SO ORDERED.

SIGNED this 27th day of February, 2023.

LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In re:	)	
	)	
Miguel Arquimedes Caceres,	)	Case No. 18-80776
	)	Chapter 7
Debtor.	)	
	)	
James B. Angell,	)	
Chapter 7 Trustee for Miguel Caceres,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. Proc. No. 20-09007
	)	
Allstate Property and Casualty	)	
Insurance Company,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

The claims in this proceeding stem from a tragic, two-car accident in which a woman, Lottie Cook, was killed and her husband, James Cook, sustained multiple, profound injuries. The driver of the other vehicle, Miguel Arquimedes Caceres, was almost immediately determined to be at fault. His passenger, Fidel Perez, was also injured. At the time, Caceres was insured by Allstate Property and Casualty

Insurance Company, the Defendant. Eight months after the accident, his claim with the Defendant yet to be paid, James Cook presented the Defendant with a time-limited demand—either tender the policy limit of $50,000 within 11 days or request additional time to do so. The Defendant did not pay by the deadline and did not request additional time. When the deadline lapsed, James Cook filed a complaint against Caceres.

Ultimately, the Defendant resolved all claims except that of James Cook, who obtained a $1.15 million judgment and initiated collection proceedings against Caceres. The Defendant continued to pay for counsel for Caceres, who represented him in supplemental proceedings and at a hearing on a motion to appoint a receiver in Chatham County state court. While Caceres had no tangible nonexempt assets to speak of, James Cook believed Caceres might have claims against the Defendant founded on the handling of his claim, including the failure to settle at the policy limit, resulting in the excess judgment. He hoped a receiver would pursue any such claims that might satisfy the judgment.

Instead, Caceres sought shelter from the Chatham County Superior Court receivership proceeding by filing a petition for relief in this Court under chapter 7 of the Bankruptcy Code. Although not initially disclosed, both the bankruptcy filing fee and the attorney's fees were paid for by the Defendant. An assiduous chapter 7 trustee unearthed the source of the payment, investigated the claims, and ultimately, filed this adversary proceeding.

This proceeding reveals the shaky foundation supporting the contractual relationship between an insurer and its insured when defending the insured against third-party claims. That partnership can be stable so long as the parties are collectively working toward a shared, common legal interest—defending the insured from claims and litigation covered by the insurance policy. There are, however, potential cracks and fissures lurking just below the surface. For instance, the insurer's handling of settlement discussions or litigation may be called into question, and in some instances, the parties' legal interests may cease to align. As a result, this relationship presents the potential for abuse if the insurer disregards notions of transparency and fairness toward its insured, the boundaries of the contractual relationship, or the existence of conflicts of interest. A relational breakdown of this sort is at the root of the allegations levied against the Defendant here.

BACKGROUND

Miguel Arquimedes Caceres ("Caceres" or the "Debtor")[1] filed a petition for relief under chapter 7 of the Bankruptcy Code on October 19, 2018. (Case No. 18-80776). The next day, James B. Angell was appointed as chapter 7 trustee in the Debtor's bankruptcy case (the "Trustee"). The Debtor listed two secured claims on his Schedule D, one secured by his residence and the other secured by a 2008 Honda

[1] Various documents, including the Complaint and the Plaintiff's briefing on the cross-motions for summary judgment, spell the Debtor's name as "Caseres." Although "Caseres" is listed as an aka, the primary spelling of the Debtor's name in his petition, as well as in the case caption and on CM/ECF, is "Caceres." (Case No. 18-80776, Docket No. 1). Moreover, the Debtor's affidavit, and his signature therein, uses the latter spelling. (Docket No. 129, Ex. 5). The Court will refer to the Debtor as "Caceres" throughout this Memorandum Opinion and Order.

Civic, and indicated that payments for both were current. He listed four unsecured claims, including three medical debts totaling $9,100, though no such claims were filed, and a judgment held by James Cook in the amount of $1,150,000. Among the primary assets listed in the Debtor's schedules were potential claims against "his insurance company" and the Debtor's former state-court attorneys who the Defendant retained to represent the Debtor in litigation arising from an automobile accident.

After the Debtor's meeting of creditors under 11 U.S.C. § 341 (the "§ 341 Meeting"), the Trustee filed an objection to the Debtor's claim for exemptions in which he also alleged conflicts of interest involving Charles M. Ivey, III, the Debtor's chapter 7 bankruptcy attorney. (Case No. 18-80776, Docket No. 34). The Court set a show cause hearing, and after extensive testimony, Ivey filed a motion to withdraw as attorney, which the Court granted on February 12, 2019, citing, as good cause, the Defendant's payment of Ivey's fees and his positional conflict. (Case No. 18-80776, Docket No. 48).

The Trustee, believing that the Defendant may be liable to the Debtor for breach of contract, insurance bad faith, and other potential claims, conducted examinations and obtained documentation under Rule 2004 of the Federal Rules of Bankruptcy Procedure. Throughout 2019 and into 2020, the Trustee conducted examinations of, and received documentation from, employees of the Defendant, Ivey, and the law firms representing the Debtor in the state-court litigation.

On May 1, 2020, the Plaintiff-Trustee initiated the instant adversary proceeding against the Defendant on behalf of the Debtor's chapter 7 estate, seeking damages for breach of contract, unfair claims handling, unfair and deceptive trade practices, bad faith, and negligence.

The Defendant filed a motion to determine whether the bankruptcy court may enter final judgment or order (Docket No. 18, the "Motion to Determine")[2] as well as a motion for withdrawal of reference. (Docket No. 9). This Court deferred ruling on the Motion to Determine until the United States District Court for the Middle District of North Carolina rendered its decision on the Defendant's motion to withdraw the reference. When the District Court ultimately denied that motion on August 28, 2020, (Docket No. 30), leaving the bankruptcy court to oversee all pre-trial matters, this Court deferred full briefing and a ruling on the Defendant's Motion to Determine until the close of discovery and the filing deadline for dispositive motions.

The Plaintiff filed a motion for partial summary judgment on his claims for breach of contract, bad faith refusal to settle, and unfair and deceptive practices on April 25, 2022 (Docket No. 124), and the Defendant filed its cross-motion for summary judgment on all claims the same day. (Docket No. 126). After all response and reply deadlines expired, the Court held a hearing on September 21, 2022, at which Robert Jessup appeared as attorney for the Plaintiff, who was also present, and Thomas Curvin appeared on behalf of the Defendant. The parties presented

[2] Unless otherwise indicated, the record citations refer to this Adversary Proceeding, Adv. Proc. No. 20-09007, rather than the underlying bankruptcy case, Case No. 18-80776.

arguments on the merits of the respective summary judgment motions as well as the Defendant's Motion to Determine. At the conclusion of that hearing, the Court considered all matters to be fully submitted.

For the reasons set forth below, the Court will grant the Defendant's motion for summary judgment, in part, and deny the Plaintiff's motion for partial summary judgment.

JURISDICTION

This Court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334. Under § 157(a), the United States District Court for the Middle District of North Carolina has referred this proceeding to this Court by its Local Civil Rule 83.11. For the reasons discussed more thoroughly below, the Court determines the claims asserted in this adversary proceeding constitute non-core proceedings under § 157(c) that are otherwise related to the bankruptcy case of Miguel Caceres. Nevertheless, the Court finds the Defendant has impliedly consented to bankruptcy court adjudication of those claims due to its pre- and post-petition conduct. *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015). To the extent that the District Court determines that the Court lacks authority to enter a final order in this matter, this Memorandum Opinion and Order shall be construed as setting out proposed findings of fact and conclusions of law under § 157(c)(1).[3]

[3] The District Court's Local Rule 83.11 further provides, "The District Court may treat any order of a Bankruptcy Judge as proposed findings of fact and conclusions of law in the event the District Court concludes that the Bankruptcy Judge could not have entered a final order or judgment consistent with Article III of the United States Constitution." M.D.N.C. L.R. 83.11(c).

APPLICABLE LEGAL STANDARD

Summary judgment is appropriate "if the movant 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); Fed. R. Bankr. P. 7056. "A fact is 'material' if proof of its existence or non-existence would affect disposition of the case under applicable law. An issue of material fact is 'genuine' if the evidence offered is such that a reasonable jury might return a verdict for the non-movant." *Sedar v. Reston Town Ctr. Prop., LLC*, 988 F.3d 756, 761 (4th Cir. 2021). "This court's summary judgment inquiry is whether the evidence 'is so one-sided that one party must prevail as a matter of law.'" *State Farm Mut. Auto. Ins. Co. v. Lawson*, 543 F. Supp. 3d 260, 262 (M.D.N.C. 2021) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

In applying this standard, this Court will "view all reasonable inferences drawn from the evidence in the light that is most favorable to the non-moving party." *Smith v. Collins*, 964 F.3d 266, 274 (4th Cir. 2020). Though viewed in the light most favorable, "the nonmoving party must rely on more than conclusory allegations, mere speculation, the building of one inference upon another, or the mere existence of a scintilla of evidence." *Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*, 790 F.3d 532, 540 (4th Cir. 2015). If there clearly exist material, factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party," then summary

judgment is inappropriate. *Anderson*, 477 U.S. at 250; *see also JKC Holding Co. LLC v. Wash. Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001).

When presented with cross-motions for summary judgment, as in this proceeding, "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), *cert. denied*, 540 U.S. 822 (2003) (cleaned up). The relative burden that each party must satisfy also compels the Court to undertake a separate analysis for each motion; a plaintiff's motion for summary judgment "takes on a slightly different procedural posture" than a defensive motion for summary judgment. *Vales v. Preciado*, 809 F. Supp. 2d 422, 428 (D. Md. 2011). As to those elements on which it bears the burden of proof at trial, a movant is only entitled to summary judgment "if the proffered evidence is such that a rational factfinder could only find for [the movant]." *Smith v. Ozmint*, 578 F.3d 246, 250 (4th Cir. 2009) (citing *Gooden v. Howard Cnty.*, 954 F.2d 960, 971 (4th Cir. 1992)). The court must deny both motions if it finds there is a genuine issue of material fact, "[b]ut if there is no genuine issue and one or the other party is entitled to prevail as a matter of law, the court will render judgment." 10A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE CIVIL § 2720 (4th ed. 2021).

Accordingly, here, the uncontested material facts are construed in the light most favorable to the Defendant for the purposes of the Plaintiff's motion for partial

summary judgment; for purposes of the Defendant's cross-motion for summary judgment, the facts are viewed in the light most favorable to the Plaintiff.

FACTS

The Court finds the following facts relating to the series of events leading up to the filing of this adversary proceeding.[4] The Court recites only those facts relevant to the claims and defenses at issue. The Court reserves for later discussion, as appropriate, the recitation of additional unopposed facts and exhibit excerpts.

On February 12, 2014, Caceres lost control of his vehicle while driving on snow-covered State Route 1003, crossed over the center line of the road, and collided with a vehicle driven by James Cook (the "Accident"). (Pl.'s SMF, ¶ 4). Perez suffered minor injuries. (Ex. 2, pp. 131-32).[5] James Cook suffered serious injuries and his wife Lottie Cook, who was a passenger in the vehicle, was killed in the collision. (Pl.'s SMF, ¶ 4; Ex. 5, ¶ 4).

Prior to the Accident, Caceres had purchased an automobile liability insurance policy from the Defendant (the "Policy"). (Pl.'s SMF, ¶ 1; Ex. 1). The Policy, which was in effect at the time of the Accident, included coverages for Bodily Injury Liability in the amounts of $50,000 per person and $100,000 per accident

[4] Objections to statements of material fact are addressed below to the extent necessary. The Court excluded from consideration most statements to which either party objected.

[5] Unless otherwise indicated, the Court cites to the Exhibits attached to the Plaintiff's statement of material facts (Docket No. 129) and uses the Plaintiff's numbering therein.

(the "BI Coverage") and Underinsured Motorist in the amount of $50,000 per person and $100,000 per accident (the "UIM Coverage").[6] (Pl.'s SMF, ¶¶ 3, 5; Ex. 1).

Initial Steps in Defendant's Claim Investigation and Determination of Liability

On February 17, 2014, Caceres reported the loss to the Defendant. He informed the Defendant that there was a death involved in the Accident and another person was taken to the hospital. (Pl.'s SMF, ¶ 7; Ex. 2, p. 140). Caceres had not received an education beyond primary school, and he does not speak fluent English. (Pl.'s SMF, ¶ 2; Ex. 5, ¶ 2). Communications between the Defendant and Caceres had to be conducted with the help of a translator. (Pl.'s SMF, ¶ 2; Ex. 5, ¶ 5). Therefore, on February 18, 2014, Cynthia Carion, a bodily injury ("BI") liability adjuster for the Defendant, spoke to Perez via an interpreter. Carion discussed the claim process and provided her contact information to him. (Pl.'s SMF, ¶ 8; Ex. 2, p. 138).

On February 18, 2014, Carion flagged a claim alert in the Defendant's claim history report (the "Claims Log") stating "Possible limits issue." (Pl.'s SMF, ¶ 9; Ex. 5A). The next day, Carion spoke to Brad Cook, the son of James Cook and Lottie Cook, to address his parents' claims against Caceres. He told Carion that his father

[6] Generally, underinsured motorist or UIM coverage is a type of insurance that serves "as a safeguard [for] when tortfeasors' liability policies do not provide sufficient recovery." *Tutterow v. Hall*, 872 S.E.2d 171, 174 (N.C. Ct. App. 2022) (cleaned up). UIM coverage is governed by "a lengthy, complicated statute," the Motor Vehicle Safety and Financial Responsibility Act, N.C. Gen. Stat. § 20-279.21, the provisions of which are incorporated into every policy of automobile insurance as a matter of law. *Id.* (citing *N.C. Farm Bureau Mut. Ins. Co. v. Dana*, 866 S.E.2d 710, 714 (N.C. 2021)). Following an automobile accident, "a tortfeasor's liability coverage is called upon to compensate the injured plaintiff," but if the tortfeasor is under insured, the plaintiff may turn to their own, or an eligible driver's, UIM coverage once the tortfeasor's liability coverage is exhausted. *N.C. Farm Bureau Mut. Ins. Co. v. Lunsford*, 861 S.E.2d 705, 710 (N.C. 2021). Here, according to the terms of the Policy, Perez was the only third-party claimant eligible to make a claim on Caceres's UIM coverage.

was still in the hospital with multiple fractures of both legs and the sternum. (Pl.'s SMF, ¶ 10; Ex. 2, p. 136).

On February 19, 2014, Carion emailed Caceres informing him of the policy limits for BI Coverage without disclosing that there was UIM Coverage. (Pl.'s SMF, ¶ 11; Ex. 6). James Cook, Lottie Cook, and Perez were entitled to recover against Caceres's BI Coverage. To the extent the BI Coverage was exhausted, Perez was entitled to make claims against the UIM Coverage. (Pl.'s SMF, ¶ 12; Rosado Rule 2004 Tr., pp. 45-47). The Defendant's adjusters could see how much UIM Coverage was available when looking at a claim. (Rosado Rule 2004 Tr., p. 74:16-19).

On February 20, 2014, a BI insurance supervisor for the Defendant conducted an "alert conference." A reserve was set up for $50,000 for Lottie Cook and $25,000 each for Perez and James Cook. He noted in the Claims Log that an "excess conversation" was needed and was "pending at this time," meaning that Caceres had excess exposure above his insurance limits. (Pl.'s SMF, ¶ 14; Ex. 2, p. 134).

On February 24, 2014, Carion reviewed the accident crash report from the NC Highway Patrol. (Pl.'s SMF, ¶ 16; Ex. 2, p. 130). She assessed legal liability and found that Caceres was 100% liable for the claims of Perez, James Cook, and Lottie Cook. (Pl.'s SMF, ¶ 17; Ex. 2, p. 129). Her supervisor then reviewed Carion's assessment of liability and noted in the Claims Log, "ok to proceed 100%." (Pl.'s SMF, ¶ 17; Ex. 2, p. 128).

On February 27, 2014, Carion discussed James Cook's condition and the policy limits with Brad Cook. (Pl.'s SMF, ¶ 18; Ex. 2, p. 125). The next day, Carion spoke with Perez and discussed his condition, informed him that the Defendant had determined Caceres was responsible for the Accident, and discussed BI Coverage. (Pl.'s SMF, ¶ 19; Ex. 2, p. 125). After assessing the Accident and communicating with the claimants, the Defendant determined in February of 2014, within a month of the Accident, that the total claims against Caceres would exceed the BI Coverage limits. (Lonker Dep., pp. 226:15-19, 229:23-25, 230:1, Jan. 6, 2022).

On March 3, 2014, Carion spoke with Caceres and informed him that the Defendant was accepting liability for the Accident and would address injuries to the Cooks and Perez. Carion advised Caceres that the value of the BI claims would more than likely exceed his limits, but that the Defendant would make every effort to settle the claims within the policy limits and obtain releases. (Pl.'s SMF, ¶ 22; Ex. 2, pp. 124-25). That same day, Carion wrote to Caceres "My goal is to make certain you are completely satisfied with your claim experience by responding to your concerns in a timely fashion and keeping you informed throughout the claim process." (Pl.'s SMF, ¶ 23; Ex. 7).

On March 8, 2014, the BI insurance supervisor approved a reserve of $50,000 on Lottie Cook and $25,000 each on the James Cook and Perez claims. He wrote in the Claims Log that "UIM Available – pending" and "need to go over the excess notice requirements to the [insured] under NC claim handling." (Pl.'s SMF, ¶ 25; Ex. 2, p. 123).

Initial Efforts to Settle Claims Against Caceres

On March 21, 2014, Carion explained to Caceres via telephone that "the value of the claim would more than likely exceed his policy limit," and that the Defendant would send Caceres an excess letter stating the same. (Pl.'s SMF, ¶ 28; Ex. 2, p. 118). That letter informs Caceres that the claims asserted may exceed the BI Coverage limits but does not disclose that Caceres has UIM Coverage on his Policy. The letter further states "We will make every effort to settle this case for a full and final release of all claims. You will be advised of all offers and demands." (Pl.'s SMF, ¶ 29; Ex. 2, p. 120; Ex. 8). Also on that day, Carion spoke with Perez, who indicated he had completed treatment and his medical expenses were about $24,500. (Pl.'s SMF, ¶ 30; Ex. 2, p. 118).

On April 17, 2014, the Defendant reassigned the Perez BI Coverage claims from Carion to Rosemarie Rosado, a BI coverage adjuster (Ex. 2, p. 109), who then wrote to Caceres, "My goal is to make certain you are completely satisfied with your claim experience by responding to your concerns in a timely fashion and keeping you informed throughout the claim process." (Pl.'s SMF, ¶ 35; Ex. 9). Rosado spoke with Caceres the next day and confirmed that Carion had spoken with him regarding the liability limits under the BI Coverage. She requested that any inquiries be brought to her attention. (Pl.'s SMF, ¶ 36; Ex. 2, p. 107). The Defendant also sent a letter to Robert Cummings, attorney for Perez, requesting a medical authorization, a list of medical care facilities, statement of lost wages, and copies of medical bills. (Pl.'s SMF, ¶ 37; Ex. 2, p. 107; Ex. 10). The next month, the Defendant

wrote Cummings to tell him it had not yet received any bills for Perez's medical expenses. (Pl.'s SMF, ¶ 40; Ex. 11).

In June 2014, the Defendant received a bill from Duke University attributable to James Cook's treatment for $212,976.33. (Pl.'s SMF, ¶ 43; Ex. 2, p. 99), as well as a faxed letter from Jason Tuttle, an attorney for the Cooks, who requested information on the insurance limits on the Policy. Tuttle further advised that he was in the process of opening an estate for Lottie Cook. (Pl.'s SMF, ¶ 45; Ex. 12).

Then on July 8, 2014, the BI Coverage on the Lottie Cook claim was reassigned to Rosado. (Pl.'s SMF, ¶ 46; Ex. 2, p. 95). On July 23, 2014, Tuttle wrote Rosado a letter stating that he represented the Estate of Lottie Cook. In the letter, Tuttle stated, "Please respond in writing whether Allstate is in a position to tender policy limits at this time." (Pl.'s SMF, ¶ 47; Ex. 13). Rosado entered Lottie Cook's demand in the demand log for the Raleigh office on July 23, 2014, with a follow-up date of August 22, 2014, noting "need a global." (Pl.'s SMF, ¶ 48; Ex. 3, p. 12).

Attempts to Reach a Global Settlement of Claims

On August 8, 2014, Tuttle sent Rosado medical reports and medical bills for James Cook exceeding $214,468. (Pl.'s SMF, ¶ 49; Ex. 14; Ex. 2, p. 92). Rosado then spoke with Cummings who indicated he did not have a complete demand package for Perez but was working on it. Rosado informed him that there were three claimants against the BI Coverage, including one death, and that there was a policy

limits issue. She suggested that he provide a demand package as soon as it is available. (Pl.'s SMF, ¶ 50; Ex. 2, p. 93).

Rosado noted a demand made by James Cook in the demand log on August 8, 2014, with a follow-up date of October 7, 2014, indicating "8/18 global needed." (Pl.'s SMF, ¶ 55; Ex. 3, p. 14).

On August 13, 2014, Rosado wrote in the Claims Log that "James Cook meds already exceed liability limits after known adjustments. Med balances are greater than submitted. Must obtain global settlement. Will conference, determine if policy tender to attys to work out apportionment." (Pl.'s SMF, ¶ 52; Ex. 2, p. 92). She also wrote, with respect to the Lottie Cook claim, "Atty demands $50k re: this [claimant] and suggests balance to be apportioned amongst surviving [claimants]. Conference file/determine if policy tender to both attys to apportion. Global settlement needed." (Pl.'s SMF, ¶ 53; Ex. 2, pp. 91-92).

On August 15, 2014, the assigned evaluation consultant assessed the BI claims and found that the claims of Lottie Cook and James Cook were worth more than the limits. (Pl.'s SMF, ¶ 56; Ex. 2, p. 91). She noted in the Claims Log that there was a third claim for Perez, the passenger in the car, and that no demand had been received yet for this claim, although there were early contacts indicating his medical expenses were over $24,000. She also noted that the goal was to get an agreed distribution of the $100,000 BI Coverage limit and obtain three releases. She agreed with Rosado's proposal to get the attorneys to reach an agreement among themselves first, writing:

> I would also call [Caceres] and advise [him] as to the status and that the largest exposures to his personal assets are with Mr. and Mrs. Cook's claims as opposed to his passenger. If he has any questions, input, we would be glad to listen and of course he has the option to retain personal counsel to advise him. Right now I am leaving auth open with the agreement that you have $100k auth to resolve all claims and you will get back with me on how to have funds disbursed.

(Ex. 2, p. 91). Rosado called Caceres with an interpreter and explained that there were three claims which, in total, exceeded his $100,000 BI Coverage, and that she would resend a letter explaining that he had excess exposure on the claims. Rosado stated that her goal was to resolve the claims within the limits. Rosado informed Caceres that she would update him as information developed. (Pl.'s SMF, ¶ 61; Ex. 2, p. 90).

That same day, Rosado left a message for Tuttle to discuss an allocation agreement. (Pl.'s SMF, ¶ 57; Ex. 2, pp. 90-91). She also spoke with Cummings about tendering the $100,000 BI Coverage limit to the claimants and about attempting to reach an allocation agreement. Cummings was hesitant but agreed to have a discussion. Cummings also provided Rosado with the bill amounts for Perez, listing $28,792.13 in medical expenses and $1,587.25 in lost wages. (Pl.'s SMF, ¶ 58; Ex. 2, p. 90). At Rosado's request, a UIM adjuster, James Meyer, was assigned to assess UIM Coverage for the Perez claim. (Pl.'s SMF, ¶¶ 59-60; Ex. 2, p. 90). Meyer noted in the Claims Log his analysis of the UIM Coverage as follows:

> [A]s the host vehicle this policy would be primary. if [Perez settles] for 50k, there would be no uim exposure. if he settles for anything less, we would get the offset off the coverage for the settlement amout (sic), we would still have an exposure up to the 49k (50k uim less the 1k med pay) as we wouldn't consider. no [other] policies are known at this time for excess or pro-rata.

(Pl.'s SMF, ¶ 63; Ex. 2, p. 89). Rosado again called Cummings to suggest they discuss the potential for Perez to seek UIM Coverage, with Perez's claim against the BI Coverage settled for $1.00. Cummings was not immediately interested and wanted to consult with Perez. He asked that Rosado update him as to whether the Cooks' attorney agreed before finalizing his decision. (Pl.'s SMF, ¶ 62; Ex. 2, pp. 89-90).

On August 18, 2014, Rosado spoke with Tuttle and noted that Tuttle was agreeable to either proposal but "prefers attempted settlement that would allow [Perez] to pursue UIM Coverage after settling [BI] with $1.00." Tuttle noted that James Cook was still in a nursing facility and that amputation was not out of the question. Rosado advised Tuttle that she had to secure Cummings's agreement before a settlement could be finalized. (Pl.'s SMF, ¶ 64; Ex. 2, p. 88). The same day, both Rosado and Meyer spoke with Cummings to discuss the option of Perez accepting $1.00 on the BI Coverage and pursuing the UIM Coverage. (Pl.'s SMF, ¶¶ 65-66; Ex. 2, p. 88).

The Claims Log shows no activity by the Defendant with respect to the James Cook claim until over three weeks later, on September 9, 2014, when Tuttle called the Defendant to check on the status of the claim and was told an adjuster would check to see whether there were any updates and would call Tuttle back. (Pl.'s SMF, ¶ 67; Ex. 2, p. 86).

On September 26, 2014, Cummings sent Rosado and Meyer a letter, with attached statements, showing Perez's medical expenses totaled $28,792.13 and his lost wages were $1,597.25. The letter stated

> It is my understanding from prior communication with you that other injured parties in this case have significant damages with one other injured person having died as a result of this collision. Therefore, I am sending this demand letter to James Meyer at Allstate who is the adjuster for the uninsured/underinsured motorist claims.

(Pl.'s SMF, ¶ 69; Ex. 15). Rosado logged a demand from Perez and left messages for Cummings on September 26, September 30, and October 7, 2014. The Claims Log does not show that Cummings returned these calls. (Pl.'s SMF, ¶ 70; Ex. 2, p. 85).

The October 13, 2014 Settlement Demand

On October 7, 2014, Rosado spoke with Tuttle about her attempts to reach Cummings and noted Tuttle's willingness to speak with Cummings if needed. Rosado did not provide Tuttle with Cummings's name or contact information because she wanted to obtain the agreements among the attorneys first. Rosado notes in the Claims Log that Tuttle understood. (Pl.'s SMF, ¶ 72; Ex. 2, pp. 84-85).

On October 13, 2014, Tuttle wrote a demand letter to Rosado with respect to James Cook's claim (the "TLD"). (Ex. 16). Tuttle noted that the loss took place in February 2014, he gave notice of his representation of James Cook on June 26, 2014, and that he provided medical records on August 6, 2014. The TLD states that James Cook has incurred over $244,468.83 in hospital and medical expenses, and offered to settle for $50,000 on the following conditions:

> Allstate must deliver a check for $50,000 to my office at 220 Fayetteville Street, Raleigh, North Carolina, on or before noon on October 24, 2014;

> the check must be payable to "James F. Cook and Everett Gaskins Hancock LLP"; the check must be accompanied by a certified declarations page showing that Mr. Caceres had liability insurance coverage limits of $50,000; the check must be accompanied by a release which releases only Miguel Caceres and no others. If Allstate has any questions or concerns about this, or if it needs additional time to comply, then let me know immediately, and, in any event by October 21, 2014.

(Pl.'s SMF, ¶ 73; Ex. 16). The TLD was hand-delivered to the Defendant at its office in Raleigh, North Carolina, as noted by the hand-delivery receipt signed by an employee, and also faxed to the Defendant that same day. (Pl.'s SMF, ¶ 74; Ex. 17; Ex. 18; McCall Dep., pp. 24:20-25, 25:1-2). In addition, Tuttle wrote a separate letter to Rosado confirming that he sent a "written settlement demand to your office." (Pl.'s SMF, ¶ 75; Ex. 19). The Defendant did not date stamp or log the TLD, the receipt, or the second October 13, 2014 letter on or about the time they were received. (Pl.'s SMF, ¶¶ 80, 90; Ex. 2, pp. 83-84; Rosado Dep., pp. 96:21-25, 97:1-17, Feb. 26, 2021). While the TLD was kept by Rosado in a physical file in her file cabinet, it was not attached to or incorporated in the Claims Log or in the demand log. (Pl.'s SMF, ¶¶ 80, 98; Ex. 2, Ex. 3; Rosado Dep., pp. 148:14-25, 149:1-5, Feb. 26, 2021).

On October 14, 2014, Meyer sent a letter to Cummings asking for records and updated billing statements as well as information about insurance. He also indicated that he would need to know what the BI settlement was before evaluating the September 26 demand from Perez. (Pl.'s SMF, ¶ 99; Ex. 2, p. 84). On October 17, 2014, Meyer entered a note in the Claims Log stating "final settlement amount with all the [claimant's] hasn't been agreed to yet. [plaintiff] atty sent a demand in but

supplied some bills and no records. responded to demand. once the global settlement is agreed to, will be able to adjust reserve." (Pl.'s SMF, ¶ 100; Ex. 2, p. 83).

On October 23, 2014, Meyer noted in the Claims Log that there was no settlement reached as to the underlying BI Coverage and no further information provided by Cummings. (Pl.'s SMF, ¶ 101; Ex. 2, p. 82). Also that day, Rosado called Tuttle's office and left a voicemail message—the first contact Rosado attempted after the TLD was hand-delivered to her office on October 13, 2014. (Pl.'s SMF, ¶ 103; Rosado Dep., p. 234: 2-14, Feb. 26, 2021; Ex. 2, p. 83-84). While the Defendant acknowledges receipt of the TLD, it did not inform Caceres of that demand before December 30, 2015. (Rosado Rule 2004 Tr., pp. 113: 2-17; Docket No. 138, p. 2).[7] The Defendant did not respond to the TLD in writing by the October 21, 2014 response deadline set out in the letter and permitted the offer to lapse on October 24, 2014. (Pl.'s SMF, ¶ 83; Ex. 2, pp. 82-84).

Complaints and Judgments Against Caceres and Ongoing Negotiations

On October 24, 2014, James Cook filed a complaint against Caceres in Chatham County, North Carolina asserting damages in excess of $10,000.00. (Pl.'s SMF, ¶ 104; Case No. 18-80776, Claim No. 2-1, p. Ex. 2).

[7] In its objection to the Plaintiff's statement of material fact, the Defendant denies that it never discussed the TLD with Caceres, pointing to defense counsel Kenneth Rotenstreich's testimony that he discussed prior attempts to settle the case with Caceres at his initial meeting with Caceres, which occurred on December 30, 2015. (Rotenstreich Dep., pp. 76:2-21, 120:7-121:25, 125:20-128:19). The Plaintiff disputes whether the TLD was specifically discussed at that meeting, relying upon Caceres's testimony that he learned of the TLD only after the judgment was entered against him and during post-judgment collection proceedings. (Ex. 5, ¶ 13). Drawing all inferences in the Defendant's favor, as it must for purposes of the Plaintiff's motion for summary judgment, the Court finds it to be an undisputed fact that the Defendant informed Caceres of the TLD no sooner than December 30, 2015.

On October 28, 2014, and again on November 4, 2014, Rosado called Tuttle and left messages. Rosado noted in the Claims Log that she left a message for Tuttle to discuss settlement options and remarked that Cummings was unresponsive; she also suggested that Tuttle speak with Cummings. (Pl.'s SMF, ¶¶ 105-06; Ex. 2, p. 82-83).

On November 6, 2014, Rosado called Cummings's office, proposing that Perez either accept $1.00 of BI Coverage with a covenant that opened Perez's UIM claim for assessment or, instead, that Rosado pay the two Cook claims already submitted and exhaust the BI Coverage, thereby allowing Perez to pursue UIM Coverage. She noted that both options would provide essentially the same result. Rosado insisted that Cummings get back to her within 10 days and sent Cummings a letter that same day reminding him of the terms of their discussion. (Pl.'s SMF, ¶ 107; Ex. 2, pp. 81-82; Ex. 20). Rosado and Cummings exchanged several voicemail messages over the next 10 days. (Pl.'s SMF, ¶¶ 109-11).

On November 18, 2014, Rosado left a message for Tuttle to update him on the case and ask if they could resolve James Cook's claims. (Pl.'s SMF, ¶ 112; Ex. 2, p. 80). The next day, Tuttle sent a letter to the Defendant regarding the Estate of Lottie Cook and had it hand-delivered to the front lobby. The letter asserted that the wrongful death claim exceeded the $50,000 limit of BI Coverage. The letter also demanded a check for $45,000 accompanied by a certified declarations page showing that Caceres had liability insurance coverage limits of $50,000 and a settlement agreement releasing only Caceres. The offer was set to expire on December 1, 2014,

with a deadline of November 25, 2014, to request additional time. (Pl.'s SMF, ¶ 113; Ex. 21).

On November 20, 2014, Rosado conducted an evaluation of Perez's claims against Caceres in the Claims Log. In the evaluation, she summarized Perez's medical expenses and the settlement discussions. (Pl.'s SMF, ¶ 114; Ex. 2, p. 79). She also conducted an evaluation of the James and Lottie Cook claims against Caceres in the Claims Log. In the evaluation, she wrote

- Atty hand delivered letter yesterday asserts $45k demand for Estate of Lottie Cook. When the prior letter re: James Cook was recd, I called & left atty detailed msg that I was working to resolve matters but requested he call me to discuss the James Cook matter in an effort to resolve that case, at minimum. Atty never returned my calls.
- At this juncture, I believe it prudent to move forward to stlmt / pay the Cook claims to protect insd interests. Atty's lack of response to my phone messages will be argued in the face of any litigation, however, atty could state his written demand supercedes my calls. I would not agree with that statement if presented.
- I request authorization to pay James Cook bi liab limits of $50k. My prior discussion w/ atty Tuttle informing him of proposal to atty Cummings with hope the Estate could resolve is not reflected in his newly delivered letter. His demand of $45k should be met as it seems to reject my previously discussed proposal. Request authorization of $45k re: Estate of Lottie Cook.

(Pl.'s SMF, ¶ 115; Ex. 2, p. 78-79). That same day, the evaluation consultant authorized Rosado to resolve the Lottie Cook claim for $49,000, the James Cook claim for $50,000, and the Perez claim for $1,000, thereby exhausting the BI Coverage; Rosado adjusted the reserves accordingly. (Pl.'s SMF, ¶¶ 116-17; Ex. 2, p. 78).

On November 21, 2014, Rosado sent a letter to Tuttle offering to settle the James Cook claim for $50,000 and enclosing a settlement check in that amount. The

offer was not contingent on an agreement to allocate the BI Coverage limit among the three claimants. (Pl.'s SMF, ¶ 118; Ex. 2, p. 77; Ex. 22). She also sent a letter to Tuttle offering to settle the Lottie Cook claim for $49,000 and enclosing a settlement check for that amount. The offer was not contingent on an agreement to allocate the BI Coverage limit among the three claimants. (Pl.'s SMF, ¶ 119; Ex. 2, p. 77; Ex. 23). She faxed Tuttle a letter regarding the Lottie Cook claim with a release of Caceres and the Defendant in consideration for payment of $49,000. (Pl.'s SMF, ¶ 120; Ex. 24). Rosado sent a letter to Cummings offering to settle the BI Coverage of the Perez claim for $1,000 and enclosing a settlement check for that amount. (Pl.'s SMF, ¶ 121; Ex. 2, p. 77; Ex. 25).

On November 26, 2014, Tuttle wrote a letter to Rosado on behalf of James Cook, returning the $50,000 check and informing Rosado that James Cook "has filed a lawsuit against Mr. Caceres and intends to take the case to trial and obtain a judgment against Mr. Caceres." Tuttle further noted:

> On October 13, 2014, I wrote a letter to Allstate which contained a settlement demand along with the conditions of settlement which included a deadline of October 24, 2014. That letter was delivered to Allstate on October 13. None of the conditions stated in the letter were satisfied. In fact, there was no response whatsoever from Allstate, so the settlement demand expired and lapsed on the deadline of October 24, 2014.

(Pl.'s SMF, ¶ 125; Ex. 26). On November 28, 2014, Rosado wrote to Tuttle regarding the James Cook and Lottie Cook matters and said:

> Please be advised that I am in receipt of your faxed letter dated Nov. 26, 2014. Please note, I attempted to discuss this matter with you and left several phone messages on your voicemail Oct. 28, 2014, Nov. 4, 2014, Nov. 6, 2014 and Nov. 18, 2014. Unfortunately, I did not receive a return

> call to discuss the issues and allow an opportunity to professionally and amicably resolve this matter.
>
> As you will recall in our earlier phone discussions, my efforts and plan to resolve all matters were outlined to you and were in agreement. You suggested $1,000.00 be apportioned to Mr. Perez's case and we agree I would continue my work to resolve the claims.
>
> I received your written demand of $45,000.00 to resolve the matter of Estate of Lottie Cook on Nov. 20, 2014. My issuance of the $49,000.00 settlement to the Estate of Lottie Cook is greater than your demand and demonstrates good faith settlement.
>
> Attached to this faxed letter you will find a letter outlining the bodily injury liability limits. Every effort was made to fairly and expeditiously resolve this matter. The drafts and releases are mailed under separate cover and you should expect our releases shortly. The release language should resolve your concerns regarding the wording on the settlement draft.

(Pl.'s SMF, ¶ 128; Ex. 28).

On December 1, 2014, Tuttle wrote to Rosado regarding the James Cook claim as follows:

> I write in response to your letter dated November 28, 2014, relating to the claim of James Freeman Cook.
>
> Contrary to your letter, I was not "in agreement" with your "efforts and plan to resolve all matters." Any such belief on your part should have been put to rest by my October 13, 2014, settlement demand.
>
> As you know, on October 13, I delivered a letter containing a time-limited demand to your office. The demand made no reference to other matters. Had that demand been met, Allstate would have had $50,000 to resolve the remaining claims. The demand letter asked Allstate to raise any questions and make any request for additional time by October 21, 2014. Nonetheless, October 21 came and went with no contact from Allstate. You left me a voicemail on October 23 asking only that I call you back. The same day, my staff left you a phone message, inviting you to email me. For reasons you have not explained, you declined to put anything in writing and did not respond.

> By the deadline, October 24, Allstate had met none of the conditions in the demand, nor had Allstate requested additional time. Therefore, the demand lapsed and Mr. Cook filed suit. At that point, there was nothing left to discuss with Allstate on this claim.
>
> On November 25, 2014, I received a check for $50,000. Since the demand had expired over a month earlier, I returned the check to you by letter dated November 26.

(Pl.'s SMF, ¶ 129; Ex. 29).

On December 4, 2014, Rosado assigned Amanda Wells of Walker Allen Grice Ammons Foy & Klick, P.A. ("Walker Allen") to resolve the issues regarding the Lottie Cook release and to research the summons and complaint in the James Cook lawsuit. (Pl.'s SMF, ¶ 135; Ex. 2, p. 72). Rosado contacted Caceres and obtained his consent to have Wells represent his interests. Caceres said he had received the summons and complaint and he agreed to fax it to the attorney. (Pl.'s SMF, ¶ 136; Ex. 2, p. 72).

On December 12, 2014, Wells emailed Tuttle, as well as David Stradley and Robert Holmes of White & Stradley, PLLC, additional attorneys retained by the Cooks, regarding the James Cook claim and extended an offer of $50,000 as "full and final settlement of his claim in exchange for a Release of All Claims releasing [Caceres] and Allstate." (Pl.'s SMF, ¶ 146; Ex. 39). The parties also negotiated regarding the language of the Lottie Cook release language but could not come to an agreement; Tuttle returned the November 21 settlement check to the Defendant, and Wells received it on December 16. (Pl.'s SMF, ¶ 147; Ex. 29; Ex. 40).

On December 19, 2014, Perez settled his claim against the BI Coverage for $1,000 with a Settlement Agreement and "Covenant Not to Enforce Judgment" that

preserved Perez's claim against the UIM Coverage. (Pl.'s SMF, ¶ 149; Ex. 2, pp. 70-71; Ex. 41).

In March 2015, Wells wrote Caceres transmitting a statement of monetary relief for $3,000,000 and advised Caceres that the amount "is in excess of your applicable insurance policy limits." (Pl.'s SMF, ¶ 161; Ex. 2, p. 65). Meyer and Cummings continued to negotiate Perez's claim against the UIM coverage, and ultimately, on April 20, 2015, Perez executed a "Receipt, Release and Trust Agreement" acknowledging receipt of $40,000 in settlement of any and all potential claims against Caceres's UIM coverage. (Pl.'s SMF, ¶¶ 164-69, 171; Ex. 45).

On April 30, 2015, Rosado spoke with Wells, who told her that Caceres was an employee of Marsh Farms in Siler City and it did not appear he had assets. Wells also indicated that it was unknown whether James Cook was pursuing a judgment in excess of the policy limits, and Caceres was on notice that there could be excess liability. (Pl.'s SMF, ¶ 172; Ex. 2, p. 62). The following day, Rosado summarized the risk analysis for the James Cook claim in the Claims Log. (Pl.'s SMF, ¶ 174; Ex. 2, pp. 61-62).

On July 7, 2015, Rosado reported in the Claims Log that she had discussed the James Cook case with Wells and wrote, "We remain uncertain what plaintiff attorney's goals are for this case inasmuch as policy limits are tendered." (Pl.'s SMF, ¶ 181; Ex. 2, p. 58). That same day, the evaluation consultant wrote in the Claims Log that the plaintiff's attorney had no explanation for protracted litigation. She noted that Caceres "has no assets and is here legally" and that he was aware

that Stradley rejected the Defendant's policy limit offer to settle the Cooks' claims. (Pl.'s SMF, ¶ 182; Ex. 2, p. 58).

The parties attempted to resolve the James Cook matter through a mediation held on July 28, 2015. Although Caceres did not attend the mediation, Wells spoke with him by telephone and confirmed that, due to unemployment, he did not have any additional funds to contribute to a potential settlement. The mediation ended without any resolution; James Cook rejected a settlement offer for the policy limit and instead demanded $3,000,000. (Pl.'s SMF, ¶ 183; Ex. 2, p. 56).

On September 2, 2015, the Chatham County Superior Court entered an order granting partial summary judgment for James Cook. (Pl.'s SMF, ¶ 186; Ex. 46). On October 14, 2015, Stradley emailed Wells inquiring if her firm represented Caceres in connection with any claims he may have against the Defendant for failure to settle the claims against him. Wells responded on October 15, 2015, that her firm did not represent Caceres with respect to any potential, future claim that he may or may not have, but took the position that Stradley should not talk or communicate with Caceres while the tort action was pending because any such communication "could potentially interfere with the attorney/client relationship in the tort pending claim." (Pl.'s SMF, ¶ 188; Ex. 47).

On November 10, 2015, John Barringer, outside counsel retained solely to advise and represent the Defendant, sent a letter to Jeffrey Ammons of Walker Allen stating that he had been retained by the Defendant to represent its interests with respect to allegations of extra-contractual liability in association with the

handling of claims asserted by James Cook and the Estate of Lottie Cook against Caceres. The letter states

> Plaintiff's counsel, David Stradley, contends that Allstate and retained counsel place the interest of Allstate ahead of the interest of Mr. Caceres. He also contends that Allstate failed to settle each claim within a time demand period set forth by counsel.
>
> I write in part to advise you of Allstate's intent to attempt settlement of both the James Cook matter and the Estate of Lottie Cook claim. Allstate has previously offered its remaining policy limits to settle each claim. Allstate will now offer sums in excess of its policy limit to resolve all issues on either or both claims. I also write to notify you that any payments made by Allstate in excess of the contractual policy limits will not be made as voluntary payments without rights of reimbursement or indemnity… from [Walker Allen].

(Pl.'s SMF, ¶ 190; Ex. 49).

Two days later, Wells wrote to Caceres advising him that while the trial was scheduled for the next week, the claim asserted in Barringer's letter "creates a potential conflict of interest that prevents our continued representation of you." (Pl.'s SMF, ¶ 191; Ex. 50). The next day, Rosado left a message with Caceres to discuss a change in defense attorneys from Wells to Kenneth Rotenstreich of Teague Rotenstreich Stanaland Fox & Holt, PLLC ("Teague Rotenstreich"), a $2,000,000 demand, his option to consult with counsel regarding excess liability, and the Defendant's intention to vigorously defend him. (Pl.'s SMF, ¶ 192; Ex. 2, p. 45). The trial was rescheduled to a later date, with the Defendant paying costs in the amount of $5,075.61 to White & Stradley. (Pl.'s SMF, ¶ 196; Ex. 2, p. 43).

On December 30, 2015, Rotenstreich and Camilla Deboard of Teague Rotenstreich met with Caceres. (Pl.'s SMF, ¶ 197; Ex. 51; Deboard Rule 2004 Tr., pp. 20:21-25, 21:1-3; 35:21-25, 36-38, 39:1-10). Rotenstreich testified that he

discussed prior attempts to settle the case at his initial meeting with Caceres on December 30, 2015. *See supra* note 7 (addressing the Defendant's objection to paragraph 197 of the Plaintiff's statement of material facts); (Rotenstreich Dep., pp. 76:2-21, 120:7-121:25, 125:20-128:19).

On February 1, 2016, the Estate of Lottie Cook filed a wrongful death complaint against Caceres. (Pl.'s SMF, ¶ 201; Ex. 52). The following week, DeBoard emailed Rosado and the evaluation consultant suggesting that a bankruptcy attorney be hired for Caceres. (Pl.'s SMF, ¶ 202; Ex. 53).

On February 25, 2016,[8] after a bench trial on the issue of damages, the Chatham County Superior Court entered a verdict in favor of James Cook against Caceres in the amount of $1,456,343.00. The verdict was subject to a "high/low" agreement, resulting in a judgment against Caceres in the amount of $1,152,700.81. (Pl.'s SMF, ¶ 205; Case No. 18-80776, Claim No. 2-1, Ex. 3). On March 10, 2016, the Defendant issued a check in the amount of $57,741.81 (the $50,000 BI Coverage limit plus costs and interest) payable to the clerk of court, purporting to be in satisfaction of its obligations to pay the James Cook claim under the Policy. (Pl.'s SMF, ¶ 206; Ex. 2, p. 36). James Cook died in April 2016. (Pl.'s SMF, ¶ 209).[9]

[8] The Plaintiff's statement of material facts contains conflicting dates with respect to when a verdict was entered against Caceres. *Compare* Pl.'s SMF, ¶ 204 (stating February 25, 2016), *with* Pl.'s SMF, ¶ 205 (stating February 12, 2016). The Defendant did not object to either of the conflicting paragraphs. For purposes of this analysis, the February 25 date referenced in the exhibit attached to James Cook's proof of claim will be used. (Case No. 18-80776, Claim No. 2-1, Ex. 3).

[9] For clarity and ease of reading throughout this Opinion, the Court will refer to the Estate of James Cook as "James Cook."

The parties mediated the Lottie Cook claim in September 2016, eventually reaching an agreement in which the Defendant would pay an amount over the $50,000 policy limit to the Estate of Lottie Cook. (Pl.'s SMF, ¶ 211; Ex. 56).[10] The Lottie Cook case was dismissed in January 2017 after the settlement. (Pl.'s SMF, ¶ 214).

Post-Judgment Representation of Caceres and Bankruptcy Filing

On November 23, 2016, Rosado noted in the Claims Log that the Lottie Cook case could be closed but the James Cook matter remained pending with "no update from pltf counsel regarding a move towards bankruptcy." (Pl.'s SMF, ¶ 212; Ex. 2, p. 22).[11] In January 2017, Rosado noted another update on the litigation from Rotenstreich, "Matter will pend awhile and then be pushed toward bankruptcy." (Ex. 2, p. 21).

On March 14, 2017, Rosado noted in the Claims Log that Robert Holmes of White & Stradley wanted to take Caceres's deposition in a supplemental proceeding

[10] The Defendant objects to paragraph 211 of the Plaintiff's statement of material facts, arguing that "it constitutes evidence of compromise negotiations and offers to compromise a disputed claim, which are inadmissible under Federal Rule of Evidence 408." (Docket No. 138, p. 5). The Plaintiff, however, is not offering the proposed facts to prove or disprove the validity or amount of the underlying Lottie Cook claim. Moreover, Rule 408 is "inapplicable when the claim is based upon some wrong that was committed in the course of settlement," such as when an insurer is sued for breaching its contractual obligations "by failing to make a reasonable settlement within the policy limits." *Am. Int'l Specialty Lines Ins. Co. v. Hoot Winc, L.L.C.*, No. 04-CV-2201, 2006 WL 8455348, at *3 (S.D. Cal. Aug. 22, 2006); *see also Leeper v. Allstate Fire & Cas. Ins. Co.*, No. 13-CV-03460, 2016 WL 1089701, at *2 n.3 (D. Colo. Mar. 21, 2016) ("Multiple courts have held that Rule 408 does not apply to evidence used to demonstrate or negate a claim that an insurance company acted in bad faith."). Accordingly, the Court overrules the Defendant's evidentiary objection as the paragraph falls outside the prohibition of Rule 408.

[11] Given the context of the Claims Log entry and the uncontested language used in the Plaintiff's statement of material facts, the Court surmises that "pltf counsel" is James Cook's attorney, Stradley.

to determine what assets Caceres had to collect for the judgment; DeBoard and Ivey, a bankruptcy attorney, were to attend the deposition and represent Caceres's interest. (Pl.'s SMF, ¶¶ 215-16; Ex. 2, p. 19). The supplemental examination of Caceres took place on April 6, 2017. (Ex. 63). On May 8, 2017, Rosado noted in the Claims Log that the defense attorney had attended the supplemental exam and James Cook's counsel repeatedly tried to talk about Caceres's claim against the Defendant. Caceres's attorneys objected to this questioning based on the attorney/client privilege. (Pl.'s SMF, ¶ 217; Ex. 2, p. 18).

Ivey exchanged emails with DeBoard on May 8 and 9, 2017, in which Ivey discussed the possibility of Caceres filing for bankruptcy after Cook's attorneys indicated their intention to move to appoint a receiver. (Ex. 63). While Ivey and DeBoard discussed whether James Cook's judgment against Caceres was dischargeable in bankruptcy, Ivey also noted with respect to a potential bad faith claim against the Defendant, "I trust the bankruptcy judge to rule correctly more than a state court judge. A state court judge may be more sympathetic to the plaintiff, whereas a bankruptcy judge only deals with hardship type cases by nature…" (Pl.'s SMF, ¶ 241; Ex. 63).

On May 18, 2017, Stradley withdrew the motion for supplemental proceedings and filed a motion to appoint a receiver on behalf of James Cook to pursue claims against the Defendant. (Pl.'s SMF, ¶¶ 218-19).

On May 29, 2017, Barringer wrote to Caceres, copying Rotenstreich and Ivey, advising that he was retained to represent the Defendant with respect to

allegations made by Stradley that the Defendant had breached its duty of good faith and fair dealing owed to Caceres by failing to settle the James Cook claim both before and after the lawsuit was filed. (Pl.'s SMF, ¶ 220; Ex. 57). The letter states that the Defendant would continue to pay all legal expenses incurred for Caceres's defense through the collection process and for the services of Caceres's bankruptcy counsel, Ivey. He informed Caceres that James Cook's attorneys had moved to have a receiver appointed "for the purpose of taking over your purported asset or right to assert claims or a lawsuit against Allstate for allegedly mishandling of your claim for benefits under the Allstate policy." (Ex. 57). Barringer wrote that a hearing on the receivership motion was set for hearing on June 5, 2017, and indicated that "Camilla DeBoard and/or Charles Ivey" would attend the hearing "with or for [Caceres]"; Barringer stated that he planned on attending the hearing as well since the Defendant was specifically mentioned in the motion. (Ex. 57). Barringer also stated that the Defendant expected the attorneys it provided for Caceres to put his interests ahead of the Defendant's "when and if a conflict arises." (Ex. 57). Rotenstreich also wrote to Caceres regarding the hearing on the motion to appoint a receiver:

> Based on my conversations with you, in previous conversations, you have not wished to pursue a claim against Allstate and do not see Allstate has committed any wrongdoing in helping you with this matter … Unless you tell me otherwise, I will represent to the court as you have previously told me that you do not wish to pursue a claim against Allstate.

(Pl.'s SMF, ¶ 224; Ex. 58).

On June 20, 2017, James Cook withdrew the motion to appoint a receiver without prejudice. (Pl.'s SMF, ¶ 225; Ex. 59). On June 27, 2017, Rotenstreich wrote to Rosado informing her that the court did not rule on James Cook's motion to appoint a receiver because an administrator for his estate had not been appointed. He further wrote, "[t]en days later, we received word that the motion in the other case to appoint a receiver was denied. This was certainly a victory." (Pl.'s SMF, ¶ 226; Ex. 60).[12] That same day, Rotenstreich wrote to Ivey, copying Rosado, regarding the James Cook claims, "Our strategy worked. Plaintiff has now withdrawn his motion for a receiver." (Pl.'s SMF, ¶ 227; Ex. 61).

In November 2017, Rosado noted her request to Rotenstreich for a status update, summarizing her request as: "Can we close? SOL re: bad faith allegation, did it toll Nov 2017? He directed co-counsel to research." (Pl.'s SMF, ¶ 230; Ex. 2, p. 14). Rotenstreich later advised Rosado that the statute of limitations was four years from the alleged incident. (Pl.'s SMF, ¶ 231; Ex. 2, p. 14).

On September 19, 2018, the North Carolina Court of Appeals issued an opinion reversing the trial court in the *Haarhuis* case. *See Haarhuis v. Cheek*, 820 S.E.2d 844, 847 (N.C. Ct. App. 2018), *cert. denied*, 826 S.E.2d 698 (N.C. 2019).[13] In *Haarhuis*, the administrator of the estate of Joris Haarhuis sought to recover on a judgment against Emily Cheek, who had killed Haarhuis while driving impaired.

[12] Based on the date of this letter, "the other case" is *Haarhuis v. Cheek* in Chatham County Superior Court, Case No. 14-CVS-684, in which the court denied a motion to appoint receiver after a hearing on June 5, 2017.

[13] To the extent needed, the Court takes judicial notice of the court docket in the *Haarhuis v. Cheek* litigation. *See In re Durant*, 586 B.R. 212, 215 n.3 (Bankr. D. Md. 2018). The Plaintiff has also included the full Court of Appeals opinion as evidence without objection. (Ex. 67).

The administrator had filed a motion to appoint a receiver to pursue potential claims against Cheek's insurer, which the trial court denied. The Court of Appeals reversed, finding (1) that the trial court erroneously found that Cheek's insurer had standing to oppose the motion, and (2) the administrator was entitled to the appointment of a receiver. *Id.* at 849, 853.

On September 28, 2018, Rotenstreich notified Rosado that James Cook was refiling a motion for appointment of a receiver based on the Court of Appeals ruling. (Pl.'s SMF, ¶ 235; Ex. 2, p. 11). Then, on October 8, 2018, Rosado received notice that the motion to appoint receiver would be heard on October 22, 2018. (Pl.'s SMF, ¶ 237; Ex. 2, p. 11).

On October 11, 2018, there was a call between various employees of Defendant (Michael Reeser, John Connolly, Chris Goode, Marcus Vann, Lisa Meyer, and Rosado), as well as Barringer. (Reeser Dep., p. 152:11-21, Dec. 10, 2021). Rotenstreich and DeBoard participated in some portion of the call. (Docket No. 138, ¶ 238). The call was set up to discuss the status of James Cook's case against Caceres, particularly the continued retention of bankruptcy counsel on Caceres's behalf and the impending hearing on the motion to appoint receiver. Management-level employees were included on the call because the case was deemed "complex" as it involved a novel issue in North Carolina relating to the Bankruptcy Court, and because they were going to discuss Caceres filing bankruptcy. (Pl.'s SMF, ¶ 238; Reeser Dep., pp. 153:7-24, 154:1-6, Dec. 10, 2021). They discussed the *Haarhuis* decision. (Ex. 67; Reeser Dep., p. 155:10-14, Dec. 10, 2021). They also discussed the

Defendant's "defenses on statute of limitations, time demands, et cetera." (Reeser Dep., p. 166:15-19, Dec. 10, 2021).

On October 19, 2018, Caceres filed a petition for relief under chapter 7 of the Bankruptcy Code in the Middle District of North Carolina. The Defendant paid Ivey's attorney's fee and the bankruptcy filing fee. (Pl.'s SMF, ¶¶ 239, 249).[14]

On the Disclosure of Compensation of Attorney for Debtor (Form B2030), filed by Ivey in the bankruptcy case, Ivey indicated that the source of compensation paid to him was "Other," specifically, a "Third Party insurance carrier." (Pl.'s SMF, ¶ 242; Case No. 18-80776, Docket No. 13, p. 45). On Caceres's Claim for Property Exemptions (Form 91C), Ivey asserted that "all personal injury claim[s] arising from the Cook litigation (14-CVS 766)" were exempt under N.C. Gen. Stat. § 1C-1601(a)(8) and could not be administered by Caceres's bankruptcy trustee, "including but not limited to any claim for breach of fiduciary duty, bad faith, unfair and deceptive trade practice, negligence, malpractice." (Pl.'s SMF, ¶ 243; Case No. 18-80776, Docket No. 13, p. 10). At his § 341 Meeting on November 30, 2018, when asked who was paying Ivey's fees, Caceres answered, "I don't know." Given Caceres's answer, the Trustee requested that Ivey amend his disclosure form to

[14] In its Objection to the Plaintiff's statement of material facts, the Defendant disputes the Plaintiff's assertion that the decision to pay Caceres's attorneys subsequent to entry of the judgment, and after policy limits were paid, was made by Defendant's attorneys and in-house counsel. (Pl.'s SMF, ¶ 269). Instead, the Defendant maintains that "the decision to continue to pay to defend Caceres in the post-judgment collection phase would have been Allstate management and counsel." (Docket No. 138, ¶ 269). While it may be an open question as to which of the Defendant's agents authorized continued payment, the Court finds it to be an undisputed fact that Defendant continued to pay for Caceres's attorneys after judgment was entered and after policy limits were paid.

clearly state who paid his attorney's fees beyond listing "third party insurance carrier." (341 Meeting Tr., pp. 15:24-25, 16:1-25).

On January 3, 2019, Ivey's paralegal wrote to Rotenstreich requesting approval of language regarding disclosure of the payment arrangement between the Defendant and Ivey. (Pl.'s SMF, ¶ 246). Ivey then filed a supplemental statement stating,

> [I]nvoices for services were sent to the firm of Teague, Rotenstreich, Stanaland, Fox & Holt (hereinafter "Firm"). Upon information and belief, a third party insurance carrier would reimburse the Firm for the attorney fees incurred by the Debtors attorney. Attorney for the Debtor does not have a direct fee agreement or any other agreement with the insurance carrier. *Upon further information the insurance carrier is Allstate Insurance Company*.

(Case No. 18-80776, Docket No. 27) (emphasis added).

On January 10, 2019, Rosado noted that Rotenstreich had informed her that the Bankruptcy Administrator had determined that the Debtor's case was not presumed to be an abuse of the provisions of chapter 7. (Pl.'s SMF, ¶ 248; Ex. 2, pp. 9-10). Rosado also approved a payment of Ivey's fee in the amount of $2500. (Pl.'s SMF, ¶ 249; Ex. 2, p. 9). On January 31, 2019, this Court sua sponte entered an order to show cause and notice of hearing, requiring Ivey to appear and show cause why he should not be disqualified from representing the Debtor. (Pl.'s SMF, ¶ 250; Case No. 18-80776, Docket No. 41). Rotenstreich, Ivey, and Caceres testified at the show cause hearing, held on February 5, 2019 (the "Show Cause Hearing"). Caceres was unable to identify any conflicts of interest involved in Ivey's representation of him. (Pl.'s SMF, ¶ 252; Show Cause Hearing Tr., pp. 87:18-25, 88:1-7). Following

the hearing, Ivey filed a motion to withdraw as counsel for Caceres, which the Court granted due to Ivey's conflicts of interest. (Case No. 18-80776, Docket No. 47). The order further provided for Ivey's fee to be turned over to the Plaintiff and held until Caceres obtained a new attorney.

Both the Trustee and James Cook filed objections to Caceres's claim for exemption of personal injury claims against the Defendant, asserting that it did not qualify under N.C. Gen. Stat. § 1C-1601(a)(8). The parties settled this dispute in April 2019; in accordance with the agreement, Caceres filed an Amended Form 91C on May 15 to remove his exemption of potential claims against the Defendant. (Case No. 18-80776, Docket No. 81). In consideration of the amended exemption, James Cook stipulated that his claim for the unsatisfied judgment against Caceres was dischargeable in bankruptcy. (Case No. 18-80776, Docket No. 68, Ex. A).

DISCUSSION

The Plaintiff seeks summary judgment on his claims for breach of contract, unfair and deceptive trade practices, and bad faith refusal to settle. The Plaintiff argues that the undisputed facts and stipulations prove that the Defendant breached its duties to Caceres under the Policy, failed to settle valid claims when presented with the opportunity to do so, deliberately concealed claims that Caceres may have had against the Defendant, and ultimately, through the Defendant's misrepresentations and self-interested dealings, encouraged Caceres to file for bankruptcy. Conversely, the Defendant seeks summary judgment as to all the Plaintiff's claims on the grounds that the undisputed evidence demonstrates that

the Defendant diligently investigated the claims, proactively negotiated for a global settlement to resolve all claims against Caceres, and continued to provide legal representation to Caceres against post-judgment collection efforts under its contractual duty to defend.

When faced with cross-motions, the normal course for the trial court is to consider each motion separately, drawing inferences against each movant in turn. *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003). Given the overlapping nature of the cross-motions, however, and in the interest of judicial efficiency, the Court will consider this case by each cause of action in turn, mindful of the separate inferences to be drawn in favor of each movant.

1. Unfair and Deceptive Trade Practices

The Plaintiff argues that the Defendant's actions, both during the claims-handling process and after its contractual duty to defend ended, violated the North Carolina Unfair and Deceptive Act or Practice statute (the "UDP"), N.C. Gen. Stat. § 75-1.1. North Carolina declares as unlawful "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." *Id.* § 75-1.1(a). "In order to establish a prima facie claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Bumpers v. Cmty. Bank of N. Va.*, 747 S.E.2d 220, 226 (N.C. 2013); *Krawiec v. Manly*, 811 S.E.2d 542, 550 (N.C. 2018). "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious

to consumers." *Gray v. N.C. Ins. Underwriting Ass'n*, 529 S.E.2d 676, 681 (N.C. 2000). "A practice is deceptive if it has a tendency to deceive, but proof of actual deception is not required." *Nelson v. Hartford Underwriters Ins. Co.*, 630 S.E.2d 221, 231 (N.C. Ct. App. 2006) (cleaned up); *Grimes v. Gov't Emps. Ins. Co.*, No. 1:18-CV-798, 2019 WL 3425227, at *11 (M.D.N.C. July 30, 2019).

"Unfair and deceptive trade practices and unfair competition claims are neither wholly tortious nor wholly contractual in nature and the measure of damages is broader than common law actions." *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 620 S.E.2d 222, 231 (N.C. Ct. App. 2005). If a defendant is found to have violated N.C. Gen. Stat. § 75-1.1, a plaintiff demonstrating injury is entitled to actual damages and attorney's fees, including damages stemming from emotional distress.[15] However, a plaintiff is also automatically entitled by statute to treble any actual damages proximately caused by a violation of the UDP. N.C. Gen. Stat. §§ 75-16, -16.1; *see also Gray*, 529 S.E.2d at 684; *Marshall v. Miller*, 276 S.E.2d 397, 402 (N.C. 1981) (finding legislature intended "trebling of any damages assessed to be automatic once a violation is shown"). The potential remedies under the UDP are thus "hybrid" in nature—partially punitive, serving as a deterrent to future violations, but "remedial for other reasons, among them the fact that it

[15] Although caselaw regarding the availability of damages for emotional distress in the context of § 75-1.1 has been described as "unclear," 1 NORTH CAROLINA UNFAIR BUSINESS PRACTICE § 9.03 (2022), decisions from courts at both the state and federal level suggest that such damages are available for a violation of the UDP. *See, e.g.*, *Barbour v. Fid. Life Ass'n*, 361 F. Supp. 3d 565, 575 (E.D.N.C. 2019) (assuming without deciding that "strain and emotional distress" constitute damages under the UDP but finding that plaintiff failed to show actual reliance on alleged misrepresentations); *Williams v. HomEq Servicing Corp.*, 646 S.E.2d 381, 388 (N.C. Ct. App. 2007); *Love v. Pressley*, 239 S.E.2d 574, 579, 583 (N.C. Ct. App. 1977) (finding damages for mental suffering resulting from defendant's trespass and conversion were recoverable and properly trebled).

encourages private enforcement and the fact that it provides a remedy for aggrieved parties." *Marshall*, 276 S.E.2d at 402.

The North Carolina legislature regulates the insurance industry, in part, through N.C. Gen. Stat. § 58-63-15(11), which enumerates certain unfair claim settlement practices that courts have considered "examples of conduct to support a finding of unfair or deceptive acts or practices." *Gray*, 529 S.E.2d at 681, 683. "[W]hen an insurance company engages in a practice or act constituting an unfair claim settlement practice under N.C. General Statute § 58-63-15(11), it 'also engages in conduct that embodies the broader standards of N.C.G.S. § 75-1.1 because such conduct is inherently unfair, unscrupulous, immoral, and injurious to consumers.'" *Guessford v. Pa. Nat'l Mut. Cas. Ins. Co.*, 983 F. Supp. 2d 652, 660 (M.D.N.C. 2013) (quoting *Gray*, 529 S.E.2d at 683); *see also Country Club of Johnston Cnty, Inc. v. U.S. Fid. & Guar. Co.*, 563 S.E.2d 269, 279 (N.C. Ct. App. 2002) (extending the holding in *Gray* to all conduct described in § 58-63-15(11)).[16] An insurer's good faith is not a defense to an alleged violation of N.C. Gen. Stat. § 58-63-15(11). *Gray*, 529 S.E.2d at 681.

[16] The Fourth Circuit described the intersection between N.C. Gen. Stat. § 75-1.1 and § 58-63-15(11):

> North Carolina's Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1, prohibits unfair and deceptive acts or practices, generally, and North Carolina's "Unfair Claim Settlement Practices" statute, N.C. Gen. Stat. § 58-63-15(11), defines unfair practices in the settlement of insurance claims. As relevant here, § 75-1.1 provides a private cause of action for violations, whereas § 58-63-15(11) does not; instead the remedy for a violation of section 58-63-15 is the filing of a section 75-1.1 claim. Thus, an individual may file an independent § 75-1.1 claim, or may file a § 75-1.1 claim that relies on a violation of § 58-63-15(11).

Elliott v. Am. States Ins. Co., 883 F.3d 384, 396 (4th Cir. 2018) (cleaned up).

Whether the Defendant has performed the act asserted by the Plaintiff is a question of fact for a jury if it is disputed. It is then a question of law for the court as to whether these proven facts constitute an unfair or deceptive practice. *Fortson v. Garrison Prop. & Cas. Ins. Co.*, No. 1:19-CV-294, 2022 WL 198782, at *2 (M.D.N.C. Jan. 13, 2022); *S. Atl. Ltd. P'ship of Tenn., L.P. v. Riese*, 284 F.3d 518, 534 (4th Cir. 2002). "If the material facts are not disputed, the court should determine whether the defendant's conduct constituted an unfair or deceptive trade practice." *Nelson*, 630 S.E.2d at 231. At the summary judgment stage, the Court "must determine whether there is a genuine dispute as to any of the material facts that a jury would be asked to find," but must also examine the legal merits of the Plaintiff's claim to assess whether the Defendant's actions "would be found as a matter of law to not violate Section 75-1.1, even after assuming the jury found all disputed facts in Plaintiff's favor." *Champion Pro Consulting Grp., LLC v. Impact Sports Football, LLC*, 116 F. Supp. 3d 644, 652 (M.D.N.C. 2015).

Even where the Court determines as a matter of law that an insurer's act violates § 58-63-15(11), and in turn § 75-1.1, the Plaintiff must still produce evidence satisfying the other two required elements: the act or action at issue was in or affecting commerce and proximately caused injury. *Murray v. Nationwide Mut. Ins. Co.*, 472 S.E.2d 358, 364 (N.C. Ct. App. 1996). Unfair and deceptive trade practice actions against insurers almost always meet the second required element due to the commercial nature of an insurer's act of selling and implementing insurance policies. *See, e.g.*, *DENC, LLC v. Phila. Indem. Ins. Co.*, 426 F. Supp. 3d

151, 156 (M.D.N.C. 2019), *aff'd*, 32 F.4th 38 (4th Cir. 2022) ("As to the second element of a Chapter 75 claim, 'the business of insurance' is 'unquestionably in commerce.'" (quoting *Chew v. Progressive Universal Ins. Co.*, No. 5:09-CV-351, 2010 WL 4338352, at *9 n.3 (E.D.N.C. Oct. 25, 2010))); *Murray*, 472 S.E. 2d at 364 (finding second element met where insurer's "act of selling plaintiff a policy affects commerce"); *Pearce v. Am. Def. Life Ins. Co.*, 343 S.E.2d 174, 179 (N.C. 1986) ("The business of insurance is unquestionably 'in commerce' insofar as an 'exchange of value' occurs when a consumer purchases an insurance policy...[and] people who buy insurance are consumers whose welfare [the UDP] was intended to protect.").

For the third element, the Plaintiff must demonstrate that Caceres suffered actual injury proximately caused by the allegedly deceptive or unfair act or trade practice. *Bumpers*, 747 S.E.2d at 226 (citing *Pearce*, 343 S.E.2d at 180). Under the UDP, damages and proximate cause are also fact questions for the jury. *ABT Bldg. Prods. Corp. v. Nat'l Union Fire Ins. Co.*, 472 F.3d 99, 123 (4th Cir. 2006). Proximate cause has been defined by the North Carolina Supreme Court as "a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary produce could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed." *Lynn v. Overlook Dev.*, 403

S.E.2d 469, 473 (N.C. 1991).[17]

The Plaintiff contends the Defendant violated § 75-1.1, and specifically § 58-63-15(11)(a), -(b), -(c), -(f), and -(m). Both parties move for summary judgment on all subparagraphs and the Court addresses each in turn.

A. N.C. Gen. Stat. § 58-63-15(11)(a)

The Plaintiff argues that the Defendant misrepresented pertinent facts and insurance policy provisions in violation of N.C. Gen. Stat. § 58-63-15(11)(a). The Plaintiff's supporting brief alleges the Defendant made the following misrepresentations: (1) misrepresenting that it would keep Caceres fully informed of material events in the case and, specifically, any and all settlement demands made by claimants; (2) misrepresenting the scope of its duty to defend and continuing to employ and pay attorneys, ostensibly on Caceres's behalf, to block or hinder claimants' efforts to appoint a receiver or trustee to pursue Caceres's potential bad faith claims against the Defendant; and (3) misrepresenting the applicable coverages under Caceres's Policy, specifically the availability of UIM coverage. The Plaintiff maintains that these alleged misrepresentations resulted in actual damages to Caceres, including but not limited to, entry of an excess judgment after the Defendant failed to inform Caceres of opportunities to settle some claims for policy limits as well as damages accompanying Caceres's "coerced" bankruptcy filing. (Docket No. 1, ¶¶ 140-42).

[17] Several courts have noted that "what constitutes proximate cause between a deceptive act and a plaintiff's damages remains ambiguous." *Guessford*, 983 F. Supp. 2d at 666 (citing *ABT Bldg. Prods.*, 472 F.3d at 126).

North Carolina courts "have not fulsomely analyzed" N.C. Gen. Stat. § 58-63-15(11)(a) or specifically defined misrepresentation within the context of subparagraph (a), *Essentia Ins. Co. v. Stephens*, 530 F. Supp. 3d 582, 606 (E.D.N.C. 2021); however, the existing caselaw provides that, for an alleged misrepresentation to form the basis of an unfair or deceptive trade practice, "a party's words or conduct must possess the 'tendency or capacity to mislead' or create the 'likelihood of deception.'" *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 507 S.E.2d 56, 64 (N.C. Ct. App. 1998) (cleaned up). "In determining whether a representation is deceptive, its effect on the average consumer is considered." *Pearce*, 343 S.E.2d at 180.

As to insurance providers, North Carolina law has established that "a negligent misrepresentation as to a policy term is sufficient to establish [a UDP] claim, and good faith or ignorance of falsity is not a defense to an action under § 75-1.1." *Topsail Reef Homeowners Ass'n v. Zurich Specialties London, Ltd.*, 11 F. App'x 225, 232-33 (4th Cir. 2001) (citing *Forbes v. Par Ten Grp., Inc.*, 394 S.E.2d 643, 651 (N.C. Ct. App. 1990)); *see also DENC*, 426 F. Supp. 3d at 155 ("An insurance company's practice or communication is deceptive if it has the tendency to deceive, even if the company asserts it acted in good faith."). "Nevertheless, a reasonable, non-negligent misunderstanding regarding a policy term is insufficient to ground [a UDP] claim." *Topsail*, 11 F. App'x at 233 (citing *Cockman v. White*, 333 S.E.2d 54, 55 (N.C. Ct. App. 1985)).

Unlike other claims under §§ 75-1.1 and 58-63-15(11), those stemming from alleged misrepresentations uniquely "require a plaintiff to demonstrate reliance on

the misrepresentation in order to show the necessary proximate cause." *Bumpers*, 747 S.E.2d at 226; *see also D C Custom Freight, LLC v. Tammy A. Ross & Assocs.*, 848 S.E.2d 552, 561 (N.C. Ct. App. 2020) (applying rule in insurance coverage); *Ernst v. N. Am. Co. for Life & Health Ins.*, 245 F. Supp. 3d 680, 686 (M.D.N.C. 2017) (same); *DENC*, 426 F. Supp. 3d at 157 (same). In determining whether the Plaintiff has met this requirement, the Court must consider two key elements regarding Caceres's mental state, which combine to determine detrimental reliance: (1) actual reliance and (2) reasonable reliance. *Bumpers*, 747 S.E.2d at 227. Actual reliance "requires that the plaintiff affirmatively incorporated the alleged misrepresentation into his or her decision-making process: if it were not for the misrepresentation, the plaintiff would likely have avoided the injury altogether." *Id.* The second element, reasonable reliance, "is most succinctly defined in the negative: reliance is not reasonable where the plaintiff could have discovered the truth of the matter through reasonable diligence, but failed to investigate." *Id.*; *see also Solum v. CertainTeed Corp.*, No. 7:15-CV-114, 2015 WL 6505195, at *5 (E.D.N.C. Oct. 27, 2015) (holding reliance is reasonable only when plaintiff "use[s] reasonable care to ascertain the truth of th[e] representation"). In the context of a summary judgment motion, "when there are genuine issues of material fact that are legitimately called into question, summary judgment should be denied and the issue preserved for the jury." *Bumpers*, 747 S.E.2d at 227.

Given this background, the Court will consider each of the Plaintiff's arguments to determine whether the Defendant's acts constitute an unfair or

deceptive act or trade practice under § 58-63-15(11)(a) and § 75-1.1 and whether the Plaintiff has produced evidence showing that Caceres "suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation." *Id.*

i. Timely Informing Caceres of Settlement Demands Made by Claimants

The Plaintiff first alleges that the Defendant, despite firm assurances that it would do so, failed to keep Caceres informed of material events in its claim handling. Although the Plaintiff provides an extensive list of events and information the Defendant failed to provide Caceres (Docket No. 125, pp. 14-15), the linchpin of this claim for relief centers on the Defendant's alleged failure to keep Caceres informed of offers and demands, particularly the October 2014 TLD, despite representations it would do so.

From the beginning stages of the claims-handling process, the Defendant promised Caceres that he would be kept informed of developments and particularly any settlement offers or demands. On March 3, 2014, less than one month after the Accident, Carion, the initial BI liability adjuster for the Defendant, wrote a letter assuring Caceres that she would be "keeping [him] informed throughout the claim process." (Pl.'s SMF, ¶ 23; Ex. 7). On April 17, 2014, Rosado, who replaced Carion as liability adjuster, wrote again to Caceres, stating she would be "keeping [him] informed throughout the claim process." (Pl.'s SMF, ¶ 35; Ex. 9). On August 15, 2014, the Claims Log reflects that Rosado again assured Caceres by phone that she "will update him as information develops." (Pl.'s SMF, ¶ 61; Ex. 2, p. 90).

In addition to the Defendant's more generalized representations that it would keep Caceres informed "throughout the claim process," the Defendant specifically told Caceres that it would keep him apprised of any settlement offers or demands received from claimants. By way of a letter written by Carion to Caceres on March 21, 2014, the Defendant represented that, as part of its efforts to settle the claims in exchange for a full and final release, Caceres would be "advised of all offers and demands." (Pl.'s SMF, ¶ 29; Ex. 8). The undisputed facts and uncontested evidence demonstrate that Caceres was told by the Defendant, both explicitly and in more general terms, that he would be told of developments in the claims-handling process and, specifically, whether claimants submitted any settlement offers or demands.[18]

In contrast to its stated representations, however, the Defendant failed to timely inform Caceres of the TLD when it was received or while it was pending. Rosado, who as liability adjuster was the Defendant's point person for communications with claimants and the insured, stated that she "never told Mr. Caceres about any specific demands or offers from plaintiff's counsel," including the TLD. (Rosado Rule 2004 Tr., pp. 113:7-12, 216:6-9). Caceres did not learn of the TLD until at least December 30, 2015, over a year after the offer was made and expired.

Without testing the credibility of the participants in that December 30, 2015, meeting, and taking the facts in a light most favorable to the Defendant, the Court

[18] The Defendant's employees testified as to the importance of promptly informing an insured of settlement demands, noting that doing so allowed the insured a meaningful opportunity to consider contributing personal funds, retaining outside counsel, or expressing views on a particular course of action. (Pl.'s SMF, ¶ 84; Meyer Dep., p. 43:3-43:24; Lonker Dep., p. 72:25-73:6).

is nevertheless able to conclude that, as a matter of law, the Defendant's clear statements to Caceres that it would inform him of all settlement offers and demands, combined with its subsequent failure to do so on a timely basis, constitutes an unfair or deceptive act or practice under N.C. Gen. Stat. §§ 58-63-15(11)(a) and 75-1.1. While N.C. Gen. Stat. § 58-63-15(11) has not been found to create a general duty for an insurer to provide the insured with periodic updates during the settlement process, *see Modern Auto. Network, LLC v. E. All. Ins. Co.*, 416 F. Supp. 3d 529, 548 (M.D.N.C. 2019),[19] the Defendant expressly represented to Caceres that it would, in fulfilling its duty to defend and pursuing a potential resolution of all claims, advise Caceres of all offers and demands. The Defendant did not comport with those representations and failed to inform Caceres of the TLD until at least December 2015, long after any opportunity for Caceres to contribute or simply express an opinion had passed.

Whether made deliberately or negligently, the Defendant's representation that it would apprise Caceres of all offers and demands has the "tendency or capacity" to deceive given the evidence that more than a year lapsed before the

[19] The District Court for the Middle District of North Carolina declined to find that N.C. Gen. Stat. § 58-63-15(11)(b) creates a general duty for the insurer to provide the insured with periodic updates throughout the settlement process. *See Modern Auto.*, 416 F. Supp. 3d at 548. *Modern Auto* is distinguishable from the instant case, however, in several key respects. Without pointing to any specific lapses in communication, the plaintiff in *Modern Auto* unsuccessfully argued that § 58-63-15(11)(b) requires an insurer to provide periodic updates through the settlement process. In that context, the court found the plaintiff "does not point to, and this Court does not find, any authority creating such a duty for [the defendant]." *Id.* Although there appears to be no authority interpreting § 58-63-15(11)(a) as broadly creating such a duty, the Plaintiff's UDP claim does not hinge on its existence. Instead, the Plaintiff points to specific representations the Defendant made to Caceres, both orally and in writing, which the Defendant later failed to effectuate. This case is fundamentally different than *Modern Auto* because, rather than arguing for the existence of an amorphous duty on the part of the Defendant that it failed to fulfill, the Plaintiff can point to specific misrepresentations made by the Defendant that it would inform Caceres of all offers and demands.

Defendant informed Caceres of the TLD. *Dunlea Realty*, 507 S.E.2d at 64; *Pearce*, 343 S.E.2d at 180. Given the Defendant's representations, the average consumer would likely expect to be apprised of any offers and demands in a timely manner, which the average consumer would likely expect to be significantly less than a year. Further, the average consumer would likely wait until hearing of an offer to settle before considering personal contributions or seeking outside counsel. Despite any good intentions or ignorance of falsity the Defendant could potentially assert, its representations to Caceres cannot be excused as a "reasonable, non-negligent misunderstanding." *Topsail*, 11 F. App'x at 233. This type of express misrepresentation as to what a policy and an insurer will provide an insured is sufficient to establish an unfair or deceptive act for purposes of the UDP. *See Defeat the Beat, Inc. v. Underwriters at Lloyd's London*, 669 S.E.2d 48, 54 (N.C. Ct. App. 2008) (finding that an insurance adjustor's misrepresentations that plaintiff had a valid claim under the policy and that payment was "imminent" would satisfy the unfair and deceptive trade act or practice element of the claim); *Guessford v. Pa. Nat'l Mut. Cas. Ins. Co.*, 918 F. Supp. 2d 453, 464 (M.D.N.C. 2013) (finding allegations that defendant misrepresented a requirement under the insurance contract, as evidenced by correspondence from the defendant to the plaintiff, was sufficient to plead a claim under § 58-63-15(11)(a)). The Court also finds the commercial nature of the Defendant's act of selling and implementing insurance policies meets the second element for a UDP claim. *See DENC*, 426 F. Supp. at 156 (M.D.N.C. 2019).

The Plaintiff, however, must produce evidence satisfying the remaining UDP element, proximate cause. Specifically, the Plaintiff must produce evidence that Caceres actually and reasonably relied on the misrepresentation and suffered actual injury as a proximate result. *Bumpers*, 747 S.E.2d at 227. For its part, the Defendant argues that the Trustee cannot point to any evidence that failing to timely inform Caceres of the TLD proximately caused him any harm or that Caceres "would have acted differently had he been provided this additional information he claims not to have received." (Docket No. 139, pp. 21-22).

The Court agrees with the Defendant; the Plaintiff has not produced sufficient evidence to demonstrate or even forecast that Caceres relied on the Defendant's misrepresentations. *Fazzari v. Infiniti Partners, LLC*, 762 S.E.2d 237, 244 (N.C. Ct. App. 2014) ("Where a plaintiff cannot forecast evidence of actual reliance, summary judgment for the defendant[ ] is proper."). In assessing the propriety of summary judgment, the Court must "view the facts in the light most favorable to the non-moving party, drawing all reasonable inferences from the affidavits, depositions, and attached exhibits submitted." *Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 551 (4th Cir. 1999). However, neither Caceres's affidavit nor the other evidence provided meet the required threshold to raise a genuine issue of material fact in the Plaintiff's favor for a jury to consider.

In his affidavit, Caceres describes his surprise upon learning of the lawsuit filed by James Cook:

> No one with Allstate ever told me that I might have to pay something for the claims of James Cook, the Estate of Lottie Cook or Fidel Perez

> because of limits on what Allstate had to pay under my insurance policy … I was only told that Allstate would take care of me and resolve their claims. I was told I had nothing to worry about. I trusted the people I was talking with at Allstate. Because of my insurance policy, I believed that I did not need to worry about having to pay anything for the claims resulting from the accident. On October 24, 2014, James Cook filed a lawsuit against me. I was surprised when I heard about the lawsuit. I didn't understand why I was being sued.

(Ex. 5, ¶¶ 6-7). Caceres avers that, based on conversations he had with the Defendant's representatives, he did not anticipate any excess verdict or any responsibility to the claimants beyond the limits of his insurance policy.

But Caceres never explicitly states, or even implies, in his affidavit that he relied on the Defendant's misrepresentation that it would apprise him of all offers and demands and incorporated that misrepresentation into his decision-making process such that he would have acted differently, perhaps by regularly contacting the Defendant for updates. While the Plaintiff has set forth sufficient evidence that Caceres had no knowledge of the TLD in 2014 or the potential settlement options available at the time, the Plaintiff has offered no evidence that absent that misrepresentation, Caceres would have had such knowledge, and perhaps would have expressed his concerns, contributed personal funds to a potential settlement, or sought outside counsel. In fact, Caceres makes no reference whatsoever to the misrepresentation in his affidavit. There being no evidence produced of actual reliance with respect to this claim, the Court need not analyze the element of reasonable reliance.

Based on the undisputed material facts, the Court finds, as a matter of law, that the Defendant's misrepresentation that it would inform Caceres of all

settlement offers or demands constitutes an unfair and deceptive trade practice under N.C. Gen. Stat. §§ 58-63-15(11)(a) and 75-1.1. The Court, however, finds that the Plaintiff has not presented sufficient evidence for a reasonable jury to find in the Plaintiff's favor on the proximate cause element, specifically actual reliance on the misrepresentations. Therefore, Court will grant the Defendant's motion for summary judgment as to this basis for relief under § 75-1.1.

ii. Misrepresenting the Contractual Duty to Defend and Conflicts of Interest

The Plaintiff next alleges the Defendant misrepresented the scope of its duty to defend and continued to employ and pay attorneys to represent Caceres after its contractual obligation to do so expired. The Plaintiff maintains that these attorneys possessed conflicts of interest, downplayed the viability of Caceres's potential claims against the Defendant, and worked to undermine any effort to appoint a receiver or trustee to pursue those claims. (Docket No. 125, pp. 20-26).

The "duty to defend," which is a "common feature of insurance contracts…is generally understood to mean the insurance company's duty to hire counsel to defend the insured in a suit brought by a third party." *Modern Auto.*, 416 F. Supp. 3d at 541. "There is no statutory requirement that an insurance company provide its insured with a defense. However, a company may provide by contract that it will defend its insured." *Brown v. Lumbermens Mut. Cas. Co.*, 390 S.E.2d 150, 152 (N.C. 1990); *see also* 1 NEW APPLEMAN INSURANCE LAW PRACTICE GUIDE 11A.04 (2022).

"A contractual duty to defend and indemnify creates a common interest and tripartite relationship between the insurer, the insured, and the defense attorney." *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 805 S.E.2d 664, 668

(N.C. 2017) (quoting *Raymond v. N.C. Police Benevolent Ass'n*, 721 S.E.2d 923, 926 (N.C. 2011)). In such a tripartite relationship, the attorney can be said, under the common interest or joint client doctrine, to represent both the insurer and the insured as to the defense for which the insurer has retained the attorney. *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 617 S.E.2d 40, 46-47 (N.C. Ct. App. 2005). "The linchpin in any analysis of a tripartite attorney-client relationship is the finding of a common legal interest between the attorney, client, and third party." *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 788 S.E.2d 170, 176 (N.C. Ct. App. 2016). When an aggrieved third party sues the insured, the insurance company, its insured, and the retained attorney share a common interest in defending against any alleged liability. The tripartite relationship, however, lasts only so long as this shared legal interest remains intact and, generally, once the underlying litigation against the insured concludes, either through judgment or settlement, the tripartite relationship between the three parties would end as well. *See generally* Ellen S. Pryor and Charles Silver, *Defense Lawyers' Professional Responsibilities: Part I - Excess Exposure Cases*, 78 TEX. L. REV. 599, 610 (2000) ("Carriers retain defense lawyers to satisfy their pre-existing contractual obligation to defend insureds and to protect their pre-existing financial interests by exercising control. They do not expect defense lawyers to provide additional services that insureds did not purchase when buying liability coverage. Nor do carriers expect defense lawyers to provide other than defense-related services. The scope of a defense lawyer's representation of an insured is therefore properly understood as

encompassing only matters relevant to the defense of liability claims."); Douglas R. Richmond, *Walking a Tightrope: The Tripartite Relationship Between Insurer, Insured, and Insurance Defense Counsel*, 73 NEB. L. REV. 265, 270-271 (1994) (noting that, "while a defense attorney generally has an on-going relationship with an insurer … the attorney's relationship with the insured is usually limited to the defense of a single case").

Determining the specific confines and duration of a given insurer's duty to defend a particular insured, however, requires analysis of the "language in the insurance contract." *Brown*, 390 S.E.2d at 153. The Court, therefore, looks to the Policy held by Caceres, and employs general contract interpretation rules, to determine the scope of the Defendant's duty to defend. *Id.*; *see also Accardi v. Hartford Underwriters Ins. Co.*, 838 S.E.2d 454, 456 (N.C. 2020) ("When interpreting an insurance policy, courts apply general contract interpretation rules."). The pertinent provision of the Policy reads as follows:

> We will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident. Damages include prejudgment interest awarded against the insured. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. *Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted.* We have no duty to defend any suit or settle any claim for bodily injury or property damage not covered under this policy.

(Ex. 1, p. 003108) (emphasis added).

Upon learning of the Accident, the Defendant took steps to fulfill its contractual duty to defend. At the onset of the case, the Defendant, through its

liability and UIM adjusters, communicated directly with claimants and their respective attorneys to resolve claims. The Defendant was unable to finalize a hoped-for global settlement between all three claimants; however, the Defendant did obtain a settlement with Perez in April 2015, which entailed payment of $1,000 to satisfy his claim against the BI Coverage and a $40,000 settlement from UIM coverage. (Pl.'s SMF, ¶¶ 168-171). After James Cook filed his lawsuit, the Defendant first employed Walker Allen to represent Caceres in the James Cook and Lottie Cook matters; in November 2015, the Defendant replaced Walker Allen with Teague Rotenstreich and its attorneys, Rotenstreich and DeBoard. (Pl.'s SMF, ¶¶ 135, 192, 194). In February 2016, judgment was entered in favor of James Cook against Caceres in the amount of $1,152,700.81 and, on March 10, 2016, the Defendant issued a check in the amount of $57,741.81 in satisfaction of its obligations to pay James Cook under the Policy. (Pl.'s SMF, ¶¶ 205-206). After successful mediation, the Defendant achieved a settlement resolving the remaining claim of the Estate of Lottie Cook in September 2016 and that case was dismissed in January 2017. (Pl.'s SMF, ¶¶ 211, 214; Ex. 56). Therefore, as of January 2017, all three claims against Caceres had resulted in settlement or entry of judgment, and the Defendant had paid applicable policy limits to all claimants.

Yet the Defendant's purported defense of Caceres continued for almost two years following the resolution of the last underlying claim against Caceres in January 2017 and exhaustion of policy limits. The Defendant, through its counsel Barringer, contacted Caceres on May 29, 2017, to restate its commitment to

providing, and paying for, Caceres's legal representation for both the supplemental proceedings as well as any potential bankruptcy as part of its duty to defend.

When questioned at the Show Cause Hearing before this Court on February 5, 2019, Rotenstreich attributed the ongoing representation of Caceres to the Defendant's duty to defend established in *Brown*, 390 S.E.2d at 152:

> As you well know, counsel, in that court case the issue became whether or not [an] insurance company could pay their money and walk away from the defense of the case. *Brown versus Lumbermens*, the court held you cannot do that, that you must pay and then defend. And it stands for the proposition and specifically holds the duty to defend is greater than the duty to indemnify.... And that is why I recommended to Allstate Insurance Company, as counsel for Mr. Caceres, that under the uniqueness of this case and the way this case was going, it had a duty to defend. And I told them that we needed to continue the defense of this case until this matter was resolved.
> ....
> Mr. Caceres needs a defense. He has a contract. I interpret *Brown versus Lumbermens* the way I interpret it. I asked Allstate to allow us to continue to defend him. They said fine. And I retained Mr. Ivey under the same tripartite relationship. That's all I can tell you.

(Show Cause Hearing Tr., pp. 41:17-24, 42:4-9, 53:19-25).

Rotenstreich's interpretation of *Brown* is flatly incorrect and would result in an unprecedented expansion of an insurer's duty to defend. Rather, the North Carolina Supreme Court, which interpreted policy language identical to that at issue here,[20] held that the duty to defend continues until policy limits have been "exhausted in the settlement of a claim or claims against the insured or until

[20] The policy language in *Brown* containing the operative "duty to defend" language read:

> We will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. *Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted.*

Brown, 390 S.E.2d at 151 (emphasis added).

judgment against the insured is reached." *Brown*, 390 S.E.2d at 154; *see also Modern Auto.*, 416 F. Supp. 3d at 541. As noted above, all claims against Caceres had resulted in settlement or judgment no later than January 2017, and the Defendant had compensated all claimants up to policy limits. Accordingly, the Defendant's contractual duty to defend Caceres expired by January 2017.

The Defendant points to no legal basis for its position that an insurer's duty to defend extends beyond settlement or judgment against the insured and exhaustion of policy limits. The Defendant does not identify any decisions holding that an insurer is required to provide and pay for an insured's defense against collection proceedings or an insured's bankruptcy counsel and filing fees. Moreover, the few courts that have considered the issue have consistently found that an insurer's duty to defend does not extend to bankruptcy filings. *See, e.g.*, *USA Gymnastics v. Ace Am. Ins. Co. (In re USA Gymnastics)*, 624 B.R. 443, 454-55 (Bankr. S.D. Ind. 2021) (finding no legal precedent that extends an insurer's duty to defend to payment of bankruptcy costs, noting that "courts consistently hold that plain language of insurance contracts similar to those at issue here dictate that the duty to defend does not extend to an insured's affirmative claims for relief or causes of action"); *In re Milwaukee Notions, Inc.*, No. 06-25918SVK, 2009 WL 1351101, at *6-7 (Bankr. E.D. Wis. May 11, 2009) (finding insurance policy covers fees relating to motion and memorandum directly discussing the allegations of the underlying litigation but concluding that "the [insurance policy] does not cover the [bankruptcy

filing] fees…or any other general bankruptcy matters, because those costs do not relate to the defense of the [third party's] claims").

The Defendant is also unable to point to any prior instances in which it paid for an insured's legal and filing fees in supplemental or bankruptcy proceedings. Rosado, Rotenstreich, and Michael Reeser, an extracontractual litigation specialist for the Defendant, testified that they were unaware of any other cases in which the Defendant provided for an insured's legal counsel in post-judgment collection activities. (Rosado Rule 2004 Tr., p. 177:12-20; Reeser Dep., pp. 44:13-25, 45:1-18, Feb. 9, 2021; Show Cause Hearing Tr., pp. 42:25, 43:1-4;). Todd Lonker, who at the time was the direct supervisor for the Defendant's evaluation consultants, also testified that he was unaware of other cases in which the Defendant paid for an insured to file for bankruptcy. (Lonker Dep., pp. 162:24-25, 163:1-11, Dec. 11, 2020). And DeBoard testified that, prior to her retention by the Defendant in the Caceres matter, she had never appeared at any supplemental or collection proceedings. (DeBoard Rule 2004 Tr., p. 42:16-21).

As things stood after January 2017, all three claims against Caceres were resolved through settlement or judgment, the Defendant had paid out policy limits to all claimants, and the Defendant's contractual duty to defend Caceres had expired as a result. The Defendant had fulfilled its contractual obligations to defend and indemnify as defined by the North Carolina Supreme Court in *Brown*. Indeed, because there were not any open, pending cases against Caceres, the tripartite relationship itself had been extinguished because Caceres's interests were no longer

in alignment with the Defendant's. At that point, Caceres did not face *additional* liability stemming from the Accident; rather, the Defendant was the party with potential liability in the form of Caceres's bad faith failure to settle claim. Because any recovery on Caceres's bad faith claim would be dedicated to satisfying the excess judgment, Caceres's interests were more aligned with James Cook's than the Defendant's.

In essence, by the time of the supplemental exam in May 2017 and for all events following, when the Defendant had no further contractual obligation to defend Caceres and when the two parties no longer shared a common legal interest or goal, the Defendant stepped beyond the role of insurer in a contractual relationship. The Defendant's so-called defense of Caceres in this period was a choice, over which the Defendant had the control to stop at any time. In other words, by providing Caceres counsel at this time—counsel with whom it was in regular contact and consultation—the Defendant was acting as an interloper, meddling in Caceres's affairs.[21]

[21] The Defendant attempts to distance itself from the actions of attorneys Rotenstreich, DeBoard, and Ivey. (Docket No. 127, p. 18). The general rule under North Carolina law is that an attorney's actions cannot be imputed to an insurer who hires and pays for the attorney to defend an insured. *See Brown v. Lumbermens Mut. Cas. Co.*, 369 S.E.2d 367, 371 (N.C. Ct. App. 1988) (declining to impose vicarious liability where there was nothing in the record "to indicate [the insurer] had any control over the details of the litigation as it was being conducted by [appointed counsel]"); *see also Porters Neck Country Club v. W. Chester Fire Ins. Co.*, 7:22-cv-00119, 2023 WL 173134, at *1 (E.D.N.C. Jan. 12, 2023); *City of Roxboro v. Gulf Ins. Co.*, No. 1:94CV00537, 1996 U.S. Dist. LEXIS 5264, at *6 (M.D.N.C. Mar. 21, 1996). However, the circumstances in *Brown* and the other related decisions must be distinguished from the present case. In those cases, the insured was seeking to impute attorney actions occurring in the course of third-party litigation clearly within the insurer's duty to defend. Here, the undisputed evidence indicates that the Defendant-insurer made a voluntary decision to provide Caceres with counsel long after its duty to defend expired, throughout which the attorneys had ethical conflicts that lead this Court to question the independence of their advice to Caceres. Moreover, the Defendant was in constant communication with those attorneys and

The only rationale proffered by the Defendant for its post-judgment defense of Caceres is one of goodwill and altruism, which lies well outside of its contractual obligations. The Defendant argues that it wanted to protect Caceres rather than "leaving him to fend for himself in the face of the post-judgment collection efforts and attempt to have a receiver appointed." (Docket No. 139, p. 9). But again, once the Defendant's contractual duty to defend had ended, its interests were no longer aligned with those of Caceres. Notes in the Claims Log and other communications show the Defendant was very much aware of the existence of Caceres's claims against it.

The weight of the evidence before the Court strongly suggests another motive for the Defendant's continuing representation of Caceres after judgment and payment of policy limits: blocking the pursuit of the potential bad faith and related claims against the Defendant. Despite the Defendant's position that any such claims were and remain without merit, the Claims Log reflects that the Defendant was nevertheless concerned about its liability on Caceres's potential causes of action. It is undisputed that Rotenstreich and DeBoard repeatedly communicated and strategized with the Defendant on the statute of limitations on the bad faith claim as well as the best means to block efforts to appoint a receiver or trustee to pursue the claim. (Pl.'s SMF, ¶¶ 230-32, 234; Exs. 60, 61).

The Defendant, through Rotenstreich, specifically retained Ivey to be part of Caceres's purported defense given Ivey's prior work as counsel for Emily Cheek in

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was an active, and at times leading, participant in devising strategies to avoid the appointment of a receiver or trustee to pursue Caceres's bad faith claim.

Haarhuis, in which Ivey had argued against the appointment of a receiver to pursue Cheek's potential bad faith claims against her insurer. *See Haarhuis v. Cheek*, 820 S.E.2d 844 (N.C. Ct. App. 2018); Show Cause Hearing Tr., p. 44:12-17. Ivey's views on claims akin to Caceres's were well known to Rotenstreich; in fact, as Ivey explained to the Court, he had told Rotenstreich *prior* to being retained of his opinion that there was no merit to claims based on bad faith where an insurance company failed to accept an offer to settle under the policy limits. (Show Cause Hearing Tr., pp. 117-18). Ivey further explained to the Court that because of his opinion, he had told an attorney in the Office of the United States Bankruptcy Administrator, that he would be conflicted from serving as a chapter 7 trustee if a case arose where such claims were potential assets. (Show Cause Hearing Tr., pp. 117-18).[22]

In addition, although Caceres testified that Ivey and Rotenstreich told him that bankruptcy was the only means "to stop Mr. Cook from taking my property and belongings" (Ex. 5, ¶ 15), the bankruptcy filing appears, from the record before this Court, motivated by a desire to block pursuit of the bad faith and related claims. The timing of the bankruptcy filing also supports this inference. Ivey was retained to represent Caceres in supplemental collection proceedings in the spring of 2017. But Ivey did not recommend the bankruptcy filing to Caceres until October 2018,

[22] Ivey was describing his positional conflict, which was one of the bases for Ivey's withdrawal, along with the payment of his fee by the Defendant, in the order allowing him to withdraw as counsel for Caceres. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128, cmt. f (AM. LAW. INST. 2000) ("However, a conflict is presented when there is a substantial risk that a lawyer's action in Case A will materially and adversely affect another of the lawyer's clients in Case B … If a conflict of interest exists, absent informed consent of the affected clients … the lawyer must withdraw from one or both of the matters.").

soon after the *Haarhuis* decision reversed a trial court's order denying a motion to appoint a receiver to pursue similar claims and after James Cook had refiled his own motion to appoint a receiver. It is difficult to reconcile this substantial delay—while Caceres was confronted with multiple collection proceedings—with Ivey's later statement that "it was kind of a no-brainer for anybody that practices bankruptcy, receiver doesn't result in discharge of debt. A bankruptcy proceeding would discharge his debts and the automatic stay. So what his primary concern was would be resolved not in a receivership but in a bankruptcy." (Show Cause Hearing Tr., p. 102:15-20).

Regardless of its motives, however, the Defendant's representations to Caceres that it was obligated by the Policy to continue providing and paying for legal counsel in supplemental, receivership, and bankruptcy proceedings was a misrepresentation that has the tendency or capacity to deceive an average consumer. The Court does not need to determine the true motive of the Defendant's ongoing defense of Caceres to find the misrepresentation regarding its duty to defend to be an unfair or deceptive practice under §§ 58-63-15(11)(a) and 75-1.1.

The Plaintiff also asserts that, after misrepresenting its duty to defend, the Defendant and its agents made further misrepresentations about the conflicts of interest held by the attorneys it hired on Caceres's behalf, after the Defendant's duty to defend expired, that constitute unfair and deceptive practices under §§ 58-63-15(11)(a) and 75-1.1. (Docket No. 125, p. 20). The Plaintiff cites Barringer's May 29, 2017 letter on behalf of the Defendant, arguing that the letter misrepresented

pertinent facts related to the conflicts of interest of the attorneys hired by the Defendant. In the letter, Barringer states:

> In the [receivership] motion, it is contended that Allstate failed to settle the James Cook claim when it had an opportunity to do so. We disagree with that and contend that Allstate honored its duties to you under its contract and in compliance with North Carolina law. Allstate did attempt to settle the claim within a reasonable time frame and tendered the full policy limits in an attempt to settle the claim. Allstate also attempted on numerous occasions to contact counsel for Cook to discuss settlement only to have calls not returned. Allstate also retained one of the most experienced and respected law firms in the State to defend you in the Cook lawsuit.
>
> It is further asserted that all of your attorneys have been paid by Allstate, thus suggesting that counsel may have placed the interest of the carrier ahead of your interest. Although Allstate funded your defense and paid for the attorneys referred to above, Allstate expects each of those attorneys to act in accordance with their legal and ethical duty to represent your interest and to place your interest ahead of the insurance carrier's when and if a conflict arises.

(Ex. 57). While this letter describes the contention by James Cook's attorneys that Caceres had potential claims against the Defendant related to its failure to settle within the policy limits, the letter does not disclose that DeBoard, Rotenstreich, and Ivey had a conflict which prohibited them from bringing claims for Caceres against the Defendant in the first place. (Pl.'s SMF, ¶ 221; Ex. 57). Rather, Barringer states that the Defendant expects DeBoard, Rotenstreich, and Ivey to place Caceres's interests "ahead of the Defendant's when and if a conflict arises." (Ex. 57).

In the context of discussing potential claims against the Defendant, the statement that DeBoard, Rotenstreich, and Ivey would represent Caceres's interest "when and if" a conflict arose was a misrepresentation. It is a bedrock rule of professional conduct that an attorney may not represent a client with whom he has

a current conflict of interest, such as the assertion of a claim by one client against another client. N.C. Rules of Pro. Conduct 1.7. Further, "when and if" implies that a conflict is not already present. As discussed above, by the time Barringer sent his letter in May 2017, Caceres's legal interests had already diverged from the Defendant's. As a result, the tripartite relationship was no longer in place and the retained attorneys would face a substantial conflict of interest in attempting to maintain the status quo. In fact, the conflict of interest had already presented itself earlier that month at the supplemental proceeding exam when James Cook's counsel inquired about Caceres's claim against the Defendant.[23] DeBoard and Ivey vigorously objected to this questioning, citing attorney-client privilege. (Pl.'s SMF, ¶ 217; Ex. 2, p. 18). DeBoard and Ivey attended the proceeding ostensibly to represent the interests of Caceres, yet they were being compensated by the Defendant and acting as "tripartite" attorneys at a time when the Defendant's interests were "entirely antagonistic" to those of Caceres, as the Defendant was his "potential debtor." *See Haarhuis*, 820 S.E.2d at 849. The practical effect of their presence at the exam was that Cook's counsel was prevented from speaking with Caceres about events that might form a basis for possible claims against the Defendant, when Caceres's "own interests clearly require[d] that any sums that are

[23] The potential for conflicts between attorneys hired by the Defendant and Caceres should have been recognized as early as October 2015, when Caceres's attorney Wells, retained and paid by the Defendant, was asked by Stradley if she represented Caceres with respect to any claims he might have against Defendant for failure to settle for policy limits. Wells responded that she only represented him on the James Cook litigation, yet she prohibited Stradley from communicating with Caceres about any matters, including any failure to settle claim. (Ex. 47). When asked in 2019 if she ever discussed with Caceres the potential to bring bad faith claims against the Defendant, Wells answered, "I believe it would be unethical for me to do so." (Wells Rule 2004 Tr., pp. 64:24-25, 65:1-11).

owed [him] by others be promptly applied to [his] debts." *See id.* (quoting *Lone Star Indus., Inc. v. Ready Mixed Concrete of Wilmington, Inc.*, 314 S.E.2d 302, 303 (N.C. Ct. App. 1984)). This event, which is detailed by Rosado in the Claims Log, illustrates the conflicts inherent when an insurer continues to provide legal representation in furtherance of a purportedly joint defense after its duty to defend expires, allowing the insurer to take actions that may discourage subsequent litigation related to the insurer's claims-settlement practices.

However, unlike the misrepresentations regarding the extent of Defendant's duty to defend, which arose directly under Caceres's policy, the misrepresentations about the conflicts of interest do not relate to any provision of the Policy nor are the misrepresentations about a pertinent fact relating to coverage. These misrepresentations regarding conflicts of interest do not constitute unfair claim settlement practices under N.C. Gen. Stat. § 58-63-15(11)(a). Rather, the misrepresentations are unfair and deceptive practices under § 75-1.1 alone, having the tendency to deceive an average consumer, who could be expected to reasonably rely on the statements of counsel regarding the presence or lack of any conflicts of interest (and other ethical matters affecting the attorney-client relationship).[24] It offends public policy and is "unscrupulous or substantially injurious to consumers" for a company to provide legal representation to a client and misrepresent whether there are conflicts of interest between the chosen attorney and the client when such conflicts of interest effectively prevent the client from asserting claims against the

[24] *See infra* Part 1.E for a discussion of other conduct which is alleged to violate § 75-1.1 independent of the insurance-specific statutes.

company. Particularly in the insurance context, where the provision of legal counsel is usually required under the insurer's contractual duty to defend, an industry-wide failure to accurately represent conflicts of interest to insureds when they arise could unfairly hinder an insured's ability to independently assess claims against their insurer and assert such claims.

Having found that Defendant's misrepresentations regarding (1) its duty to defend and (2) the conflicts of interest held by Caceres's appointed attorneys constitute unfair and deceptive practices, the Court must now determine whether the Plaintiff has shown sufficient evidence of proximate cause to survive the Defendant's motion. Despite credibility determinations that must be decided by a jury, the Court finds there is sufficient evidence that could prove proximate cause, which includes reliance and injury, to allow the matter to proceed to trial. In terms of actual reliance, the Plaintiff has produced evidence that Caceres affirmatively incorporated into his decision-making process the alleged misrepresentations that (1) the attorneys paid by the Defendant were part of his continued defense under the Policy, (2) were not conflicted, and (3) when and if conflicted, would represent Caceres's interests ahead of the Defendant's. In his affidavit Caceres states,

> During 2017 and 2018, Mr. Ivey and Mr. Rotenstreich spoke to me several times, using the translator provided by Mr. Rotenstreich. They told me they didn't want me to act against Allstate. When I asked about the offer that was not accepted, they told me that I should not sue Allstate. They said that Allstate had done nothing wrong. Mr. Ivey told me that any claims against Allstate would not be successful.
> …
> I believed what Mr. Rotenstreich, Mr. Ivey, and Ms. DeBoard told me because I thought they were my lawyers and were trying to help me.

(Ex. 5, ¶ 14).

Caceres states in his affidavit that he only filed bankruptcy at the insistence of Ivey and Rotenstreich, believing it was the only option available to him.

> In October of 2018, I met with Mr. Ivey and Mr. Rotenstreich. A translator was there. They told me that I should file bankruptcy to stop Mr. Cook from taking my property and belongings. I did not know anything about bankruptcy before the meeting, and I did not understand what it was. Mr. Ivey and Mr. Rotenstreich did not give me any choice, other than to file bankruptcy. They told me filing bankruptcy was the only way I could stop Mr. Cook's lawyers from taking my property and belongings, so I agreed to file bankruptcy. They again emphasized to me that Allstate had done nothing wrong and that I should not sue Allstate.

(Ex. 5, ¶ 15).

The evidence in the record demonstrates that Caceres had no intention of filing bankruptcy before receiving the advice of Ivey and Rotenstreich, who, as far as Caceres was told, were representing his interests and were provided as part of the Defendant's contractual duty to defend. For example, at his § 341 Meeting, Caceres was asked what prompted his bankruptcy filing:

> Q: All right, so did you have discussions with your attorneys in September of 2018 about filing bankruptcy?
> A: Yes.
> Q: Who started that communication, you or your attorneys? Did you call him up to start the communication or did they call you up to start the communication?
> A: The attorneys.
> …
> Q: Okay, so in – in August of 2018 you had no plans to file for bankruptcy. Is that an accurate statement?
> A: Yes.
> Q: And it was not until you had some discussions with your attorneys in September that you decided to file for bankruptcy. Is that correct?
> A: Yes.

(341 Meeting Tr., p. 22, 24-25).

While Rotenstreich, DeBoard, and Ivey maintained that Caceres did not believe the Defendant committed any wrongdoing and did not wish to pursue the bad faith claim (Pl.'s SMF, ¶ 224), the evidence supports a finding that Caceres's view toward the viability of that claim was shaped by those attorneys as well as the Defendant directly. In his letter to Caceres, Barringer emphasized that Caceres had the right to seek independent counsel as to the potential bad faith claim, but also took the opportunity to undercut the merits of that claim. (Ex. 57). During the period Rotenstreich and Ivey represented Caceres in supplemental and bankruptcy proceedings, and in which both were paid by the Defendant, both attorneys consistently downplayed the merits of Caceres's potential claim against the Defendant. In explaining how he initially characterized to Caceres the events leading to the bad faith claim, Rotenstreich testified that:

> If you -- if you go back to whatever that exhibit was, we told Mr. Caceres that this appeared to be a setup, that -- that there was an attempt of the plaintiff's lawyer to pit him against his carrier. We told him at that time that he had rights if he thought the carrier was doing [sic], he could -- so I would have to say based on all those things, we knew that there was this unreasonable letter of settlement that was placed upon the carrier with no real ability to respond to it in the manner in which they wanted and that there was an immediate lawsuit filed to create this scenario where you could get an excess judgement and then proceed to throw someone into receivership or bankruptcy in order to go pursue a claim that you -- your group didn't already have because it was going on in other cases.

(Rotenstreich Dep., p. 127:3-23). At the Show Cause Hearing before this Court, Ivey testified to his evaluation of the bad faith claim and how he repeatedly described it to Caceres:

> One other thing that I discussed with [Caceres], either at that first meeting or at a separate meeting, and did this at times with only him, was to indicate to him that, based on the information that I had, I would indicate to him that, in my legal opinion, that the claims against the insurance company based upon bad faith did not have merit, and that the primary reason that I believed they did not have merit is that it appeared to me that the situation of saying, well, you didn't accept our offer to settle under the limits had been orchestrated, it had been done with a system that was intended to fail. It had failed. And I have -- still to this day do not see how somebody, then, can blame the insurance company for failure they created.

(Show Cause Hearing Tr., p. 96:5-19). When asked if he ever advised Caceres to get an independent opinion from an attorney who was not compensated by the Defendant, Ivey replied, "No, because I was able to give him that independent opinion." (Show Cause Hearing Tr., p. 105).

There is also sufficient evidence regarding reasonable reliance to raise a jury issue. With respect to the Defendant's purported defense of Caceres, as demonstrated by the confusion exhibited by the Defendant's own agents and retained attorneys, the average consumer cannot be expected to understand the contours of an insurer's duty to defend under North Carolina law. Though Barringer's letter emphasizes Caceres's right "to seek the assistance of independent counsel with respect to all issues that arise from the excess verdict," a jury could find it reasonable that Caceres relied on his Defendant-supplied counsel's assessment that a failure to settle claim lacked merit based on the Defendant's assurances that his interests were paramount—and that in the event of conflict, his Defendant-supplied counsel would put his interests over the Defendant's. Similarly, a jury could find it reasonable that Caceres relied on Defendant-supplied counsel's

statements regarding the lack of any present conflicts of interest and other ethical matters.

Lastly, the Plaintiff proffers evidence tending to show injury proximately caused by the Defendant's misrepresentations. A reasonable jury could find from the evidence that the misrepresentations regarding the Defendant's duty to defend and conflicts of interest dissuaded Caceres from hiring his own counsel and prevented Caceres from asserting bad faith and related claims against the Defendant, which recovery could have satisfied the James Cook judgment—and obviated the need for James Cook to seek a receiver to administer Caceres's assets/claims or for Caceres to seek bankruptcy protection. From the Plaintiff's evidence, a jury could reasonably adopt an expansive view of the damages arising from these misrepresentations, such as the entirety of the lingering excess judgment. But at a minimum, the Plaintiff's evidence could show that Caceres was harmed by the efforts to combat receivership proceedings and the filing of the bankruptcy in the form of negative credit ratings, lost wages, and travel expenses. (Ex. 5, ¶ 16; Docket No. 1, ¶¶ 140-42).[25]

Based on the undisputed material facts, the Court finds, as a matter of law, that the Defendant misrepresented its duty to defend in violation of N.C. Gen. Stat. §§ 58-63-15(11)(a) and 75-1.1, insisting to Caceres that it was bound by contract to

[25] Caceres states that Rotenstreich told him he would be paid "an hourly rate for all of the time I spent dealing with the bankruptcy" and for "travel, food and expenses for court appearances." (Ex. 5, ¶ 16). Caceres, however, insisted that he never received the promised money, and Rosado confirmed in testimony that the Defendant never reimbursed Caceres for bankruptcy related expenses. (Ex. 5, ¶ 16; Rosado Dep., p. 263:19-25, Feb. 26, 2021).

provide him with legal representation for post-judgment and bankruptcy proceedings despite no contractual or legal obligation to do so. The Court also finds as a matter of law that, given the context and the undisputed facts as to the Defendant's surrounding course of conduct, the Defendant's misrepresentations that no conflicts of interest existed between Caceres and his provided counsel, and that if a conflict arose, those attorneys would represent Caceres's interests, violated § 75-1.1. Once again, however, the Court finds material facts in dispute as to proximate cause, including damages and Caceres's actual and reasonable reliance on the misrepresentations. Therefore, the Plaintiff's summary judgment motion will be denied; the Defendant's motion for summary judgment will also be denied.

iii. Defendant's Misrepresentation of the Applicable Coverages

As a final alleged violation of N.C. Gen. Stat. § 58-63-15(11)(a), the Plaintiff asserts that the Defendant misrepresented the available coverages under Caceres's insurance policy. Specifically, the Plaintiff alleges that the Defendant, through an email and letter sent to Caceres by Carion in early 2014, did not disclose that Caceres had UIM coverage. (Pl.'s SMF, ¶¶ 11, 29). The Plaintiff also argues that the Defendant failed to inform Perez, the only third-party claimant entitled to make a UIM claim, that Caceres's policy had UIM coverage until more than six months after the Accident. (Docket No. 125, pp. 18-19)

There is precedent for finding that an insurer's misrepresentation as to what is covered on an insured's policy may be an unfair or deceptive trade practice under N.C. Gen. Stat. §§ 58-63-15(11)(a) and 75-1.1. *See Pearce v. Am. Def. Life Ins. Co.*,

343 S.E.2d 174, 179-80 (N.C. 1986). Nevertheless, because a BI liability adjuster is not responsible for UIM coverage and the coverages are separated (Pl.'s SMF, ¶ 265), there may be an issue of disputed fact as to whether Carion had responsibility for informing Caceres of his UIM coverage. In the March 21, 2014 letter, for instance, Carion writes that "[t]he purpose of the letter is to provide you with the status of *the bodily injury claim(s)* being presented." (Ex. 8) (emphasis added). The letter goes on to discuss the "bodily injury liability policy limits" of the Policy, which was Carion's primary responsibility.

Even if the facts surrounding the communications at issue were undisputed, the evidence, considered in a light most favorable to the Plaintiff, would be insufficient to create a disputed issue of fact as to proximate cause. The Plaintiff does not point to any injury suffered by Caceres or Perez that was proximately caused by the delayed disclosure of UIM coverage. Any argument attempting to tie the TLD or the excess judgment to the alleged misrepresentation would be far too attenuated; all sides were aware of UIM coverage and the available limit, including Perez and his attorney, more than two months before the Defendant received the TLD.

Further, the evidence is insufficient to create a disputed fact regarding whether Caceres or Perez relied on the alleged misrepresentations. There is no evidence in the record that Perez or Caceres relied on communications omitting reference to the UIM coverage. Even if the Plaintiff could point to actual reliance by Caceres on the two communications from Carion, any reliance would be

unreasonable. "Reliance is unreasonable where the plaintiff could have discovered the truth of the matter through reasonable diligence, but failed to investigate." *Bumpers v. Cmty. Bank of N. Va.*, 747 S.E.2d 220, 227 (N.C. 2013). The coverage available to Caceres, including the UIM coverage, was unambiguously expressed within the insurance policy. (Ex. 1). Caceres could have discovered the true extent of his insurance coverage through reading the Policy. *See Cobb v. Pa. Life Ins. Co.*, 715 S.E.2d 541, 549 (N.C. Ct. App. 2011); *see also D C Custom Freight, LLC v. Tammy A. Ross & Assocs.*, 848 S.E.2d 552, 562 (N.C. Ct. App. 2020). For these reasons, the Court will grant the Defendant's motion for summary judgment with respect to this basis under §§ 58-63-15(11)(a) and 75-1.1.

B. N.C. Gen. Stat. § 58-63-15(11)(b)

The Plaintiff alleges that the Defendant failed "to acknowledge and act reasonably promptly upon communications with respect to claims arising under the insurance polic[y]" in violation of N.C. Gen. Stat. § 58-63-15(11)(b). Specifically, the Plaintiff alleges the following violations on the part of the Defendant: (1) failing to respond to James Cook's demand to settle for $25,000 on August 6, 2014; (2) failing to request additional time to respond to James Cook's TLD for $50,000 on October 13, 2014; and (3) failing to timely adjust its strategy upon receipt of James Cook's TLD. The Plaintiff maintains that, had the Defendant acted reasonably promptly in those enumerated instances, Caceres would have been spared the exposure that resulted in the excess verdict. (Docket No. 125, pp. 30-33).

"Neither the Supreme Court of North Carolina nor the United States Court of Appeals for the Fourth Circuit, when interpreting North Carolina law, have

analyzed subparagraph (b) of section 58-63-15(11) in detail." *Labudde v. Phoenix Ins. Co.*, No. 7:21-CV-197, 2022 WL 2651846, at *8 (E.D.N.C. July 8, 2022) (cleaned up). In looking to decisions of lower courts at both the state and federal level, it appears courts have "eschewed a bright line deadline to constitute unreasonable delay" and instead look to whether "the responses were reasonably prompt under the circumstances." *Pa. Nat'l Mut. Cas. Ins. Co. v. Beach Mart, Inc.*, No. 2:14-CV-08, 2022 WL 4709249, at *16 (E.D.N.C. Sept. 30, 2022) (collecting cases); *see also Labudde*, 2022 WL 2651846, at *8.

The Court finds there are material issues of fact in dispute relevant to whether the Defendant acknowledged or acted reasonably promptly to the communications at issue. The Plaintiff points to evidence showing the Defendant was aware that the Cooks' claims presented the greatest exposure to Caceres and failed to promptly respond to opportunities to settle these claims for policy limits. As the evaluation consultant noted in the Claims Log on August 15, 2014, "The 2 claims of Lottie and James in an[d] of themselves are worth more than the limits." (Pl.'s SMF, ¶ 56; Ex. 2, p. 91). Despite this, the undisputed facts show that the Defendant did not pay $25,000 to James Cook in August 2014 or request additional time to respond to the TLD. (Pl.'s SMF, ¶¶ 51, 103).

At the time of the communications at issue, however, the Defendant asserts it was vigorously pursuing a global settlement of multiple claims against Caceres. The Defendant and its adjuster believed that the attorneys for the Cooks and Perez understood that the Defendant was offering the full policy limits subject only to an

agreed division of the proceeds. Rosado testified that she did not pay or respond to the demands because she believed she had already offered the full policy limits and was simply waiting for an allocation agreement to be finalized. Rosado explained, "you have to recall the limits were already offered to the attorneys before [the TLD] … I had offered the $100,000 to both attorneys so we can try to resolve all the claims. The tender was already done before this letter came into the office." (Rosado Rule 2004 Tr., p. 95).

There are material facts in dispute regarding the parties' relative understanding of when and what settlement offers were made by the Defendant. There is also a factual dispute as to whether the attorneys acknowledged a tacit agreement for the three claimants to share in the full policy limits. These disputed facts greatly shape any determination of the reasonableness of the Defendant's responses. Accordingly, the matter must go to trial to determine whether the Defendant's actions constitute an unfair or deceptive act under N.C. Gen. Stat. § 58-63-15(11)(b).

C. N.C. Gen. Stat. § 58-63-15(11)(c)

Section 58-63-15(11) deems it unlawful to "fai[l] to "adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies." N.C. Gen. Stat. § 58-63-15(11)(c). As with other subparagraphs of § 58-63-15(11), "the caselaw discussing the subparagraph (c) requirement for 'reasonable standards for prompt investigation' is quite thin," *Fortson v. Garrison Prop. & Cas. Ins. Co.*, No. 1:19-CV-294, 2022 WL 198782, at *9 (M.D.N.C. Jan. 13, 2022), but

there are some general principles that can be derived from those decisions. For instance, what constitutes a reasonable standard "is usually evaluated in light of all the facts and circumstances surrounding the act or decision at issue." *Id.* at *10. Reasonable, however, "does not mean 'perfect' or 'the best practice.'" *Id.* The fact that an insurer's system "is not perfect or could be more accurate does not mean that it is not reasonable." *Id.* at *11. Further, at least one court has found that it "seems unlikely that the mere failure to follow established procedures, without more, would contravene Section 58-63-15(11)(c), given that the [unfair claim settlement practices statute] appears focused on systemic issues in handling insurance claims." *Whitworth v. Nationwide Mut. Ins. Co.*, No. 1:17cv1124, 2018 WL 4494885, at *7 (M.D.N.C. Sept. 19, 2018) (finding that plaintiff failed to establish a violation of (c) for an allegedly deficient investigation where defendant had adopted and implemented "best claims practices" guidelines, which the plaintiff's expert agreed were "good standards").

The Plaintiff alleges two violations under subparagraph (c): first, while the Defendant had in effect a "Casualty Claim Handling Manual" (the "Claim Handling Manual"), it failed to adopt reasonable standards for the prompt opening of UIM coverage; second, the Defendant failed to implement reasonable standards for responding to time-limited and policy limit demands. (Docket No. 125, pp. 33-42). The Plaintiff contends that the Defendant's unwillingness to implement and follow reasonable standards in both instances led to the excess judgment against Caceres. The Court considers each of the Plaintiff's arguments in turn.

i. Failing to Adopt Reasonable Standards for the Prompt Opening of UIM Coverage

The Plaintiff first takes issue with the Defendant's claims-handling organization, particularly the fact that BI coverage is handled separately from UIM coverage by two different adjusters. (Pl.'s SMF, ¶ 265). The only policies or procedures the Defendant had in place for when to open UIM coverage was found in its Claim Handling Manual. (Pl.'s SMF, ¶ 278). As stated in Chapter 1 of the Claim Handling Manual, there are two triggers that may expose UIM coverage: (1) a "limits trigger" that occurs when the limits of the insured's UIM coverage exceed the limits of the tortfeasor's liability coverages and the value of the claim exceeds the tortfeasor's limits and (2) a "damages trigger" when the value of an insured's claim exceeds the applicable liability limits of the tortfeasor's automobile liability policy. (Ex. 4, p. 1-11). In accordance with the Claim Handling Manual, UIM coverage should be opened when the "damages trigger" occurs (Pl.'s SMF, ¶ 21), but, importantly, the Manual itself contains no explicit directions about how quickly UIM coverage should be opened after a triggering event occurs and does not designate an employee responsible for reviewing and identifying a trigger.

The Plaintiff also points to evidence showing the lack of coordination between the UIM and BI liability adjusters. The Claim Handling Manual is silent about which employees are responsible for identifying and processing a UIM claim, but the record indicates that, as a practical matter, the Defendant segregates UIM claims from BI liability claims. While an insured's policy may include both coverages, the Defendant assesses and processes BI liability and UIM claims

separately through different adjusters. (Pl.'s SMF, ¶¶ 265, 283). The undisputed facts also show there was little coordination expected between UIM adjusters and BI liability adjusters. When asked whether and how she coordinated with the UIM adjuster, Rosado testified that, "I handle the liability coverage, and there are separate adjusters that handle the uninsured coverage. We don't coordinate. We handle the coverages separately." (Pl.'s SMF, ¶ 283; Rosado Rule 2004 Tr., pp. 227:20-25, 228:1-5). The BI adjuster also defers to the UIM adjuster to disclose the UIM coverage and policy benefits to the insured. (Pl.'s SMF, ¶ 266).

UIM coverage was belatedly opened in the months following the Accident, despite the early presence of a necessary trigger. The Defendant conceded that the second "damages trigger" defined under the Claim Handling Manual was present in February 2014, i.e., the Defendant knew the extent of the injuries resulting from the accident and that the value of the claims exceeded Caceres's automobile liability policy limits. (Lonker Dep., pp. 229:23-25, 230:1-7, Jan. 6, 2022). Nevertheless, despite possessing the information needed to know the damages trigger was present, the Defendant did not open UIM coverage until six months later, in August 2014. When pressed to explain the delay, Lonker stated that no party had yet presented a UIM claim to the Defendant and "[n]o one recognized the potential for a UIM claim for Mr. Perez" until Rosado identified the UIM coverage and referred the file to an underinsured motorist claim handler in August 2014. (Lonker Dep., pp. 230-232, 233:19-20, Jan. 6, 2022). As to why no one recognized the damages trigger prior to August 2014, Lonker replied only, "I cannot answer that question." (Lonker

Dep., p. 233:2-4, Jan. 6, 2022). When asked which adjuster was responsible for recognizing the damages trigger in February 2014, Lonker replied "I don't know that there is a responsible party. I think – I think the adjuster that recognized it was Rosemarie Rosado." (Lonker Dep., 239:9-13, Jan. 6, 2022). Reeser, however, testified that it would have been Rosado's responsibility to get the information to the UIM adjuster to open the coverage.[26] (Reeser Dep., p. 98:4-10, Feb. 9. 2021).

The Plaintiff argues that this six-month delay between Caceres's accident and Rosado's referral of the matter to a UIM adjuster is evidence of the Defendant's failure to implement reasonable standards and guidelines for investigating claims, specifically the conditions under which UIM coverage should be opened. The Defendant nevertheless asserts that the matter was properly handled. When asked whether it was appropriate to wait six months after a damages trigger is present to open UIM coverage, Lonker explained, "I don't think it was recognized. But when it was recognized, [Rosado] opened the coverage, and I think that is proper." (Lonker Dep., p. 233:10-15, Jan. 6, 2022).

The Plaintiff argues that the Defendant's deficient policies and procedures for opening UIM coverage significantly hampered efforts to resolve the claims against Caceres, but there is insufficient evidence in the record to determine the reasonableness of those standards for purposes of N.C. Gen. Stat. § 58-63-15(11)(c).

[26] Lonker clarified in later testimony that Rosado, as a BI liability adjuster, merely transferred the Perez claim to a UIM adjuster for review. Only the UIM adjuster had authority to then open the UIM coverage. (Lonker Dep., p. 242:1-9, Jan. 6, 2022). Rosado confirmed that she submitted the request for the underinsured coverage to be opened, but "another adjuster opens it, explores it, investigates, and handles it." (Rosado Dep., p. 128:2-24, Feb. 26, 2021).

Unlike other cases considering potential violations of subparagraph (c), the parties here have submitted no expert reports or other evidence of industry standards by which the Court can compare the Defendant's procedures to those of other insurance companies. *See, e.g.*, *Fortson*, 2022 WL 198782, at *7 (referencing the experts proffered by both parties); *Whitworth*, 2018 WL 4494885, at *7 (considering evidence from plaintiff's expert that defendant adopted and implemented "good standards"). Although some policies and procedures could be found inherently unreasonable, in this instance, the absence of any evidence of industry standards in the record hinders the Court's ability to determine whether the Defendant's UIM procedures are "reasonable standards for the prompt investigation of claims" under § 58-63-15(11)(c). Further evidence introduced at trial could show that, given the unique nature of UIM claims and the governing state laws, the dual-track nature by which the Defendant processed BI and UIM claims was a reasonable approach. Conversely, additional evidence could demonstrate that this standard was out-of-step with industry norms and would inevitably lead to delays and miscommunication.

Even assuming the Defendant's UIM procedures caused the six-month delay in opening UIM coverage for Perez's claim against Caceres, this failing is not enough on its own to find a violation of § 58-63-15(11)(c); the Defendant's UIM procedures need not be perfect to be reasonable under the UDP. *Fortson*, 2022 WL 198782, at *10, 11. The Defendant has pointed to a rationale for its division of UIM and BI liability claims and, without further evidence, expert or otherwise,

undercutting that basis or proving it to be without merit, the Court is unable to determine the reasonableness of the Defendant's UIM standards for purposes of subparagraph (c).

The Defendant also argues that the Plaintiff fails to put forward sufficient evidence of proximate cause and damages, stating that "there is no evidence that the claims would have or could have been resolved earlier had the UIM coverage been opened before Perez's counsel even made a demand." (Docket No. 139, p.23). The Plaintiff, however, argues that "[h]ad Allstate implemented its own claims handling standards as to when to open UIM coverage … when excess exposure was recognized in February, 2014, all of the facts show that it would likely have been in a position to settle James Cook's claim for the $50,000 policy limit when the [TLD] was sent." (Docket No. 134, p. 8). The Court finds that the evidence presented could lead a reasonable jury to find for either party as to whether the Defendant's UIM procedures proximately caused damages in the form of the excess judgment. Moreover, under the UDP, damages and proximate cause are fact questions for the jury. *ABT Bldg. Prods. Corp. v. Nat'l Union Fire Ins. Co.*, 472 F.3d 99, 123 (4th Cir. 2006).

While the Plaintiff has produced enough at this stage to survive the Defendant's motion for summary judgment, the record is not sufficiently developed to allow the Court to determine whether the Defendant's UIM procedures are reasonable standards for the prompt investigation of UIM claims. The Court similarly finds enough evidence to allow the issues of proximate cause and damages

to proceed to trial.

ii. Failing to Implement Reasonable Standards for Responding to Time-Limited and Policy Limit Demands

The Plaintiff alleges, as a second potential violation of § 58-63-15(11)(c), that the Defendant failed to implement reasonable standards for handling and responding to time-limited and policy limit demands. Specifically, the Plaintiff argues that the Defendant, through its adjuster Rosado, repeatedly declined to follow the Claim Handling Manual for managing and responding to such demands, did not timely accept the October 2014 TLD from James Cook, and did not request additional time for consideration of the TLD. These failures, according to the Plaintiff, resulted in the filing of Cook's complaint and the entry of an excess judgment against Caceres. The Plaintiff urges the Court to find the Defendant's failure to implement reasonable standards for the handling of time-limited and policy limit demands, and the resulting damage caused to Caceres, constitutes a violation of subparagraph (c).

At the time the TLD was received, the Defendant had official policies and procedures in place through its Claim Handling Manual.[27] The Defendant does not contest that claims adjusters are expected to abide by the good faith claims-

[27] The parties dispute the familiarity that the Defendant's employees had with the requirements of the Claim Handling Manual. Evidence in the record suggests that the Defendant's employees, including Rosado, did not regularly read or consult the Claim Handling Manual. (Arcangel Dep., p. 72:15-21; Meyer Dep., p. 29:12-17; Rosado Rule 2004 Tr., p. 221: 13-23). The Defendant, however, asserts that liability adjusters received extensive annual training regarding the requirements of the Claim Handling Manual, which has testimonial support in the record. (Arcangel Dep., p. 73:8-25; Rosado Rule 2004 Tr., pp. 223-224). Taking the evidence in a light most favorable to the Defendant, the Court will infer that the Defendant's employees were generally familiar with the requirements of the Claim Handling Manual.

handling standards set forth in the Manual. (Pl.'s SMF, ¶ 79; Meyer Dep., p. 39:7-18). Chapter 12, entitled "Good Faith Claim Handling," stated the following procedures under the heading "Policy Limit/Excess Demand":

- Log receipt of a policy limit and/or excess demand letter in the demand log
- Respond to the demand promptly in writing to the plaintiff attorney. Be sure to include the settlement offer, the basis for the offer, or reasons why an offer was not extended. If applicable, identify any investigation items remaining, and include timeframes for evaluating the claim, if known
- Advise the insured promptly and in writing about any and all policy limit demands and settlement offers
- An alert conference is not required unless the demand includes a time limit and/or the claim involves a serious injury trigger

(Ex. 4, p. 12-8; Pl.'s SMF, ¶ 78).

In the same section of the Claim Handling Manual, under the heading "Time Limit Demands," the Defendant's employees are instructed to approach such demands with the following steps:

- Date stamp the demand letter and attach it to a postmarked envelope
- Log receipt of the demand letter in a demand log
- If the file is unassigned, immediately assign the file for proper handling of the demand
- Conduct an alert conference upon receipt of a time limit demand
- Respond to all requirements of the demand promptly and within the time limit set forth in the demand letter
- Confirm Allstate's response to the demand in writing and send a copy of the letter to the insured

(Ex. 4, p. 12-7; Pl.'s SMF, ¶ 89).

When asked if James Cook's claim against Caceres was "handled in accordance with Allstate claim practices and procedures at all time[s]," Rosado

unequivocally answered, "I believe so, yes"; indeed, Rosado stated that, given another opportunity, she would not have handled the James Cook claim any differently. (Rosado Rule 2004 Tr., p. 18:5-12). The undisputed material facts, however, undercut Rosado's assertion that she and the Defendant adhered to the Claim Handling Manual. As it relates to the TLD, specifically, the Defendant, through Rosado, failed to comport with many of the requirements listed in Chapter 12 of the Claim Handling Manual. The TLD was not date-stamped or logged as required, was not reported to managers through an "alert conference," was not referenced in communications to the insured, and was not responded to in a prompt fashion.

First, any time-limited demand should immediately be date-stamped and attached to the envelope. (Ex. 4, p. 12-7). While Rosado's claims manager confirmed, and the Defendant does not contest, that a demand letter should always be date-stamped when possible, the undisputed facts show that the Defendant did not date-stamp the TLD and attach it to the postmarked envelope. (Pl.'s SMF, ¶¶ 90-91).

Second, upon receiving the hand-delivered and faxed TLD, Rosado failed to provide it to an evaluation consultant to log in the "Demand Log."[28] Chapter 12 references "the demand log" without any additional details, but the Defendant's employees testified as to how time-limited and policy limit demands were to be

[28] While not explicitly stated as a requirement in Chapter 12 of the Claim Handling Manual, the Defendant also failed to promptly log or mention the TLD in the Caceres Claims Log. (Pl.'s SMF, ¶ 80). Rosado kept the TLD as a physical file in her file cabinet but did not attach or incorporate the TLD into the Claims Log. (Pl.'s SMF, ¶¶ 80, 98). Indeed, there is no direct reference to the TLD in the Claims Log until November 20, 2014, almost a month after its expiration. (Ex. 2, pp. 78-79).

entered into the demand log. According to that testimony, the TLD should have been given immediately upon receipt to an evaluation consultant to log into an Excel document. Only the evaluation consultants had the ability to access this document, which would contain the date a demand was received, the applicable reply deadline, and a follow-up date to alert the adjuster that a response was due. (Meyer Dep., p. 33:10-25). Regardless of the mechanics, however, the parties do not dispute that a demand such as the TLD should have been entered into the demand log the day it was received. (Pl.'s SMF, ¶ 81). Despite this requirement, the Defendant did not enter the TLD into the demand log on or about the time it was received in October 2014.[29] (Pl.'s SMF, ¶ 80).

Third, Rosado did not call an alert conference after receiving the TLD. According to Chapter 12 of the Claim Handling Manual, an "alert conference" is "called by leaders upon receipt of a demand letter. Its purpose is to decide upon an appropriate response." (Ex. 4, p. 12-5). Specifically, the alert conference, which is to be conducted between the claim adjuster and frontline performance leaders (and potentially evaluation consultants), is designed to "[r]eview the claim investigation to date, determine if any further claim investigation is necessary, and set

[29] The Defendant does not assert that Rosado was absent from the office at the time the TLD was hand-delivered and faxed to the Defendant. Deposition testimony indicates that, if a policy limit or time-limited demand was hand-delivered to the Defendant, mailroom staff would bring it to the adjuster directly or, if the adjuster was not there, would leave it on their desk. If the adjuster was known to be on vacation or otherwise unavailable, the staff would probably deliver the demand to the manager. (Meyer Dep., pp. 34:9-25, 35:1-15; Arcangel Dep., p. 64:16-17). The Defendant keeps records of employee days off from work in its Human Resources department. Based on those records, the Defendant finds no record of any absence of Rosado from work from October 13, 2014, through October 21, 2014. (Pl.'s SMF, ¶ 77). The Defendant also does not point to evidence showing the TLD was delivered to any evaluation consultant, manager, or any employee other than Rosado. (Arcangel Dep., pp. 70:20-25, 71:1-4; Meyer Dep., p. 50:8-10).

completion timelines." (Ex. 4, p. 12-5). In a broader sense, according to the undisputed material facts, the alert conference involves the adjuster and the manager discussing the claim to make sure that the Defendant "was trying what it should be trying and settling what it should be settling." (Pl.'s SMF, ¶ 86). The Defendant, however, failed to conduct an alert conference upon receipt or expiration of the TLD. (Pl.'s SMF, ¶ 88).

Fourth, Rosado failed to respond to all requirements in the TLD promptly. While the Defendant's Claim Handling Manual may not require acceptance of a demand, "[i]t is important for Allstate adjusters to respond promptly to policy limit demands to protect [the] insured from excess exposure when claims can be resolved within the policy limits." (Pl.'s SMF, ¶ 82; Meyer Dep., p. 42:5-9). Here, the TLD was hand-delivered and faxed to the Defendant on October 13, 2014 and provided two applicable deadlines: (1) the Defendant could pay the demanded $50,000 policy limit to James Cook on or before noon on October 24, 2014, or, alternatively, (2) the Defendant could request additional time to comply so long as it did so by October 21, 2014. (Ex. 16). Rosado, however, neglected to promptly respond to Tuttle in any fashion until calling and leaving a voicemail message on October 23, 2014, one day before the TLD expired. (Pl.'s SMF, ¶ 103; Ex. 2, pp. 83-84). Critically, Rosado did not timely request additional time to comply with the settlement demand, an option explicitly offered in the TLD. (Ex. 16). Despite possessing the authority to pay the demanded $50,000 amount, which would have settled James Cook's claim against Caceres, Rosado did not attempt any additional communication with Tuttle, did not

accept the terms of the TLD, and permitted the offer to lapse on October 24, 2014. (Pl.'s SMF, ¶ 83). In line with the deadline established in the TLD, James Cook filed a state court complaint against Caceres on October 24, 2014. (Pl.'s SMF, ¶ 104).

Fifth, Rosado likewise failed to comply with the Claim Handling Manual's requirement that she inform the insured of a time-limited demand and the Defendant's response to it. Rosado did not confirm her employer's response to the TLD in writing as required by Chapter 12 of the Claim Handling Manual. (Pl.'s SMF, ¶ 97). As discussed at length, *see supra*, Rosado also did not promptly inform Caceres of the TLD after it was received. (Rosado Rule 2004 Tr., p. 113:2-17). The earliest that the Defendant states it informed Caceres of the TLD, or its expiration, was December 30, 2015.

Although there is no evidence of wider industry practices in the record, the Plaintiff's allegations as to this purported violation of N.C. Gen. Stat. § 58-63-15(11)(c) are distinguishable from those centered on the Defendant's standards for the prompt opening of UIM coverage. Here, rather than alleging the Defendant neglected to adopt reasonable standards in the first instance, the Plaintiff instead asserts that the Defendant failed to *implement* reasonable standards it already had in place regarding the handling of time-limited and policy limit demands. Accordingly, the Court may assume the Defendant's policies and procedures described in Chapter 12 of the Claim Handling Manual are "reasonable standards" for purposes of subparagraph (c) but must then assess whether the Defendant failed to implement those standards.

Collectively, the undisputed facts show that the Defendant, through its agent Rosado, failed to comport with numerous provisions of the Claim Handling Manual governing the handling of the TLD. The Defendant did not date-stamp the TLD upon receipt, did not enter it into the demand log, did not conduct an alert conference, did not issue a prompt response, and did not inform the insured of the demand. Rather than a single lapse in its handling of the TLD, the record demonstrates a course of conduct whereby the Defendant thoroughly ignored the standards set forth in the Claim Handling Manual.[30] Assuming that the guidelines contained in Chapter 12 of the Defendant's Claim Handling Manual represent "reasonable" standards under § 58-63-15(11)(c), which the Defendant has adopted, the Court finds, as a matter of law, that the Defendant's sweeping failure to implement these standards in its handling of the TLD constitutes a violation of § 58-63-15(11)(c) and is an unfair and deceptive practice under § 75-1.1.

[30] The numerous and material instances in which the Defendant failed to adhere to its Claim Handling Manual distinguish this case from *Whitworth*, where the District Court for the Middle District of North Carolina held that a plaintiff's allegations that an insurer's investigation departed from its guidelines was insufficient to establish a violation of § 58-63-15(11)(c). *Whitworth*, 2018 WL 4494885, at *7. In *Whitworth*, the plaintiff alleged that the insurer's investigation of water damage was "perfunctory" and not as thorough as required by the insurer's best claims practices. *Id.* The evidence before the court, however, showed the defendant generally adhered to its guidelines by conducting an investigation, taking photographs of the damage, and recording an interview with the claimant. *Id.* at *3. The court noted that "it seems unlikely that the mere failure to follow established procedures, *without more*, would contravene Section 58-63-15(11)(c)," and held, based on the facts and circumstances of the case, including the plaintiff's expert's agreement that the defendant adopted and implemented good standards, that the plaintiff failed to state a claim under subparagraph (c). *Id.* at *7 (emphasis added). Rather than the limited, and less severe, departures from the insurer's guidelines that were alleged in *Whitworth*, the undisputed material facts here show that the Defendant failed to implement *any* of the guidelines contained in Chapter 12 of the Claim Handling Manual, all but ignoring the TLD and the potential consequences for declining James Cook's settlement demand. The Defendant's across-the-board departure from its guidelines in this case is beyond "the mere failure to follow established procedures" described in *Whitworth* and, in any event, is something "more" that elevates such a failure to a violation of § 58-63-15(11)(c). *Id.*

The Court is not dissuaded from this finding by the Defendant's assertion that it followed alternative procedures not addressed in the Claim Handling Manual. According to Rosado's claims manager, the Claim Handling Manual contained "guidelines" that need not be followed when it was "not appropriate." Instead, adjusters looked at the Claim Handling Manual as a guide for best practices but were able to decide when and when not to follow the procedures therein. (Pl.'s SMF, ¶ 93; Shylock Dep., pp. 67-69). For instance, adjusters at the Defendant's Raleigh office did not respond to time-limited, policy limit demands, or excess demands in writing on a regular basis and did not always notify insureds of a policy limit demand. (Pl.'s SMF, ¶ 94). The deposition evidence submitted demonstrates that other employees of the Defendant shared the view that adjusters could deviate from the Claim Handling Manual depending on the situation.[31]

To the extent the Defendant was implementing alternative procedures outside the scope of the Claim Handling Manual, the Court nevertheless finds them to be unreasonable under § 58-63-15(11)(c). While there are no industry standards in the record as points of comparison, the Court finds the Defendant's handling of the TLD, to the extent it is reflective of the Defendant's unwritten procedures, to be inherently unreasonable. The Defendant, through Rosado, kept the physical TLD

[31] Despite the requirements of Chapter 12 of the Claim Handling Manual, when asked whether it is appropriate to not tell the insured whether orally or in writing for more than a year about the existence of a time-limited or policy limit demand, Lonker replied that "I think again, did the insured know that limits were a problem here? And if the insured knew that, then we had accomplished that – that goal." (Lonker Dep., p. 70:11-17, Dec. 11, 2020). For her part, when asked whether an employee should tell a manager if they realize there is an expired time-limited demand, Rosado stated "I could. I don't know if … if there's a rule – hard and fast rule if I should." (Rosado Rule 2004 Tr., p. 233:8:15).

letter but did not timely log its receipt; did not timely alert any manager or employee to its existence or expiration; allowed the opportunity to request additional response time to expire without attempting to communicate with the claimant's attorney; did not alert the insured as to the demand or the Defendant's response; and did not pay the requested policy limit demand despite having authority, and the purported willingness, to do so. In short, the Court finds that no reasonable jury could find that the Defendant's handling of the TLD reflected the implementation of reasonable standards for the prompt investigation of claims.

After reviewing the record in a light most favorable to the Defendant, the Court finds no genuine issues of material fact remain to be resolved regarding the Defendant's failure to implement reasonable standards for handling time-limited and policy limit demands. The Court finds the Defendant's conduct to be an unfair and deceptive practice under N.C. Gen. Stat. §§ 58-63-15(11)(c) and 75-1.1. The Court also finds the commercial nature of the Defendant's act of selling and implementing insurance policies meets the second element for a UDP claim. *See DENC, LLC v. Phila. Indem. Ins. Co.,* 426 F. Supp. 3d 151, 156 (M.D.N.C. 2019).

Lastly, the Court finds that the Plaintiff meets the necessary showing of proximate cause to survive the Defendant's motion, but the ultimate determination of whether, and which, damages to Caceres were proximately caused by the Defendant's failure to implement reasonable standards for handling time-limited and policy limit demands must be made at trial. An "inference of fact generally drawn from other facts and circumstances," proximate cause is "ordinarily a

question of fact for the jury" and should only be decided as a matter of law "in exceptional cases, in which reasonable minds cannot differ as to the foreseeability of injury." *Williams v. Carolina Power & Light Co.*, 250 S.E.2d 255, 258 (N.C. 1979) (cleaned up). The facts as presented here do not constitute such a rare exception and reasonable minds could differ as to the extent of damages proximately caused by the Defendant's violation of N.C. Gen. Stat. §§ 58-63-15(11)(c) and 75-1.1. On the one hand, a jury could find the Defendant's failure to implement reasonable standards in handling and responding to the TLD proximately caused Caceres injury in the form of the excess judgment. Such a jury could infer that, but for the Defendant's across-the-board departure from its procedures, the Defendant inevitably would have accepted the TLD and the complaint and excess judgment would not have occurred. *See Lynn v. Overlook Dev.*, 403 S.E.2d 469, 473 (N.C. 1991). However, a different jury could determine that the Defendant would have nevertheless rejected the TLD even if it had implemented reasonable procedures. The Defendant maintains it had already offered policy limits but was awaiting final approval from all claimants to complete a global settlement when James Cook's attorney abruptly, and unexpectedly, sent the TLD. Under this view, even a timely request for more time to respond to the TLD may not have altered the Defendant's ultimate decision to reject it, thereby limiting the damages stemming from the Defendant's failure to implement reasonable standards. Given these conflicting potential outcomes, the Court finds judgment as matter of law would be inappropriate at this juncture as reasonable minds could differ; the question of

whether the excess judgment "would not have occurred" without the Defendant's failure to implement reasonable standards is ultimately a question of fact that the jury must determine. *ABT Bldg. Prods.*, 472 F.3d at 123; *Lynn*, 403 S.E.2d at 473; *Williams*, 250 S.E.2d at 258.

Based on the undisputed material facts, the Court finds, as a matter of law, that the Defendant failed to implement reasonable standards in violation of § 58-63-15(11)(a) and § 75-1.1. However, the Court finds material facts in dispute as to proximate cause and damages, but the Plaintiff has set forth sufficient evidence to allow the issues to proceed to trial. Accordingly, the Court will deny both parties' motions for summary judgment.

D. N.C. Gen. Stat. § 58-63-15(11)(f), (m)

The Court considers subparagraph (f) and (m) together as both concern the Defendant's alleged failure to promptly settle claims where liability has become reasonably clear and because, in both instances, there are material disputes of fact that prevent the Court from granting summary judgment to either side.

Subparagraph (f) of § 58-63-15(11) proscribes "not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear," while subparagraph (m) bars "failing to promptly settle claims where liability has become reasonable clear, under one portion of the insurance policy in order to influence settlements under other portions of the insurance policy coverage." The Plaintiff cites, among other bases, the Defendant's failure to accept the August and October 2014 settlement demands of James Cook, its delay in disclosing UIM Coverage, and its failure to make any settlement offers

as evidence of purported violations of § 58-63-15(11)(f). Moreover, the Plaintiff asserts that the Defendant failed to promptly settle the BI claims in order to obtain releases of its UIM liability at a reduced cost. (Docket No. 125, pp. 42-45).

For reasons discussed below, *see infra* Part 3.B, there are material issues of fact in dispute that are necessary for the Court to determine whether the Defendant, as a matter of law, did not attempt in good faith to effectuate prompt settlements with the Cooks and Perez. The undisputed material facts establish that the Defendant, having accepted liability and recognizing that the Cooks' claims vastly exceeded Caceres's policy limits, failed to request additional time to respond to the TLD. The Defendant's agent Rosado also failed to follow internal guidelines and declined to provide contact information for claimants' attorneys to each other, while insisting that those claimants come to an allocation agreement among themselves.

The Defendant, however, has provided evidence that its adjuster believed all claimants and their attorneys were close to agreeing on a global settlement that would resolve all claims against Caceres, but that James Cook's attorney arbitrarily demanded the policy limit while the Defendant was completing its negotiations with Perez. After the TLD expired, Rosado wrote to Tuttle, "[a]s you will recall in our earlier phone discussion, my efforts and plan to resolve all matters were outlined to you and were in agreement." (Ex. 28). As the evaluation consultant testified on the situation, "I think that we were in active negotiations, that Mr. Tuttle knew exactly what was trying to be effected. As far as a global settlement, I don't know what the

purpose was of a hand-delivered letter that came in when we were in active negotiations[.]" (Meyer Dep., pp. 49:24-25, 50:1-11). Given the conflicting testimony and evidence, there are credibility determinations to be made by the factfinder that would greatly influence the Court's legal conclusions as to whether the Defendant's actions or inactions constitute a violation of § 58-63-15(11)(f).

For similar reasons, the Court finds there are material factual disputes necessary to determine whether Defendant intended, through its negotiations with the Cooks and Perez, to use a proposed three-way BI policy limits allocation between the parties to reduce its potential UIM payout to Perez. The Plaintiff has proffered evidence showing the Defendant's adjusters were cognizant of how a Perez BI settlement could impact the UIM exposure. For example, Meyer noted in the Claims Log on August 15, 2014, that "If [Perez] settls [sic] for 50k, *there would be no uim exposure*. If he settles for anything less, we would get the offset off the coverage for the settlement amout [sic], we would still have an exposure up to the 49k (50k uim less the 1k med pay) as we wouldn't consider." (Ex. 2, p. 89) (emphasis added). The Plaintiff also points to the six-month lag between when UIM coverage could have been opened and when Rosado made the request that a UIM adjuster be assigned on August 15, 2014. (Pl.'s SMF, ¶ 59). The Defendant, however, argues that it "was Rosado's idea" to open UIM without prompting from the claimants and without a formal demand from Perez that would have implicated UIM coverage. It was, the Defendant argued, "Rosado's persistence [that] ultimately convinced [Perez] to accept the UIM alternative, thereby making more money available to

settle the Cooks claims." (Docket No. 139, p. 23). The evidence on summary judgment demonstrates there are factual disputes as to the Defendant's intentions and motives in settlement negotiations as well as the circumstances around how and when UIM coverage was opened. These factual disputes must be decided at trial to determine whether the Defendant's BI negotiations were designed to influence the potential UIM payout to Perez, which would constitute a violation of § 58-63-15(11)(m).

Accordingly, the Court will deny both parties' motions for summary judgment as to subparagraphs (f) and (m).

E. Independent Claim Under § 75-1.1

As discussed above, the Plaintiff has alleged numerous violations of N.C. Gen. Stat. § 58-63-15(11), which in turn can support a finding of unfair or deceptive acts or practices under § 75-1.1. *Bacon v. State Auto Prop. & Cas. Ins. Co.*, No. 1:20CV1007, 2021 WL 2207056, at *9 (M.D.N.C. June 1, 2021) (citing *Gray v. N.C. Ins. Underwriting Ass'n*, 529 S.E.2d 676, 682 (N.C. 2000)). The Plaintiff, however, argues that the Defendant's conduct may alternatively be a violation of § 75-1.1, even if there is no express corresponding prohibition on the conduct in § 58-63-15(11). Specifically, the Plaintiff argues that the Defendant's failure to settle the Cook claim before trial and its subsequent, deceptive efforts to avoid liability on Caceres's bad faith claim are sufficient to prove a violation of the UDP independent of any violation of § 58-63-15(11). The Defendant's conduct, the Plaintiff alleges, left Caceres subject to an excess judgment and an unwanted bankruptcy. (Docket No.

125, pp. 45-46).

The Plaintiff is correct that he is not confined to seeking relief under the UDP through proving a violation of § 58-63-15(11); he may also "file an independent [Section] 75-1.1 claim." *Bacon*, 2021 WL 2207056, at *9 (quoting *Elliott v. American States Ins. Co.*, 883 F.3d 384, 396 (4th Cir. 2018)). As recently described by the United States District Court for the Middle District of North Carolina, "[s]howing a § 58-63-15(11) violation is not the exclusive means by which an insured can pursue its insurer under § 75-1.1. A plaintiff may also prevail [on a UDP claim] by showing a breach of contract accompanied by 'egregious or aggravating circumstances.'" *Martin v. Nautilus Ins. Co.*, No. 1:20CV858, 2022 WL 4329710, at *3 (M.D.N.C. Sept. 19, 2022) (collecting cases).[32]

The offending conduct cited by the Plaintiff as the basis for his independent claim under § 75-1.1—the failure to settle James Cook's claim—does indeed mirror that underpinning the Plaintiff's cause of action for breach of the insurance contract's implied covenant of good faith and fair dealing. "It is clearly established in North Carolina that a plaintiff may maintain both a breach of contract claim and an unfair and deceptive trade practices claim." *In re Charlotte Com. Grp., Inc.*, No. 01-52684C-11W, 2003 WL 1790882, at *3 (M.D.N.C. Mar. 13, 2003). Courts applying North Carolina law, however, "have grown skeptical of contract-related section 75-1.1 claims," Matthew W. Sawchak and Kip D. Nelson, *Defining Unfairness in "Unfair Trade Practices*, 90 N.C. L. REV. 2033, 2049 (2012), cautioning

[32] The Court has already found the Defendant liable under § 75-1.1 for misrepresentations it made with respect to conflicts of interest. *See supra* Part 1.A.ii.

that, "[i]n evaluating a [UDP] claim, courts must guard against permitting a litigant to transform a breach of contract claim into a [UDP] claim." *LRP Hotels of Carolina, LLC v. Westfield Ins. Co.*, No. 4:13-CV-94-D, 2014 WL 5581049, at *3 (E.D.N.C. Oct. 31, 2014) (citing *Birtha v. Stonemor, N.C. LLC*, 727 S.E.2d 1, 10 (N.C. Ct. App. 2012)). "[A] mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75–1.1." *Branch Banking & Tr. Co. v. Thompson*, 418 S.E.2d 694, 700 (N.C. Ct. App. 1992).

"To maintain both claims, a plaintiff must allege substantial aggravating circumstances." *In re Charlotte Com.*, 2003 WL 1790882, at *3. "Aggravating circumstances include conduct of the breaching party that is egregiously unfair or deceptive; however, the aggravating circumstances must be substantial and independent of the performance of the parties' obligations under the existing contract." *In re B & K Coastal, LLC*, No. 11-08609-8-JRL, 2013 WL 1935300, at *7 (Bankr. E.D.N.C. May 9, 2013) (collecting cases). Specific examples of egregious or aggravating circumstances include "'forged documents, lies, and fraudulent inducements,' although cases presenting these circumstances are 'rare.'" *Martin*, 2022 WL 4329710, at *3 (quoting *Davis v. State Farm Life Ins. Co.*, 163 F. Supp. 3d 299, 307 (E.D.N.C. 2016)).[33] While misunderstandings ordinarily are not sufficient,

[33] The Defendant states in its briefs that any UDP claim requires proof of egregious or aggravating circumstances. (Docket No. 127, p. 20; Docket no. 139, p 19) (citing *Ellis v. Louisiana-Pacific Corp.*, 699 F.3d 778, 787 (4th Cir. 2012)). *Ellis*, the case relied upon by the Defendant for this assertion, was analyzing an independent UDP claim made under § 75-1.1 rooted in a breach of contract, not one based on a violation of § 58-63-15(11). *Id.* Substantial aggravating circumstances are not required to prove a claim for unfair and deceptive trade practices under § 75-1.1 when the basis for the claim is that the defendant committed a prohibited practice enumerated in § 58-63-15(11). *Mod. Auto. Network, LLC v. E. All. Ins. Grp.*, No. 1:17CV152, 2018 WL 1474362, at *5-6 (M.D.N.C. Mar. 26, 2018).

deception, either in the formation of the contract or the circumstances of the breach, may supply the "substantial aggravating circumstances" that would justify recovery under the UDP. *In re B & K Coastal*, 2013 WL 1935300, at *7; *see also Interstate Narrow Fabrics Inc. v. Century USA, Inc.*, 218 F.R.D. 455, 465-66 (M.D.N.C. 2003).

As explained in more detail below, *see infra* Part 3, the Court finds there are genuine issues of material fact as to the Plaintiff's claim for breach of the Policy's implied covenant of good faith and fair dealing. The Plaintiff's independent UDP claim is based on the same material facts in dispute and, accordingly, summary judgment is not warranted here for either party.

While there remain material questions around the Defendant's motives that must be addressed at trial, which in turn require determinations of witness credibility, the Court also finds the Plaintiff has forecasted evidence of substantial aggravating circumstances attending the alleged breach to survive the Defendant's motion for summary judgment. In general terms, "an intentional misrepresentation made for the purpose of deceiving another and which has the natural tendency to injure another can act as a sufficient aggravating factor." *Interstate*, 218 F.R.D. at 465 (cleaned up). More specifically, proven allegations akin to concealment of a breach of contract are sufficient to prove substantial aggravating circumstances. *See, e.g.*, *id.* at 465-66 (denying summary judgment for defendant where a jury could find the defendant engaged in intentional deception for the purpose of "continu[ing] to reap the benefits of the Agreement"); *Lendingtree, LLC v. Intercontinental Capital Grp., Inc.*, 2017 NCBC LEXIS 54, at **8-9 (N.C. Super. Ct. June 23, 2017)

(finding complaint alleged aggravating circumstances above and beyond a mere breach of contract where plaintiff alleged a scheme by defendant "to enjoy both the benefit of its bargain and the benefit of its breach"); *Sparrow Sys. v. Private Diagnostic Clinic, PLLC*, 2014 NCBC LEXIS 70, at *44 (N.C. Super. Ct. Dec. 24, 2014) (denying motion to dismiss where allegations included the defendant's "deceitful conduct in order to effectuate and conceal its breaches").

Here, the Plaintiff has presented evidence that, taken in a light most favorable to the Plaintiff, could convince a reasonable juror that the Defendant intentionally sought to conceal its breach of the implied covenant of good faith and fair dealing. Specifically, a jury could reasonably find that the Defendant intentionally misrepresented both its duty to defend and the merits of Caceres's potential bad faith claim in an effort to conceal its breach and forestall any attendant liability. The Defendant, based on the testimony of its employees, counters that its only motivation in continuing to represent Caceres after entry of judgments and payment of policy limits was to ensure Caceres was "protected" and not left "to fend for himself in the face of the post-judgment collection efforts and attempt to have a receiver appointed." (Docket No. 139, p. 9) (citing Rosado Rule 2004 Tr., pp. 182:7-25, 183:1-7). At summary judgment, the Court is unable to make credibility determinations regarding the Defendant's intentions post-judgment, but the evidence presented by the Plaintiff is sufficient to allow the issue to proceed to trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986).

Based on the foregoing reasoning, the Court finds material facts in dispute as to whether the Defendant breached the implied covenant of good faith and fair dealing and whether there were substantial aggravating circumstances. Accordingly, the Court will deny both parties' motions for summary judgment as to the Plaintiff's independent claim under N.C. Gen. Stat. § 75-1.1.

2. Breach of Contract: Express Provisions

The Plaintiff alleges that the Defendant breached its duties to Caceres under the Policy in two respects: (1) by failing to provide him with the benefits, coverages, and protections afforded by the provisions of the policy and (2) by failing to perform its obligations under the policy "fairly and in good faith." (Docket No. 125, p. 5). The Plaintiff merges these purported violations into a single cause of action labeled as "breach of contract." (Docket No. 1, ¶¶ 124-135). These alleged breaches, the Plaintiff maintains, exposed Caceres to an excess judgment, years of litigation, and a bankruptcy filing.

Under North Carolina law, a claim for breach of the implied covenant is separate from a traditional breach of contract claim if there are distinct factual bases for the two claims and the express terms of the contract do not preclude the implied terms purportedly breached. *Nadendla v. WakeMed*, 24 F.4th 299, 308 (4th Cir. 2022) (citing *Richardson v. Bank of Am., N.A.*, 643 S.E.2d 410, 426 (N.C. Ct.

App. 2007)); *Petruzzo v. HealthExtras, Inc.*, No. 5:12-CV-113-FL, 2013 WL 4517273, at *6-7 (E.D.N.C. Aug. 23, 2013).[34]

Such is the case here, where the Plaintiff's breach of contract and breach of implied covenant claims are factually and conceptually distinguishable. Unlike his claim for breach of express contract provisions, the Plaintiff's claim for breach of the implied covenant does not allege the Defendant reneged on its contractual obligations altogether; instead, the latter claim relates to the allegedly deficient manner in *how* and *when* the Defendant performed its contractual duties, not whether it failed to perform at all. *See Hancock v. Americo Fin. Life & Annuity Ins. Co.*, 378 F. Supp. 3d 413, 432 (E.D.N.C. 2019). Therefore, because the Plaintiff's combined cause of action for breach of contract is more properly conceived of as two separate claims, the Court will first analyze the Plaintiff's assertion that the Defendant violated the express provisions of the Policy before turning separately to the contention that the Plaintiff breached the implied convent of good faith and fair dealing.[35]

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[34] An insured's claim based on an insurer's breach of the implied duty of good faith and fair dealing, which is commonly invoked in the context of a settlement, need not always be accompanied by a claim for breach of contract. *Petruzzo*, 2013 WL 4517273, at *6 (citing *Alford v. Textile Ins. Co.*, 103 S.E.2d 8, 12 (N.C. 1958)). A plaintiff may assert that the implied covenant was breached separate and apart from express breaches of the contract where the alleged breach of the implied covenant "is not tied factually or conceptually" to a breach of contract claim. *Petruzzo*, 2013 WL 4517273, at *7; *Sutherland v. Domer*, No. 1:17CV769, 2018 WL 4398259, at *5 (M.D.N.C. Sep. 14, 2018). But when a "claim for breach of the implied covenant of good faith is based on an alleged breach of the express terms of the contract, these two claims are treated as a single breach of contract issue and evaluated together." *Sutherland*, 2018 WL 4398259, at *5.

[35] Because the elements necessary to establish a breach of the implied covenant of good faith and fair dealing mirror those required to prevail on a claim for bad faith refusal by an insurance company to settle a claim, *see Michael Borovsky Goldsmith LLC v. Jewelers Mut. Ins. Co.*, 359 F. Supp. 3d 306, 315 (E.D.N.C. 2019), the Court, for purposes of clarity and judicial efficiency, will discuss both claims together. *See* discussion *infra* Part 3.

A successful breach of contract claim must establish (1) the existence of a valid contract and (2) the breach of the terms of that contract. *Browder v. State Farm Fire & Cas. Co.*, No. 1:20-CV-26, 2021 WL 3112437, at *4 (W.D.N.C. July 22, 2021) (citing *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 827 S.E.2d 458, 472 (N.C. 2019)). "An insurance policy is a contract, and the policy's provisions govern the rights and duties of the contracting parties." *LRP Hotels*, 2014 WL 5581049, at *2 (citing *Gaston Cnty. Dyeing Mach. Co. v. Northfield Ins. Co.*, 524 S.E.2d 558, 563 (N.C. 2000)). If a contract's terms are clear, its construction is a matter of law, and the Court looks at the instrument in its entirety. *Browder*, 2021 WL 3112437, at *4.

In his motion for summary judgment and supporting brief, the Plaintiff points to two specific provisions of the insurance contract allegedly breached by the Defendant:

> Part A – Liability Coverage Bodily Injury – "We will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident."
> …
> Part C2 – Combined Uninsured/Underinsured Motorists Coverage – "We will also pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury sustained by an insured and caused by an accident. The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the underinsured motor vehicle. We will pay for these damages only after the limits of liability under any applicable liability bonds or policies have been exhausted by payment of judgments or settlements …"

(Ex. 1, p. 003108, 003116).

The undisputed facts, however, do not support a conclusion that the Defendant breached the cited provisions of the Policy. After judgment was entered

against Caceres in the James Cook case, the Defendant issued a check in the amount of $57,741.81 payable to the clerk of court, which equated to its BI Coverage limit plus interest. (Pl.'s SMF, ¶ 206). The Defendant also reached settlement and paid beyond its BI policy limits to resolve the Lottie Cook claim. (Pl.'s SMF, ¶ 211; Ex. 56). Finally, the Defendant paid $1,000 to Perez to settle his claim against BI Coverage. (Ex. 2, p. 53). Despite the Plaintiff's protestations of delay and failure to timely accept settlement demands, the uncontested evidence shows that Defendant ultimately complied with its obligations to pay damages for bodily injury or property damage for which its insured, Caceres, became legally responsible because of the Accident.

Similarly, the evidence reflects that the Defendant paid the compensatory damages that Caceres was legally entitled to recover. After Perez settled his claim against Caceres's BI Coverage policy for $1,000, Perez and his attorney pursued, negotiated for, and ultimately received a $40,000 settlement from the Defendant under Caceres's UIM policy. (Pl.'s SMF, ¶¶ 169, 171; Ex. 45). The Plaintiff points to what he characterizes as the Defendant's unnecessary delay in opening UIM coverage when it was required to do so, but the uncontested facts again prove that the Defendant complied with its obligation to pay UIM compensatory damages when required under the language of the Policy, "only after the limits of liability under any applicable liability bonds or policies have been exhausted by payment of judgments or settlements." (Ex. 1, p. 003116); *see Elliott*, 883 F.3d at 398 ("Therefore, under [North Carolina] law, a plaintiff is legally entitled to recover

under a UIM policy only once a judgment is issued against the underinsured motorist determining liability and damages owed to the plaintiff."). The Defendant paid the $40,000 UIM compensatory damages to Perez only after it settled Perez's claim against Caceres's BI Coverage for $1,000. Although the Plaintiff takes issue with the timing of the UIM payment and the manner in which the Defendant met its obligations, the evidence does not show a breach of that express provision of the Policy.

Accordingly, the Court finds the Plaintiff has not come forward with evidence sufficient to prove a breach of the express provisions of the Policy. Therefore, the Court will grant the Defendant's motion for summary judgment, in part, as it relates to the Plaintiff's claim for breach of the express terms of the contract. Nevertheless, the Court will separately consider the Plaintiff's argument that the Defendant breached the implied covenant of good faith and fair dealing.

3. Breach of Contract: Implied Covenant of Good Faith and Fair Dealing and Bad Faith Failure to Settle

The Plaintiff asserts that the Defendant breached the Policy "by abrogating its duties to deal fairly and in good faith with [Caceres]." (Docket No. 125, p. 9; Docket No. 1, ¶ 129). In addition to its express provisions, every contract contains "an implied covenant of good faith and fair dealing," which requires that "neither party will do anything which injures the right of the other to receive the benefits of the agreement." *Bicycle Transit Auth., Inc. v. Bell*, 333 S.E.2d 299, 305 (N.C. 1985); *accord First Protective Ins. Co. v. Rike*, 516 F. Supp. 3d 513, 531 (E.D.N.C. 2021). The implied duty of good faith "concerns the parties' performance of obligations

under the agreement, not the terms selected for the agreement." *Hancock*, 378 F. Supp. 3d at 432. Typically, "[w]here parties have executed a written contract, an action for breach of the covenant of good faith and fair dealing is part and parcel of a claim for breach of contract." *First Protective*, 516 F. Supp. 3d. at 531 (cleaned up). The parties each seek judgment as a matter of law on the Plaintiff's claim for breach of the implied covenant of good faith and fair dealing.

The parties also move for summary judgment on the Plaintiff's claim for bad faith failure to settle, which, if proven, allows for the recovery of compensatory and punitive damages if an insurer refuses to settle a valid claim against its insured in bad faith. *Dailey v. Integon Gen. Ins. Corp.*, 331 S.E.2d 148, 153-54 (N.C. Ct. App. 1985); N.C. Gen. Stat. § 1D-15. The Plaintiff contends that the undisputed facts establish that the Defendant refused in bad faith to settle the claims against Caceres for the policy limit when presented with the opportunity to do so. The Defendant counters that it had a reasonable, good-faith basis for not accepting the TLD at the time it was offered.

The two claims, breach of the implied covenant of good faith and fair dealing and bad faith failure to settle, are closely intertwined; the tort of bad faith failure to settle is rooted in an insurer's breach of its implied covenant of good faith and fair dealing in effectuating its contractual duty to defend or settle claims against the insured. *See generally* 14A COUCH ON INSURANCE § 203:7 (3d rev. ed. 2022). Although an insurer such as the Defendant possesses the exclusive contractual authority to settle a claim as it sees fit, "this discretion must be exercised in a

reasonable manner based upon good faith and fair play." *Nationwide Mut. Ins. Co. v. Pub. Serv. Co. of N.C., Inc.*, 435 S.E.2d 561, 564 (N.C. Ct. App. 1993). An insurer "must give at least as much consideration to the interest of the insured as it does its own interest[;]" if presented with a situation in which recovery in excess of policy limits "is substantially likely," the insurer "has a duty implied by law to settle within policy limits" when afforded the opportunity to do so "in order to protect the insured from a gamble by the insurer on which only the insured could lose." 14A COUCH ON INSURANCE § 203:13.

In addition to the overlapping origins and policy rationales, the elements of a claim for breach of the covenant of good faith and fair dealing mirror those required to prevail on a claim for bad faith refusal by an insurance company to settle a claim. *See Michael Borovsky Goldsmith*, 359 F. Supp. 3d at 315 ("[T]he elements of a bad faith refusal to settle claim are the same as those for breach of the covenant of good faith and fair dealing."); *compare First Protective*, 516 F. Supp. 3d at 531, *with Guessford v. Pa. Nat'l Mut. Cas. Ins. Co.*, 983 F. Supp. 2d 652, 671-72 (M.D.N.C. 2013). To prevail on either claim, the Plaintiff must show: "[1] a refusal to pay after recognition of a valid claim; (2) bad faith; and (3) aggravating or outrageous conduct." *Topsail Reef Homeowners Ass'n v. Zurich Specialties London, Ltd.*, 11 F. App'x 225, 237 (4th Cir. 2001) (quoting *Lovell v. Nationwide Mut. Ins. Co.*, 424 S.E.2d 181, 184 (N.C. Ct. App. 1993)). Bad faith is defined as not based on a legitimate, honest disagreement as to the validity of the claim. *Id.* at 239; *Carolina Chirocare & Rehab, Inc. v. Nationwide Prop. & Cas. Ins. Co.*, No. COA20-511, 2021

WL 4272058, at *4 (N.C. Ct. App. Sept. 21, 2021). Those factors that would satisfy the third element for aggravating or outrageous conduct, which must be proven by clear and convincing evidence, are (1) fraud, (2) malice, or (3) willful or wanton conduct. N.C. Gen. Stat. § 1D-15(a), -(b); *Carolina Chirocare*, 2021 WL 4272058, at *4. Conduct that violates N.C. Gen. Stat. § 58-63-15(11), which identifies unfair claim settlement practices, may be considered a factor contributing to the aggravated conduct requirement. *Guessford*, 983 F. Supp. 2d at 668; *Kielbania v. Indian Harbor Ins. Co.*, No. 1:11CV663, 2012 WL 3957926, at *12 (M.D.N.C. Sept. 10, 2012).

The Plaintiff's claims for breach of the implied covenant and bad faith failure to settle both center on common questions of law and fact regarding the Defendant's handling of opportunities to settle the James Cook claim for policy limits. Claims for breach of the implied covenant and for bad faith failure to settle against insurers are, in most instances, "not suited for resolution on summary judgment because they involve disputed issues of material fact." 12 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 154.05 (2022); *see also* 14A COUCH ON INSURANCE § 203:6. "Unless reasonable minds could not differ, the issue of whether an insurer acted negligently or in bad faith in failing to settle a claim against the insured within policy limits is generally a question of fact based upon the circumstances and particular facts of each case." 14A COUCH ON INSURANCE § 203:6; *see also* 11 MOORE'S FEDERAL PRACTICE § 56.25 (2022) (noting that "issues of 'negligence' [and subsidiary issues such as 'reasonableness,' 'due care,' or 'proximate cause'] … are

not, in most cases, suitable for resolution on summary judgment").

As the three elements for the causes of action are identical, the Court will assess the Plaintiff's claim for breach of the implied covenant of good faith and fair dealing together with the parallel claim for bad faith failure to settle to determine whether this is one of the rare instances in which summary judgment may be granted to either party.

A. Refusal to Pay After Recognition of a Valid Claim

The undisputed material facts demonstrate the Plaintiff can satisfy the first required element, "refusal to pay after recognition of a valid claim." An essential aspect of a bad faith claim is an insurer's recognition of a claim and its insured's liability. "An insurer does not have a duty to settle where the underlying critical question of liability was hotly contested. Rather, the duty to settle arises only when liability and damages for the underlying claim have become reasonably clear." 14A COUCH ON INSURANCE § 203:12. For that reason, courts have routinely granted summary judgment to defendant insurers where, at the time of the settlement offer, an insurer had not recognized a valid claim or had not yet determined or accepted liability. *See, e.g.*, *Topsail*, 11 F. App'x at 237-39 (granting summary judgment for insurer where insured's claim was reasonably in dispute); *Pa. Nat'l Mut. Cas. Ins. Co. v. Beach Mart, Inc.*, No. 2:14-CV-08, 2022 WL 4709249, at *14 (E.D.N.C. Sept. 30, 2022).

Here, the Defendant determined in February 2014, within a month of the Accident, that Caceres was "100% liable for the claims of Perez, James Cook, and

Lottie Cook" and that the total claims against Caceres would exceed the BI Coverage limits. (Ex. 2, p. 129; Lonker Dep., pp. 226:15-19; 229:23-25, 230:1, Jan. 6, 2022). Even if the Defendant was awaiting final medical statements or receipts for every claimant, it had received all such documentation, at the latest, by September 26, 2014. (Pl.'s SMF, ¶ 69). At the time the Defendant received and failed to respond to the TLD in October 2014, it did not dispute Caceres's liability for the Accident nor whether the Accident victims' claims against Caceres were validly covered under the Policy.

Therefore, there is no question that the Defendant recognized its insured's liability and the validity of the claim. The undisputed material facts also demonstrate that the damages stemming from the Accident, which left one occupant dead and another with severe, life-altering injuries, were clear to the Defendant well before the time it received the TLD. Accordingly, the Court finds the Plaintiff has provided evidence sufficient to meet the first required element of his bad faith failure to settle claim and the parallel claim for breach of the implied covenant of good faith and fair dealing.

B. Bad Faith

The parties dispute whether the facts can support the "bad faith" element of the claim, which has been defined by numerous courts as "not based on honest disagreement or innocent mistake." *Topsail*, 11 F. App'x at 239; *Dailey*, 331 S.E.2d at 155. As first articulated by the North Carolina Supreme Court in *Wynnewood Lumber Co. v. Travelers' Ins. Co.*, 91 S.E. 946 (N.C. 1917), in cases "where hindsight

turns out to be better than foresight, a mistake [of judgment] honestly made does not subject the person to legal liability." *Id.* at 947 (cleaned up). Nevertheless, while "North Carolina courts may wish to insulate insurance companies from liability for 'honest mistakes of judgment,'" insurers are required "to act diligently and in good faith" when overseeing settlement negotiations. *Gray v. Grain Dealers Mut. Ins. Co.*, 871 F.2d 1128, 1130 (D.C. Cir. 1989) (applying North Carolina law).

The Plaintiff alleges the Defendant failed to exercise in good faith its complete discretion as to when and under what conditions it would settle or defend claims against Caceres. While the Defendant did provide legal defense for, and eventually pay the policy limits for many of the claims against Caceres, thereby precluding a finding that the Defendant breached an express policy provision, the Plaintiff avers that the Defendant's failure to settle the James Cook claim for the policy limit when it had an opportunity to do so was unreasonable and a breach of its duty to perform, fairly and in good faith, its duty to defend Caceres. The Plaintiff urges the Court to find as a matter of law that, based upon the information available at the time, the Defendant "failed to use reasonable care in handling the claims against Caceres, failed to protect him against foreseeable exposure, and that at a minimum … was recklessly indifferent to Caceres' rights." (Docket No. 125, p. 47).

For its part, the Defendant contends that it should be granted summary judgment on this claim based on two critical factors that illustrate that it did not refuse to settle the claims against Caceres in bad faith. Specifically, the Defendant

asserts that (1) the deadline contained in the TLD was unreasonably short and that there is no authority in North Carolina imposing liability on an insurer for failing to meet such an arbitrary time-limited demand and (2) at the time it received the TLD, it was diligently pursuing a global settlement of all claims against Caceres to maximize his protection. The Defendant maintains that, even if the strategy was ill-advised and subject to post-hoc criticism, an honest mistake in judgment does not equate to a bad faith refusal to settle.

After reviewing the full record of this proceeding, the Court finds the Plaintiff has forecasted evidence that could support the "bad faith" element. The undisputed material facts establish that the Defendant, at the time it received the TLD, had accepted liability, recognized that the claims would almost certainly exceed Caceres's policy limits, and authorized its adjuster to settle any of the individual claims up to policy limits. (Pl.'s SMF, ¶ 76; Rosado Rule 2004 Tr., pp. 238:18-25, 239:1-11). The Defendant did not request any additional time to respond to the TLD despite the claimant's explicit invitation to do so by October 21, 2014. While insisting that the claimants come to an allocation agreement among themselves, the Defendant did not provide James Cook's attorney with contact information for Perez's attorney. The facts also show that the Defendant, through its agent Rosado, failed to follow the company's claims-handling guidelines with respect to the TLD; specifically, the Defendant did not log the demand upon receipt and did not issue a prompt response.

The evidence provided also demonstrates that the Defendant did not timely

apprise Caceres of the TLD. Despite the Defendant's assurances to Caceres that he would be kept informed throughout the claim process and would "be advised of all offers and demands" (Ex. 8), Caceres did not learn of the TLD until at least December 30, 2015, over a year after the offer was made and expired. As the Defendant's employee testified, it is "important" to inform the insured of a policy limit demand to allow them to retain counsel, if desired, and to "be given an opportunity to consider a contribution of personal funds toward a settlement." (Meyer Dep., pp. 43:3-25, 44:1-10). While the Defendant contends that it repeatedly sent letters to Caceres explaining his limits and excess exposure, and that Caceres understood the efforts to achieve a global settlement to maximize his protection (Docket No. 139, pp. 7-8), a key question in determining whether an insurer acted in good faith "is whether the insurer kept the insured informed of all proceedings, including communication of settlement offers." 14A COUCH ON INSURANCE § 203:14. While summary judgment for bad faith is not appropriate "where issues of fact remai[n] as to the reasons for and reasonableness of an insurer's failure to communicate a settlement offer to the insured," that failure to inform "is one of the factors that a jury may consider in determining whether the insurer acted in bad faith." *Id.* § 203:16.

From the evidence presented, a jury could reasonably draw the inference that the Defendant's failure to settle for the policy limit when offered the opportunity to do so, where liability and the potential for an excess judgment were clear, along with the Defendant's failure to timely inform Caceres of the TLD, were intentional,

indicative of bad faith, and not due to an innocent mistake or honest disagreement.

The Court is not dissuaded from this finding by what the Defendant characterizes as the "arbitrary" 11-day response deadline imposed by the TLD. (Docket No. 127, p. 16). While the Defendant attempts to paint this timeframe as unilaterally set by the claimant's attorney without warning (Docket No. 127, pp., 2, 4), the reasonableness of a given deadline depends upon the complete circumstances of the case. As one insurance law treatise describes:

> An insurer has a duty to the insured to respond to settlement offers within policy limits by the deadline prescribed in the offer, at least where the insurer has knowledge of clear liability and damages in excess of policy limits, and providing that the time allotted for acceptance is reasonable. What constitutes a reasonable time depends upon the circumstances of the particular case. Whether an insurer has acted in bad faith by failing to settle a claim within the time limits unilaterally imposed by a plaintiff is a question for the finder of fact.

14A COUCH ON INSURANCE § 203:15.

The reasonableness of a time-limited demand cannot be determined solely by the number of days afforded to respond. The purported brevity of an imposed settlement deadline, albeit a factor, will not alleviate a finding of bad faith against the insurer if the context of the case reveals the insurer's non-response to be unreasonable. *See* 1 NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 2.03 (2d ed. 2022) ("The mere fact that the demand is open for only a limited period and that the claimant refuses later offers of the amount formerly demanded does not alone prevent a finding of bad faith."). For instance, an insurer's untimely response to a 15-day time-limited demand for policy limits was found sufficient to impose liability for bad faith failure to settle where liability was clear and the insurer knew

damages could exceed limits. *Grumbling v. Medallion Ins. Co.*, 392 F. Supp. 717, 721 (D. Or. 1975), *aff'd*, 545 F.2d 686 (9th Cir. 1976). A different court found it could not, as a matter of law, deem a ten-day timeframe for responding to a settlement demand to be unreasonable where the insurer "knew for many months that Plaintiff's claim exceeded the policy limits and had internally authorized payment to the limits of the policy approximately five months earlier." *Camacho v. Nationwide Mut. Ins. Co.*, 13 F. Supp. 3d 1343, 1361 (N.D. Ga. 2014). Conversely, the Fourth Circuit found a ten-day time-limited demand to be unreasonable where the insurer had not completed its investigation and had not been provided medical records or billing. *Columbia Ins. Co. v. Waymer*, 860 F. App'x 848, 852, 853-54 (4th Cir. 2021).

The reasonableness of a time-limited demand must be considered within the context of a particular case. Along with the length of time in which an insurer must respond,[36] courts may consider the sequence of events leading to the offer, the stage of the proceedings at which the offer was made, and the status of the insurer's

[36] In its brief supporting summary judgment, the Defendant appears to take issue with the third-party claimant's motivation in sending the TLD, implying at various points that James Cook's attorney, Jason Tuttle, was attempting to set up a bad faith claim by imposing an unreasonably short response time. According to the Defendant, Tuttle "knew that Allstate was willing to settle for limits and was attempting to settle all three claims," yet "arbitrarily" and "without any warning, or even a courtesy phone call," sent the 11-day time-limited demand. (Docket No. 127, p. 4). It is questionable whether a third party's motivation in sending a policy limit demand has any bearing on whether an insurer responded properly. *See State Auto Prop. & Cas. Co. v. Griffin*, No. 4:11-CV-14, 2012 WL 1940797, at *2 (M.D. Ga. May 29, 2012). And again, the TLD here included a mechanism for requesting an extension of time if needed. Nevertheless, the result of an attorney's attempt to "set up" an insurer, in the form of an unrealistic acceptance deadline, may factor into a jury's determination of the reasonableness of an insurer's response to a time-limited settlement demand. *Id.*; *see also Domercant v. State Farm Fire & Cas. Co.*, No. 1:11-cv-02655, 2013 WL 11904718, at *6 (N.D. Ga. Mar. 5, 2013) (concluding that a jury could reasonably believe that the claimant "was trying to set up State Farm for an excess judgment," but noting that question was for the jury to decide and not the court).

investigation of the claims. *See, e.g.*, *Grumbling*, 392 F. Supp. at 721 ("Defendant knew long before the receipt of the settlement proposal that this was a sure liability case, and that damages would far exceed the liability limit."); *State Auto Prop. & Cas. Co. v. Griffin*, No. 4:11-CV-14, 2012 WL 1940797, at *2 (M.D. Ga. May 29, 2012) (finding the "imposition of an unreasonably short time within which an offer to settle would remain open is a relevant factor in evaluating whether the insurance company acted unreasonably in failing to accept such an offer"); 1 NEW APPLEMAN BAD FAITH LITIGATION § 2.03 ("If the insurer already has enough information and has evaluated it or is given a reasonably opportunity to do so and to respond, the mere brevity of the time allowed for response will not preclude a finding of bad faith.").

The Defendant places great emphasis on the absence of North Carolina caselaw imposing liability on an insurer for failing to meet a time-limited demand akin to that issued in this case. (Docket No. 139, p. 14). That perceived lack of authority, however, does not reflexively require granting the Defendant's motion for summary judgment. Where a district court was faced with a similar question—that is, under what conditions may an insurer reasonably reject a time-limited demand to pay policy limits—but found that South Carolina courts had not yet weighed in, the Fourth Circuit affirmed and approved the district court's "thoroughly reasoned opinion" in which it "relied on ample case law in other jurisdictions" to predict how the South Carolina Supreme Court would answer. *Columbia*, 860 F. App'x at 852, 854. In *Columbia*, the claimants' attorney issued the insurer a 10-day time-limited

settlement demand to pay policy limits. *Id.* at 850-51. The demand was sent only 38 days after the automobile accident at issue and before the insurer, and even the claimants' attorney, had complete medical records or bills. *Id.* Under those conditions, the district court and Fourth Circuit determined that the insurer was entitled to summary judgment on the bad faith claim because "an insurer, acting with diligence and due regard for its insured, is allowed a reasonable time to investigate a claim [and] no obligation exists to accept a settlement offer without time for investigation." *Id.* at 854 (cleaned up). *Columbia* cautions, however, that "there will be close cases in which a jury must decide whether under all of the circumstances – including the time limit in a claimant's demand, the information already available to the insurer, and the additional investigation or documentation sought by the insurer – a carrier has acted reasonably in refusing a policy-limits settlement offer." *Id.* at 855.

In line with *Columbia* and other well-reasoned persuasive authority from other jurisdictions, this Court finds the North Carolina Supreme Court would similarly consider the full context of a given case when determining the reasonableness of a time-limited demand. In applying that analysis, the Court finds the undisputed material facts establish that, before it received the TLD, the Defendant had determined Caceres's liability, recognized that the claims would almost certainly exceed Caceres's policy limits, and authorized its adjuster to settle any of the individual claims up to policy limits. Unlike the insurer in *Columbia*, the Defendant had ample time to complete its own investigation, had months of

negotiations with the claimants' attorneys, and had received billing statements sufficient to assess the medical claims for all three claimants against Caceres. Against this backdrop, this Court cannot say, as a matter of law, that no reasonable jury could find bad faith in the Defendant's failure to respond to the TLD.

The Defendant also argues that the Plaintiff cannot make the requisite showing of bad faith because the Defendant was pursuing a good faith effort at achieving a global settlement of all claims against Caceres to maximize his protection. By August 2014, the Defendant had communicated with the attorneys for Perez and the Cooks its desire to pay policy limits as part of a global settlement. As the Defendant describes, acceding to James Cook's October 2014 TLD for $50,000, as well as an earlier demand of $50,000 for the Estate of Lottie Cook's claim, "would have exhausted the liability coverage, leaving nothing for Perez's claim before Perez had agreed to any such [global] settlement." (Docket No. 127, p. 2). The Defendant maintains that the adjuster's "judgment call" that she needed Perez to sign on to the global settlement before exhausting limits on the Cooks' claims "was an informed decision with Caceres's interests in mind, not Allstate's." (Docket No. 127, p. 17).

The Defendant is correct that any assessment of its alleged bad faith in failing to respond to the TLD must include consideration of the multi-claim nature of the Accident. "When and how to settle claims arising under an automobile policy can readily become a problem with many sides. Particularly is this true when numerous persons are making claims against the insured." *Alford v. Textile Ins.*

Co.,103 S.E.2d 8, 13 (N.C. 1958). Where, as is the case here, the aggregate of potential claims against the insured greatly exceeds the insured's policy limits, an insurer faces a "much more complex assessment" of whether and how to settle claims and "it will not always be possible for an insurer, by exhausting the policy limits, to guarantee that its insured will not face direct liability – due to the fact that other claims may still be outstanding." *DeMarco v. Travelers Ins. Co.*, 26 A.3d 585, 613 (R.I. 2011). North Carolina courts have generally affirmed an insurer's right to "settle part of multiple claims arising from the negligence of its insured, even though such settlements result in preference by exhausting the fund to which the injury party whose claim has not been settled might otherwise look for payment." *Alford*, 103 S.E.2d at 13.

To that end, it is not out line, or out of practice, for an insurer to work towards a global settlement of all potential claims arising out of a single accident. "Where multiple claims arise out of one accident, a liability insurer may exercise its discretion in how it elects to settle the claims, and may even choose to settle certain claims to the exclusion of other claims due to exhaustion of the policy limits, provided this decision is reasonable and in keeping with its good faith duties to the insured." 14A COUCH ON INSURANCE § 203:29. In tackling the complexities of a multi-claim case, an insurer "is not held to standards of omniscience or perfection" and "has leeway to use, and should consistently employ, its honest business judgment." *Peckham v. Cont'l Cas. Ins. Co.*, 895 F.2d 830, 835 (1st Cir. 1990). Depending upon the facts of a case, an insurer's rejection of a time-limited, policy

limit demand may well be excusable, and within the insurer's business judgment, where accepting would expose the insured to monetary judgment claims from other claimants. *See, e.g.*, *Mirville v. Allstate Indem. Co.*, 87 F. Supp. 2d 1184, 1188-89 (D. Kan. 2000) (finding insurer's actions "were focused on trying to settle all potential claims … within policy limits" and that declining to accept a "unilaterally imposed" time-limited demand did not amount to bad faith); *Liberty Mut. Ins. Co. v. Davis*, 412 F.2d 475, 481 (5th Cir. 1969) ("[E]fforts to achieve a prorated, comprehensive settlement may excuse an insurer's reluctance to settle with less than all of the claimants, but need not do so. The question is for the jury to decide."); 14A COUCH ON INSURANCE § 203:15 (citing *Mirville*).

Any added complexities involved with multi-claim cases do not, however, relieve an insurer of its duty of carrying out in good faith its contract of insurance, including the duty "to act diligently and in good faith in effecting settlements within policy limits, and if necessary to accomplish that purpose, to pay the full amount of the policy." *Alford*, 103 S.E. 2d at 12; *see also DeMarco*, 26 A.3d at 613 (despite complexities of multi-claim cases, insurers retain "affirmative duty to engage in timely and meaningful settlement negotiations"). Again, whether an insurer was justified in rejecting a policy limit demand in the hopes of achieving a global settlement is context dependent and must account for the surrounding circumstances of a case. "In many cases, efforts to achieve an overall agreement, even though entailing a refusal to settle immediately with one or more parties, will accord with the insurer's duty. In other cases, use of the whole fund to cancel out a

single claim will best serve to minimize the defendant's liability." *Davis*, 412 F.2d at 481. Although North Carolina courts have not yet weighed in on an analytical framework to be employed in determining, within the context of a multi-claim accident, whether an insurer's handling of a policy limit demand was reasonable or in good faith, other jurisdictions consider factors such as the number of claimants, the relative extent of the damages suffered by each claimant, the amounts of the claimants' settlement demands, the wishes of the insured, and the timing and nature of the insurer's attempts at negotiating a settlement. *See, e.g.*, *DeMarco*, 26 A.3d at 614; *Gen. Sec. Nat'l Ins. Co. v. Marsh,* 303 F. Supp. 2d 1321, 1325-26 (M.D. Fla. 2004); *Davis*, 412 F.2d at 481.

While it may be the case here that many, if not most, of the material facts leading up to the TLD are undisputed, the reasonableness of the Defendant's response to that demand is contested. A reasonable jury may find credible the Defendant's explanation of events—that the adjuster believed all sides were close to a global settlement that would afford Caceres maximum protection, but that James Cook's attorney made an arbitrary demand for the policy limit before the Defendant could effectuate the agreement, only to subsequently ignore the adjuster's messages and attempts to discuss the demand. (Docket No. 139, p. 17; Rosado Rule 2004 Tr., pp. 58-64, 66-70, 74-76). Conversely, a reasonable jury could find the Defendant's handling of the TLD to be in bad faith where, despite the challenges in dealing with multiple claimants and attorneys, the Defendant ignored its own internal guidelines, took no action as to the TLD until the day before it expired, failed to

request an available extension, and refused to pay the policy limit when it had determined liability and the potential for an excess judgment.[37] A jury could find that the Defendant did not handle the claim diligently, and in good faith; it could have settled James Cook's claim within policy limits while retaining sufficient UIM funds to minimize any potential excess judgment against Caceres stemming from Perez's less threatening claim. *DeMarco*, 26 A.3d at 614 ("The determination of the reasonableness of an insurer's action in multiple claimant cases will normally be a question for a fact-finder to decide."); *Davis*, 412 F.2d at 481 (finding the question of whether attempting to achieve a global settlement excuses the insurer's reluctance to settle with less than all of the claimants "is for the jury to decide"); *ABT Bldg. Prods. Corp. v. Nat'l Union Fire Ins. Co.*, No. 5:01-cv-100, 2005 WL 6124840, at *5 (W.D.N.C. May 31, 2005), *aff'd*, 472 F.3d 99 (4th Cir. 2006) ("Whether an insurer acted in bad faith is a jury question[.]").

[37] For purposes of comparison, in a case involving a similar fact pattern but where the insurer chose an alternate course of action after its global settlement strategy faltered, the district court declined to find bad faith in an insurer's decision to settle a wrongful death claim for the full policy limit while allowing another party's bodily injury claim to proceed to trial and an excess judgment. *Marsh*, 303 F. Supp. 2d at 1326. The court summarized the evidence of the insurer's reasonable and good faith performance of its contractual duties:

> It is further undisputed that the Plaintiff allowed the claimants several months to negotiate an agreement as to how to divide the policy limit amongst themselves; arranged and attended a mediation conference in a further effort to effectuate a settlement of both claims within the policy limits; and, offered the full policy limit to Schaefer's estate only after settlement negotiations had failed … The record is clear that after a full investigation and an effort to settle both claims the Plaintiff determined that the wrongful death claim posed the greater risk for an excess judgment against its insured. In light of this risk the Plaintiff settled with Schaeffer's estate in order to minimize the magnitude of possible excess judgments against its insured.

Id.

C. Aggravating or Outrageous Conduct

While the question of bad faith must ultimately go to the factfinder, the Court, as part of assessing the Defendant's motion for summary judgment, must also determine whether the Plaintiff has forecasted evidence sufficient to permit a jury to find "aggravating or outrageous conduct." *Topsail*, 11 F. App'x at 237-39; *Dailey*, 331 S.E. 2d at 154-55. Showing such conduct requires the Plaintiff to prove the presence of an aggravating factor as defined through N.C. Gen. Stat. §§ 1D-5 and 1D-15.[38]

In early opinions outlining the availability of punitive damages for bad faith failure to settle in the insurance context, courts held that "[e]ven when sufficient facts are alleged to make out an identifiable tort … the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed." *Dailey*, 331 S.E.2d at 154 (quoting *Newton v. Standard Fire Ins. Co.*, 229 S.E.2d 297, 301 (N.C. 1976)). In 1995, the North Carolina legislature clarified the conditions under which punitive damages may be awarded through the enactment of Chapter 1D, which allows for such damages "in an appropriate case and subject to the provisions of this Chapter, to punish a defendant for egregiously

[38] It is unclear whether "aggravating or outrageous conduct" should be viewed a third element of the tort claim for bad faith failure to settle or is more properly conceived of as the standard for recovering punitive damages on the underlying tort. As described in *Martinez v. Nat'l Union Fire Ins. Co.*, 911 F. Supp. 2d 331 (E.D.N.C. 2012), those courts describing "aggravating or outrageous conduct" as a component of a bad faith claim relied upon *Lovell*, 424 S.E.2d at 185 for the tort elements; *Lovell*, however, "set forth the elements to recover *punitive* damages for the tort of an insurance company's bad faith refusal to settle." *Martinez*, 911 F. Supp. 2d at 337 n.2. Regardless of the analytical approach, the Court finds the Plaintiff forecasts evidence sufficient to allow a reasonable jury to find the presence of an aggravating factor.

wrongful acts and to deter the defendant and others from committing similar wrongful acts." N.C. Gen. Stat. § 1D-1. Under Chapter 1D, the aggravating factors that merit an award of punitive damages are (1) fraud, (2) malice, or (3) willful or wanton conduct. N.C. Gen. Stat. § 1D-15(a).[39]

Here, the Plaintiff's complaint alleges willful or wanton conduct, which is further defined by Chapter 1D as follows:

> "Willful or wanton conduct" means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. "Willful or wanton conduct" means more than gross negligence.

Id. § 1D-5(7). Willful or wanton conduct lies between gross negligence and an intentional tort where the tortfeasor intends injury. *Justice v. Greyhound Lines, Inc.*, No. 5:16-CV-132, 2018 WL 1570804, at *4 (E.D.N.C. Mar. 30, 2018) (citing *Yancey v. Lea*, 550 S.E.2d 155, 158 (N.C. 2001)). Critically, unlike the other elements of a bad faith failure to settle claim, which need only be proven by a preponderance of the evidence, a plaintiff must prove the existence of an aggravating factor by clear and convincing evidence. *See* N.C. Gen. Stat. § 1D-15(b). The statute further limits the conditions in which punitive damages may be awarded against a corporate defendant. "Punitive damages may be awarded against

[39] Chapter 1D and its statutory definitions now govern the availability of punitive damages and replace the previous definition for "aggravated or outrageous conduct" promulgated in *Dailey*, 331 S.E. 2d at 155, and *Lovell*, 424 S.E.2d at 185-86. When compared with the now statutorily-defined "aggravating factor" and "willful or wanton conduct," *see* N.C. Gen. Stat. § 1D-15 and § 1D-5(7), the prior *Dailey* and *Lovell*-derived "aggravated conduct" element required for awarding punitive damages imposed a lesser burden and encompassed a broader range of qualifying behavior, including "fraud, malice, gross negligence, insult . . . willfully, or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights." *Dailey*, 331 S.E.2d at 155.

. . . a corporation [only if] the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages." *Id.* § 1D-15(c). In addition, a corporation's acts or policies may constitute the aggravating factor and create liability for punitive damages. *Braswell v. Colonial Pipeline Co.*, 395 F. Supp. 3d 641, 656 (M.D.N.C. 2019) (citing *Everhart v. O'Charley's, Inc.*, 683 S.E.2d 728, 737 (N.C. Ct. App. 2009)). While the ultimate question of whether alleged facts satisfy the aggravated conduct element is one for the trier of fact, *see Smith v. Nationwide Mut. Fire Ins. Co.*, 385 S.E.2d 152, 154 (N.C. Ct. App. 1989), the Court finds, for several reasons, that the Plaintiff has produced enough evidence to withstand the Defendant's motion for summary judgment and advance the matter to trial.

First, numerous courts, including those in this district, have held that conduct violative of N.C. Gen. Stat. § 58-63-15(11) may be considered a factor contributing to the aggravated conduct requirement. *See Guessford*, 983 F. Supp. 2d at 668; *Kielbania*, 2012 WL 3957926, at *12; *Huang v. State Farm Fire & Cas. Co.*, No. 5:14-CV-00069, 2015 WL 1433553, at *2 (E.D.N.C. Mar. 27, 2015). The Court has already found the Defendant's misrepresentation that it would inform Caceres of all settlement offers constitutes an unfair and deceptive trade practice under N.C. Gen. Stat. §§ 58-63-15(11)(a) and 75-1.1. Similarly, the Defendant's misrepresentations to Caceres in the period after judgment had been entered against Caceres and after the Defendant had paid out its policy limits, which the Court also finds to be deceptive and unfair trade practices under §§ 58-63-15(11)(a)

and 75-1.1, may also be considered factors demonstrating aggravated conduct. In addition, the Court has found that the Defendant failed to implement reasonable standards for responding to time-limited and policy limit demands in violation of §§ 58-63-15(11)(c) and 75-1.1. The Court's identification, as a matter of law, of various unfair and deceptive trade practices in connection with the Defendant's handling of James Cook's claim against Caceres could be enough, without more, to allow a reasonable jury to find the aggravating conduct element is met.

Aside from the Court's determination that the Defendant committed unfair and deceptive practices under §§ 58-63-15 and 75-1.1, a jury could separately consider the Defendant's pre- and post-judgment actions and find that they constitute aggravated conduct. First, a reasonable jury could find evidence of aggravating circumstances in the Defendant's handling of the TLD. While the Defendant's failure to follow its own internal guidelines in the initial handling of the TLD could be treated as simple negligence, insufficient to impose punitive damages, a jury could find the Defendant's numerous and repeated violations of the Claim Handling Manual, *see* discussion *supra* Part 1.C.ii, was a "conscious and intentional disregard of and indifference to the rights" of Caceres. N.C. Gen. Stat. § 1D-5(7). *Compare Justice*, 2018 WL 1570804, at *4-5 (finding that defendant's procedures to prevent accidents, although inadequate and arguably negligent, were not enough on their own to demonstrate the defendant consciously and intentionally disregarded motorists' rights), *with Davis v. G. Allen Equip. Corp.*, No. 4:20-CV-49, 2022 WL 1129900, at *3 (E.D.N.C. Apr. 15, 2022) (finding that "a jury could

conclude that fraudulent record-keeping and repeated rule violations on the day prior to the crash, combined with insufficient rest, amounted to a conscious and intentional disregard of and indifference to the rights and safety of others").

Aggravating circumstances may also be found in the Defendant's post-judgment conduct. During the time in which the Defendant provided extracontractual legal "representation" to Caceres—outside the ordinary course of the Defendant's business practices—the attorneys retained on Caceres's behalf directly advised the Defendant on when the statute of limitations would run on Caceres's bad faith claim, while counseling Caceres that such a claim lacked merit. A jury could reasonably conclude based on the evidence and undisputed facts that the Defendant, through Rosado, its managers, and the attorneys it employed for Caceres, chose to give preference to protecting the Defendant from possible litigation over enforcing or respecting the rights of Caceres. *See Everhart*, 683 S.E.2d at 736 (finding injured patron could pursue punitive damages against corporate restaurant where assistant manager insisted on completing accident report rather than administering first aid, noting that "a jury could reasonably find that [the assistant manager] chose to give preference to protecting [the restaurant] from possible litigation over providing assistance to the [patron.]"). Based on the evidence provided, a jury could reasonably infer that the Defendant was protecting its own interests by continuing to provide legal representation for Caceres, with the intention of blocking or discouraging Caceres, or a potential court-appointed receiver or trustee, from bringing a bad faith failure to settle cause of action.

Although punitive damages may only be awarded against a corporate defendant if the "officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor," N.C. Gen. Stat. § 1D-15(c), the record contains clear instances in which the Defendant's managers directly approved the continued representation and payment of Caceres's attorneys despite no contractual or legal basis to do so. This evidence includes the October 11, 2018, telephone call in which the Defendant's managers, corporate attorney, and Caceres's insurer-appointed attorneys discussed the utility of bankruptcy as a means to avoid the appointment of a receiver who could pursue the bad faith claim. Further, the Defendant concedes that "the decision to continue to pay to defend Caseres [sic] in the post-judgment collection phase *would have been Allstate management and counsel*," citing the testimony of its agent Reeser. (Docket No. 138, ¶ 269; Reeser Dep., p. 57:16-24, Feb 9, 2021) (emphasis added). Thus, if a jury concludes that the Defendant's post-judgment conduct constitutes an aggravating factor, the evidence that the Defendant's managers participated in or condoned that conduct is sufficient to impose liability on the corporate Defendant for punitive damages.

In sum, given the limited circumstances under which summary judgment is granted on such claims, the Court finds that there are genuine issues of material fact as to the bad faith and aggravated conduct elements of the Plaintiff's claims for bad faith failure to settle and the parallel claim for breach of the implied covenant of good faith and fair dealing. The evidence presented could support a finding for

either party on those elements, notwithstanding testimony credibility issues that must be left to a jury. *JKC Holding*, 264 F.3d at 465. However, the Court finds that there is no genuine dispute as to the first element of these claims—that the Defendant refused to pay certain claims against its insureds after recognizing these claims were valid. Accordingly, the Court will deny both cross-motions for summary judgment as it relates to those two claims.

4. Negligence and Gross Negligence

The Defendant further requests that the Court grant summary judgment in its favor on the Plaintiff's cause of action for negligence and gross negligence. The Plaintiff alleges in the complaint that the Defendant owed Caceres "a duty of reasonable care in the claims handling process," "common law … duties of an insurance company to its insured," and "a duty to act in accordance with the covenant of good faith and fair dealing." (Docket No. 1, ¶¶ 149-51). The Plaintiff argues the Defendant allegedly breached these duties in several respects, by negligently training adjusters, failing to follow internal rules and requirements for handling the TLD and keeping its insured Caceres informed of settlement offers, inhibiting settlement negotiations between the parties, and negligently handling the defense and settlement process. (Docket No. 1, ¶ 152). "To prevail on a claim of negligence in North Carolina, a plaintiff must establish the essential elements of duty, breach, proximate cause, and damages." *PLS Investments, LLC v. Ocwen Loan Servicing, LLC*, 699 F. App'x 166, 167 (4th Cir. 2017) (citing *Ward v. Carmona*, 770 S.E.2d 70, 72 (N.C. 2015)).

The Court first observes that the negligent conduct cited by the Plaintiff relates entirely to the Defendant's performance under the Policy. When injury occurs in connection with the subject matter of the contract, "[i]t is the law of contract and not the law of negligence which defines the obligations and remedies of the parties." *Spillman v. Am. Homes of Mocksville, Inc.*, 422 S.E.2d 740, 742 (N.C. Ct. App. 1992). The economic loss rule, as applied by North Carolina courts, precludes a tort action for purely economic loss "against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract." *LRP Hotels*, 2014 WL 5581049, at *5 (quoting *Spillman*, 422 S.E.2d at 741-42). As the Plaintiff's allegations are directed at how the Defendant handled Caceres's defense and settlement negotiations, which are obligations the Defendant owed under the Policy, and the alleged damages are purely economic, the Plaintiff's negligence cause of action would seemingly be barred by the economic loss rule. *See Wilkie v. Amica Mut. Ins. Co.*, No. 1:17CV314, 2018 WL 2326130, at *3 (W.D.N.C. Apr. 30, 2018).

There are, however, exceptions to the economic loss rule where a plaintiff can establish a duty owed by the defendant independent from any duties contained within the contract. *LRP Hotels*, 2014 WL 5581049, at *6 ("For a party to pursue a tort claim stemming from a contract, a plaintiff must allege a duty owed him by a defendant separate and distinct from any duty owed under a contract." (cleaned

up)). These exceptions are narrow; "in order to keep open-ended tort damages from distorting contractual relations, North Carolina has recognized an 'independent tort' arising out of breach of contract only in 'carefully circumscribed' circumstances." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 346 (4th Cir. 1998) (citing *Newton*, 229 S.E.2d at 301). Included among these exceptions are claims for breach of the implied covenant of good faith and fair dealing and claims for bad faith failure to settle. *Dailey*, 331 S.E.2d at 153-54; *Robinson v. N.C. Farm Bureau Ins. Co.*, 356 S.E.2d 392, 395 (N.C. Ct. App. 1987).

The Plaintiff points to the Defendant's duty to act in accordance with the implied covenant of good faith and fair dealing, but the Plaintiff is already pursuing a cause of action for the breach of that duty, along with the parallel claim of bad faith failure to settle. A separate negligence claim would be duplicative of the Plaintiff's bad faith and breach of the implied covenant claims, which require the Plaintiff to meet a heightened burden for imposing liability. As discussed above, a party must prove bad faith—more than negligence—in an insurance company's claim handling to impose liability.[40] The acts the Defendant identifies as evidence of

[40] Early decisions did not provide a definitive answer to whether an insurer could face liability under North Carolina law for negligent handling of defense and settlement responsibilities. *See Wynnewood Lumber*, 91 S.E. at 947 (finding that where an insurer is "negligent" in conducting a defense, the insured "was entitled to sue the insurer for breach of its implied contract to exercise reasonable care in conducting the suit or in tort for negligence"); *State Auto. Mut. Ins. Co. v. York*, 104 F.2d 730, 734 (4th Cir. 1939) (collecting cases from other jurisdictions and finding, generally, that "recovery may be had for negligence of the insurer in refusing to settle a claim for damages against the insured"). The overall weight of caselaw since those early decisions, however, suggests that North Carolina requires more than negligence, i.e. bad faith, in an insurer's handling of claims and its duty to defend in order to establish liability for excess judgments. *See Abernathy v. Utica Mut. Ins. Co.*, 373 F.2d 565, 568 (4th Cir. 1967) (contrasting North Carolina "good faith" standard for insurer liability with "a minority of other jurisdictions" employing the negligence standard); *Henry v. Nationwide Ins. Co.*, 139 F. Supp. 806, 808 (E.D.N.C. 1956) (observing that the "North Carolina

negligence were part of the claim-handling process and are the crux of the Plaintiff's bad faith failure to settle cause of action. Permitting the Plaintiff to pursue a negligence claim against the Defendant based on the same conduct would allow the Plaintiff to circumvent the heightened standard necessary to prevail on his parallel claims for breach of the implied covenant and bad faith failure to settle.

The Plaintiff does not point to any other extra-contractual duty owed by the Defendant that could provide the basis for a negligence claim. While the complaint alludes to "a duty of reasonable care in the claim handling process" and "duties established by the common law," the Plaintiff provides no legal basis for these purported duties under North Carolina law. As the Plaintiff's negligence and gross negligence claims are rooted solely in the Defendant's deficient performance under the Policy, and the Plaintiff has not alleged any duties "separate and distinct" from the contract other than the implied covenant of good faith and fair dealing, the Plaintiff's negligence claim is foreclosed by the economic loss rule. *LRP Hotels*, 2014 WL 5581049, at *6; *see also Wilkie*, 2018 WL 2326130, at *3. Accordingly, the Court will grant the Defendant's motion for summary judgment as to the negligence and gross negligence cause of action.

[Supreme] Court seems to have adopted the bad faith rather than the negligence rule"); *Grain Dealers*, 871 F.2d at 1130 ("It may well be that in North Carolina, if the insurance company actively assumes the defense of an insured, it is not liable for mere negligence in failing to gain the best settlement for the insured. In that event, a showing of bad faith may be required to recover in excess of policy limits.").

THE BANKRUPTCY COURT'S AUTHORITY TO ENTER A FINAL ORDER OR JUDGMENT

Given the overlapping factual background, and in the interest of judicial efficiency, the Court considers the Motion to Determine together with the parties' summary judgment motions; however, the question presented in the Motion to Determine, whether the bankruptcy court may enter a final order or judgment on the Plaintiff's claims, is assessed under a different legal standard than a motion for summary judgment. A proceeding's status under 28 U.S.C. § 157 is a question of law to be resolved by the Court rather than a jury. *See*, *e.g.*, *Sheridan v. Michels (In re Sheridan)*, 362 F.3d 96, 105 (1st Cir. 2004); *Demos v. Brown (In re Graves)*, 279 B.R. 266, 270 (B.A.P. 9th Cir. 2002). Although factual findings are necessary to ascertain whether a litigant knowingly and voluntarily consented, the ultimate determination of whether a party's conduct constituted implied consent is reserved for the Court. *See United States v. Underwood*, 597 F.3d 661, 665 (5th Cir. 2010) (citing *Roell v. Withrow*, 538 U.S. 585 (2003)). With this legal context in mind, the Court will determine whether, as a matter of law, this Court may enter a final order on the claims raised in this adversary proceeding.

In its Motion to Determine and supplemental briefing, the Defendant takes the position that this Court may not enter a final judgment or order with respect to the Plaintiff's claims in this adversary proceeding, citing the following bases: (1) the Plaintiff's claims require application of non-bankruptcy North Carolina state law and do not turn on bankruptcy law; (2) the Defendant has not consented, expressly or impliedly, to this Court's entry of a final order; and (3) the Defendant has

Seventh Amendment rights as to all of the Plaintiff's claims and has demanded a jury trial before the United States District Court for the Middle District of North Carolina. (Docket Nos. 18, 133).[41] The Defendant does not challenge this Court's subject matter jurisdiction, but merely its authority to enter a final order or judgment on the Plaintiff's underlying claims. (Docket No. 18).

In response, the Plaintiff first argues that this adversary proceeding "arises under" Title 11 and would have no practical existence but for the underlying bankruptcy case, thus making it a core proceeding under 28 U.S.C. § 157(b)(1). Although the Plaintiff acknowledges that the claims are rooted in state law, he argues that the facts surrounding the Defendant's breach of the Policy and "its efforts to disguise and protect itself from those breaches by abusing the bankruptcy process are inextricably intertwined." The adversary proceeding, the Plaintiff notes, "was brought, in part, as a way to address Allstate's abuse of the Bankruptcy Court and hold Defendant liable in order to benefit Debtor and his creditors." (Docket No. 123, pp. 12-13). Even if the proceeding is non-core, the Plaintiff argues that it is nevertheless "related to" a case arising under Title 11 and, further, that the Defendant has impliedly consented to this Court's entry of a final order. As evidence of implied consent, the Plaintiff points to the Defendant's participation at numerous hearings in the early stages of the underlying bankruptcy case, at which it raised no

[41] The Defendant argues in the Motion to Determine that resolution of the Plaintiff's claims would also be more expeditiously accomplished in the District Court. (Docket No. 18). The Court need not consider that position, however, as it was rendered moot by the District Court's Order Denying Motion for Withdrawal of Reference. By that Order, the District Court designated this Court to oversee all pretrial matters, finding that "these proceedings are also likely to be more efficiently resolved by the Bankruptcy Court, which is in the best position to frame and focus the issues should objections be filed or an appeal be necessary." (Docket No. 30, p. 4).

initial objections to this Court's jurisdiction, as well as the Defendant's facilitation of Caceres's bankruptcy filing because it "believed such jurisdiction would benefit Defendant by blocking the appointment of a receiver to bring bad faith claims against it." (Docket No. 19, p. 19). Finally, in addressing the Defendant's third rationale, the Plaintiff argues that the question of whether the Defendant consented to the Bankruptcy Court conducting a jury trial is irrelevant to the determination of whether the Bankruptcy Court can enter final orders or judgments. (Docket No. 123, pp. 8-9).

1. The Plaintiff's Claims are Non-Core Proceedings that are Related to the Bankruptcy Case under 28 U.S.C. § 157(c)

District courts have exclusive jurisdiction of all cases arising under Title 11, and original, but not exclusive, jurisdiction over all civil proceedings arising under Title 11 and arising in or related to cases under Title 11. 11 U.S.C. § 1334(a), -(b); *Stern v. Marshall*, 564 U.S. 462, 473 (2011). District courts may refer any or all such proceedings to the bankruptcy court, *see* 28 U.S.C. § 157(a), which our District Court has done through its local rules. *See* M.D.N.C. L.R. 83.11 ("Pursuant to 28 U.S.C. § 157(a), the Court hereby continues its reference to the Bankruptcy Judges for this District all cases under Title 11 and all proceedings arising under Title 11 or arising in or related to a case under Title 11.").

"The manner in which a bankruptcy judge may act on a referred matter depends on the type of proceeding involved." *Stern*, 564 U.S. at 473. Bankruptcy courts have statutory jurisdiction to adjudicate and enter final judgments in "core proceedings" under Title 11, which are those that "arise under" Title 11 or "arise in"

Title 11 cases. 28 U.S.C. § 157(b)(1); *Stern* 564 U.S. at 474-75. The Fourth Circuit Court of Appeals has described the general characteristics of core proceedings as follows:

> A claim arises under Title 11 if it is a cause of action created by the Bankruptcy Code, and which lacks existence outside the context of bankruptcy. In addition, a proceeding or claim "arising in" Title 11 is one that is not based on any right expressly created by Title 11, but nevertheless, would have no existence outside of the bankruptcy. Such claims would have no practical existence but for the bankruptcy.

MDC Innovations, LLC v. Hall, 726 F. App'x 168, 171 (4th Cir. 2018) (cleaned up). Section 157 also provides a non-exhaustive list of matters that constitute core proceedings. *See* § 157(b)(2)(A)-(P).

The bankruptcy court may also hear a referred matter that is not a core proceeding, but which is "related to" a case under the Bankruptcy Code. *Id.* § 157(c)(1). "The 'related to' category of cases is quite broad and should be broadly interpreted." *MDC*, 726 F. App'x at 171 (cleaned up); *see also In re CAH Acquisition Co. #1, LLC*, No. 19-00730-5, 2022 WL 4389301, at *7 (Bankr. E.D.N.C. Sept. 22, 2022) ("'Related to' jurisdiction is…expansive as it includes non-core claims such as state law claims existing as of the filing of the bankruptcy case[.]"). As employed by the Fourth Circuit, "the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *MDC*, 726 F. App'x at 171 (citing *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)).

Bankruptcy judges may hear and enter final orders and judgments in most core proceedings, which the district court reviews under traditional appellate

standards. *Stern*, 564 U.S. at 474-75. The Supreme Court has held that there are some claims designated as core proceedings under § 157(b) that the bankruptcy court does not have the constitutional authority to adjudicate. *See id.* at 487-90. In both non-core and so-called "*Stern* claim" proceedings, absent consent, the bankruptcy judge must submit proposed findings of fact and conclusions of law to the district court, which then reviews *de novo* any matter to which a party objects. 28 U.S.C. § 157(c); *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 679-81, 686 (2015).

With this guidance in mind, the Court finds the Plaintiff's causes of action to be non-core proceedings. The Plaintiff's claims for breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith failure to settle, unfair and deceptive trade practices, and negligence are based on state law, not on any right expressly created by the Bankruptcy Code and are not part of the claims-allowance process. Nor do they fit within one of the proceedings identified as core under 28 U.S.C. § 157(b)(2). These causes of action would exist outside of the bankruptcy and could be pursued in other venues. Moreover, the Plaintiff's causes of action are almost entirely rooted in the Defendant's prepetition conduct: although part of the Plaintiff's claims concern the Defendant's use of the bankruptcy system to avoid liability, the Defendant's conduct in encouraging Caceres to file, selecting and paying for a bankruptcy attorney, and hiding potential conflicts of interest largely occurred before the case was filed. *Cf. In re Griffin Servs., Inc.*, No. 01-52373, 2005 WL 1287920, at *4 (Bankr. M.D.N.C. Mar. 2, 2005) (finding claims

based upon post-petition conduct to be core as it directly impacted the estate and creditors).

Courts have also consistently found similar causes of action to be non-core. The Plaintiff's breach of contract action, "against a party to a prepetition contract who has filed no claim with the bankruptcy court, is non-core." *Harleysville Mut. Ins. Co. v. Hill (In re The Hammocks, LLC)*, No. 1:09CV377, 2010 WL 3783952, at *3 (W.D.N.C. Sept. 28, 2010) (citing *In re Orion Pictures Corp.*, 4 F.3d 1095, 1102 (2d Cir. 1993)); *see also In re Pisgah Contractors, Inc.*, 215 B.R. 679, 681 (W.D.N.C. 1995). The Plaintiff's negligence cause of action is similarly non-core. *See, e.g.*, *TP, Inc. v. Bank of Am., N.A. (In re TP, Inc.)*, 479 B.R. 373, 386 (Bankr. E.D.N.C. 2012) (treating state-law negligence claim that arose prior to the bankruptcy filing as non-core proceeding). The Plaintiff's claim that the Defendant acted in bad faith in refusing to settle or pay the claims against Caceres is a cause of action deemed by numerous courts to be non-core. *Harleysville*, 2010 WL 3783952, at *4 (collecting cases). Finally, courts have consistently found claims based on unfair or deceptive trade practice statutes to be non-core state law claims. *See, e.g.*, *In re Smith*, 866 F.2d 576, 579-80 (3d Cir. 1989) (unfair trade practice claim was merely "related to" bankruptcy proceeding"); *Walter v. Freeway Foods, Inc. (In re Freeway Foods of Greensboro, Inc.)*, 449 B.R. 860, 876 (Bankr. M.D.N.C. 2011); *Harleysville*, 2010 WL 3783952, at *4 (collecting cases).

Although the Plaintiff's claims are non-core, they are nevertheless "related to" Caceres's underlying bankruptcy case. The Court finds the outcome of this

adversary proceeding could conceivably affect the bankruptcy case; if successfully prosecuted, the recovery on the Plaintiff-Trustee's claims would greatly augment the bankruptcy estate. Therefore, the Court determines the Plaintiff's causes of action are non-core proceedings under 28 U.S.C. § 157(c) that are related to Caceres's underlying bankruptcy case. Unless the parties have consented to this Court's entry of a final order or judgment, the Court is limited to issuing proposed findings of fact and conclusions of law.

2. The Defendant Impliedly Consented to Bankruptcy Court Adjudication

There is no requirement, either in the U.S. Constitution or in § 157, that consent to final adjudication by a bankruptcy court be express. *Wellness*, 575 U.S. at 683-84. A litigant may impliedly consent to final adjudication by the bankruptcy court of both non-core matters and *Stern* claims so long as the consent is "knowing and voluntary." *Id.* at 685-86. Such implied consent may be through a party's "actions rather than [their] words." *Id.* at 684; *In re Tribune Media Co.*, 902 F.3d 384, 394 (3d Cir. 2018). Determining whether a defendant has consented to bankruptcy court adjudication, however, requires "a deeply factbound analysis of the procedural history" of a given proceeding. *Wellness*, 575 U.S. at 685. Here, the Defendant has objected to adjudication by this Court in its Answer and in its Motion for Withdrawal of Reference. (Docket No. 7, p. 16; Docket No. 9, ¶¶ 10-12). The Plaintiff, however, asserts that the Defendant impliedly consented to this Court's adjudication of the non-core claims in this proceeding in two respects.

First, the Plaintiff argues that the Defendant's participation in the underlying bankruptcy case, specifically its responses and opposition to the Plaintiff's Rule 2004 investigation into the potential bad faith cause of action, constitutes implied consent to this Court's entry of a final order or judgment. (Docket No. 123, pp. 18-19). Not every form of participation in a bankruptcy case, however, equates to implied consent to bankruptcy court adjudication. The Defendant, for instance, is not a creditor of the estate and did not file a formal or informal proof of claim in the underlying bankruptcy case; such an action would trigger the process of allowance and disallowance of claims and clearly subject the Defendant to this Court's equitable powers. *See Langenkamp v. Culp*, 498 U.S. 42, 44 (1990) (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 58-59 (1989)). Here, the Defendant intervened in the underlying bankruptcy case to assert its work product and privilege rights, and it was also the direct respondent to some of the Plaintiff's Rule 2004 requests. The Court cannot find that complying with these requests, the failure of which could subject the Defendant to sanctions, *see* Bankruptcy Rule 2004(c), is indicative of the Defendant's knowing and *voluntary* consent to this Court's adjudication of the Plaintiff's causes of action.

Similarly, in this adversary proceeding the Defendant has not filed a counterclaim or raised affirmative defenses that would amount to an independent claim against the bankruptcy estate and effectively function as consent. *See, e.g.*, *Crum v. Blixseth (In re Big Springs Realty LLC)*, 430 B.R. 629, 632-36 (Bankr. D. Mont. 2010); *Gecker v. Marathon Fin. Ins. Co. (In re Auto. Pros., Inc.)*, 389 B.R. 621,

629-30 (Bankr. N.D. Ill. 2008); *In re Pro. Facilities Mgmt. Inc.*, No. 14-31095-WRS, 2015 WL 6501231, at *6 (Bankr. M.D. Ala. Oct. 27, 2015). Given its objections, the Motion to Determine, and the District Court's directive that this Court should handle all pretrial matters, the Defendant's appearance and participation in this adversary proceeding alone do not amount to implied consent to this Court's issuance of a final order.

Second, the Plaintiff asserts that the Court should look to the Defendant's actions and motives in prompting Caceres *to file* for bankruptcy as evidence of consent. Specifically, the Plaintiff argues that

> The communications between Ivey, Rotenstreich, and Defendant indicate that Defendant specifically contemplated and welcomed the jurisdiction of the Bankruptcy Court when it believed such jurisdiction would benefit Defendant by blocking the appointment of a receiver to bring bad faith claims against it. It is only now that the Bankruptcy Court's jurisdiction may result in Defendant's liability that Defendant objects to such jurisdiction.

(Docket No. 123, p. 19). The Defendant challenges the relevance of its prepetition conduct to determining consent, asserting that the "Plaintiff's unfounded allegations about the initiation of the debtor's bankruptcy proceeding are likewise irrelevant to the question of consent. The actions of counsel for the debtor do not bind Allstate." (Docket No. 133, p. 4 n.2). The Defendant also asserts that the decision to file for bankruptcy was solely between Caceres and his attorneys. (Docket No. 127, pp. 18-20).

The Defendant's attempt to distance itself from the actions of Rotenstreich, DeBoard, and Ivey is undercut by the undisputed facts**.** In addition to counseling

the Defendant on when Caceres's claims against it would expire and when the Defendant could close the claim file, these attorneys regularly updated the Defendant on the ongoing status of James Cook's attempts to appoint a receiver, as well as available countermeasures. (Pl.'s SMF, ¶¶227, 230-38). The Defendant then facilitated Caceres's bankruptcy by paying the filing fees and Ivey's attorney fees despite no obligation to do so. (Pl.'s SMF, ¶ 249; Case No. 18-80776, Docket Nos. 13, 27).[42] The Defendant maintained regular contact with the attorneys after the bankruptcy filing, recording status updates in the Claims Log. (Ex. 2, pp 8-10). Moreover, during this time, the Defendant was not bound by its contractual duty to defend, but rather, as explained previously, was acting as an interloper.

Taken together, the Defendant's post-judgment conduct and that of its counsel, as well as the counsel it retained for Caceres, is indicative of the "knowing" and "voluntary" consent described in *Wellness*. *See Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, 674 (E.D. Va. 2022) (citing *Wellness*, 575 U.S. at 684-85; *Roell*, 538 U.S. at 586 n.3) (examining the defendant's actions to discern implied consent). The undisputed material facts show that the Defendant took steps to encourage and pay for Caceres's bankruptcy filing upon the advice of Rotenstreich,

[42] The Defendant's role in the filing of the bankruptcy was initially obfuscated by Ivey's failure to disclose on his Disclosure of Compensation that the Defendant had paid the bankruptcy filing fee and his attorneys' fees. Ivey indicated, "The source of the compensation paid to me was -- Other (specify): Third party insurance carrier." (Case No. 18-80776, Docket No. 13, p. 45). Only after the Trustee's questioning at the § 341 Meeting, and in consultation with Rotenstreich, did Ivey supplement his disclosure to specifically name the Defendant "upon information and belief" as the primary source of his compensation. (Pl.'s SMF, ¶¶ 242, 245-49). But it strains credulity that Ivey was in any way unsure or unaware of the Defendant's identity. The record shows Ivey's active participation with the Defendant's attorneys and claims adjusters in Caceres's case for well over a year before he filed the bankruptcy petition. Moreover, Ivey was CC'd on Barringer's letter, which directly stated that the Defendant would pay Ivey's fees. (Ex. 57).

DeBoard, and Ivey, who deliberately chose the bankruptcy forum for strategic reasons, viewing bankruptcy as the best means to thwart James Cook's efforts to appoint a receiver to pursue Caceres's bad faith claim against the Defendant. Ivey and DeBoard had indeed discussed the possibility of voluntary bankruptcy in May 2017, but no action was taken after that conversation. (Ex. 63). Instead, after the June 2017 hearing and subsequent denial of the motion to appoint receiver in the *Haarhuis v. Cheek* case in trial court, and Cook's withdrawal of his initial motion to appoint a receiver that same month, the attorneys retained to purportedly defend Caceres bided their time, updating the Defendant on the outcome of the receivership litigation and advising the Defendant on when the statute of limitations would expire on Caceres's potential bad faith claim. (Ex. 60; Pl.'s SMF, ¶¶ 227, 230-34). Despite Ivey's contention that it was "kind of a no-brainer" that bankruptcy was necessary and that a "receiver doesn't result in discharge of debt," Caceres's attorneys were content to wait over a year to file the bankruptcy petition, doing so only three days before the scheduled hearing on Cook's renewed motion to appoint receiver in October 2018. (Pl.'s SMF, ¶¶ 222, 237, 240).

This sudden[43] move towards bankruptcy occurred shortly after the North Carolina Court of Appeals reversed the trial court's denial of the receivership motion in the *Haarhuis* case in September 2018. The evidence shows that Rotenstreich was following developments in the *Haarhuis* case and contacted Ivey when the September 2018 decision was issued, with the intent of devising a

[43] Caceres filed what is commonly known as a "bare bones" bankruptcy petition, one lacking any schedules and other required documents.

strategy to "protect" Caceres from a receiver who would seek to litigate the claims against the Defendant. (Show Cause Hearing Tr., p. 44:12-22). The Defendant's insurance agents, attorneys, and Caceres's attorneys also discussed the *Haarhuis* case in a call on October 11, 2018. (Pl.'s SMF, ¶ 238). When it became clear that Cook's second attempt to appoint a receiver could be successful, Caceres's attorneys filed his chapter 7 petition—effectively ending the receivership proceedings due to the bankruptcy stay—with an expectation that a "bankruptcy judge [would] rule correctly more than a state court judge" on matters relating to the potential bad faith claim. (Pl.'s SMF, ¶ 241; Ex. 63).[44]

Examining the Defendant's entire course of conduct, its strategy is not hard to discern:

- Post-judgment, the Defendant continued to provide litigation counsel to Caceres despite having no contractual duty to defend after January 2017 and knowing it was Caceres's potential debtor.
- Additional counsel provided by the Defendant for Caceres specialized in bankruptcy and held the opinion that there was no merit to claims based on bad faith where an insurance company failed to accept an offer to settle under the policy limits.
- In May 2017, James Cook filed a motion to appoint a receiver in Chatham County state court.
- On June 27, 2017, Rotenstreich informed Rosado that the receivership motions in *Caceres* and *Haarhuis* were not granted, stating, "This was

[44] Caceres's attorneys were not only tracking receivership cases in North Carolina, they were also monitoring developments in similar cases pending before the bankruptcy court. For example, in April 2017, DeBoard forwarded an email she received from Stephanie Anderson, an attorney colleague practicing in Greensboro, discussing Stradley's recent filing of an involuntary bankruptcy petition against a judgment-debtor similar to Caceres. (Ex. 64). Stradley sought to bring the individual into bankruptcy so that bad faith failure to settle and related claims could be brought by a chapter 7 trustee against an insurer, State Farm, but the Court dismissed the case. *See In re Carter*, Case No. 16-50723. This was Stradley's second failed attempt at pushing an insured into an involuntary bankruptcy, and so Anderson remarked, "Stradley, by my count, is now 0-2 in bankruptcy court." (Ex. 64).

certainly a victory." (Ex. 60). Rotenstreich also wrote Ivey, copying Rosado, "Our strategy worked." (Ex. 61).

- After the Court of Appeals' reversal of the *Haarhuis* trial court's order on September 19, 2018, James Cook filed a new motion to appoint a receiver, which was scheduled for hearing on October 22, 2018.
- As held in *Haarhuis*, the Defendant would not have standing to oppose the motion to appoint a receiver, as it was not a party to the action and its interests were "entirely antagonistic" to Caceres.
- Because a bankruptcy filing would trigger the automatic stay and stop James Cook's effort to appoint a receiver, the Defendant and affiliated attorneys decided to push Caceres towards bankruptcy instead of remaining in state court. The Defendant believed "a state court judge may be more sympathetic to the plaintiff," i.e., a state court would look more favorably upon bad faith claims against the Defendant than a bankruptcy court. (Ex. 63).
- Ivey would also assert that any proceeds derived from any claim for breach of fiduciary duty, bad faith, unfair and deceptive trade practices, negligence, and malpractice would be entirely exempt as compensation for personal injury under N.C. Gen. Stat. § 1C-1601(a)(8), an expansive reading of North Carolina law and a position that could dampen a trustee's interest in pursuing the actions on behalf of the bankruptcy estate.
- Caceres would receive a discharge of his debts, reducing the chances Caceres would ever pursue the claims because he would no longer need sufficient assets to satisfy the massive Cook judgment.

The eventual outcome and apparent failure of that strategy, the Plaintiff's pursuit of the bad faith failure to settle cause of action and related claims, does not alter the fact that the Defendant knowingly and voluntarily chose the bankruptcy forum when it facilitated Caceres's bankruptcy filing.[45] The undisputed facts show that

[45] While the facts and procedural history of this case are unique, the Court draws parallels to instances where creditors initiated involuntary bankruptcy cases and then subsequently challenged bankruptcy court adjudication. For instance, in *In re Kelton Motors, Inc.*, 121 B.R. 166 (Bankr. D. Vt. 1990), the Vermont Bankruptcy Court considered whether it could adjudicate claims made by a chapter 7 trustee against a petitioning creditor. The trustee had alleged, in part, that the filing of an involuntary petition by the defendants was part of a conspiracy to drive the debtor out of business for the defendants' mutual benefit. *Id.* at 172. The court found that, even assuming the proceeding was non-core related, the defendants had waived any objection to jurisdiction by "fil[ing] the involuntary

Rotenstreich, DeBoard, and Ivey—attorneys who were retained and paid by the Defendant—deliberately chose this bankruptcy forum to hobble both Cook's specific attempt to appoint a receiver as well as broader efforts to pursue Caceres's bad faith and related claims.

The Court's finding comports with the "pragmatic virtues" of the implied consent standard described by the Supreme Court: "increasing judicial efficiency and checking gamesmanship." *Wellness*, 575 U.S. at 684-85; *see also Tribune Media*, 902 F.3d at 395. The Supreme Court has also expressed concern about litigants "sandbagging" courts by remaining silent about jurisdictional objections and belatedly raising the issue "only if the case does not conclude in his favor." *Stern*, 564 U.S. at 482. The Defendant's actions leading up to and following Caceres's bankruptcy filing are emblematic of the "gamesmanship" and "sandbagging" highlighted by the Supreme Court. The Defendant encouraged and paid for Caceres to file for bankruptcy believing at that time that a bankruptcy judge was more

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petition against [the debtor] and consent[ing] to the entry of an order for relief of a voluntary Chapter 11 petition by [the debtor]." *Id.* at 183. In a different case, but with comparable reasoning, the Bankruptcy Court for the Middle District of Florida enjoined several probate estates from pursuing supplementary collection proceedings outside of bankruptcy. *GTCR Golder Rauner, LLC v. Scharrer (In re Fundamental Long Term Care, Inc.)*, 501 B.R. 770, 784 (Bankr. M.D. Fla. 2013). The probate estates were petitioning creditors in the involuntary bankruptcy case, but later sought to recover hundreds of millions of dollars in assets they claimed through the supplementary proceedings. *Id.* at 773. Explaining why the probate estates' claims should be centralized in the bankruptcy court, the *GTCR* court emphasized that bankruptcy "is the forum the probate estates chose when filing this involuntary case." *Id.* at 784. These cases, while not perfect analogies, are nevertheless informative. Although they were not themselves the debtors, the actions taken by petitioning creditors to prompt bankruptcy were taken as indications of consent to bankruptcy court adjudication. Here, the Defendant is similarly not the debtor in the underlying bankruptcy case but, like those petitioning creditors, has taken overt acts that encouraged and enabled Caceres's bankruptcy filing. To echo the language of *Kelton*, and given the Defendant's role in Caceres's bankruptcy, the Court finds "it is too late in the proceeding for [the Defendant] to complain of the exercise of our subject matter jurisdiction or the entry of a final order." 121 B.R. at 183.

likely to rule in its favor. Only when the Plaintiff-Trustee filed the adversary proceeding did the Defendant change course and voice an objection. The Court cannot condone or encourage these types of "litigation hijinks" where "a party seeks affirmative relief in the bankruptcy court believing it might win and then cries foul over the court's entry of final judgment" when it could potentially lose. *True Traditions, LC v. Wu*, 552 B.R. 826, 837 (N.D. Cal. 2015).

3. The Defendant's Right to Trial by Jury

A final argument raised in the Motion to Determine is that the Defendant has jury trial rights on all the claims made in the Plaintiff's complaint, has demanded a jury trial, and has not expressly consented to a jury trial in the Bankruptcy Court. (Docket No. 18, pp. 3-4). The Plaintiff responds that the Defendant's demand for a jury trial is irrelevant to the determination of whether the Bankruptcy Court can enter final orders or judgments, but the Plaintiff has not expressed an opinion on whether all of his claims are triable by jury. (Docket No. 123, pp. 8-9).

The Court concurs with the Plaintiff's position; questions regarding a litigant's right to a jury trial, and who may conduct that trial, are separate from whether a court may enter a final order. *See, e.g.*, *In re Healthcentral.com*, 504 F.3d 775, 787 (9th Cir. 2007); *In re Ben Cooper Inc.*, 896 F.2d 1394, 1400-1402 (2d Cir. 1990); *McClelland v. Grubb & Ellis Consulting Servs. Co. (In re McClelland)*, 377 B.R. 446, 459 (Bankr. S.D.N.Y. 2007); *Farmers Bank & Capital Tr. Co. v. Travel Professionals Int'l (In re Travel Professionals Int'l)*, 213 B.R. 669, 671 (Bankr. E.D.

Ky. 1997). The Defendant's implied consent to bankruptcy court adjudication of the Plaintiff's non-core claims has no bearing on whether the Defendant has waived or retained his right to a jury trial. As described by one bankruptcy court, these touch upon "distinctly separate rights" held by a litigant. *In re Swift Air, LLC*, No. 2:12-BK-14362, 2019 WL 1266100, at *6 (Bankr. D. Ariz. Mar. 15, 2019). "A right to a jury trial is an apple. A right to Article III adjudication is an orange. Waiver of one does not waive the other." *Id.*

For the reasons stated, the Court finds that the Plaintiff's claims are non-core proceedings under 28 U.S.C. § 157(c) that are "related to" the Caceres bankruptcy case. While this Court would be typically limited to making proposed findings of fact and conclusions of law, the Court finds it has statutory and constitutional authority to enter a final order through the Defendant's implied consent. The Defendant, through its actions in facilitating Caceres's bankruptcy filing for the purpose of frustrating a receivership proceeding in state court, knowingly, and voluntarily availed itself of the bankruptcy court and has therefore waived any objection to this Court's adjudication of the Plaintiff's claims.

CONCLUSION

Based upon the findings and conclusions above, IT IS HEREBY ORDERED that the Defendant's motion to determine that the Bankruptcy Court may not enter a final judgment or order is DENIED.

IT IS FURTHER ORDERED that the Plaintiff's motion for partial summary judgment is DENIED.

IT IS FURTHER ORDERED that the Defendant's motion for summary judgment is GRANTED as to (1) the Plaintiff's unfair and deceptive trade practice claims under N.C. Gen. Stat. § 58-63-15(11)(a) for failing to timely inform Caceres of settlement demands and for misrepresenting available coverages under Caceres's insurance policy, (2) the Plaintiff's cause of action for negligence and gross negligence, and (3) the Plaintiff's cause of action for breach of the express provisions of the Policy.

IT IS FURTHER ORDERED that the balance of the Defendant's motion for summary judgment is DENIED.

The Plaintiff's remaining claims under N.C. Gen. Stat. §§ 58-63-15(11)(a), (b), (c), (f), (m) and 75-1.1 as well as the Plaintiff's claims for breach of the implied covenant of good faith and fair dealing and bad faith failure to settle may proceed to trial. Either party may file a motion to withdraw the reference to the United States District Court for the Middle District of North Carolina or, alternatively, the Defendant may waive its Seventh Amendment right and allow this Court to conduct a bench trial on the Plaintiff's remaining claims.

END OF DOCUMENT

PARTIES TO BE SERVED

James B. Angell, Trustee

vs.

Allstate Property and Casualty Insurance Company

Adversary 20-9007

William P. Miller, Bankruptcy Administrator
via cm/ecf

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via cm/ecf

Robert H. Jessup, Attorney for Chapter 7 Trustee
via cm/ecf

Thomas W. Curvin on behalf of Allstate Property and Casualty Insurance Company
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