IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

TIAA-CREF INDIVIDUAL & INSTITUTIONAL SERVICES, LLC; TIAA-CREF INVESTMENT MANAGEMENT, LLC; TEACHERS ADVISORS, INC.; TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA; and COLLEGE RETIREMENT EQUITIES FUND,	)	
Plaintiffs,	)	
v.	)	C.A. No. N14C-05-178 JRJ CCLD
ILLINOIS NATIONAL INSURANCE COMPANY; ST. PAUL MERCURY INSURANCE COMPANY; ACE AMERICAN INSURANCE COMPANY; ARCH INSURANCE COMPANY; ZURICH AMERICAN INSURANCE COMPANY; TWIN CITY FIRE INSURANCE COMPANY; AXIS REINSURANCE COMPANY; ST. PAUL FIRE & MARINE INSURANCE COMPANY; and U.S. SPECIALTY INSURANCE COMPANY,	)	
Defendants.	)	

OPINION

Date Submitted: September 16, 2016
Date Decided: October 20, 2016

Motion 1 (Issues 1 and 2):
Upon Plaintiffs' Motion for Partial Summary Judgment That: 1) the Underlying Lawsuits Trigger the 2007-08 Policy Period; and 2) Coverage is Not Precluded by a Commingling Exclusion:
GRANTED.

Motion 2 (Issues 3 and 4):
Upon Plaintiffs' Motion for Partial Summary Judgment that No Insurer May Avoid Coverage Based on Lack of Consent to Settlement or Limit Coverage by Challenging the Reasonableness of Plaintiffs' Out-of-Pocket Costs Actually Paid to Defend the Underlying Actions:
DENIED.

Motion 3 (Issues 5 and 6):
Upon Plaintiffs' Motion for Partial Summary Judgment Against All Defendants that Plaintiffs' Settlements of the Underlying Class Actions Constitute Loss Covered Under Plaintiffs' Insurance Policies, and Defendants' Agreement to Insure That Loss is Not Relieved by any Applicable Public Policy:
GRANTED.

Upon Defendant Illinois National Insurance Company's Motion for Summary Judgment:
GRANTED, in part, and DENIED, in part.

Upon Defendant Arch Insurance Company's Motion for Summary Judgment:
DENIED.

Upon Defendant Ace American Insurance Company's Motion for Summary Judgment and its Joinder in the Respective Motions for Summary Judgment of Defendants Illinois National Insurance Company and Zurich American Insurance Company:
GRANTED, in part, and DENIED, in part.

Upon Defendant Zurich American Insurance Company's Motion for Summary Judgment:
DENIED.

Upon Defendants St. Paul Mercury Insurance Company's and St. Paul Fire & Marine Insurance Company's Motion for Summary Judgment:
DENIED.

Jennifer C. Wasson, Esquire, Andrew H. Sauder, Esquire, Potter Anderson & Corroon LLP, Wilmington, DE, Robin L. Cohen, Esquire (*pro hac vice*), Adam S. Ziffer, Esquire (*pro hac vice*) (argued), Michelle R. Migdon, Esquire (*pro hac vice*) (argued), McKool Smith P.C., New York, NY, Attorneys for Plaintiffs.

Timothy S. Martin, White and Williams LLP, Wilmington, DE, Lawrence J. Bistany, Esquire (*pro hac vice*) (argued), Celestine M. Montague, Esquire (*pro hac vice*) (argued), White and Williams LLP, Philadelphia, PA, Attorneys for Defendant Illinois National Insurance Company.

Chase T. Brockstedt, Esquire, Baird Mandalas Brockstedt, LLC, Lewes, DE, Michael L. Zigelman, Esquire (*pro hac vice*) (argued), Daniel H. Brody, Esquire (*pro hac vice*) (argued), Kaufman Dolowich & Voluck, LLP, New York, NY, Attorneys for Defendant Arch Insurance Company.

James W. Semple, Esquire, Cooch & Taylor P.A., Wilmington, DE, Edward P. Gibbons, Esquire (*pro hac vice*), Tiffany S. Saltzman-Jones (*pro hac vice*), Walker Wilcox Matousek LLP, Chicago, IL, Attorneys for Defendant Ace American Insurance Company.

Josiah R. Wolcott, Esquire, Connolly Gallagher LLP, Newark, DE, Joseph Boury, Esquire (*pro hac vice*) (argued), Litchfield Cavo LLP, New York, NY, Attorneys for Defendants St. Paul Mercury Insurance Company and St. Paul Fire & Marine Insurance Company.

Bruce W. McCullough, Esquire, Bodell Bove, LLC, Wilmington, DE, Ronald P. Schiller, Esquire (*pro hac vice*) (argued), Daniel J. Layden, Esquire (*pro hac vice*) (argued), Hangley Aronchick Segal Pudlin & Schiller, Philadelphia, PA, Attorneys for Defendant Zurich American Insurance Company.

JURDEN, P.J.

INTRODUCTION

Before the Court are multiple motions for summary judgment filed by Plaintiffs, TIAA-CREF,[1] and Defendants, Plaintiff's professional liability insurers. This lawsuit stems from TIAA-CREF's involvement as a defendant in three underlying class action lawsuits, *Rink*,[2] *Bauer-Ramazani*,[3] and *Cummings*[4] (collectively, the "Underlying Actions"), each of which resulted in a settlement.[5] As part of the settlement agreements in the Underlying Actions, TIAA-CREF paid out sums of money directly to the class action plaintiffs. TIAA-CREF now seeks coverage from the Defendants for its costs of defending and settling the Underlying Actions.

TIAA-CREF asks the Court to rule as a matter of law that: (1) the Underlying Actions constitute insurable loss under its insurance policies with Defendants; (2) *Bauer-Ramazani* and *Cummings* relate back to *Rink* and the 2007–08 policy period; (3) the settlements in the Underlying Actions are reasonable and not against public policy; (4) TIAA-CREF did not commingle clients' funds with

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[1] Plaintiffs TIAA-CREF Individual & Institutional Services, LLC, TIAA-CREF Investment Management, LLC, Teachers Advisors, Inc., Teachers Insurance and Annuity Association of America, and College Retirement Equities Fund are a family of entities. For ease of reference, they will be collectively referred to in this opinion as "Plaintiff" or "TIAA-CREF."

[2] *Rink v. College Retirement Equities Fund*, No. 07- CI-10761 (Ky. Cir. Ct.) (Oct. 29, 2007) ("*Rink*").

[3] *Walker v. Teachers Ins. & Annuity Assoc. of Am. – College Retirement & Equities Fund, et al.*, No. 1:09- cv-00190 (D. Vt.) ("*Bauer-Ramazani*").

[4] *Cummings v. Teachers Ins. & Annuity Assoc. of Am. – College Retirement & Equities Fund, et al.*, No. 1:12-cv-93 (D. Vt.) ("*Cummings*").

[5] All of the Underlying Actions involved allegations that TIAA-CREF had not paid out investment gains to clients earned during a processing delay period.

its own; and (5) TIAA-CREF's defense costs in the Underlying Actions are reasonable.

Defendants are Illinois National Insurance Company ("Illinois National"), St. Paul Mercury Insurance Company ("St. Paul Mercury"), St. Paul Fire & Marine Insurance Company ("St. Paul Fire," and collectively with "St. Paul Mercury," "St. Paul"), Ace American Insurance Company ("Ace"), Arch Insurance Company ("Arch"), and Zurich Insurance Company ("Zurich"). All of the Defendants disclaim coverage for various reasons.

All Defendants allege TIAA-CREF's settlements constitute uninsurable disgorgement under their insurance policies with TIAA-CREF. Zurich alleges that TIAA-CREF commingled funds and that TIAA-CREF's defense costs were unreasonable. St. Paul and Arch allege that TIAA-CREF never asked for, nor received, their consent to settle, which they argue is a necessary precondition to enter into a settlement. Finally, St. Paul alleges that *Bauer-Ramazani* and *Cummings* do not relate back to *Rink* and the 2007–08 policy period.

For the reasons discussed below, TIAA-CREF's Motions 1 (Issues 1 and 2) and 3 (Issues 5 and 6) are **GRANTED**. TIAA-CREF's Motion 2 (Issues 3 and 4) is **DENIED**. Illinois National's Motion is **GRANTED** as to the relation back claim, and **DENIED** as to the remaining issues. Arch's Motion is **DENIED**. Ace's Motion is **GRANTED** as to the relation-back claim, and **DENIED** as to the

remaining issues. Zurich's Motion is **DENIED**. St. Paul's Motions are **DENIED**.[6]

BACKGROUND

A. TIAA-CREF

Plaintiff is comprised of a family of companies, including companion companies TIAA and CREF, and additional related entities.[7] TIAA-CREF provides retirement accounts, annuities, life and other insurance, and pension plan counseling to employees of non-profit colleges, universities, and other research institutions.[8]

TIAA is a non-profit organization.[9] TIAA offers, *inter alia,* traditional and variable annuities, including the TIAA Real Estate Account (the "REA").[10] TIAA provides investment advisory and management services to the REA on an at-cost basis.[11]

CREF is a New York non-profit membership corporation.[12] CREF operates on an at-cost basis and retains no earnings.[13] CREF's only assets are those held in

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[6] *See* Appendix A.
[7] TIAA-CREF operates under the trade name Teachers Insurance and Annuity Association of America – College Retirement Equities Fund ("TIAA-CREF"). Affidavit of Michelle R. Migdon in Support of Plaintiffs' Three Motions for Partial Summary Judgment Filed on May 20, 2016 ("Migdon Aff.") at ¶ 1 (Trans. ID. 59042258).
[8] *Id.* Ex. 22 at TIAA-CREF_0065301.
[9] *Id.* Ex. 22 at TIAA-CREF_0065300–01; *id.* Ex. 24 at ¶ 3.
[10] *Id.* Ex. 22 at TIAA-CREF_0065299–300; *Id.* Ex. 29 at TIAA-CREF_0064511.
[11] *Id.* Ex. 19.
[12] *Id.* Ex. 14.

eight investment accounts through which it offers variable annuities (collectively, the "CREF Accounts").[14]

At all relevant times, TIAA-CREF managed and distributed assets related to the REA and the CREF Accounts (together, the "At-Cost Accounts").[15] Those services were provided subject to certain agreements (the "At-Cost Agreements"), the terms of which obligated TIAA-CREF to provide these services to the At-Cost Account holders on an at-cost basis.[16]

Pursuant to the At-Cost Agreements, TIAA-CREF could charge the At-Cost Accounts only for the expenses actually incurred in providing services. As a result, TIAA-CREF cannot earn profit or incur loss.[17] The At-Cost Accounts are required under the At-Cost Agreements to reimburse TIAA-CREF for the cost of its services "through daily payments based on the expense deduction rate agreed upon from time to time by mutual agreement of [the respective signatories] reflecting estimates of the cost of such services with the objective of keeping the payments as close as possible to actual expenses."[18] On a quarterly basis, "the amount necessary to correct any differences between the payments and the expenses actually incurred [would] be determined" and that amount "paid or

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[13] *Id.* Ex. 20 at TIAA-CREF_0065294–95; *id.* Ex. 24 at ¶¶ 4–6.
[14] *See, e.g.*, *id.* Ex. 28 at TIAA-CREF_0064053.
[15] *Id.* Exs. 14–19.
[16] *Id.* Exs. 14–19.
[17] *Id.* Exs. 14–19; *see also id.* Ex. 77 at 19:19–25; *id.* Ex. 24 at ¶ 6; *id.* Ex. 76 at 25:1–26:4, 59:9–18.
[18] *Id.* Ex. 15 at TIAA-CREF_0065646; *see also id.* Exs. 14, 16–18.

credited [to the service provider], as the case may be, in equal daily installments over the remaining days in the quarter."[19]

At-Cost Account holders may request a transfer of all or part of their funds to another account or investment option, or request a direct payment of all or part of their funds via withdrawal. Value is calculated by determining the value of the units (or shares) for the account in question,[20] and then dividing that amount by the total number of outstanding units in that account.[21]

In a given transaction, this calculation is determined as of the "Good Order Date," which is either the day that all documents needed to process the request have been received in good order, or an agreed-upon future business day.[22] The value of the redeemed unit(s) as of the Good Order Date is the amount that the account holder ultimately receives at the time of payment.[23] As a result of daily market fluctuations, the value of the units on the date the transaction is actually processed and paid (the "Processing Date") may differ from the value on the Good

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[19] *Id.* Ex. 14 at TIAA-CREF_0104177; *see also id.* Ex. 28 at TIAA-CREF_0064055; *id.* Ex. 29 at TIAA-CREF_0064509, TIAA-CREF_0064512–16.

[20] Unit value = Fair value of the Account's net assets minus net expenses. *See generally* Plaintiffs' Opening Brief in Support of their Motion for Partial Summary Judgment Against All Defendants that Plaintiffs' Settlements of the Underlying Class Actions Constitute Loss Covered Under Plaintiffs' Insurance Policies, and Defendants' Agreement to Insure that Loss is Not Relieved by Any Applicable Public Policy at 9–10 ("TIAA-CREF Motion 3") (Trans. ID. 59042327).

[21] Migdon Aff. Ex. 77 at 17:19–18:2, 18:23–19:25; *id.* Ex. 24 at ¶¶ 9–10.

[22] *Id.* Ex. 28 at TIAA-CREF_0064096–97; *id.* Ex. 29 at TIAA-CREF_0064565–66.

[23] *Id.* Ex. 74 at 58:20–60:24, 69:11–70:6, 111:14–114:3; *id.* Ex. 76 at 61:20–62:24, 137:7–24.

Order Date.[24] Any difference—positive or negative—in the value of the units on the Processing Date and the amount paid to the account holder (the value as of the Good Order Date) is referred to as the "Transactional Fund Expense," or "TFE."[25] If the units increase in value between the Good Order Date and the Processing Date, there is a TFE gain, whereas any decrease in value results in a TFE loss.[26] All TFE gains and losses are recorded on TIAA's general ledger.[27]

TFE gains and losses are netted with other operational expenses and allocated based on relative net asset value to the At-Cost Accounts.[28] The TFE allocation is factored into the total expenses charged to each serviced At-Cost Account and investment option.[29] With respect to the At-Cost Accounts, any and all allocated TFE, including any TFE gains, are passed through to current participants as a component of those Accounts' total expenses.[30] TFE is, however, a relatively minor component of each investment option's overall expenses and is "de minimis" with respect to each investment option's net asset value.[31]

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[24] *Id.* Ex. 76 at 61:20–62:9; *id.* Ex. 24 at ¶ 11.
[25] *Id.* Ex. 77 at 12:21–13:9, 14:14–17; *id.* Ex. 74 at 165:1–166:14; *id.* Ex. 24 at ¶¶ 11–12.
[26] *Id.* Ex. 74 at 165:1–166:14; *id.* Ex. 24 at ¶¶ 11–12.
[27] *Id.* Ex. 76 at 63:10–64:1; *id.* Ex. 77 at 26:16–28:23; *id.* Ex. 78 at 84:1–85:23.
[28] *Id.* Ex. 77 at 20:2–22:6, 28:5–23; *id.* Ex. 76 at 43:20–44:10.
[29] *Id.* Ex. 76 at 63:10–66:8.
[30] *Id.* Ex. 74 at 62:14–64:11, 165:1–167:19; *id.* Ex. 24 at ¶ 13; *id.* Ex. 76 at 81:3–11. This fact appears to be undisputed by the parties. *See* September 16, 2016 Summary Judgment Oral Argument Transcript at 63:11–64:22, 70:20–71:20 ("Summ J. Oral Arg. Tr.") (Trans. ID. 59697172); *see also* TIAA-CREF Motion 3 at 4, 11.
[31] Migdon Aff. Ex. 74 at 167:21–22; *id.* Ex. 77 at 32:10–33:2; *id.* Ex. 24 at ¶ 14.

B. TIAA-CREF's Insurance Programs and Policies

In the 2007–08 and 2009–10 policy years, TIAA-CREF purchased professional liability insurance from Defendants. Illinois National issued both of the primary Professional Liability Polices (collectively, the "Primary Policies"). Each Primary Policy has liability limits of $15 million in excess of a $5 million deductible for the year of coverage. The remaining Defendants issued excess policies for each policy period:[32]

2007–08 Policies	Insurer	Limit of Liability
Primary	Illinois National	$15 million
First Excess	St. Paul Mercury	$15 million
Second Excess	ACE	$15 million
Third Excess	Arch	$5 million
Fourth Excess	Zurich	$15 million

[32] TIAA-CREF stayed or dismissed its claims against three insurers: Twin City Fire Insurance Company, Axis Reinsurance Company, and U.S. Specialty Insurance Company. The parties agreed that TIAA-CREF's losses were unlikely to trigger those Insurers' policies. *See* Stipulation and Order of Stay as to Axis Reinsurance Company and Twin City Fire Reinsurance Company (Trans. ID. 58465950); Stipulation and Order for Voluntary Dismissal without Prejudice as to U.S. Specialty Insurance Company (Trans. ID. 57178765).

2009–10 Policies	Insurer	Limit of Liability
Primary	Illinois National	$15 million
First Excess	ACE	$15 million
Second Excess	St. Paul Fire	$15 million
Third Excess	Arch	$5 million

All of the excess policies "follow form" to the Primary Policies, meaning that they adopt the terms of the Primary Policies as their own, except where the excess policies contain their own superseding or conflicting terms.[33]

C. Relevant Policy Language

Because all of the Defendants' policies follow form to the Illinois National Primary Policies, the Primary Policies define the major terms at issue. The Primary Policies provide:

> The Insurer shall pay the Loss of the Insured arising from a Claim first made against the Insured during the Policy Period . . . and reported in writing to the Insurer pursuant to the terms of this policy for any actual or alleged Wrongful Act of any Insured . . . .[34]

[33] Migdon Aff. Ex. 3 at MARSH 002670 (St. Paul Mercury's 2007–08 Insuring Agreement); *id.* Ex. 8 at MARSH 002937 (St. Paul Fire's 2009–10 Insuring Agreement); *id.* Ex. 4 at ACE 000862 (Ace's 2007–08 Insuring Agreement); *id.* Ex. 7 at TIAA-CREF_0000285 (Ace's 2009–10 Insuring Agreement); *id.* Ex. 5 at TIAA-CREF_0000343 (Arch's 2007–08 Insuring Agreement); *id.* Ex. 6 at ZUR000366 (Zurich's 2007–08 Insuring Agreement); *id.* Ex. 9 at TIAA-CREF_0000301 (Arch's 2009–10 Insuring Agreement).

[34] *Id.* Ex. 1 at MARSH 004818; *see also id.* Ex. 2. at IN0001716.

"Loss" is defined as "judgments and settlements and any Defense Costs," while expressly excluding "matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed[.]"[35] Under the Primary Policies, Illinois National agreed to "pay the Loss of the Insured . . . for any actual or alleged Wrongful Act of any Insured" in the rendering of, or failure to render, Professional Services.[36]

"Claim" is defined as: "(a) a written demand for monetary or non-monetary relief; (b) a civil or arbitration proceeding for monetary or non-monetary relief . . . ; or (c) an administrative or regulatory proceeding commenced by the filing of a notice of charges or investigative order or similar document."[37]

"Wrongful Act" is defined as "any breach of duty, neglect, error, misstatement, misleading statement, omission or other act committed, attempted or allegedly committed or attempted in the rendering or failing to render Professional Services."[38]

The Primary Policies provide that, under limited circumstances, Claims submitted after the policy period may be deemed as having been "first made" during the policy period. The Primary Policies state:

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[35] *Id.* Ex. 1 at MARSH 004819; *id.* Ex. 2 at End. 20 (IN0001766).
[36] *Id.* Ex. 1 at MARSH 004818; *id.* Ex. 2 at IN0001716.
[37] *Id.* Ex. 1 at MARSH 004818; *id.* Ex. 2 at IN0001716.
[38] *Id.* Ex. 1 at MARSH 004821; *id.* Ex. 2 at IN0001719.

> If written notice of a Claim has been given to the Insurer pursuant to Clause V.C(1) above, then a Claim which is subsequently made against an Insured and reported to the Insurer alleging, arising out of, based upon or attributable to the facts alleged in the Claim for which such notice has been given, or alleging any Wrongful Act which is the same as or related to any Wrongful Act alleged in the Claim of which such notice has been given, shall be considered related to the first Claim and made at the time such notice was given.[39]

The Primary Policies also contain a Commingling Exclusion, which provides that the Insurer shall not be liable to make any payment for Loss in connection with any Claim made against an Insured "arising out of, alleging, or any way involving, directly or indirectly, the commingling of funds or accounts."[40]

The Primary Policies also contain a Defense Participation Clause providing that the "Insurer shall have the right to effectively associate with the Insureds in the defense and settlement of any Claim."[41]

The Zurich Policy contains a slightly different Defense Participation clause providing that Zurich may "elect to participate in the investigation, settlement or defense of any claim against any of the 'Insured(s)' for matter [sic] covered by this Policy."[42]

The Primary Policies also contain a Consent to Settle Provision which states that "[t]he Insured shall not admit or assume any liability, settle any Claim or incur

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[39] *Id.* Ex. 1 at MARSH 004828; *id.* Ex. 2 at IN0001727.
[40] *Id.* Ex. 1 at MARSH 004827; *id.* Ex. 2 at IN0001726.
[41] *Id.* Ex. 1 at MARSH 004829; *id.* Ex. 2 at IN0001728.
[42] *Id.* Ex. 6 at ZUR000367.

any Defense Costs in connection with such Claim without the written consent of the Insurer, but such consent shall not be unreasonably withheld . . . ."[43]

Arch's Policies have their own Consent to Settle Provision, which is slightly narrower that in the Primary Policies. Arch's Policies state:

> With respect to any Claims(s) that, alone or combined ***might result*** in payment pursuant to the insurance coverage afforded under this Policy, no costs, charges or expenses for defense of any Claim shall be incurred, or settlements made, without [Arch's] consent, ***such consent not to be unreasonably withheld.***[44]

D. Underlying Actions

The instant case stems from the three Underlying Actions. In each Underlying Action, TIAA-CREF customers alleged that TIAA-CREF failed to pay them TFE gains that had accrued in their accounts between the Good Order Date and the Processing Date. In total, TIAA-CREF paid approximately [redacted] to defend and settle the Underlying Actions.[45]

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[43] *Id.* Ex. 1 at MARSH 004687; *id.* Ex. 2 at IN0001729.

[44] *Id.* Ex. 5 at TIAA-CREF_0000345 (emphasis added); *id.* Ex. 9 at TIAA-CREF_0000303 (emphasis added). St. Paul's policies do not contain any separate provision relating to the insurer's right to participate in the defense of underlying actions or to consent to settle, and thus incorporate the Primary Policies' terms set forth above. *See id.* Exs. 3, 8.

[45] Plaintiffs' Opening Brief that No Insurer May Avoid Coverage Based on Lack of Consent to Settlement or Limit Coverage by Challenging the Reasonableness of Plaintiffs' Out-of-Pocket Costs Actually Paid to Defend the Underlying Actions at 6 (Trans. ID. 59042258).

1. The *Rink* Action and Settlement

On October 29, 2007, during the 2007–08 policy period, CREF was sued in the *Rink* action.[46] The *Rink* plaintiffs alleged that CREF failed to: (1) process participants' transfer or withdrawal requests within the seven days required by the CREF accounts prospectuses; and (2) pay such participants any TFE gains between the Good Order Date and the Processing Date.[47] The *Rink* plaintiffs sought, among other relief, actual damages, in addition to attorneys' fees.[48]

TIAA-CREF notified its insurers of the *Rink* lawsuit on November 29, 2007.[49] On January 14, 2008, Illinois National responded, reserving all of its rights and defenses under the policy.[50] On January 29, 2008, Arch determined the case was unlikely to hit its limits and closed its file.[51] Arch stated that its closure was subject to reopening if the circumstances so warranted.[52] On February 27, 2008, St. Paul Mercury responded, but made no coverage determination.[53] Instead, St. Paul Mercury requested to remain informed.[54] On May 23, 2008, TIAA-CREF

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[46] *Rink* was originally filed on behalf of one plaintiff, Richard Rink, but was later certified as a class action suit in 2011. *See* Migdon Aff. Ex. 45 at IN0008769, IN0008775–81.
[47] *Id.* Ex. 37 at TIAA-CREF_0092915–47. The REA was not at issue in *Rink*. *Id.* Ex. 37 at TIAA-CREF_0092915–47.
[48] *Id.* Ex. 37 at TIAA-CREF_0092925.
[49] *Id.* Ex. 37 at TIAA-CREF_0092909.
[50] *Id.* Ex. 39 at IN0003275.
[51] *Id.* Ex. 40 at MARSH 004595; *see also id.* Ex. 83 at 54:24–55:10, 85:6–22.
[52] *Id.* Ex. 40 at MARSH 004595.
[53] *Id.* Ex. 41 at STP000808–09.
[54] *Id.* Ex. 41 at STP000809.

submitted Illinois National's coverage letter to the excess insurers.[55] On January 10, 2010, Zurich, like Arch, closed its file because it believed that the *Rink* case would not trigger its obligations.[56] Zurich also reserved its right to reopen and investigate the matter at a later time.[57] TIAA-CREF continued to update Defendants on the progress in the *Rink* action.[58]

In May 2012, CREF entered into a class action settlement agreement with the *Rink* class (the "*Rink* Settlement").[59] As to each class member who filed an approved claim, CREF agreed to pay an individual amount calculated according to a formula set forth in the *Rink* settlement.[60] On June 8, 2012, TIAA-CREF notified Defendants that it had executed a settlement agreement with the *Rink* class.[61] TIAA-CREF also provided Defendants with an estimate of its costs, as well as its reasons for entering into settlement.[62]

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[55] *Id.* Ex. 42 at STP000796.
[56] *Id.* Ex. 43 at ZUR000152–53. Zurich's obligations for the 2007–08 policy year were only triggered if TIAA-CREF had a loss of at least $55 million during that year.
[57] *Id.* Ex. 43 at ZUR00153.
[58] On June 25, 2010, TIAA-CREF forwarded a letter from Rink's counsel, demanding $450.0 million to settle his claim; TIAA-CREF denied the settlement. *Id.* Ex. 44 at TIAA-CREF_0093557–61. On February 11, 2011, TIAA-CREF informed Defendants that the *Rink* matter was now a class-action lawsuit. *Id.* Ex. 45 at IN0008769, IN0008775–81. On May 25, 2011, TIAA-CREF notified the Defendants that they had received a judicial order to mediate *Rink*. *Id.* Ex. 46 at ARCH3_000006–08. On June 6, 2011, TIAA-CREF notified Defendants that mediation was scheduled for June 13, 2011, and that the *Rink* class had not made any settlement demands other than its initial $450.0 million demand. *Id.* Ex. 47 at ACE 000850–53.
[59] *Id.* Ex. 10.
[60] *Id.* Ex. 10 at § III.A.
[61] *Id.* Ex. 48 at STP000052–53.
[62] *See id.* Ex. 48 at STP000115.

At that time, St. Paul did not inform TIAA-CREF that it believed the settlement was unreasonable.[63] Arch did not communicate with TIAA-CREF after receiving notice of the *Rink* Settlement.[64] And Zurich, according to the deposition of its claims handler, believed its consent was probably not needed because the settlement was not going to trigger Zurich's obligations; thus, at the time *Rink* settled, he considered the matter closed.[65]

The *Rink* Settlement provided that CREF expressly denied any allegations of wrongdoing in the pleadings, and did not admit or concede any fault, wrongdoing, or liability alleged in *Rink*.[66] The *Rink* Settlement Agreement contains a "DENIAL OF LIABILITY" section expressly providing:

> Defendant enters into this Agreement without in any way acknowledging any fault, liability, or wrongdoing of any kind. Defendant expressly denies that it has engaged in any misconduct, and agrees to settle to avoid the continued expense and distraction of litigation. Neither this Agreement, nor any of its terms or provisions, nor any of the negotiations or proceedings connected with it, will be construed as an admission or concession by Defendant of any of the allegations in the Action, or of any liability, fault, or wrongdoing of any kind on the part of Defendant.[67]

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[63] *Id.* Ex. 84 at 163:22–164:5.
[64] *Id.* Ex. 83 at 135:18–136:17, 144:2–13.
[65] *Id.* Ex. 85 at 155:3–156:15.
[66] *Id.* Ex. 10 at § I.J.
[67] *Id.* Ex. 10 at § XIV.

CREF ultimately paid over [redacted] to the *Rink* Settlement class members, and paid approximately $7.8 million in class counsel fees.[68]

2. The *Bauer-Ramazani* Action and Settlement

On August 17, 2009, during the 2009–10 policy period, a second class action suit was filed against TIAA-CREF. The *Bauer-Ramazani* plaintiffs alleged that TIAA-CREF failed to pay any TFE gains between the Good Order Date and the Processing Date to all participants who had requested transfers or withdrawals from their variable annuity accounts.[69] As in *Rink*, the plaintiffs in *Bauer-Ramazani* sought both compensatory damages and attorneys' fees and costs, among other relief.[70]

TIAA-CREF notified Defendants of the *Bauer-Ramazani* lawsuit on or about January 3, 2010.[71] On January 5, 2010, Arch reserved its rights to decide coverage at a later date; on February 2, 2010, St. Paul Fire reserved its rights; and on April 14, 2010, Illinois National reserved its rights.[72]

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[68] *Id.* Ex. 30 at Response No. 4.
[69] *Id.* Ex. 56 at ARCH3_000224–34. The *Bauer-Ramazani* complaint alleged various violations of the Employee Retirement Income Security Act of 1974 ("ERISA") and state law claims. *Id* Ex. 56.
[70] *Id.* Ex. 56.
[71] *Id.* Ex. 56 at ARCH3_000220–21.
[72] *Id.* Ex. 58 at ARCH3000135–36; *id.* Ex. 60 at MARSH005025–27; *id.* Ex. 61 at IN0002199–202.

TIAA-CREF continued to update Defendants regarding the progress of the lawsuit until it was ultimately settled.[73] On April 23, 2013, Illinois National denied coverage, as did Arch on June 9, 2013.[74] St. Paul never provided its position, and there is no evidence on the record indicating whether it denied or accepted coverage for *Bauer-Ramazani.*[75]

In May 2013, the court certified a class of participants whose transfer or withdrawal requests for their ERISA-governed variable annuity accounts had not been processed within seven days of the Good Order Date, and who had not been paid any alleged appreciation in value between the Good Order Date and Processing Date.[76] On May 31, 2013, TIAA-CREF notified Defendants that the Court ordered mediation for June 12, 2013, stating, "[a]s with any mediation we will need to decide on settlement authority for the purpose of negotiating."[77] However, no Defendant responded.[78]

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[73] On June 26, 2012, TIAA-CREF notified Defendants of a summary judgment action against a *Bauer-Ramazani* defendant and of a motion to intervene. *Id.* Ex. 62 at IN0007716–39. On October 22, 2012, TIAA-CREF informed Defendants that the motion to intervene was denied, and that the *Bauer-Ramazani* plaintiffs were seeking class certification. *Id.* Ex. 63 at IN0008150–53.

[74] *Id.* Ex. 65 at STPF00620–24; *id.* Ex. 66 at TIAA-CREF_0090703–05.

[75] St. Paul's claim handler, however, indicated at a deposition that it would likely have followed the Primary Policy's lead in determining coverage. *Id.* Ex. 84.

[76] *Id.* Ex. 64. On May 16, 2013, TIAA-CREF notified Defendants that the *Bauer-Ramazani* class had been certified. *Id.* Ex. 64 at IN0007976–95.

[77] *Id.* Ex. 65 at STPF00607–08.

[78] *See, e.g., id.* Ex. 8 at 67:7–13, 241:12–242:5.

In mid-December 2013, possibly due to escalating settlement discussions, TIAA-CREF requested that ACE and Illinois National waive their consent to defense clauses.[79] Both insurers agreed.[80]

On January 31, 2014, TIAA-CREF entered into a class action settlement agreement with the *Bauer-Ramazani* class (the "*Bauer-Ramazani* Settlement").[81] Under the *Bauer-Ramazani* Settlement, TIAA-CREF stated that it:

> Den[ies] the material allegations of *Bauer-Ramazani*; den[ies] any liability whatsoever; believes that they acted at all times reasonably, prudently, and loyally in compliance with ERISA; ha[s] asserted defenses and would assert certain other defenses if this Settlement is not consummated, believe[s it] ha[s] meritorious defenses to the claims alleged, and [is] entering into the Settlement solely to avoid the cost, disruption, and uncertainty of litigation.[82]

Similar to *Rink*, the *Bauer-Ramazani* Settlement also contains a section entitled "No Admission of Liability," which provides:

> The Settling Parties understand and agree that this Settlement Agreement embodies a compromise settlement of disputed claims, and that nothing in this Settlement Agreement, including the furnishing of consideration for this Settlement Agreement, shall be deemed to constitute any finding of wrongdoing by any of the Defendants, or give rise to any wrongdoing or admission of wrongdoing or liability in this or any other past or future proceedings. This Settlement Agreement

[79] *Id.* Ex. 68 at ACE000627–29.
[80] *Id.* Ex. 68.
[81] *Id.* Ex. 12.
[82] *Id.* Ex. 12 at TIAA-CREF_0078573.

> and the payments made hereunder are made in compromise of disputed claims and are not admissions of any liability of any kind, whether legal or factual. The Defendants expressly deny any liability or wrongdoing with respect to the matters alleged in the Action. Defendants believe and assert that they acted at all times reasonably, prudently, and loyally in compliance with ERISA and other laws.[83]

Pursuant to the *Bauer-Ramazani* Settlement, TIAA-CREF agreed to pay the *Bauer-Ramazani* class members $19.5 million on a *pro rata* basis and $3.3 million for class counsel fees and costs.[84] On February 25, 2014, TIAA-CREF forwarded its estimated total loss for *Bauer-Ramazani* to Defendants.[85]

3. The *Cummings* Action and Settlement

The third Underlying Action, *Cummings*, was filed on May 10, 2012. The *Cummings* plaintiffs alleged that TIAA-CREF delayed processing for fund withdrawal requests from certain At-Cost Accounts and failed to pay class members the fully-appreciated value/positive TFE between the Good Order Date and the Processing Date in their accounts.[86] TIAA-CREF notified the Defendants of the *Cummings* action on November 14, 2014.[87]

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[83] *Id.* Ex. 12 at Recitals ¶ 84
[84] *Id.* Ex. 12 at Recitals ¶¶ 4, 30, 61, 69.
[85] *Id.* Ex. 69 at ACE000636–37.
[86] Affidavit of Josiah R. Wolcott in Support of Defendants St. Paul Mercury Insurance Company and St. Paul Fire & Marine Insurance Company's Motion for Summary Judgment Seeking Dismissal of Plaintiffs' Complaint and First Amended Complaint Filed on May 20, 2016 ("Wolcott Aff.") Ex. X at TIAA-CREF_0126142–56 (Trans. ID. 59042344). Like *Bauer-Ramazani*, it involved allegations pertaining to ERISA and non-ERISA accounts. *Id.* Ex. X.
[87] *Id.* Ex. U at TIAA-CREF_0125714–31.

Cummings went to mediation in November 2015, after TIAA-CREF filed its Amended Complaint in this Court, and the parties "agreed in principle" to the mediator's settlement proposal.[88] Pursuant to the proposal, TIAA-CREF agreed to pay $2.9 million in settlements and incurred [redacted] in defense costs. TIAA-CREF notified Defendants of these amounts on December 2, 2015.[89]

PARTIES' CONTENTIONS

TIAA-CREF asks the Court to find as a matter of law that: (1) disgorgement is not an uninsurable loss under Delaware and New York law; (2) *Bauer-Ramazani* and *Cummings* relate back to *Rink* and the 2007–08 policy period; (3) the policies' commingling exclusion does not apply; and (4) the insurers lost their right to require consent or to challenge the reasonableness of defense costs in the Underlying Actions.

All Defendants allege that TIAA-CREF's settlements of the Underlying Actions constitute disgorgement of funds and that such payments are uninsurable loss under New York law. There are four additional arguments advanced by various insurers: (1) St. Paul argues that *Bauer-Ramazani* and *Cummings* do not relate back to *Rink* and the 2007–08 policy period;[90] (2) Zurich, Illinois National, and ACE allege that TIAA-CREF commingled clients' funds with its own;

[88] *Id.* Ex. Y.
[89] *Id.* Ex. Y.
[90] St. Paul stands alone on this argument. The other Insurers either take no position, or agree with TIAA-CREF and Illinois National that *Bauer-Ramazani* and *Rink* relate back to *Rink* and the 2007–08 policy period.

(3) Arch and St. Paul each argue TIAA-CREF failed to obtain their consent to settle the Underlying Claims, thereby obviating their duty to pay, and (4) Zurich argues that TIAA-CREF's defense costs for the Underlying Actions are unreasonable.

STANDARD OF REVIEW

Summary judgment should be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[91] The United States Supreme Court has defined the summary judgment standard as follows:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which the party will bear the burden of proof at trial.[92]

The moving party bears the initial burden of showing there are no genuine issues of material fact in dispute. This burden may be satisfied by demonstrating that no evidence exists to support the non-moving party's claim.[93] Once the moving party has met its evidentiary burden, the burden shifts to the non-moving

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[91] Super. Ct. Civ. R. 56(c).
[92] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991) (explaining that "[t]he *ratio decidendi* of *Celotex* is persuasive and directly applicable").
[93] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

party to proffer specific evidence showing that a genuine issue of material fact still exists.[94]

If there are no genuine issues of material fact, then the moving party is entitled to judgment as a matter of law.[95] If, however, material facts remain in dispute or the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record, then summary judgment will not be granted.[96]

DISCUSSION

A. Conflict of Laws

The policies at issue do not contain choice of law provisions, but all parties agree that either Delaware or New York law applies. At oral argument, the parties further agreed that the application of Delaware and New York law would result in the same outcome as to all of the issues in contention except for the issue of insurability of disgorgement; therefore, the parties agree there is a "false conflict" as to all but one of the issues.[97] Where there is a false conflict, "the Court should avoid a choice-of-law analysis altogether" and apply the law of the forum.[98] Because the forum is Delaware, Delaware law will apply to the extent there is a

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[94] *Id.*
[95] *Merrill v. Crothall-Am. Inc.*, 606 A.2d 96, 99–100 (Del. 1992) (internal citations omitted); *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).
[96] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).
[97] Summ J. Oral Arg. Tr. at 98:2–14 (regarding consent), 145:8–13 (regarding commingling), 181:20–182:3 (regarding defense costs).
[98] *Deuley v. DynCorp Intern., Inc.*, 8 A.3d 1156, 1161 (Del. 2010).

false conflict.[99] Furthermore, "absent any conflict, the Court may apply general principles that are consistent with the law of either jurisdiction."[100]

The parties disagree as to whether New York law and Delaware law conflict on the issue of insurability of disgorgement. Both parties agree that Delaware law is silent on this issue, but disagree as to the outcome under New York law. Defendants contend that New York law would render TIAA-CREF's loss in the Underlying Settlements uninsurable, whereas TIAA-CREF argues that New York law would not render its loss uninsurable under these facts.

The Court can find no case, and the parties have not identified one, in which a Delaware court has articulated Delaware public policy regarding the insurability of disgorgement. However, the parties agree that, in the event of a true conflict, New York law applies.[101] Because—as discussed below—the Court does not find that the settlement agreements in the Underlying Actions constitute uninsurable disgorgement under New York's public policy, it is unnecessary to determine whether Delaware law conflicts with New York law on this issue.

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[99] *See id*; *see also Lagrone v. Am. Mortell Corp.*, 2008 WL 4152677, at *5 (Del. Super. Sept. 4, 2008).

[100] *See Sun-Times Media Grp., Inc. v. Royal & Sunalliance Ins. Co. of Canada*, 2007 WL 1811265, at *9 (Del. Super. June 20, 2007) (citing *Eon Labs Mfg., Inc. v. Reliance Ins. Co.*, 756 A.2d 889, 892 (Del. 2000)).

[101] Summ. J. Oral Arg. Tr. At 14:6–13, 33:7–35:3, 45:11–13.

B. Disgorgement

The Primary Policies provide that "[t]he Insurer shall pay the Loss of the Insured arising from a Claim."[102] Loss is defined as "judgments and settlements and any Defense Costs," which does not include "matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed[.]"[103] The Defendants contend that the settlements paid by TIAA-CREF in the Underlying Actions constitute disgorgement, and that disgorgement is an uninsurable loss.[104]

Disgorgement is defined as "the act of giving up something (such as profits illegally obtained) on demand or by legal compulsion."[105] New York courts elaborate that the purpose of disgorgement is "to deprive a party of ill-gotten gains and to deter improper conduct."[106]

Defendants maintain that New York disfavors insuring disgorgement, and cite a number of cases in support of this argument. However, as discussed below, those cases are not on all fours with this case.

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[102] Migdon Aff. Ex. 1 at MARSH 004818.
[103] *Id.* Ex. 1 at MARSH 004819; *id.* Ex. 2 at IN0001766.
[104] Defendants, on the other hand, argue that "the underlying settlements **only** resolved claims for disgorgement." Defendant Illinois National Insurance Company's Reply Brief in Further Support of Its Motion for Summary Judgment at 12 (Trans. ID. 59318561). Defendants argue that because TIAA-CREF wrongfully withheld customers' appreciated gains after the Good Order Date, and because TIAA-CREF then retained those gains and used them to offset its own operational expenses and obligations to other customers, the settlement payment to those customers amounts to disgorgement. *Id.* at 12, 15.
[105] *Disgorgement*, *Black's Law Dictionary* (10th ed. 2014).
[106] *Vigilant Ins. Co. v. Credit Suisse First Boston Corp.*, 2003 WL 24009803, at *4 (N.Y. Sup. Ct. Jul. 8, 2003).

In *Vigilant Insurance Co. v. Credit Suisse First Boston Corp.*,[107] the Securities and Exchange Commission ("SEC") and NASD Regulation, Inc. ("NADSR") investigated allocations of IPO shares of Credit Suisse First Boston Corp. ("Credit Suisse").[108] The SEC commenced a civil action on January 22, 2012, and Credit Suisse entered into a consent judgment one week later.[109] The Final Judgment explicitly stated that Credit Suisse "shall pay $70.0 million, representing disgorgement of monies obtained improperly . . . ."[110]

Credit Suisse then sought coverage from its insurer, Vigilant Insurance Co. ("Vigilant"), which denied the claim.[111] Vigilant moved for summary judgment, arguing that its policy did not cover the $70 million loss.[112] The Court ruled in Vigilant's favor, holding, "Credit Suisse cannot recoup $70.0 million disgorgement because it would defeat the purpose of the disgorgement provision in the final judgment."[113] Further, the Court held, "The final judgment *specifically links* the disgorgement payment to the improper activity that the SEC complaint alleged. This is not merely a case in which a party settled an action without admitting liability."[114]

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[107] *Id.*
[108] *Id.* at *1.
[109] *Id.* at *2.
[110] *Id.*
[111] *Id.*
[112] *Id.* at *3.
[113] *Id.* at *3, *5.
[114] *Id.* at *4 (emphasis added).

Millennium Partners, L.P. v. Select Insurance Co. similarly involved the insurability of settlement-related costs resulting from an SEC order.[115] In that case, the SEC and the New York Attorney General's Office conducted an investigation into the trading practices of a hedge fund, Millennium Partnership ("Millennium"), and Millennium settled with both agencies. The SEC entered an "SEC Order" asserting that Millennium had wrongfully made millions of dollars in profit.[116] Further, the SEC Order concluded that Millennium's conduct violated the Securities Act and the Exchange Act.[117] Without admitting or denying the SEC findings, Millennium consented to the relief and agreed to pay $148.0 million.[118]

Millennium then sought coverage from its insurer, Select, for defense costs it incurred during the SEC investigation. When Select denied coverage, Millennium brought suit.[119] The Supreme Court held that Millennium's defense costs were uninsurable.[120] Like *Credit Suisse*, the *Millennium* Court found that the SEC Order established a conclusive link between disgorgement and the improperly acquired

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[115] 882 N.Y.S.2d 849 (N.Y. Sup. Ct. Mar. 9, 2009) (Slip Op.), *affirmed* 889 N.Y.S.2d 575 (N.Y. App. Div. 2009).
[116] *Id.* at 851–52. ("Millennium . . . generated tens of millions of dollars in profits through market timing trades of mutual fund shares, a practice which mutual funds generally discouraged . . . [and] 'devised and carried out a fraudulent scheme to avoid detection and circumvent restrictions . . . .'" (citing SEC Order § III[9])).
[117] *Id.*
[118] *Id.* at 852.
[119] *Id.* Millennium admitted it was not entitled to reimbursement of disgorgement payments. *Id.*
[120] *Id.* at 853.

funds.[121] Even though Millennium Partnership settled and did not admit to the SEC's findings, the Court found no other reasonable interpretation of, or rationale for, the settlement.[122]

Similarly, in *J.P. Morgan Securities Inc. v. Vigilant Insurance Co.*, an SEC investigation triggered a settlement.[123] In 2003, the SEC began investigating Bear Stearns for allegedly facilitating late trading and deceptive market timing.[124] Bear Stearns eventually settled with the SEC, and the SEC Order directed Bear Stearns to disgorge $160 million.[125] When Bear Stearns subsequently sought indemnity from its insurers, the insurers declined, citing New York's public policy against insuring disgorgement as a deterrence mechanism.[126]

In the litigation that followed, the New York Supreme Court denied the insurers' Motion to Dismiss. However, the appellate court reversed the Supreme Court's holding, stating:

> Here, too [like *Millennium Partners*], read as a whole, the offer of settlement, [and] the SEC Order . . . are not reasonably susceptible to an interpretation other than that Bear Stearns knowingly and intentionally facilitated illegal late trading for preferred customers, and that the

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[121] *Id.* at 854.
[122] *Id.*
[123] 936 N.Y.S.2d 102, 103 (N.Y. App. Div. 2011) ("*J.P. Morgan I*"), *reversed* 992 N.E.2d 1076 (N.Y. 2013) ("*J.P. Morgan II*").
[124] *Id.*
[125] *Id.* at 104.
[126] *Id.* at 105.

> relief provisions of the SEC Order required disgorgement of funds gained through that illegal activity.[127]

The facts here differ from those in *Credit Suisse*, *Millennium*, and *J.P. Morgan*. After lengthy litigation TIAA-CREF settled, expressly denying any liability.[128] Moreover, neither the SEC nor any other governmental entity was involved in the Underlying Actions. Defendants focus on *Credit Suisse's* language about "being ordered to return funds." But, the *Credit Suisse* court noted, an order to return funds is different than a settlement, and "[a] different outcome [in which disgorgement payments are deemed insurable] might result when parties settle under different circumstances."[129]

Credit Suisse, *Millennium*, and *J.P. Morgan* all involve conclusive links between the insured's misconduct and the payment of monies. Not so here. TIAA-CREF settled and expressly denied any liability. The Court finds no conclusive link between the settlements in the Underlying Actions and wrongdoing by TIAA-CREF that would render the settlement agreements uninsurable disgorgement.

TIAA-CREF's Motion for Summary Judgment that the settlements do not constitute uninsurable disgorgement under the insurance policies (Motion 3, Issue

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[127] *Id.* at 105–06. In *J.P. Morgan II*, the New York Court of Appeals did not disavow this language, or disagree that wrongfully-acquired profits are uninsurable; rather, the Court of Appeals found that profits that were not used for the wrongdoer's own benefit, which were arguably at issue in that case, might be insurable.

[128] *See* Migdon Aff. Ex. 10 at §§ I.J., XIV; *id.* Ex. 12 at Recitals ¶ 84.

[129] *See Credit Suisse*, 2003 WL 24009803, at *4.

5) is **GRANTED.** TIAA-CREF's Motion for Summary Judgment against Defendants that TIAA-CREF's loss is not relieved by a public policy against insuring disgorgement (Motion 3, Issue 6) is **GRANTED.** Defendants' Motions for Summary Judgment that the settlement payments constitute uninsurable loss are **DENIED.**

C. Relation Back

TIAA-CREF, Illinois National, and ACE argue that *Bauer-Ramazani* and *Cummings* relate back to 2007–08.[130] St. Paul is the only insurer to argue that *Bauer-Ramazani* and *Cummings* actions, both filed after the 2007–08 policy year, do not relate back to *Rink*, which was filed in the 2007–08 policy year.[131]

[130] Arch and Zurich's positions on the relation back issue are unclear from the record.

[131] Given TIAA-CREF's $5 million deductible, each defendant's layer of coverage, and the total settlement sums paid out for each Underlying Action, TIAA-CREF, Illinois National, and ACE will be liable for millions less if the claims do relate back:

Party	**Total Owed: Relation Back**	**Total Owed: No Relation Back**
TIAA-CREF	$5 million	$10 million
Illinois National	$15 million	$30 million
ACE	$15 million	$10.8 million
St. Paul	$15 million	$5.8 million
Arch	$5 million	Nothing
Zurich	$6.25 million	Nothing

Delaware and New York courts use a plain reading approach to examine unambiguous policy language.[132] The Notice/Claim Reporting Provision in the Primary Policies states:

> [A] Claim which is subsequently made against an Insured and reported to the Insurer **alleging, arising out of, based upon or attributable to the facts** alleged in the Claim for which such notice has been given, or alleging any Wrongful Act which is the **same as or related to** any Wrongful Act alleged in the Claim of which such notice has been given, shall be considered related to the first Claim and made at the time such notice was given.[133]

Given this language, whether a claim relates back to an initial claim turns on the similarity and relatedness of the facts between the initial case and each subsequent case. The greater the similarities and relatedness between cases, the more likely subsequent claims are to relate back to an initial claim.

In support of its argument that *Bauer-Ramazani* and *Cummings* do not relate back to 2007–08, St. Paul avers that the three Underlying Actions are dissimilar and unrelated because they involve different time frames, jurisdictions, entities, and laws (*e.g.*, non-ERISA vs. ERISA claims).

In this case, the plain language of Primary Policies is clear; if the subsequent claims allege, arise out of, and are based upon or attributable to the facts alleged in the initial claim, then the subsequent claims should relate back. Although TIAA-

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[132] *See Nomura Holding Am., Inc. v. Fed. Ins. Co.* 629 Fed. App'x. 38 (2d Cir. 2015) (prescribing a "plain reading" approach, and criticizing a "factual nexus" approach, to examine unambiguous policy language).

[133] Migdon Aff. Ex. 1 at MARSH 004828 (emphasis added); *id.* Ex. 2 at IN0001727 (emphasis added).

CREF was sued in different jurisdictions by different plaintiffs, and in cases encompassing both ERISA and non-ERISA claims, the allegations in the Underlying Actions arise out of, and are attributable to, the same type of conduct—TIAA-CREF's business practice that resulted in failure to pay customers their gains during delays in processing.[134]

Given the plain language in the Primary Policies and the allegations in each Underlying Action, there is no genuine issue of material fact in dispute. The Court finds that the claims in all of the Underlying Actions arise out of the same conduct on the part of TIAA-CREF. Thus, *Bauer-Ramazani* and *Cummings* relate back to *Rink* and the 2007–08 policy period.[135]

Consequently, TIAA-CREF's Motion for Summary Judgment that the Underlying Actions relate back to the 2007–08 policy period (Motion 1, Issue 1) is **GRANTED.** Illinois National's Motion for Summary Judgment as to relation back is **GRANTED.** St. Paul's Motion for Summary Judgment as to relation back is **DENIED.**

D. Commingling

Zurich, joined by Illinois National and Ace, contends that TIAA-CREF's claims are excluded by the policies' Commingling Exclusions, which state: "the

[134] *See id.* Ex. 37 at TIAA-CREF_0092915–47 (*Rink* complaint); *id.* Ex. 56 at ARCH3_000224–34 (*Bauer-Ramazani* complaint); Wolcott Aff. Ex. X at TIAA-CREF_0126142–56 (*Cummings* complaint).

[135] *See, e.g.*, Migdon Aff. Ex. 37 at TIAA-CREF_0092915–47; *id.* Ex. 56 at ARCH3_000224–34; Wolcott Aff. Ex. X at TIAA-CREF_0126142–56.

policy will not apply to any claim made against the insured arising out of, alleging, or any way involving, directly or indirectly, the commingling of funds or accounts."[136] The policies at issue do not define commingling. Commingling is defined in Black's Law Dictionary as "[a] mixing together; esp[ecially], a fiduciary's mixing of personal funds with those of a beneficiary or client."[137]

Zurich argues that TIAA-CREF commingled funds because: (1) TIAA-CREF took gains and losses from clients' accounts and either paid administrative expenses or allocated those funds to other accounts,[138] and (2) TIAA-CREF mixed its clients' funds with its own.[139]

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[136] Migdon Aff. Ex. 1 at MARSH 004827; *id.* Ex. 2 at IN0001726.

[137] *Commingling*, *Black's Law Dictionary* (10th ed. 2014). In *Matter of Schreibman*, 211 A.D.2d 836, 837 (1995), the New York Supreme Court – Appellate Division found that the respondent engaged in commingling where the respondent held his customer's down payment in his checking account while he, "on numerous occasions, deposited personal funds into the checking account."

[138] *See, e.g.*, Defendant Zurich American Insurance Company's Brief in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Its Cross Motion on the Application of the Commingling Exclusion at 17 (Trans. ID. 59193501).

[139] At oral argument, Zurich argued that once the clients' funds were pooled into a common account, those funds essentially became TIAA-CREF's own funds such that commingling occurred. *See* Summ. J. Oral Arg. Tr. at 156:9–21 ("Here when [clients] closed their account, that money went into a different account, a TIAA account with everyone else's earnings . . . . What the allegation is is that you took our money, you put it to your own use—and this is spelled out in those pleadings—you put it to your own use, and then you had to give it back to us."). The Court disagrees. There is no evidence to suggest that TIAA-CREF's clients' funds were ever simultaneously mixed with TIAA-CREF's funds. The record shows that clients' funds were pooled together in a common account, and that TIAA-CREF later allocated some of those funds to cover costs associated with servicing clients' funds and other administrative costs. *See, e.g.*, Migdon Aff. Ex. 74 at 62:14–64:11, 165:1–167:19; *id.* Ex. 24 at ¶ 13; *id.* Ex. 76 at 81:3–12. That allocation entailed separating those funds from the common account, thereby precluding any commingling from occurring. In addition, TIAA-CREF's clients were aware of this operating procedure, and had agreed to it in their At-Cost Account Agreements contracts with TIAA-CREF. *See id.* Exs. 14–19.

Zurich cites to a number of cases in support of its position, each of which is distinguishable from this case. For example, in *K. Bell & Associates v. Lloyd's Underwriters,* an insurance broker placed premiums received from an insured and reinsurers' payments to the insured into the same account.[140] K. Bell could not account for the insured's funds because it could not distinguish between the insured's funds and the reinsurers' premiums.[141] Consequently, the insured obtained a judgment against K. Bell.[142] K. Bell sought coverage from its insurer, which contended the underlying claim fell under the policy's commingling exclusion.[143] The exclusion stated there was no indemnity for claims "arising out of the commingling of monies or accounts, or loss of monies received by the insured or credited to the insured's account."[144] The Court held this exclusion precluded coverage for K. Bell because K. Bell was unable to discern its clients' funds from its own.[145]

In *Jiaxing Globallion Import & Export Co., Ltd. v. Argington, Inc.*, a case cited by both TIAA-CREF and Zurich that involves Missouri law, the Court found the defendants commingled funds where the defendants mixed the corporation's

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[140] 97 F.3d 632, 634 (2d Cir. 1996).
[141] *Id.*
[142] *Id.* at 636.
[143] *Id.* at 637.
[144] *Id.*
[145] *Id.* at 638.

funds with their own, and used those mixed funds to pay personal debts, make personal purchases, and take out cash advances.[146]

The conduct at issue in *K. Bell* and *Jiaxing* is clearly commingling: a mixing of personal and business funds, without a clear identity as to whose funds belonged where, and using the mixed funds for personal expenses. That is simply not the case here. First, TIAA-CREF's At-Cost Account Agreements state that any TFE will be allocated among other accounts.[147] Second, the TIAA-CREF clients could readily calculate the value of their gain.[148] And third, TIAA-CREF did not mix clients' funds with its own funds, the hallmark of commingling, and nor did it use those funds for its own private benefit.[149] TIAA-CREF did not make purchases, repay debts, or take out cash advances with the TFE gains.[150] The Court finds no genuine issues of material fact that preclude summary judgment on this issue. The undisputed facts establish that the Commingling Exclusion does not apply here.

TIAA-CREF's motion for Summary Judgment that coverage is not precluded by the Commingling Exclusion (Motion 1, Issue 2) is **GRANTED.** Zurich's Motion for Summary Judgment as to commingling is **DENIED.**

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[146] 2014 WL 1478864, at *3–4 (E.D.N.Y. Apr. 15, 2014).
[147] *See* Migdon Aff. Exs. 14–19.
[148] *See id.* Ex. 37 ¶ 10; *id.* Ex. 71 ¶ 21; *id.* Ex. 57 ¶ 22.
[149] Summ. J. Oral Arg. Tr. at 146:4–22, 149:16–21.
[150] *Cf. Jiaxing*, 2014 WL 1478864, at *3–4.

E. Consent to Settle Provisions

Arch and St. Paul argue that consent to a settlement is a condition precedent to coverage. As such, they contend TIAA-CREF was required to obtain their consent to settle the Underlying Actions in order to trigger Arch and St. Paul's coverage obligations, but failed to do so.[151]

TIAA-CREF argues that it kept Defendants informed of the developments and settlement discussions in the Underlying Actions, and that Defendants' behavior (or lack thereof) obviated TIAA-CREF's obligation to obtain Defendants' consent before entering into settlement agreements in the Underlying Actions.[152]

Arch admits it denied coverage for *Bauer-Ramazani*, but at the time it denied coverage, the parties were operating under a presumption that *Bauer-Ramazani* fell within the 2009–10 policy period.[153] Arch contends that its denial of coverage was therefore only relevant to its right to consent to settlement under 2009–10 policy. Now that TIAA-CREF, Illinois National, and ACE seek to relate back *Bauer-Ramazani* and *Cummings* to *Rink* and the 2007–08 policy period,[154] Arch maintains that its denial of coverage under the 2009–10 policy is not

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[151] *See, e.g.*, Summ. J. Oral Arg. Tr. at 121:4–8, 138:15–23.

[152] *See, e.g.*, *id.* at 90:9–11, 94:9–16, 98:22–99:20, 133:16–134:19.

[153] Additionally, the parties have not filed much, if any discovery, on reservation of rights, acceptances of coverage, or denials regarding *Cummings*. The Court cannot determine, regarding *Cummings*, whether any of the Insurers accepted or denied coverage.

[154] *See, e.g.*, Summ J. Oral Arg. Tr. at 76:3–9, 80:15–81:2; Defendant Ace American Insurance Company's Motion for Summary Judgment and its Joinder in Defendant Illinois National Insurance's Motion for Summary Judgment at 4 (Trans. ID. 59040944).

tantamount to a denial of coverage under the 2007–08 policy.[155] Thus, Arch argues, it did not waive its right to consent to settlement by denying coverage under its 2007–08 policy.

It is unclear from the record exactly when TIAA-CREF and Illinois National agreed they would seek relation back of *Bauer-Ramazani* and *Cummings* to *Rink* and the 2007–08 policy period, and when the other Defendants received notice of any such agreement.[156]

Whether Arch and St. Paul gave, or could have given, consent to settle (or whether they waived the consent to settle provision) depends on when and if they received notice that TIAA-CREF and Illinois National sought to relate *Bauer-Ramazani* and *Cummings* back to *Rink* and the 2007–08 policy period. These are genuine issues of material fact which must be determined by the finder of fact and are therefore inappropriate for disposition on summary judgment.

TIAA-CREF's Motion for Summary Judgment that defendants' may not avoid coverage based on lack of consent to settlement (Motion 2, Issue 3) is **DENIED.** Arch's Motion for Summary Judgment that its consent to settle was a

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[155] *See e.g.*, Summ J. Oral Arg. Tr. 126:11–21.

[156] At oral argument, Illinois National stated that the relation back issue was "discussed between them [TIAA-CREF and Illinois National] at meetings, but the actual decision as to—put in writing . . . was in January 2013 where it was first reserved, and then in May 2014 when Illinois National took a position on it." Summ J. Oral Arg. Tr. at 76:15–20. This information does not clarify when the other Defendants received notice of TIAA-CREF and Illinois National's agreement that *Bauer-Ramazani* and *Cummings* relate back to *Rink* and the 2007–08 policy period.

condition precedent to coverage is **DENIED.** St. Paul's Motion for Summary Judgment that its consent to settle was a condition precedent to coverage is **DENIED.**

F. Defense Costs

TIAA-CREF contends that because it paid all defense costs for the Underlying Actions out-of-pocket, those costs are *per se* reasonable. Consequently, it asks the Court to rule as a matter of law that the defense costs are reasonable.

In Delaware, the finder of fact employs a multi-factor test to determine the reasonableness of defense costs:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
> (3) The fees customarily charged in the locality for similar legal services.
> (4) The amount involved and the results obtained.
> (5) The time limitations imposed by the client or by the circumstances.
> (6) The nature and length of the professional relationship with the client.
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
> (8) Whether the fee is fixed or contingent.[157]

[157] Prof. Cond. R. 1.5. These are commonly referred to as "the *Cox* factors." *See Gen. Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973).

These factors are well-established in Delaware.[158] New York courts consider an almost identical set of factors when determining the reasonableness of defense costs.[159]

TIAA-CREF bases its argument on *Taco Bell Corp. v. Continental Casualty Co.*, in which the Seventh Circuit held: "Because of the resulting uncertainty about reimbursement, [the insured] had an incentive to minimize its legal expenses (for it might not be able to shift them); and where there are market incentives to economize, there is no occasion for a painstaking judicial review."[160] Accordingly, TIAA-CREF suggests that the Court should dispense with the multi-factor analysis entirely because its out-of-pocket payment of defense costs renders those costs *per se* reasonable.

The Court has not found, nor have the parties identified, any Delaware case that addresses *Taco Bell*, and only one New York has cited it—*Danaher Corp. v. Travelers Indemnity Co.*, a United States Magistrate's Report and

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[158] *See, e.g.*, *Nat'l Grange Mut. Ins. Co. v. Elegant Slumming, Inc.*, 59 A.3d 928, 933 (Del. 2013); *Cox*, 304 A.2d at 57; *Husband S. v. Wife S.*, 294 A.2d 89, 93 (Del. 1972).

[159] *See, e.g.*, *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany & Albany Cty. Bd. of Elections*, 522 F.3d 182, 190 n.3 (2d Cir. 2008) ("We think the better course . . . is for the district court, in exercising its considerable discretion, to bear in mind *all* of the case-specific variables that we and other courts have identified as relevant to the reasonableness of attorney's fees in setting a reasonable hourly rate. The reasonable hourly rate is the rate a paying client would be willing to pay. In determining what rate a paying client would be willing to pay, the district court should consider, among others, the *Johnson* factors; it should also bear in mind that a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively.") (citing *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974)); *Sandoval v. Materia Bros. Inc.*, 2013 WL 1767748, at *4 (S.D.N.Y. Mar. 5, 2013), *report and recommendation adopted*, 2013 WL 1759581 (S.D.N.Y. Apr. 24, 2013).

[160] 388 F.3d 1069, 1075–76 (7th Cir. 2004).

Recommendation later adopted in full by the United States District Court.[161] In discussing the various considerations courts should take into account when determining a "reasonable hourly rate," the Magistrate's Report mentions *Taco Bell* in passing, noting that defendants who pay out-of-pocket attorneys' fees have an incentive to minimize defense costs.[162]

TIAA-CREF argues that because the Federal Magistrate's Report in *Danaher* ultimately awarded all of the defense costs to the insured who had paid out-of-pocket, it followed the *Taco Bell* holding. This argument misses an important point. The Magistrate in *Danaher* first conducted a multi-factor analysis before awarding costs.[163] The Magistrate did not, as TIAA-CREF implies, rely solely on the *Taco Bell* rationale, but rather accepted the *Taco Bell* rationale as one of many factors to be considered when determining the reasonableness of defense costs—nothing more.[164]

Given that neither Delaware nor New York has relied on *Taco Bell* to dispense with the well-established multi-factor approach to determining

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[161] *Danaher Corp. v. Travelers Indem. Co.*, 2015 WL 409525, at *2 (S.D.N.Y. Jan. 16, 2015), *amended*, 2015 WL 417820 (S.D.N.Y. Jan. 29, 2015), *adopted*, 2015 WL 1647435 (S.D.N.Y. Apr. 14, 2015), and *report and recommendation adopted*, 2015 WL 1647435 (S.D.N.Y. Apr. 14, 2015).

[162] *Id.*

[163] *Id.*

[164] *See id.* at *2–3. TIAA-CREF also references a Louisiana case that cites *Taco Bell* in applying New York law, *Louisiana Generating LLC v. Illinois Union Ins. Co.*, 2014 WL 1270049 (M.D. La. Mar. 27, 2014). While the *Louisiana Generating* court did accept the *Taco Bell* rationale, the court nevertheless went through a multi-factor analysis before arriving at its ultimate conclusion. *See id.* at *8. *Louisiana Generating* is therefore not persuasive on the point that courts should completely forgo a multi-factor analysis based on the *Taco Bell* rationale.

reasonableness of defense costs, this Court will not do so. In particular, it will not do so because, if anything, recent Delaware case law has consistently applied the multi-factor analysis in determining the reasonableness of defense costs.[165]

While it is true that TIAA-CREF had an incentive to minimize its defense costs because it was paying them out-of-pocket, the finder of fact must consider the *Cox* factors. It cannot do so on the record before it.

Consequently, TIAA-CREF's Motion for Summary Judgment as to the reasonableness of its defense costs (Motion 2, Issue 4) is **DENIED.**

[165] For example, in *National Grange v. Elegant Slumming*, the Delaware Supreme Court affirmed the Superior Court's determination that the defense costs in that case were reasonable because "[t]he trial judge appropriately applied the factors enumerated by this Court in *General Motors Corp. v. Cox.*" *Nat'l Grange*, 59 A.3d at 933.

CONCLUSION

For the foregoing reasons, the Court finds that: (1) *Bauer-Ramazani* and *Cummings* relate back to *Rink* and the 2007–08 policy year; (2) TIAA-CREF's losses do not constitute uninsurable disgorgement; (3) coverage is not precluded by the Commingling Exclusion; (4) it is for the finder of fact to determine whether notice of relation back was given to St. Paul and Arch, such that their consent to settle was required in order to trigger their coverage obligations; and (5) it is for the finder of fact to determine whether TIAA-CREF's defense costs were reasonable.

Consequently, TIAA-CREF's Motions 1 (Issues 1 and 2) and 3 (Issues 5 and 6) are **GRANTED**. TIAA-CREF's Motion 2 (Issues 3 and 4) is **DENIED**. Illinois National's Motion is **GRANTED** as to the relation back claim, and **DENIED** as to the remaining issues. Arch's Motion is **DENIED**. Ace's Motion is **GRANTED** as to the relation back claim, and **DENIED** as to the remaining issues. Zurich's Motion is **DENIED**. St. Paul's Motions are **DENIED**.

IT IS SO ORDERED.

Jan R. Jurden, President Judge

APPENDIX A

	TIAA-CREF	Illinois Nat'l	St. Paul	ACE	Arch	Zurich
No Insurer May Avoid Coverage Based on Lack of Consent to Settlement	x					
No Insurer May Limit Coverage by Challenging the Reasonableness of Plaintiffs' Out-of-Pocket Costs Actually Paid to Defend the Underlying Actions	x					
The Underlying Lawsuits Trigger the 2007-08 Policy Period/All of the Underlying Class Actions are Considered Made During the Policy Period of the 2007-2008 Illinois National Policy	x	x		x	?	?
Coverage is Not Precluded by a Commingling Exclusion	x					
Plaintiffs' Settlements of the Underlying Class Actions Constitute Loss Covered Under Plaintiffs' Insurance Policies	x					
Against Defendants' Agreement to Insure that Loss is Not Relieved by Any Applicable Public Policy	x					
TIAA-CREF Cannot Prove Loss Under the Illinois National Policies		x	x	x	x	x
Plaintiffs Failed to Obtain or Seek Arch's Consent Prior to Settling the *Rink* Action, Thereby Precluding Coverage Under the 2007-08 Arch Policy					x	
Plaintiffs' Settlement of the *Cummings* Action Confirms There Cannot Be Sufficient Loss to Trigger the 2009-10 *Arch* policy					x	

	TIAA-CREF	Illinois Nat'l	St. Paul	ACE	Arch	Zurich
Plaintiffs Failed to Satisfy the Condition Precedent to Coverage that they Seek and Obtain St. Paul's Consent Prior to Settling with the Underlying Plaintiffs			x			
The Underlying *Rink*, *Bauer*, and *Cummings* actions are not Related Claims			x			
Cross Motion on the Application of the Commingling Exclusion		x	?	x	x	x