commingling" of funds held or controlled by the insured in any capacity, but made no reference to "negligent supervision." Whittington Law Assocs., 961 F. Supp. 2d at 372. The opinion in that case did, however, address the defendants' alternative argument that such provision should be deemed "ambiguous" as a result of the fact that a "new version" of the same ALPS exclusion had additional language extending its application to "negligent supervision"; the district court was not swayed by such claim. Id. at 373-75, 374 n.5.

[12] In Goodville Mut. Cas. Co. v. Tripp, 46 Pa. D. & C. 4th 538, 548-49 (Com. Pl. 2000), the court reviewed multiple different dictionary definitions of the word "supervise," and determined that "the term 'supervision' has a range of meanings from a general or expansive definition of directing and watching over, to a more narrow definition that requires an element of control and authority." To the extent such term could arguably be viewed as "ambiguous" in other contexts, it is not ambiguous here because Farthing's conduct qualifies as "supervising" trust assets under either a broad or narrow definition.

its burden to demonstrate that the disputed "exclusionary language . . . clearly and unambiguously bring[s] [Farthing's conduct] within its scope." Salzi v. Virginia Farm Bureau Mut. Ins. Co., 263 Va. 52, 55, 556 S.E.2d 758, 760 (2002) (quoting Floyd, 245 Va. at 158, 427 S.E.2d at 196).

In reaching this conclusion, the Court does not apply "the rules of contra proferentem or liberal construction for the insured" because the policy language is clear and no ambiguity exists. Ward, 284 Va. at 553, 736 S.E.2d at 325; see PBM Nutritionals, 283 Va. at 633-36, 724 S.E.2d at 713-14 (explaining that the words of an insurance policy must be "construe[d] as written," that terms may not be added or ignored, and that a policy "is not ambiguous merely because courts of varying jurisdictions differ with respect to the construction of policy language") (citations omitted). Rather than identifying an ambiguity on the face of the policy, this Court finds as follows:

> [T]he language used in this exclusion clause is clear and simple [and] there is nothing ambiguous in the words or phrases used therein. They have a common and well-understood meaning. When viewed and considered in the light of the entire contract, and as a part thereof, it is clear that such clause excludes from liability thereunder any claim for damages arising from [the insured's negligent supervision, to include the reckless investment of, funds or property held or controlled by an insured on behalf of a client, or on behalf of the beneficiary of a trust].

Nationwide Mut. Ins. Co. v. Wenger, 222 Va. 263, 268-69, 278 S.E.2d 874, 877 (1981) (citation omitted).

ii. § 3.1.8 does not swallow trustee coverage

Having determined that § 3.1.8 is both clear and unambiguous, and that it is facially applicable to exclude coverage for the $1,383,000 monetary award at issue, the Court must next address Defendants' alternative argument that § 3.1.8 should not be applied as written because such interpretation of the Farthing Policy eviscerates the coverage applicable to acts taken as a "trustee." In conducting such analysis, the Court agrees with Plaintiff that although the negligent supervision exclusion vastly reduces the breadth of coverage provided to trustees, it does not render the trustee coverage "illusory."

As referenced by both parties, in Global Title, LLC v. St. Paul Fire & Marine Ins. Co., 788 F. Supp. 2d 453, 455 (E.D. Va. 2011), another judge of this Court addressed a similar challenge to exclusionary language in a professional insurance policy purchased by a "full-service title insurance and closing company." In Global Title, the insurance policy at issue covered losses arising from the insured's negligent acts, errors, or omissions, but expressly excluded coverage for losses resulting from "any unauthorized act committed by any protected person that deprives an owner of the use of its funds" (hereinafter, the "handling of funds" provision). Id. at 455-56. The insurance dispute in Global Title arose out of the title company's release of over two million dollars to a putative borrower after the borrower informed the

title company that the bank loans would not close. Id. at 455. The "borrower" absconded with the prematurely released money and the bank thereafter sued the title company on various legal theories, including negligence and breach of fiduciary duty. Id.

After the title company made an insurance claim, the insurer denied coverage based on the "handling of funds" policy provision. In the subsequent federal insurance coverage suit, the insured argued that even if such exclusion facially applied, interpreting it in a manner that denied coverage would "render meaningless the Policy's insurance coverage for escrow services." Id. at 462. In rejecting such illusory coverage argument, the Court noted that numerous acts associated with searching title history, processing closing documents, recording mortgages, etc., do not involve the handling of funds, and thus remain covered by the policy. Id.

Here, while a closer question than in Global Title, the Court finds that the policy coverage for trustees is not rendered illusory based on the limitations provided in § 3.1.8, as coverage remains for some acts taken by a trustee that do not involve the insured's conversion, misappropriation, commingling, or negligent supervision of trust funds/property. First, it is important to begin the analysis by considering the enforceability of § 3.1.8 vis-à-vis the express policy coverage for "Professional Services" as a whole, which broadly includes acts taken by counsel in a traditional attorney-client relationship. Considering the full

scope of "Professional Services" as defined by the Policy, it is immediately apparent that only a small fraction of a lawyer's acts taken in a traditional attorney-client setting involve such lawyer's "supervision" of a client's property or funds. Lawyers routinely prepare and interpret contracts and other legal documents, interview and depose witnesses, analyze case law and statutes, and prepare and try cases on behalf of their clients, with such examples constituting a small sampling of the myriad of activities a lawyer engages in that are wholly unrelated to handling/supervising/controlling client funds or property. Accordingly, § 3.1.8 plainly does not "swallow," or otherwise render meaningless, or even greatly circumscribe, the affirmative coverage for "Professional Services" typical to the legal profession.

Second, focusing on the fact that the Policy definition of "Professional Services" also extends to "services as . . . trustee," Policy § 2.24.3, the Court must determine whether such coverage can be reasonably harmonized with the exclusion in § 3.1.8, or whether the exclusion in § 3.1.8 results in only "illusory" protection for acts taken as a trustee. In conducting such analysis, it is important to again highlight the fact that "Professional Services" performed as a trustee are merely one small subset of the legal services generally covered by the instant "Lawyer's Professional Liability Insurance Policy." Accordingly,

the concern that a clear and unambiguous exclusion applies to greatly circumscribe coverage within such defined subset is not as grave a concern as would arise if an exclusion applied to broadly limit the vast majority of otherwise covered actions across all manner of Professional Services. Cf. Transcon. Ins. Co. v. Caliber One Indem. Co., 367 F. Supp. 2d 994, 1007 (E.D. Va. 2005) (finding that "some limiting construction" of the exclusion in dispute was necessary "to avoid the result that [the insured] in fact purchased no professional liability coverage whatsoever") (emphasis added).

Having considered the parties' written and oral arguments on this issue, the Court agrees with Plaintiff that one can hypothesize several "potentially covered claims against trustees under the Policy that do not involve a reduction in value of the trust corpus entrusted to the trustee . . . includ[ing]:" (a) a trustee gives faulty tax advice to trust beneficiaries which results in unforeseen individual tax liabilities to the beneficiaries; (b) a dispute among actual and potential beneficiaries of a trust because of the trustee's interpretation of trust documents; (c) a potential violation related to hazardous property; (d) the trustee's loss of trust documents; and (e) damages to a putative purchaser of trust property because of errors in documents and identification of all interests." ECF No. 23, at 10. Additionally, at oral argument, Plaintiff provided the following additional and/or clarifying examples:

(1) "you could draft trust documents that don't do what they're supposed to do."
(2) "You could give flawed legal advice about the meaning of trust documents to . . . the relevant parties to the trust documents."
(3) "You could mishandle a beneficiary designation in some way . . . like a paperwork issue."
(4) "You could get less money as a beneficiary because of a poorly drafted document or an erroneous beneficiary designation."

Hearing Tr. 91-92. Although Plaintiff's examples are limited to a handful of scenarios, all of which appear designed to avoid any direct financial impact on the trust corpus, such examples have not been effectively rebutted by Defendants, and the Court believes that they illustrate that § 2.24.3 provides coverage for an identifiable subset of acts taken by an attorney/trustee that are not excluded by § 3.1.8. Additionally, it appears to the Court that the Farthing Policy may provide coverage if a lawyer/trustee was sued based on the timing or amount of discretionary distributions made to a proper trust beneficiary. NationsBank of Virginia, N.A. v. Estate of Grandy, 248 Va. 557, 561, 450 S.E.2d 140, 143 (1994) ("Whether a beneficiary is entitled to support from the trust if other resources are available is a question of trust interpretation.") (emphasis added). Accordingly, it appears to the Court that the exclusion in § 3.1.8 greatly restricts, but does not wholly swallow, the coverage provided in § 2.24.3.[13] See

[13] While the Court finds that Plaintiff offers sufficient examples to rebut Defendants' illusory coverage argument, the Court recognizes that additional examples of covered activity might exist, thereby further undercutting

Silver v. Am. Safety Indem. Co., 31 F. Supp. 3d 140, 148 (D.D.C. 2014) (rejecting a claim by the insured that the insurance coverage at issue was "non-existent" or "de minimis" or "invalid as a matter of public policy," instead finding that exclusion provisions, when clear and unambiguous, must be enforced as written "even if the insured did not foresee how the exclusion operated, otherwise courts will find themselves in the undesirable position of rewriting insurance policies and reallocating assignment of risks between insurer and insured") (citations omitted).

Defendants' argument. Specifically, certain acts taken by a trustee that cause a reduction in value of the trust corpus may nevertheless fall outside of the exclusion in § 3.1.8 if: (1) such acts do not directly involve the supervision of trust assets, but instead involve negligent legal advice or legal interpretation of statutes, trust documents, or case law; and (2) "the rules of contra proferentem or liberal construction for the insured," are deemed applicable in light of conflicting reasonable interpretations of the scope of the negligent supervision exclusion. Ward, 284 Va. at 553, 736 S.E.2d at 325. Notably, here, Farthing's conduct falls squarely within the core of the concept of negligent supervision as he was entrusted with managing/supervising the stock investments on behalf of the trust, and it was his direct mismanagement of such stocks that caused the harm. A different result could conceivably occur if the insured's challenged conduct did not involve, or was at the fringe of, the "management" or "supervision" of trust assets, such as situations where the attorney's error was a failure to review the applicable tax code, or failure to determine the number of contingent beneficiaries, or similar acts that are one or more steps removed from the direct "supervision" of the property/funds held on behalf of another. Stated differently, as argued by ALPS, here, "[t]he behavior, the action a[t] issue, is . . . investing," Hearing Tr. 82, and this Court has found that such investing, when performed negligently, plainly constitutes the "negligent supervision" of trust assets. In contrast, when the challenged conduct involves interpreting trust documents, applying the federal tax code, or making a determination as to whether a trust beneficiary is legally entitled to a distribution, it is conceivable that "the action at issue" is properly framed as the erroneous performance of traditional legal activities, not the "supervision" of stocks/funds held on behalf of another.

Because § 3.1.8 appears to so greatly circumscribe the coverage provided for acts taken as a trustee, the Court finds that a more searching review of the policy as a whole is necessary prior to the final resolution of this issue. See Berry v. Klinger, 225 Va. 201, 208, 300 S.E.2d 792, 796 (1983) ("The court must give effect to all of the language of a contract if its parts can be read together without conflict," and the meaning "is to be gathered from all [the] associated parts assembled as the unitary expression of the agreement of the parties."). When considering the purported "grant" of coverage for the subset of Professional Services involving actions taken as a trustee, it is important to carefully consider what the Policy does, and does not, provide.

Notably, the Farthing Policy does not state, or otherwise suggest, that all acts taken as a trustee are covered. It also does not state, or otherwise suggest, that investment in the stock market, or other acts involving the direct handling or management of client funds or property, are covered activities. Rather, the Policy states that insurance coverage applies to acts, errors, or omissions in "Professional Services," and rather than leaving the concept of Professional Services undefined, and thus subject to ambiguity as to how far such term extends beyond "traditional" legal services provided in an attorney-client relationship, the Policy expressly defines Professional Services to extend to acts taken as a mediator, arbitrator, administrator, conservator,

guardian, executor, personal representative or trustee. Policy §§ 2.24.2, 2.24.3.

The fact that Professional Services is somewhat broadly defined, however, does not itself reveal an intent to cover all acts, taken as an arbitrator, or administrator, or trustee, because the preliminary statements defining what constitutes Professional Services must be read in conjunction with the list of activities that immediately follow and expressly state what does not constitute "Professional Services." These limitations apply regardless of the insured's "role" or "title" at the time of a given act, as do the subsequent policy "exclusions."

Turning to these other policy provisions for context, within the very same section defining the scope of "Professional Services," the Policy makes clear that covered "Professional Services" do not include "the rendering of investment advice in any context to any person including, but not limited to, advice concerning securities." Policy § 2.24 (emphasis added). Such express limitation is both familiar in the insurance industry and consistent with a common understanding of the conceptual difference between legal activities and investment activities. Cf. Darwin Nat'l Assurance Co. v. Rosenthal, No. CV 13-5670 FMO, 2014 WL 12558837, at *8 (C.D. Cal. Sept. 24, 2014) (rejecting the defendant's challenge to the application of an investment advice exclusion, explaining that "the Investment Advice Exclusion . . .

exists to protect [the insurance company] where policyholders 'wear[ ] two hats'—providing legal services and dispensing investment advice—and are sued in connection with their non-legal activities") (emphasis added) (second alteration in original); Gonakis v. Medmarc Cas. Ins. Co., 722 F. App'x 529, 534 (6th Cir. 2018) (acknowledging the "admittedly blurry line between legal advice and investment advice," but noting that the "aim of the investment-advice exclusion is to preclude coverage when an attorney gives advice regarding the financial benefits of a particular investment, or is involved in a capacity other than providing legal services"). Accordingly, it cannot be debated that the "affirmative" coverage provided in § 2.24 not only expressly provides bounded coverage for services undertaken as a trustee, but that one of the clear and obvious "bounds" is that such coverage does not extend to "advice" provided by a trustee regarding the wisdom of a trust investing in certain securities.[14]

[14] As a backdrop to analyzing the interplay between the policy provisions first defining, and then restricting, the scope of covered "Professional Services," this Court reviewed several historical attorney malpractice cases which reveal the potential for conflicting outcomes when a policy fails to define whether a lawyer's "Professional Services" includes investment advice and/or supervising assets through investing activities. See Smith v. Travelers Indem. Co., 343 F. Supp. 605, 609 (M.D.N.C. 1972); Cont'l Cas. Co. v. Burton, 795 F.2d 1187, 1190 (4th Cir. 1986); Gen. Acc. Ins. Co. v. Namesnik, 790 F.2d 1397, 1399-1400 (9th Cir. 1986); Watkins v. St. Paul Fire and Marine Ins. Co., 376 So. 2d 660, 662-63 (Ala. 1979). In light of the risk of ambiguity in this arena, it is unsurprising that more recent case law suggests that malpractice insurers have shifted to squarely addressing such issue through policy terms that either expressly exclude, or expressly provide, coverage for acts associated with investments. Compare Gonakis, 722 F. App'x at 534 (expressly excluding coverage for both investment advice and investing activities); with Murray v. Royal All. Assocs., Inc., No. CV

Assuming, in Defendants' favor, that the express policy limitation regarding "investment advice," applies only to "advice," (i.e., recommending investments to another), and does not extend to investing activities performed on behalf of another, the Court nevertheless finds that: (1) as discussed above, the negligent supervision exclusion expressly applies to negligent/reckless investing activities undertaken "in any capacity," i.e., as a trustee; and (2) far from providing a surprising or facially unjust result, the negligent supervision provision, as applied to trustees, provides a predictable and consistent limitation that goes hand-in-hand with the "investment advice" exception. Notably, one provision bars coverage for negligent investment advice given by a trustee (or attorney) and followed by a beneficiary (or client), and the other provision bars coverage for negligent investment activity conducted by a trustee (or attorney), independent of the wishes/direction of the beneficiary (or client).[15] See Christensen v. Darwin Nat. Assur.

06-617-JJB, 2008 WL 11408432, at *2 (M.D. La. Aug. 29, 2008) (expressly providing coverage when investment advice is given in connection with legal services performed as a lawyer or a trustee). The language in the Farthing Policy similarly excludes acts involving investment advice, and separately excludes acts involving the negligent supervision of assets held or controlled on behalf of another. While this Court concludes that these two provisions unambiguously exclude coverage for Farthings' challenged acts, the use of an express definition of "investment advice," as in the policy in Gonakis, appears to be an even better way to articulate the scope of the exclusion.

[15] Policy § 2.24.7 provides an additional limit to coverage, expressly excluding services performed by an insured "as a broker, dealer, business manager, accountant, or real estate broker or agent." Plaintiff, however,

Co., No. 2:13cv956-APG, 2014 WL 1628133, at *1, *5-*6 (D. Nev. Apr. 14, 2014), aff'd, 645 F. App'x 533 (9th Cir. 2016) (rejecting the assertion that an "Investment Advice Exclusion" was "so broad as to swallow any coverage" under a policy otherwise providing coverage for services "performed in the ordinary course of the Insured's activities as a lawyer," including those performed "as a . . . trustee," explaining that the "Investment Advice Exclusion concerns only situations in which a lawyer exceeds his or her role as a legal advisor by assuming the role of financial advisor as well"); Glob. Title, 788 F. Supp. 2d at 462 (rejecting the claim that the "handling of funds" exclusion rendered the policy covering escrow services "meaningless," noting a list of covered services that "do not involve the handling of funds").

In sum, the Court finds that when the Farthing Policy provisions are read in context, and harmonized to avoid placing undue focus on any solitary term or provision, such analysis supports Plaintiff's position that the Policy provides quite limited, although not illusory, coverage for acts taken as a trustee.[16] Importantly, the "investment advice" limitation and

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takes the factual position that Farthing was not acting as a "broker."

[16] The Court's interpretation of the interplay between the purported "grant" of coverage to trustees and the subsequent exclusion for negligent supervision would presumably be different had the Policy affirmatively stated, or even suggested, that a trustee's investment advice, investment activities, or actions involving the direct handling of trust assets were covered under the policy. See, e.g., Murray, 2008 WL 11408432, at *2 (expressly providing coverage for investment advice given in connection with

"negligent supervision" provisions expressly apply when the insured is acting in any capacity. In a traditional lawyer-client relationship, counsel is clearly not covered for giving his or her client faulty investment advice, or for negligently supervising his or her client's cash, securities, or other property. Whittington Law Assocs., 961 F. Supp. 2d at 372. Defendants fail to point to any policy provision that establishes, or even suggests, that the breadth of coverage should somehow "expand" simply because the same lawyer acts as a "trustee" managing trust assets, rather than as an attorney managing client assets. To the contrary, both the investment advice exception and the negligent supervision exclusion are phrased to broadly apply, with the former applying "in any context" and the latter applying when counsel is acting "in any capacity." Accordingly, this is not a case where the exclusion at issue risks rendering all, or even most, of the policy illusory;[17] rather, the Farthing Policy provides broad coverage for legal activities taken in the traditional attorney-

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services performed as a trustee). Such language, however, does not appear in the Policy, either expressly nor by inference. Accordingly, the only reasonable interpretation of the Policy language before this Court is that, just as the Policy does not provide coverage for negligent investment advice, or negligent investment activities, by a lawyer on behalf of a represented client, it does not provide coverage for these same activities merely because the insured's title has shifted from "lawyer" to "trustee."

[17] Cf. Nationwide Mut. Ins. Co. v. Overlook, LLC, 785 F. Supp. 2d 502, 527-28 (E.D. Va. 2011) (discussing, in detail, the Supreme Court of Virginia's opinion in Granite State Ins. Co. v. Bottoms, 243 Va. 228, 415 S.E.2d 131 (1992), a case where "one of the court's main concerns was that a broad interpretation of the exclusion would swallow a significant portion of the policy's intended coverage provisions").

client relationship, as well as other listed roles (such as a mediator or arbitrator) but evidences the parties' unambiguous intent to "contract for broad exclusions resulting in narrow coverage" for acts taken as a trustee. Christensen, 2014 WL 1628133.

In reaching such conclusion, the Court acknowledges that an insured attorney acting as a trustee may viscerally object to any suggestion that an attorney-malpractice policy does not provide coverage for the negligent supervision of trust assets. However, thoughtful consideration of the issue illustrates that enforcing the express "negligent supervision" provision not only in the context of the traditional attorney-client relationship, but also in the context of acts taken as trustee, is both appropriate and predictable, particularly when the policy otherwise makes clear that "investment advice," given to any person in any context, is not covered by the legal malpractice policy.[18] To the extent an

[18] Contracting parties are, of course, free to bargain for coverage for investment activities in an attorney liability policy. Cf. Pias v. Cont'l Cas. Ins. Co., No. 2:13cv182, 2013 WL 4012709, at *1 (W.D. La. Aug. 6, 2013) (discussing a "Lawyer's Professional Liability Policy" that defined covered "legal services" to include services performed by an Insured "as a lawyer . . . trustee or in any other fiduciary capacity and any investment advice given in connection with such services") (emphasis added); Duckson v. Cont'l Cas. Co., No. Civ. 14-1465, 2015 WL 75262, at *5 (D. Minn. Jan. 6, 2015) (same). The existence of some attorney malpractice policies expressly providing coverage for investment advice and/or investment activities, and some polices expressly excluding coverage for the same, underscores the import of practitioners carefully choosing a liability policy. Cf. 5 Legal Malpractice § 38:61 (2018 ed.) (discussing a policy exclusion covering the promotion or sale of real estate "or other investments," and noting that an attorney should consider the significance of such exclusion to his or her practice and "[i]f coverage is needed, the attorney may be able to pay an

insured attorney that did not carefully review his or her insurance policy may not "expect" that investment activities performed as a trustee would fall outside of policy coverage, "[i]t suffices to say in response that if the plain and unambiguous language of the insurance policy excludes coverage for those acts, the insured [attorney or] law firm should expect just that." Whittington Law Assocs., 961 F. Supp. 2d at 375.

C. Plaintiff's Reservation of Rights & Attorney's Fees

The parties dispute, on summary judgment, the extent to which ALPS should be permitted to recover the attorney's fees and costs it incurred for the defense of the Farthing Defendants in the underlying state court suit.[19] In light of the parties' uncertainty regarding how this Court would rule on Policy coverage issues, the parties' briefing on this issue is understandably limited. That said, based on the Court's ruling herein, the Farthing Defendants offer no valid argument in opposition to Plaintiff's right to recoup all, or nearly all, of the attorney's fees and costs incurred by ALPS in the underlying state court lawsuit because the defense provided by ALPS was provided under a reservation of

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additional premium to have the insurer delete the exclusion by an endorsement").

[19] Plaintiff's summary judgment motion also sought a declaratory judgment indicating that ALPS is no longer obligated to provide a continuing defense to the Farthing Defendants; however, as ALPS notes in its reply brief, the Virginia Supreme Court's intervening denial of the Farthing Defendants' state court appeal rendered such request moot. ECF No. 23, at 1 n.2.

rights, and the Farthing Policy expressly provides for recoupment of defense costs associated with non-covered claims. Policy § 1.2.1; see Prot. Strategies, Inc. v. Starr Indem. & Liab. Co., No. 1:13cv763, 2014 WL 1655370, at *8-*9 (E.D. Va. Apr. 23, 2014). The Farthing Defendants do, however, offer a potentially meritorious argument asserting that there were at least some claims asserted in the amended complaint in the state court action (claims that may have ultimately been abandoned in that case) that not only triggered a duty to defend, but if proven, would have been within policy coverage. See ECF No. 22, at 7 (discussing the allegations in the amended state court complaint associated with failing to provide accurate trust accountings, failing to provide appropriate trust distributions to beneficiaries, and failing to properly file tax returns). Plaintiff does not appear to directly respond to the Farthing Defendants' arguments as to these specific claims, nor has Plaintiff otherwise provided evidence documenting the actual fees and costs incurred in funding a defense for the Farthing Defendants. Accordingly, while the record establishes that Plaintiff is legally entitled to recoup all, or nearly all, of the attorney's fees and costs expended in the underlying lawsuit, the current record is insufficient to permit the Court to enter a specific money judgment at this time.

In light of the above, the Court **GRANTS** summary judgment in Plaintiff's favor with respect to its right to recoup attorney's

fees and costs expended in defense of claims not covered under the Policy, but **INSTRUCTS** counsel for Plaintiff and counsel for the Farthing Defendants to:[20]

(1) Within **ten (10) calendar days** of the date of this Order, confer to determine whether the amount of the fee recoupment award can be agreed to by the parties based on the Court's ruling in this case, or whether further litigation of such issue is required.

(2) If counsel believe that such matter can be negotiated to avoid a needless waste of resources, counsel shall file a joint status update **within fourteen (14) calendar days** of the date of this Order outlining an agreed plan moving forward on this issue. To the extent the parties believe that it will be beneficial to resolving the fee dispute, the Magistrate Judge previously assigned to this case is willing to make himself available for an additional settlement conference.

(3) If counsel do not believe that further discussions will prove fruitful, counsel for Plaintiff shall file a motion documenting the amount of fees for which recoupment is sought, with any necessary supporting documentation, no later than **twenty-one (21) days** after the date of this Order. The typical briefing schedule established by Local Rule shall apply to govern the filing of an opposition and reply brief, if any.

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[20] The Higgerson Defendants did not address the attorney's fee issue in their summary judgment filings and it appears unlikely that they have any interest in the resolution of such issue between ALPS and the Farthing Defendants.

IV. Conclusion

For the reasons set forth above, ALPS' summary judgment motion is **GRANTED, in part**, as the Court finds that: (1) insurance coverage is excluded under the Farthing Policy's "negligent supervision" provision; and (2) ALPS is entitled to the recoupment of an undetermined amount of attorney's fees and costs that it incurred in providing a defense for the Farthing Defendants in the underlying state court lawsuit. ECF No. 15. ALPS summary judgment motion is **DENIED** in all other respects, although such denial is without prejudice to ALPS' right to file an independent motion, if necessary, addressing the proper quantum of attorney's fees and costs that Plaintiff has the right to recoup.

The cross-motion for summary judgment filed by the Higgerson Defendants is **DENIED**. ECF No. 19.

The Clerk is **REQUESTED** to send a copy of this Opinion and Order to all counsel of record.

IT IS SO ORDERED.

/s/ MSD
Mark S. Davis
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
September 25, 2018