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UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

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| NAVIGATORS SPECIALTY INSURANCE COMPANY |) | CASE NO. 2:18-cv-01514-BJR |
| |) | |
| <i>Plaintiff,</i> |) | |
| |) | |
| v. |) | ORDER GRANTING IN PART PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT’S CROSS- MOTION FOR SUMMARY JUDGMENT |
| DOUBLE DOWN INTERACTIVE, LLC |) | |
| |) | |
| <i>Defendant.</i> |) | |

I. INTRODUCTION

In this action, Plaintiff Navigators Specialty Insurance Company (“Navigators”) seeks relief from the Court as to whether Navigators has a duty to defend Defendant Double Down Interactive, LLC (“Double Down”) in a putative class action lawsuit. Compl., Dkt. No. 1 at ¶ 1. The parties have brought cross-motions for summary judgment. Dkt. Nos. 16, 18. Having reviewed the parties’ filings, the record of the case, and the relevant legal authorities, the Court concludes that Navigators does not have a duty to defend Double Down in the putative class action.

II. BACKGROUND

Double Down operates Double Down Casino, an online game where players are initially given one million free digital chips to play casino-like games on an interactive platform. Dkt. No. 17 at 11. After players use their initial chips, Double Down offers to sell them additional chips starting at \$2.99 for 300,000 chips so that they can continue playing the game. *Id.* at 12.

1 Currently, Double Down is the defendant in a putative class action lawsuit on behalf of
2 Adrienne Benson, Mary Simonson, and all others similarly situated (“Benson action”). *Id.* at 1.
3 Benson began playing Double Down Casino on Facebook in 2013, and since 2016 she has
4 allegedly lost over \$1,000 playing the game. *Id.* at 10. The complaint for the Benson action
5 alleges unjust enrichment; violations of Washington’s gambling statute, Wash. Rev. Code §
6 4.24.070; and violations of Washington’s Consumer Protection Act, Wash. Rev. Code §
7 19.86.010. *Id.* at 12-17.

8
9 In 2017, DoubleU Games bought Double Down. Dkt. No. 17, Ex. A. at ¶ 24. Around
10 that time, Double Down purchased two claims-made liability insurance policies from Navigators.
11 Dkt. Nos. 1-3, 1-4. The first is SmartPolicy No. CH17DOL331672IC (“2017-2018 Policy”),
12 which provides coverage for claims made between June 2017 and June 2018. Dkt. No 1-3,
13 Endorsement No. 5. The second is SmartPolicy No. CH17DOL331675IC (“Runoff Policy”),
14 which provides coverage for claims made between June 2017 and June 2023, but contains an
15 endorsement (“Runoff Endorsement”) that excludes from coverage claims “based upon, arising
16 from, or in any way related to any Wrongful Act committed or allegedly committed on or after
17 June 1, 2017.” Dkt. No. 1-4, Endorsement No. 5. The Runoff Policy contains several other
18 exclusions from coverage, including an interrelationship of claims provision and a professional
19 services exclusion. Dkt. No. 1-4, Directors and Officers Liability Coverage Part, § 3 A.11;
20 General Terms and Conditions, § VIII.B.

21
22 In another court, Navigators is currently defending Double Down in the Benson action
23 under a reservation of rights. Dkt. No. 16 at 3. In this Court, Navigators alleges that it has no
24 duty to defend or indemnify Double Down in the Benson action under either insurance policy.

25 *Id.*

III. LEGAL STANDARDS

A. Standard for summary judgment

Summary judgment is proper “if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In deciding a summary judgment motion, the court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in its favor. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 960 (9th Cir. 2011). The parties do not dispute any material facts in this case. Therefore, it is appropriate for the Court to consider summary judgment.

B. Choice of law

Pursuant to 28 U.S.C. § 1332, the basis of the Court’s jurisdiction in this case is diversity because Plaintiff and Defendant are citizens of different states and the matter in controversy exceeds the sum value of \$75,000. Dkt. No. 1-1 at 1. If a defendant has its principal place of business or is incorporated in a state, it is subject to the substantive laws of that state when sitting in diversity. *See* 18 U.S.C. § 1332(c)(1); *Hanna v. Plumer*, 380 U.S. 460, 464 (1965); *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 535 (1958). Defendant Double Down is incorporated or holds its principal place of business in Washington. Dkt. No. 1-1 at 1. Therefore, Washington state law governs this dispute.

C. Standard for finding a duty to defend

“[I]f there is any reasonable interpretation of the facts or the law that could result in coverage, the insurer must defend.” *Nat’l Sur. Corp. v. Immunex Corp.*, 297 P.3d 688, 691 (Wash. 2013) (en banc). However, the insurer “will not be compelled to defend its insured when

1 the potential for liability is . . . tenuous and farfetched.” *Id.* (“Although the duty to defend is
2 broad, it is not triggered by claims that clearly fall outside the policy.”); *see also Lassen Canyon*
3 *Nursery, Inc. v. Royal Ins. Co. of Am.*, 720 F.2d 1016, 1018 (9th Cir. 1983).

4 IV. DISCUSSION

5 There are three main contested issues about whether the Runoff Policy provides
6 coverage¹: (1) whether the Runoff Policy’s interrelationship of claims provision applies; (2)
7 whether the policy period provisions of the Runoff Policy preclude coverage for the Benson
8 action; and (3) whether the professional services exclusion applies.

9 1. Interrelationship of claims provision

10 Navigators argues that coverage for the Benson action is barred by the interrelationship
11 of claims provision. The Runoff Policy requires that claims be “first made” during the policy
12 period. Dkt. No. 1-4, Directors and Officers Liability Coverage Part, § 1. The interrelationship
13 of claims provision states:
14

15 All Claims involving the same Wrongful Act or Related Wrongful Acts of one or
16 more Insureds will be considered a Single Claim, and will be deemed to have
17 been made on . . . the earliest date on which any such Wrongful Act or Related
18 Wrongful Act was reported under this [Runoff Policy] or any other policy
providing coverage.

19 Dkt. No. 1-4, General Terms and Conditions, § VIII.B. The policy further defines “Related
20 Wrongful Acts” as:
21

22
23 ¹ Double Down does not dispute that the 2017-2018 Policy does not cover the Benson action.
24 The 2017-2018 Policy covers claims from June 2017 through June 2018 and excludes any claims
25 that are based on wrongful acts that occurred prior to June 1, 2017. Dkt. No. 1-3 at 43,
Endorsement No. 5. The Benson action alleges that since 2016, Benson has wagered and lost
more than \$1,000 playing Double Down Casino. Dkt. No. 17 at ¶ 34. Given that at least some
of the alleged wrongful acts in the Benson action occurred prior to June 2017, it is clear that the
Benson action is not covered under the 2017-2018 Policy.

1 “Wrongful Acts which are logically or causally connected by reason of any
2 common fact, circumstance, situation, transaction, event or decision.”

3 *Id.* at General Terms and Conditions, § II.M.

4 Navigators argues that the interrelationship of claims provision bars coverage for the
5 Benson action because that action is related to a previous class action lawsuit brought by Margo
6 Phillips in 2015 (“Phillips action”), and therefore, it is not a claim first made during the policy
7 period. Double Down asserts that the two claims are not related because the plaintiffs are
8 different, the losses of the plaintiffs are different, the claims are temporally distinct, and each
9 claim is subject to different state laws. Double Down also argues that finding these two claims
10 to be related would be tantamount to eliminating insurance coverage for Double Down’s entire
11 business model, and thus, finding them to be related could not be a correct interpretation.
12 Double Down’s arguments are not convincing.

13
14 In determining whether two claims are related under the definition of “Interrelated
15 Wrongful Acts” that was used in the Runoff Policy, the Court looks not to whether there are
16 differences between the two claims at issue, but instead whether there is “any common fact,
17 circumstance, situation, transaction, event or decision” that “logically or casually connect[s]” the
18 acts. *See Carolina v. Cas. Ins. Co. v. Omeros Corp.*, No. C12-287RAJ, 2013 WL 5530588, at *3
19 (W.D. Wash. Mar. 11, 2013) (applying Washington law and finding that after interpreting an
20 identical related claims provision to the Runoff Policy, two claims that arose from the same false
21 reporting action were related).

22
23 The language of interrelated claims that was agreed to by the parties in the Runoff Policy
24 is broad. Applying this policy language to the Court’s review of the Benson action and the
25 Phillips action, the similarities between the two actions are obvious. Several entire portions of
the Benson complaint are copied directly from the Phillips complaint. The two complaints are

1 not tenuously related; in many aspects they *are* the same complaint. The facts and class
2 allegation sections of each complaint are substantially identical, both claims allege violations of
3 similar state gambling statutes, both complaints allege violations of similar consumer protection
4 statutes, and both claims allege unjust enrichment.

5 The Ninth Circuit has found that claims are interrelated under similar circumstances. In
6 *WFS Financial, Inc. v. Progressive Cas. Ins. Co., Inc.*, the court found that although two suits
7 “were filed by two different sets of plaintiffs in two different fora under two different legal
8 theories, the common basis for those suits was the WFS business practice of permitting
9 independent dealers to mark up WFS loans.” No. 05-55854, 2007 WL 1113347, at *1 (9th Cir.
10 Apr. 16, 2007). Thus, the relationship between the two claims was not so “attenuated or
11 unusual” to prevent the insurer from treating them as the same claim. *Id.*

12 The Eleventh Circuit has also found that two claims similar to those here were
13 interrelated. *Vozzcom, Inc. v. Great Am. Ins. Co. of N.Y.*, 374 Fed. App’x. 906, 907-08 (11th Cir.
14 2010). In *Vozzcom, Inc.*, the court found that three claims were related when the plaintiffs were
15 all cable installers who worked for Vozzcom during the same approximate time period, the
16 complaints arose under similar facts, and the complaints all alleged Fair Labor Standards Act
17 violations. *Id.* at 908. The court found that all of these factors made the three claims “at the very
18 least” interrelated. *Id.* at 907. The Benson and Phillips action share several of the similarities
19 between the claims in *Vozzcom* that the court found were more than enough to find the claims to
20 be interrelated.
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23 Moreover, the present case is distinguishable from the claims in *Fin. Mgmt. Advisor, LLC*
24 *v. Am. Intern. Specialty Lines Ins. Co.*, 506 F.3d 922, 926 (9th Cir. 2007) (applying California
25 law). In the authority proffered by the Defendant, the Ninth Circuit did not find that a

1 contractor's two claims were related under an insurance policy. *Id.* The policy had an
2 interrelated claims provision, but did not define the term "related acts." However, the Court
3 followed a definition of "related" commonly used by California courts that includes both logical
4 and causal connections. *Id.* The court's reasoning for finding the claims unrelated was that the
5 plaintiffs in each claim complained of different wrongful acts. *Id.* In one claim, the plaintiff
6 complained of various oral omissions and representations made in connection with several
7 investment vehicles. In the other claim, the plaintiff complained about a breach of a written
8 agreement concerning an investment. *Id.* The mere fact that both parties were advised to invest
9 in the same fund and blamed the same financial advisor did not render the claims related. *Id.*
10 Unlike *Fin. Mgmt. Advisor, LLC*, the parties in the Benson and Phillips actions complain of the
11 same conduct.
12

13 Double Down relies on *Hrobuchak v. Fed. Ins. Co* to argue that if the Court were to find
14 that the Benson action and the Phillips action were related, then nearly any conceivable claim
15 made against Double Down would be found to be related to the Phillips action. No. 3:10-cv-481,
16 2010 WL 4237435 (M.D. Pa. Oct. 21, 2010). In *Hrobuchak*, the court held that finding the
17 claims to be related would make the liability policy "essentially a nullity" because almost every
18 suit brought against the company would relate back to the claim at issue. *Id.* at *4. The Benson
19 action and Phillips action, on the other hand, attack only one portion of the Double Down's
20 business: that the Double Down Casino game violates state gambling laws.
21

22 The Runoff Policy presents an unambiguous definition of "Related Wrongful Acts" that
23 includes "any common fact, circumstance, situation, transaction, event or decision." Dkt. No. 1-
24 4, General Terms and Conditions, § II.M. When interpreting an insurance policy, the language
25 in the policy must be given its ordinary meaning. *Witherspoon v. St. Paul Fire & Marine Ins.*

1 Co., 548 P.2d 302, 308 (Wash. 1976). As applied, the Benson action and the Phillips action have
2 striking similarities: the facts that arose to each complaint were nearly indistinguishable and the
3 complaints themselves are facially identical in many areas. Therefore, the Court finds that the
4 Benson action and the Phillips action are interrelated.

5 **2. The Runoff Policy's runoff endorsement**

6 Navigators additionally argues that the Runoff Policy's runoff endorsement precludes
7 coverage of the Benson action because the acts within the Benson action occurred within the
8 Runoff Policy period, June 1, 2017 to June 2023, which is not permitted by the policy. Double
9 Down concedes that alleged wrongful acts occurred both before and during the policy period but
10 argues that the Runoff Policy still provides coverage because the Policy language is ambiguous,
11 and any ambiguity should be resolved in their favor.
12

13 Double Down's argument is flawed in light of the plain language of the runoff
14 endorsement, which states:

15 [Navigators] shall not be liable for Loss in connection with any claim for, based
16 upon, arising from, *or in any way related to any* Wrongful Act committed or
17 allegedly committed on or after June 1, 2017.

18 Dkt. No. 1-4, Endorsement No. 5 (emphasis added). The wrongful acts in the Benson action
19 alleged to have occurred prior to June 1, 2017 are "in connection with" and "in any way related"
20 to the wrongful acts in the Benson action that are alleged to have occurred after June 1, 2017
21 because they arise from the same conduct. *See Madison Materials Co., Inc. v. St. Paul Fire &*
22 *Marine Ins. Co.*, 523 F.3d 541, 544 (5th Cir. 2008) (explaining that previous acts of
23 embezzlement that occurred outside of a policy period were related to other acts of
24 embezzlement that occurred within the policy period because they were part of the same
25 embezzlement scheme).

1 The Court is unpersuaded by Double Down’s assertion that the language of the 2017-
2 2018 Policy injects ambiguity into the runoff endorsement. The 2017-2018 Policy bars coverage
3 for:

4 [Claims] based upon, arising out of, relating to, directly or indirectly resulting
5 from or in consequence of, or in any way involving any Wrongful Acts or Related
6 Wrongful Acts where *all or any* of such acts were committed, attempted, or
allegedly committed or attempted prior to June 1, 2017.

7 Dkt. No 1-3, Endorsement No. 5 (emphasis added). Double Down focuses on the “all or any”
8 language in the 2017-2018 Policy as contrasted with the “any” language in the Runoff
9 Endorsement. This distinction, however, is without difference – at least as applied to the facts in
10 this case. *See State Farm Fire & Cas. Co. v. English Cove Ass’n*, 88 P.3d 986, 991 (Wash. Ct.
11 App. 2004) (finding that just because plaintiff could have further clarified or expressly defined a
12 term did not make it ambiguous). Moreover, the Runoff Policy period is consistent with the
13 common expectations and uses of a Runoff Policy. *See Med. Care Am., Inc. v. Nat’l Union Fire*
14 *Ins. Co. of Pittsburgh, Pa.*, 341 F.3d 415 (5th Cir. 2003); *HSB Grp., Inc. v. SVB Underwriting,*
15 *Ltd.*, 664 F. Supp. 2d 158, 165 (D. Conn. 2009) (explaining that a Runoff Policy is typically
16 acquired when a company changes ownership in order to extend the policy period after the
17 ownership change to cover claims regarding conduct that occurred before the change in control).
18

19 The Court concludes that Navigators’ reading of the runoff endorsement is reasonable,
20 that the terms at issue are unambiguous, and that an ordinary reading of the policy language bars
21 coverage.
22

23 **3. The Runoff Policy’s professional services exclusion**

24 Navigators next argues that it has no duty to defend or indemnify Double Down in the
25 Benson action because the Runoff Policy’s professional services exclusion applies. The
exclusion states that any claim made against the Insured “based upon, arising out of, relating to,

1 directly or indirectly resulting from, or in any way involving the performance by any Insured of
2 professional services for others for a fee or other compensation or remuneration” shall be barred
3 from coverage. Dkt. No. 1-4, Directors and Officers Liability Coverage Part, § 3 A.11.
4 Navigators’ arguments are not persuasive.

5 In Washington, a professional service “is one arising out of a vocation, calling,
6 occupation, or employment involving specialized knowledge, labor or skill, and the labor or skill
7 involved is predominantly mental or intellectual, rather than physical or manual.” *E.g., Bank of*
8 *Calif., N.A. v. Opie*, 663 F.2d 977, 981 (9th Cir. 1981) (applying Washington law); *Planet Earth*
9 *Found. v. Gulf Underwriters Ins. Co.*, No. 55068-3-I, 2005 WL 3275619, at *1 (Wash Ct. App.
10 Dec. 5, 2005).

12 An act will not be considered a professional service when that act requires no specialized
13 knowledge or individualized decision-making. *See, e.g., Tagged, Inc. v. Scottsdale Ins. Co.*, No.
14 JFM-11-127, 2011 WL 2748682, at *1 (S.D.N.Y. May 27, 2011) (applying California law);
15 *Jefferson Ins. Co. of N.Y. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 677 N.E. 2d 225, 230
16 (Mass. App. Ct. 1997). Washington courts appear to have not yet addressed how “professional
17 services” applies to a website such as Double Down Casino. Therefore, both parties rely on
18 *Tagged, Inc.*, where a district court evaluated a professional services exclusion’s application to a
19 website. 2011 WL 2748682, at *1. In *Tagged*, the court found that a company representative’s
20 determination of when to remove inappropriate content from its website was a professional
21 service since the website made representations to parents and guardians of its teenage users that
22 the company would remove explicit content. *Id.* at *6. The court distinguished between the act
23 of identifying explicit material, which was an intellectual and mental task, and something that
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1 was merely incidental to the site's everyday operations, which would not be considered a
2 professional service. *Id.*

3 In another instructive case, *Jefferson Ins. Co.*, a Massachusetts appellate court found that
4 a radio dispatcher's miscommunication with ambulance attendants was not a professional service
5 because the task was not one that required an exercise of professional judgment; it was merely an
6 administrative decision that could be performed by anyone lacking professional training and
7 expertise. 677 N.E. 2d. at 230. As the court reasoned in *Jefferson*, it may have been a
8 professional service to develop plans for the emergency service system and to operate on patients
9 using specialized knowledge. However, it was not a professional service to communicate with
10 ambulance attendants because that was merely an incidental administrative task that does not
11 require an intellectual level of decision-making. Double Down presents an analogous situation.
12 In the definition of professional services used by Washington courts, a professional service must
13 be something that requires "skill" that is "predominantly mental or intellectual." *E.g., Bank of*
14 *Calif., N.A.*, 663 F.2d at 981; *Planet Earth Found*, 2005 WL 3275619, at *1. While designing
15 and coding online games might be considered a professional service, simply playing the game is
16 not because it only requires the computer to execute a function that it was programmed to do.
17 Therefore, it does not meet the requisite level of skill to be deemed a professional service under
18 the definition used by Washington courts.
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21 Therefore, the Court does not find persuasive the assertion that playing a game such as
22 Double Down Casino is a professional service. Construing the policy language in favor of the
23 insured, the Court concludes that Navigators' professional services exclusion in the Runoff
24 Policy does not apply to the Benson action. *See Am Star Ins. Co. v. Grice*, 854 P.2d 622, 625
25

1 (Wash. 1993) (en banc) (holding that any ambiguity in the policy language should be resolved in
2 the insured's favor, especially when exclusionary clauses seek to limit policy coverage).

3 **V. CONCLUSION**

4 For the foregoing reasons, the Plaintiff's motion for summary judgment (Dkt. No. 16) is
5 GRANTED IN PART and the Defendant's cross-motion for summary judgment (Dkt. No. 18) is
6 DENIED, consistent with the following declarations:

- 7
- 8 1. Navigators does not have a duty to defend Double Down in the Benson action under
9 the 2017-2018 policy;
 - 10 2. Navigators does not have a duty to defend Double Down in the Benson action under
11 the Runoff Policy because the Interrelationship of Claims Exclusion bars coverage;
 - 12 3. Navigators does not have a duty to defend Double Down in the Benson action under
13 the Runoff Policy because the Runoff Endorsement bars coverage.

14 SO ORDERED.

15 DATED this 26th day of July, 2019.

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18 BARBARA J. ROTHSTEIN
19 UNITED STATES DISTRICT JUDGE