Docket #10493 Date Filed: 03/16/2018

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Case No. 12-12020-shl
RESIDENTIAL CAPITAL, LLC, et al.,	Chapter 11
Debtors.	Jointly Administered
	Adv. Case No. 15-01025-shl

ROWENA DRENNEN, FLORA GASKIN, ROGER TURNER, CHRISTIE TURNER, JOHN PICARD AND REBECCA PICARD, individually and as the representatives of the KESSLER SETTLEMENT CLASS,

STEVEN AND RUTH MITCHELL, individually and as the representatives of the MITCHELL SETTLEMENT CLASS,

And

RESCAP LIQUIDATING TRUST,

Plaintiffs,

vs.

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, *et al.*,

Defendants.

RESCAP LIQUIDATING TRUST'S NOTICE OF MOTION FOR SUMMARY JUDGMENT ON FEES-RELATED EXCLUSIONS

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PLEASE TAKE NOTICE that the Rescap Liquidating Trust ("Plaintiff"), by its attorneys, moves this Court, located at the United States Bankruptcy Courthouse, Southern District of New York, One Bowling Green, New York, NY 10004, for an Order pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure and Rule 56 of the Federal Rules of Civil Procedure, granting the Plaintiff's Motion for Summary Judgment on Fees-Related Exclusions. In support of this Motion, the Plaintiff attaches the accompanying Memorandum of Law in Support of Plaintiff's Motion for Summary Judgement on Fees-Related Exclusions, and jointly submit with Plaintiffs the Kessler Settlement Class and the Mitchell Settlement Class, and Defendants Certain Underwriting Members at Lloyd's of London, Twin City Fire Insurance Company, Continental Casualty Company, Clarendon National Insurance Company, Swiss Re International SE (f/k/a SR International Business Insurance Company Ltd.), Steadfast Insurance Company, St. Paul Mercury Insurance Company and North American Specialty Insurance Company, the Joint Concise Statement of Undisputed Material Facts and the exhibits attached thereto.

Dated: March 16, 2018

Respectfully submitted,

PERKINS COIE LLP

By: */s/ Selena Linde*

Selena J. Linde, Esq.
Vivek Chopra, Esq.
Alexis Danneman, Esq.
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone (202) 654-6200
Facsimile (202) 654-9952
SLinde@perkinscoie.com
VChopra@perksincoie.com
ADanneman@perkinscoie.com
Counsel for the ResCap Liquidating Trust

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2018, I caused a true and correct copy of the foregoing document to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

By: /s/ *Alexis Danneman*
Counsel for the ResCap Liquidating Trust

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RESCAP LIQUIDATING TRUST'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON FEES-RELATED EXCLUSIONS

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Introduction

For years, Residential Funding Company, LLC ("RFC") purchased and securitized second mortgages originated by Mortgage Capital Resource ("MCR"), a California-licensed real estate broker and RFC client. Unbeknownst to RFC, however, MCR and affiliated entities charged improper fees to their customers, the borrowers, in originating and closing the mortgage loans RFC later purchased. Specifically, the originating banks added improper closing fees to the principal amount of borrowers' loans, which were rolled into the principal of the loan and financed at closing. RFC had *no* involvement in originating and closing these loans or in charging the improper closing fees associated with these transactions, which were all paid in full at closing. Instead, RFC simply purchased loans after closing and after the borrowers fully paid all closing fees. Then, after RFC had purchased the loans, its subsidiary collected payments from the borrowers for the principal and interest owed. As a result of its purchase of these loans, and even though the Missouri trial and appellate courts held "as a matter of law" that RFC did not charge the improper fees, RFC was ultimately held liable for the improper fees borrowers paid to MCR in *Mitchell v. Residential Funding Company*, 334 S.W.3d 477, 487 (Mo. Ct. App. 2010) (the "*Mitchell* Action").

Now, as they have for more than a decade, Certain Underwriters at Lloyd's of London ("Lloyd's") seek to avoid their obligations to RFC to cover these liabilities under the insurance policy number 823/FD0001142 that the Lloyd's Syndicates issued to General Motors (the "Policy"). Lloyd's clings to a handful of exclusions in the Policy that reference "fees." It wrongfully claims that the improper "fees" charged and collected

by MCR and affiliated entities at loan closing, without the involvement of RFC, prevent the Residential Capital Liquidating Trust (the "Trust"), the successor to RFC, from obtaining the insurance coverage RFC expended millions of dollars in premiums to maintain over the years. But they do not.

Specifically, Lloyd's denies coverage for RFC's payment of the *Mitchell* compensatory damages judgment based on, among other things, Exclusion C.10 (the "Mortgage Fee Exclusion") and Exclusion C.9 (the "Return of Fees Exclusion") (collectively, the "Fees Exclusions"). Policy, III.C.9–10. But the Fees Exclusions preclude coverage *only* for claims arising out of fees "paid to" the insured. *See id.* at II.Y., III.C.10 ("paid to or by" the insured); *see also id.* at III.C.9 (fees "paid or payable by or to" the insured). Yet none of the improper fees paid in full by the *Mitchell* borrowers at loan closing were "paid to (or payable to)" RFC, the insured in this case. Lloyd's nonetheless relies on the fact that the improperly charged fees were paid through loan proceeds and therefore financed (*i.e.*, "rolled into the loan principal"), rather than paid by the borrowers out of pocket at closing, as the sole basis for arguing that the fees were "paid to" RFC.

Such an interpretation, and reliance on this *indirect* receipt of fees, however, ignores the plain language of these exclusions and requires an expansionary re-writing of exclusionary language that must be interpreted and applied narrowly. Faced with millions of dollars of liability, Lloyd's cannot now rewrite and expand these exclusions post-loss. Nor can they delete terms (*e.g.*, "paid to" the insured) that inconveniently limit the application of these exclusions. Unfortunately for Lloyd's, all of the applicable principles

of insurance law—*e.g.*, that courts give unambiguous language its plain and ordinary meaning, that exclusions are applied narrowly, and that the Policy is read as a whole to give all language meaning—foreclose this gambit. Lloyd's is bound by the terms of the policy they wrote and sold.

As a result, the entry of summary judgment in favor of the Trust is appropriate as to the interpretation and application of the Fees Exclusions to the insured losses RFC incurred in the *Mitchell* Action.

Factual Background

MCR's Loan Origination

Mortgage Capital Resources Corporation (again, "MCR") was a California-licensed real estate broker that made mortgage loans, including second mortgage or subordinate loans, to homeowner-borrowers. [Stipulated Statement of Facts ("SOF") ¶ 44][1] Specifically, MCR originated and closed each of the second mortgage or subordinate loans made to the borrowers that later became the plaintiffs in the *Mitchell* Action (collectively, the "*Mitchell* Class Loans"). [*Id.*]

At or before the time the *Mitchell* Class Loans were closed, the borrower-plaintiffs paid various fees (the "*Mitchell* Loan Fees") in full to different entities in exchange for services those entities provided in connection with the origination of their loans. [SOF ¶¶ 45, 46, 48] Such entities included MCR, governmental entities, and third-party service providers such as title and overnight delivery companies that provided services at or

[1] The SOF was agreed to by all parties prior to the filing of this Motion pursuant to Bankruptcy Rule 7056 and Local Rule 7056-1. Defendants have filed the SOF at Doc. 336.

before loan closing. [SOF ¶ 47] Neither RFC, nor any of its subsidiaries or affiliates performed any such services in exchange for the *Mitchell* Loan Fees. [SOF ¶ 53] Further, the HUD-1 Settlement Statements that MCR provided to each *Mitchell* Class Member confirm the amounts of the *Mitchell* Loan Fees and to whom the borrowers paid them. [SOF ¶¶ 46-50] The HUD-1 Settlement Statements do not identify RFC, or any of its subsidiaries or affiliates, as recipients of the *Mitchell* Loan Fees. [SOF ¶ 54] The *Mitchell* Loan Fees were due and were paid in full by the *Mitchell* Class Members to the entities listed on the HUD-1 Settlement Statements at or before the time each *Mitchell* Class Loan was closed. [SOF ¶ 51]

Ultimately, for each of the *Mitchell* Class Loans, the *Mitchell* Loan Fees were rolled into the principal of the loans and financed at closing. [SOF ¶ 52] Thus, the *Mitchell* Class Members paid the *Mitchell* Loan Fees in their entirety, to non RFC entities, through proceeds of the loans at the time MCR closed each *Mitchell* Class Loan. [*Id*.]

RFC's Purchase of the* Mitchell *Class Loans

As a general matter, RFC purchased mortgage and subordinated loans originated by financial institutions as part of its mortgage conduit business. [SOF ¶ 56] RFC then packaged these mortgages into pools and either sold the pooled loans directly as part of a whole loan sale or issued securities in the form of bonds, which were sold to investors. [*Id*.]

As relevant here, between 1998 and 2000, RFC purchased 257 second mortgage loans that MCR originated, 248 of which allegedly involved unlawful fees charged and

paid by borrowers at closing. [SOF ¶ 58] In making these purchases from MCR, RFC entered into a contractual relationship with it. Specifically, RFC and MCR entered into a "Seller Contract." [SOF ¶ 57] And RFC provided MCR, among other things, a "Client Guide," which contained guidelines for the loans that RFC would purchase. These documents confirmed, among other things, that in originating loans and selling them to RFC, MCR was acting as an "independent contractor," and not an agent of RFC; MCR was RFC's "client," *not* the borrowers. [*Id*.]

During the period of RFC and MCR's relationship, the loan purchase process worked as follows. After closing, MCR delivered a closed loan file to RFC for review and approval. RFC then reviewed the loan file before agreeing to purchase the loan. [SOF ¶ 59] During the RFC approval process for the closed loans, RFC worked with MCR to resolve discrepancies in the loan files. The loans that failed to satisfy the criteria set forth in the Client Guide were returned to MCR. Upon approval of the loan file, RFC funded the purchase of the loans by wiring or otherwise transferring funds to MCR; RFC's purchase of the *Mitchell* Class Loans occurred between 14 and 60 days after loan closing. [SOF ¶¶ 60-61] Upon purchase, RFC acquired all rights, title, and interest in the *Mitchell* Class Loans. Prior to that, neither RFC nor or any of its subsidiaries or affiliates had any contact or relationship with the *Mitchell* Class Members regarding the *Mitchell* Class Loans. [SOF ¶ 62]

After acquiring the *Mitchell* Class Loans, RFC sold them, pursuant to the terms of a sale agreement, to Residential Funding Mortgage Securities II, Inc. ("RFMS-II"), which was registered with the Securities and Exchange Commission ("SEC") to issue public

bonds and securities to investors. [SOF ¶ 63] In turn, RFMS-II sold the loans to a trust, into which the loans were deposited, where they were assigned to different classes or tranches based on their risk. The trust issued notes based on the loans it acquired from RFMS-II and sold these notes to investors. [SOF ¶ 64]

Notably, after RFC purchased the *Mitchell* Class Loans, Homecomings Financial, LLC ("Homecomings"), a subsidiary of RFC, collected and processed the loan payments for all of the loans RFC purchased from MCR. Homecomings transferred the principal and interest payments on the notes it collected from the *Mitchell* Class Members to a custodial account maintained by a trustee. The custodial account was then aggregated and remitted to the downstream trust on a monthly basis. [SOF ¶ 65]

The* Mitchell *Action

On July 29, 2003, the borrowers that took out the *Mitchell* Class Loans first filed suit against RFC and other defendants. They subsequently, and finally, amended their complaint on September 7, 2007. [SOF ¶ 66] In this suit, the borrower-plaintiffs sought "to certify a class" and "claim[ed] that MCR charged closing fees to Missouri consumers that were prohibited by Missouri's Second Mortgage Loan Act, §§ 408.231–242," ("MSMLA"). *Mitchell*, 334 S.W.3d at 485.

The MSMLA is "'a consumer-protection measure designed to regulate the business of making high interest second mortgage loans on residential real estate.'" *Id*. at 486 (quoting *Avila v. Cmty. Bank of Va.*, 143 S.W.3d 1, 4 (Mo. App. W.D. 2003)). Under the MSMLA, lenders can bypass limits on interest rates, provided they comply with the MSMLA's restrictions. *Id.* at 486-87. Specifically, the MSMLA "allows lenders to

charge interest rates on second mortgages that exceed Missouri's statutorily prescribed usury rate," but it provides specific "limits on closing costs and fees," which "act as a trade-off." *Id.* at 487 (citation omitted). Plaintiffs alleged that the fees they paid to MCR and various third parties in connection with the *Mitchell* Class Loans violated the statutory limitations on fees imposed by the MSMLA. [SOF Exhibit J at 21, 25]

As to RFC, plaintiffs alleged that it violated the MSMLA by "'directly or *indirectly* charg[ing], contract[ing] for, or receiv[ing] one or more' of the unlawful settlement charges or fees." *Id.* at 500 (emphasis added); [SOF Exhibit J at 26]. Plaintiffs also alleged that, RFC and others "were derivatively liable for MCR's violations of the MSMLA," both through the Home Ownership and Equity Protection Act ("HOEPA") and common law. *Mitchell,* 334 S.W.3d at 487.

RFC's Liability in the* Mitchell *Action

The *Mitchell* Action went to trial on December 5, 2007. [SOF ¶ 67] At the conclusion of the trial, RFC was held liable on two bases. First, the trial court granted a partial directed verdict in favor of the *Mitchell* Class Plaintiffs, holding that (1) MCR had violated the MSMLA by "charging, contracting for, or receiving" the *Mitchell* Loan Fees; and (2) that RFC was derivatively liable for MCR's violations of the MSMLA. [SOF ¶¶ 68-70] Second, the court submitted to the jury the question of whether RFC itself had violated the MSMLA. [SOF ¶ 71] The jury found that it had. [SOF ¶ 72] Ultimately, for both violations, the jury awarded the *Mitchell* Class Plaintiffs compensatory damages of $4,329,048 and punitive damages of $92,000,000 against RFC. [SOF ¶¶ 73-76]

RFC appealed the trial court's ruling. On November 23, 2010, the Missouri Court of Appeals affirmed the judgment as to compensatory damages, but reversed and remanded the punitive damages award for a retrial of the punitive damages claim. [SOF ¶ 78]; *see also Mitchell*, 334 S.W.3d at 500-01, 506. RFC ultimately paid Plaintiffs $15,648,868.12 to satisfy the compensatory damages judgment that was affirmed on appeal, in addition to the interest and related attorneys' fees awarded on appeal. [SOF ¶¶ 79-80] On, February 27, 2012, RFC and the *Mitchell* Class Plaintiffs reached an agreement to settle the remanded claim for punitive damages for a payment of $14.5 million. [SOF ¶ 81]

Then, on May 14, 2012, before RFC could finish paying the *Mitchell* Class Plaintiffs, RFC filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code. [SOF ¶ 82] Pursuant to the Plan approved by the bankruptcy court on December 11, 2015, the ResCap Liquidating Trust was established for the purpose of liquidating and distributing RFC's remaining assets to its unsecured creditors. The Plan assigned the Liquidating Trust RFC's right to insurance recovery for the unpaid costs, charges and expenses incurred by RFC in the defense of the *Mitchell* Action, approximately $6.1 million, as well as RFC's rights to payment for the $15.6 million it had paid to the *Mitchell* Class Plaintiffs to satisfy the compensatory damages judgment. [SOF ¶ 83]

It is the application of the Fees Exclusions to Lloyd's obligation to reimburse the Trust for RFC's payment of this $15.6 million compensatory damages judgment that is at issue in this Motion.[2]

The Insurance Claims

Prior to the *Mitchell* Action, Lloyd's had issued a comprehensive, combined insurance policy to General Motors Corporation, which ran from December 15, 2000 to December 15, 2003. [SOF ¶ 1; SOF Exhibit A at 13] At issue in this case is Insuring Clause I.D of the Policy, which provides coverage for "errors and omission liability," which provides liability for among other things, "[l]oss which the Assureds shall become legally obligated to pay by reason of any Claim . . . resulting directly from a Wrongful Act committed by a Professional Liability Assured." [Policy I.D.; SOF Exhibit A] Under the Policy, RFC was an "Assured" and a "Professional Liability Assured" as defined in the Policy, it was thus entitled to coverage under the Policy, and this insuring clause, where applicable. [SOF ¶ 3]

Despite RFC providing timely notice of the *Mitchell* Action to its insurers, Lloyd's has refused to provide coverage in connection with the *Mitchell* Action. [*See* Answer to Second Amended Adversary Complaint, Affirmative Defenses and Jury Demand of Underwriters at Lloyd's, London (Doc. 219) ("Lloyd's Answer (Doc. 219)") at 44] Among other things, both before and during the course of this lawsuit, Lloyd's has asserted that the Policy does not cover losses associated with the *Mitchell* Action due to various exclusions contained within the Policy. As relevant to this Motion, Lloyd's

[2] The *Mitchell* defense costs are not at issue here.

asserts that RFC's payment of the *Mitchell* compensatory damages judgment is excluded under Policy Exclusion C.10, the Mortgage Fee Exclusion, because the *Mitchell* Action is a "Mortgage Fee Claim." [*Id*. at 46, Affirmative Defense No. 4] Similarly, Lloyd's has asserted that since "[s]ome or all" of the *Mitchell* compensatory damages judgment "constitute the return of fees, premiums or commissions," no coverage is available for RFC's payment of the judgement due to exclusion C.9, the Return of Fees Exclusion, which excludes loss "in connection with any Claim . . . for premiums, return premiums, fees, commissions, costs, expenses or other charges paid or payable by or to the Assured." [Policy, III.C.9; SOF Exhibit A; Lloyd's Answer (Doc. 219) at 47-48, Affirmative Defense No. 6] We disagree.

As discussed below, the Policy provided coverage for the errors and omissions of the Assured, in this case, RFC. But, based on the plain language of the Policy, none of the disputed fees in this case, which were paid in full at closing, were "paid to" the Assured; Homecomings' post-closing and post-loan purchase collection of principal and interest does not trigger either narrowly drawn Fees Exclusion. Thus, neither exclusion applies.

I. LEGAL STANDARD AND APPLICABLE INSURANCE PRINCIPLES

A. Choice of Law

New York law governs the resolution of this Motion. In determining which state's law applies, this Court must look to the conflict-of-law principles of New York. *See In re Gaston & Snow*, 243 F.3d 599, 601–02 (2d Cir. 2001) ("[B]ankruptcy courts confronting state law claims that do not implicate federal policy concerns should apply the choice of law rules of the forum state."). Under New York law, the first step in a choice-of-law

analysis "is to determine whether there is an actual conflict between the laws of the jurisdictions involved." *In re Allstate Ins. Co. (Stolarz*), 81 N.Y.2d 219, 223, 613 N.E.2d 936, 937 (1993). With respect to the law at issue in this Motion, there is no conflict between the law of this forum, New York, and the law of Michigan—the other jurisdiction whose laws could potentially govern the interpretation of the Policy. Thus, no choice of law analysis is necessary. *See id.* The law of this forum, New York, applies. *See Excess Ins. Co. v. Factory Mut. Ins. Co.*, 2 A.D.3d 150, 151, 769 N.Y.S.2d 487, 489 (2003) ("If no conflict exists, then the court should apply the law of the forum state in which the action is being heard.").

B. Summary Judgment Standard

A court should grant summary judgment "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); *see also* Fed. R. Bankr. P. 7056. "In determining whether there are genuine disputes of material fact," courts "'resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought.'" *Estate of Gustafson ex rel. Reginella v. Target Corp.*, 819 F.3d 673, 675 (2d Cir. 2016) (quoting *Stern v. Trustees of Columbia Univ.*, 131 F.3d 305, 312 (2d Cir. 1997)). Summary judgment is only appropriate if "'the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.'" *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

C. Insurance Policy Interpretation Principles

When interpreting an insurance policy, the Court "should assign the plain and ordinary meaning to each term . . . ." *Alexander & Alexander Servs., Inc. v. These Certain Underwriters at Lloyds, London*, 136 F.3d 82, 86 (2d Cir. 1998); *see also Castle Oil Corp. v. Ace Am. Ins. Co.*, 137 A.D.3d 833, 836, 26 N.Y.S.3d 783, 786 (2016) (quoting *Universal Am. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 25 N.Y.3d 675, 680, 37 N.E.3d 78, 80 (2015)) ("Unambiguous provisions must be given their 'plain and ordinary meaning.'").

An insurance "contract should be 'read as a whole, and every part [should] be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.'" *Ins. Co. of N.Y. v. Cent. Mut. Ins. Co.*, 47 A.D.3d 469, 471, 850 N.Y.S.2d 56, 58 (2008) (quoting *Empire Props. Corp. v. Mfrs. Trust Co.*, 288 N.Y. 242, 248, 43 N.E.2d 25, 28 (1942)). In addition, in determining the meaning of a contract "a court should not read a contract so as to render any term, phrase, or provision meaningless or superfluous." *Givati v. Air Techniques, Inc.*, 104 A.D.3d 644, 645, 960 N.Y.S.2d 196, 198 (2013).

Notably, insuring provisions "should be broadly interpreted, with any doubts as to coverage resolved in favor of the insured." *Berman v. Gen. Accident Ins. Co. of Am.*, 671 N.Y.S.2d 619, 623 (Sup. Ct. 1998). Furthermore, special rules of interpretation apply to the interpretation of exclusions. "Exclusions to coverage must be strictly construed and read narrowly with any ambiguity construed against the insurer . . . ." *Lancer Indem. Co. v. JKH Realty Grp., LLC*, 127 A.D.3d 1032, 1034, 7 N.Y.S.3d 492, 494 (2015).

Similarly, "exceptions from policy coverage," such as carve-outs from covered loss, "must be specific and clear in order to be enforced" and are similarly "to be accorded a strict and narrow constructions." *Cragg v. Allstate Indem. Corp*, 17 N.Y.3d 118, 122, 950 N.E.2d 500, 502 (2011) (quoting *Pioneer Tower Owners Ass'n v. State Farm Fire & Cas. Co.*, 12 N.Y.3d 302, 307, 908 N.E.2d 875 (2009)).

Finally, when evaluating whether to apply an insurer's claim as to the meaning of language used, courts will consider whether the insurer could have used alternative or more precise policy language. *See, e.g., Entron, Inc. v. Affiliated FM Ins. Co.*, 749 F.2d 127, 130 (2d Cir. 1984) ("'[I]n evaluating the insurer's claim as to the meaning of the language under study, courts necessarily consider whether alternative or more precise language, if used, would have put the matter beyond reasonable question . . . [the insurer] could have either explicitly excluded [the damages at issue] from coverage . . . or employed language similar to that [of another section] of the same policy . . .' [the insurer's] failure to follow either route toward precise meaning undermines its claim that the contested language is clear and unambiguous." (internal citations omitted)); *U.S. Fid. and Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1159 (W.D. Mich. 1988) ("[T]he courts have no patience with attempts by a paid insurer to escape liability by taking advantage of an ambiguity, a hidden meaning, or a forced construction of the language in a policy, *when all question[s] might have been avoided by a more generous or plainer use of words*." (citation omitted)).

Argument

I. THE MORTGAGE FEE EXCLUSION DOES NOT APPLY

The Policy's exclusion for "Mortgage Fee Claims" does not exclude coverage for any loss in the *Mitchell* Action. Specifically, the Policy excludes "Loss" "in connection with any Claim" that "is a Mortgage Fee Claim." [Policy, III.C.10; SOF Exhibit A] A "Mortgage Fee Claim" is a claim "arising out of fees paid to or by a Professional Liability Assured in connection with" specified loan-related activities.[3] [Policy, II.Y.; SOF Exhibit A] In this case, however, the Plaintiffs' claims in the *Mitchell* Action are not Mortgage Fee Claims, and thus the Mortgage Fee Exclusion does not prevent coverage.

This is true for at least three reasons. First, based on the plain language of the Policy, none of the improper fees at issue were "paid to or by" RFC, a Professional Liability Assured under the Policy. [Policy, II.Y.; SOF Exhibit A] Second, Lloyd's cannot extend the Mortgage Fee Exclusion to apply to an "indirect" receipt of fees. Third, and finally, the only money "paid to" RFC (*i.e.*, collected by Homecomings) was "principal" and "interest," neither of which are "fees."[4]

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[3] Specifically, a "Mortgage Fee Claim" is:

> a [c]laim arising out of fees paid to or by a Professional Liability Assured in connection with loan origination, loan processing, loan closing, loan marketing or loan servicing, inclusive of any yield spread premium, overage, premium pricing, yield spread differential, par plus pricing, discharge fee, loan payoff charge or late payment fee.

[Policy, II.Y.; SOF Exhibit A]

[4] The Trust also joins the arguments of the Settlement Classes that the claims in this case are not "arising out of fees paid to or by a Professional Liability Assured."

A. Loan-Related Fees Were "Paid to" MCR and Others, Not to RFC.

Most critically, the "plain and ordinary meaning" of both (1) "*paid*" and (2) "*to*" makes it clear that none of the improper fees at issue in the *Mitchell* Action were "paid to" RFC, or any other Professional Liability Assured,[5] as they must have been for the Mortgage Fee Exclusion to apply.[6] *Alexander*, 136 F.3d at 86; [Policy, II.Y. (emphasis added); SOF Exhibit A].

Taking the second term first, "to" is commonly used "to indicate the receiver of an action." *See, e.g.*, *To*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/to (last visited Mar. 16, 2018); *see also Fed. Ins. Co. v. Am. Home Assur. Co.*, 639 F.3d 557, 567 (2d Cir. 2011) ("[I]t is common practice for the courts of [New York] State to refer to the dictionary to determine the plain and ordinary meaning of words to a contract." (alterations in original) (quoting *Mazzola v. Cty. of Suffolk*, 143 A.D.2d 734, 735, 533 N.Y.S.2d 297, 297 (1988))). In this case, MCR and other third parties were the receivers of fees, *not* RFC.

This is confirmed by the HUD-1 Settlement Statements that were issued to each borrower by MCR. [SOF ¶ 46] The type, amount, and "recipient" of each of the closing fees were identified on each Settlement Statement. [SOF ¶¶ 46–50] *None* of these Settlement Statements identified RFC as the recipient of any fees. [SOF ¶ 54] Rather the

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[5] "Professional Liability Assured" means: (1) General Motors Acceptance Corporation ("GMAC"); (2) any subsidiary of GMAC; (3) General Motors Asset Management Corporation ("GMAMC"); and (4) any subsidiary of GMAMC. It is undisputed that RFC is a Professional Liability Assured. [SOF ¶ 3]

[6] Since no fees were ever "paid by" RFC, the Mortgage Fee Exclusion only applies if Plaintiffs' claims arise out of fees "paid to" RFC, or another Professional Liability Assured. [Policy, II.Y. (emphasis added); SOF Exhibit A]

Settlement Statements reflect that *all* of these fees were paid in full by the borrowers to MCR and other entities at the time of closing. [SOF ¶¶ 47–51] This is evidenced by the class representatives' Settlement Statement, which reflects that, at closing, the following fees were paid to the following entities in the following amounts:

HUD-1A Line No.	Description:	Paid To:	Amount
801	Loan Origination Fee	MCR	$315.00
802	Loan Discount	MCR	$735.00
804	Credit Report	MCR	$50.00
808	Custodial Fee	Republic Bank	$35.00
809	Underwriting Fee	MCR	$525.00
810	Processing Fee	MCR	$525.00
811	Federal Express Fee	Federal express	$80.00
1103	Title Examination	Johnson & Payne PLC	$200.00
1105	Document Preparation	MCR	$420.00
1107	Attorney's Fees	Johnson & Payne, PLC	$450.00
1111	Flood Certification Fee	GE Capital Flood Serv.	$35.00
1112	Wire Transfer Fee	Johnson & Payne, PLC	$30.00
1201	Recording Fees	Johnson & Payne, PLC	$33.00

[SOF ¶ 50] As the Missouri Court of Appeals held in the appeal of the *Mitchell* judgment, the borrowers' Settlement Statements "evidence[] as a matter of law and show[] as a matter of law" that the improper fees were "paid to MCR" and other third parties, not to RFC. *Mitchell*, 334 S.W.3d at 499; [*see also* Policy, II.Y.; SOF Exhibit A; SOF ¶¶ 47, 53–54].

An examination of the plain meaning of the word "paid" also compels the conclusion that no fees were "paid to" RFC for the purposes of the Mortgage Fee Exclusion. "Pay" and "Paid" are defined as "to make due return for services rendered or property delivered" and "to give in return for goods or service." *Pay*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/pay (last visited Mar.

16, 2018). So, where money or fees are "paid to" a party, it ordinarily is done so in return for goods or services. *Id.*

Here, the "fees" were "paid to" MCR and other third parties in return for the services they provided. [SOF ¶¶ 47–48] For instance, as part of the closing process for the loans at issue in the *Mitchell* Action, credit report fees were paid to a third party to obtain borrowers' credit reports that were used to assess their creditworthiness. [SOF ¶¶ 49-50] Similarly, a "Federal Express" fee was assessed and paid to Federal Express for overnight shipping charges related to the transmittals to and from the borrowers, and attorney's fees were paid to law firms for title examination services. [*Id.*]

RFC, on the other hand, did not render any services to the underlying plaintiff borrowers at the time the loans were closed. [SOF ¶ 53] Again, RFC purchased the loans at issue in the *Mitchell* Action from MCR 14 to 60 days *after* the loans had closed, *after* the borrowers paid all fees, and *after* all services provided in exchange for those fees had been rendered. [SOF ¶¶ 45, 61] Prior to RFC's purchase of the loans, RFC did not have any contact or relationship with the *Mitchell* Class Members and it certainly did not provide any services to the borrowers. [SOF ¶ 62] Consequently, and logically, RFC was never given anything by the borrowers in return for these non-existent services. Hence, it makes sense that the improper fees were not "paid to" RFC in return for services. *See Pay*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/pay (last visited Mar. 16, 2018).

Accordingly, as the plain language of the Mortgage Fee Exclusion makes clear, the fees that formed the basis of the *Mitchell* Action were not "paid to" RFC. Since the

Mortgage Fee Exclusion can only apply if the improper fees were "paid to" RFC, Lloyd's reliance on this exclusion to deny coverage is misplaced.

B. The Mortgage Fee Exclusion Does Not Apply to an "Indirect" Receipt of Fees.

Lloyd's has nonetheless argued that the Mortgage Fee Exclusion applies because RFC *indirectly* received the improper closing fees because the fees were paid at closing through loan proceeds and therefore financed (*i.e.*, "rolled into the loan principal") and months later RFC's subsidiary Homecoming collected principal and interest payments. [*See* SOF ¶ 65]

RFC acknowledges that the Missouri Court of Appeals held that RFC *indirectly* received improper fees in the *Mitchell* Action. Specifically, the court concluded that there was enough evidence to hold RFC liable for its *indirect* receipt of improper fees related to mortgage loans under the provision of the MSMLA that prohibits certain fees from being "directly or *indirectly* charged, contracted for or received in connection with any . . . mortgage loan." *Mitchell*, 334 S.W.3d at 494-95 (emphasis added) (quoting Mo. Stat. § 408.233.1); [*see also* SOF ¶¶ 71-75]. In so holding, the court concluded that RFC "indirectly . . . received" improper fees because these fees were "rolled into the loan principal on which [RFC] charged interest." *Mitchell*, 334 S.W.3d at 502. The court concluded that this was enough to hold RFC liable under the MSMLA, which sweepingly "reaches even those entities that *never* received the fees or interest, *never* charged for them, or never contracted for them." *Id.* at 501 (emphasis added).

But while RFC's indirect receipt of fees may have subjected it to liability under the expansive reach of the MSMLA, such an indirect receipt of fees is *not* enough to trigger the application of the Mortgage Fee Exclusion, which unlike the MSMLA, does not exclude the "indirect" receipt of fees. A contrary reading would contravene the "plain language" of the Mortgage Fee Exclusion. Such a reading would also be inconsistent with a reading of the Policy "as a whole," because unlike the Mortgage Fee Exclusion, Lloyd's included numerous other exclusions which expressly exclude indirect conduct. *See Ins. Co. of N.Y.*, 47 A.D.3d at 471, 850 N.Y.S.2d at 58 (quoting *Empire Props.*, 288 N.Y. at 248, 43 N.E.2d at 28).

1. The Plain Language of "Paid to" Must Mean "Paid to" the Original Payee at the Time of Closing.

First, the plain language of the Policy makes clear that an indirect receipt of fees does not trigger the Mortgage Fee Exclusion, which is limited only to claims arising from fees "paid to" an insured. [Policy, II.Y.; SOF Exhibit A] Again, when interpreting an insurance policy, courts "should assign the plain and ordinary meaning to each term . . . ." *Alexander*, 136 F.3d at 86. As discussed above, the plain language of "paid to" refers to money paid directly to an insured. It does not refer to "monies," or even "fees," that an insured somehow indirectly received months later, as Lloyd's now stretches to argue.

Indeed, Lloyd's desired expansive reading of "paid to" has been rejected by courts assessing similar exclusions. In fact, courts have expressly held that the term "paid to" an insured refers to whom the fees were *originally* paid. Illustratively, the court in *PNC*

Financial Services Group, Inc. v. Houston Casualty, Co. analyzed the meaning of an exclusion for "fees, commissions or charges for Professional Services paid or payable to an Insured." No. CV 13-331, 2014 WL 12602876, at *2 (W.D. Pa. July 28, 2014), *aff'd in relevant part*, 647 F. App'x 112 (3d Cir. 2016). Significantly, the court held that the term "paid or payable to an Insured . . . clarif[ied] to whom the fees . . . were *originally* paid," particularly since "there could be . . . situations in which the fees . . . were originally paid to someone other than the Insured." *Id.* at *3. In these circumstances, the court concluded, the fee exclusion "would *not* preclude coverage" because these fees were not "paid to" an insured in the first instance. *Id.* (emphasis added).

Additionally, that the fees in this case were not "paid to" RFC, is also supported by the decisions of several courts, which have held that fees charged to borrowers and paid to the loan originator and other service providers at the loan closing are considered "paid" on the date the loan closed. *See Faircloth v. Fin. Asset Sec. Corp. Mego Mortg. Homeowner Loan Trust*, 87 F. App'x 314, 319 (4th Cir. 2004) ("[T]he fees were 'paid,' albeit with loan proceeds, at the date of closing"); *Miller v. Pac. Shore Funding*, 92 F. App'x 933, 937 (4th Cir. 2004) ("[Plaintiff]'s claims accrued when he signed the closing documents and paid the disputed fees, even though that payment was through the expedient of a promissory note"); *Shepard v. Ocwen Fed. Bank*, FSB, 172 N.C. App. 475, 481, 617 S.E.2d 61, 65 (2005), *aff'd*, 361 N.C. 137, 638 S.E.2d 197 (2006) ("Although [Class] [P]laintiffs make periodic payments toward the loan, the fee was paid on the date of closing out of the loan proceeds.").

Second, to interpret the term "fees paid to" an insured to encompass subsequent indirect transfers of such fees would not just ignore the exclusion's plain meaning, but it would also fail to "giv[e] effect and meaning" to the term "paid to." *Hartford Ins. Co. of Midwest v. Halt*, 223 A.D.2d 204, 212, 646 N.Y.S.2d 589, 594 (1996) (discussing plain meaning). Specifically, if "paid to" also means "paid to indirectly" or "transferred to subsequently" there would have been no reason for Lloyd's to have specifically selected the words "paid to."[7]

The decision of the Missouri Court of Appeals in *Mitchell* is in accord. There, the court confirmed that monies originally paid to MCR could not, to avoid liability, be transformed into amounts "paid to" other parties based on subsequent transfers. *See Mitchell*, 334 S.W.3d at 495, 498. It did so in rejecting RFC's argument that the fees listed on the Settlement Statements as "paid to MCR" were authorized under the MSMLA because they were subsequently "advanced" to third parties and thus fell within the MSMLA's exception for "bona fide closing costs paid to third parties." *Id.* (quoting Mo. Stat. § 408.233).

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[7] Specifically, were the Mortgage Fee Exclusion to mean what Lloyd's says it does, the exclusion would have to be re-written, in relevant part, with the following additions:

> Underwriters shall not be liable for Loss under Insuring Clause I.D. in connection with any Claim that is a claim arising out of fees paid [**directly or indirectly**] to or by a Professional Liability Assured in connection with loan origination, loan processing, loan closing, loan marketing or loan servicing, inclusive of any yield spread premium, overage, premium pricing, yield spread differential, par plus pricing, discharge fee, loan payoff charge or late payment fee.

[Policy, II.Y., III.C.; SOF Exhibit A] Unlike numerous other exclusions in the Policy, Lloyd's chose not to include such wording in the Mortgage Fee Exclusion. *See infra* pp. 22-24.

Specifically, the court noted that it was undisputed that MCR charged the improper fees and allowed the borrowers at closing to pay these fees in full to it with loan proceeds. *Id.* at 498. Accordingly, based on the plain meaning of the statute, the court held that the fees were "paid to MCR," and not third parties, given that "[a] 'payment' is" defined as a "'delivery of money or its equivalent in either specific property or services by one person from whom it is due to another person to whom it is due.'" *Id.* (quoting Black's Law Dictionary 1129 (6th ed. 1990)). Relying on principles of statutory interpretation, the court presumed that "the legislature 'intended that every word, clause, sentence, and provision of a statute have effect.'" *Id.* (quoting *Hyde Park Housing P'ship v. Dir. of Revenue*, 850 S.W.2d 82, 84 (Mo. 1993)). Accordingly, the court held that "[w]ere lenders allowed to later 'advance,' 'reimburse,' or 'pass through' fees in order to transform those improper fees listed as [originally] paid to the lender into fees the borrower 'paid to third parties,' it would render the statute's 'paid to third parties' language meaningless." *Id.* at 498-99

In sum, the plain language of the term "paid to" must be interpreted to mean to whom the fees were *originally* paid. Here, it is undisputed that no fees were originally "paid to" RFC. [SOF ¶¶ 47–48] Under the plain language of the Policy, that months later Homecomings may have collected payments of principal and interest, [SOF ¶ 65], does not change *to* whom the fees were originally paid. Accordingly, because no fees were "paid to" RFC, the Mortgage Fees Exclusion does not apply.

2. To Interpret the Mortgage Fee Exclusion to Include Subsequent, Indirect Payments Is Also Inconsistent with the Policy as a Whole.

Moreover, to interpret fees "paid to" an insured as encompassing a subsequent, indirect receipt of fees is inconsistent with a reading of the Policy as a whole, which contains numerous exclusions that expressly carve out indirect conduct. *See Ins. Co. of N.Y.*, 47 A.D.3d at 471, 850 N.Y.S.2d at 58 (quoting *Empire Props.*, 288 N.Y. at 248, 43 N.E.2d at 28) (noting that an insurance "contract should be 'read as a whole, and every part [should] be interpreted with reference to the whole . . .'"). Specifically, it would render the terms used in these other exclusions superfluous. *Givati*, 960 N.Y.S.2d at 198 ("[A] court should not read a contract so as to render any term, phrase, or provision meaningless or superfluous").

Numerous other exclusions in the Policy apply to claims "based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving" the excluded acts, or some variation on that phrase. This expansionary language is entirely missing from the Mortgage Fee Exclusion. These broader exclusions include claims:

- "based upon, arising out of, directly *or indirectly*, resulting from or in consequence of, or in any way involving . . . (a) any Wrongful Act or any fact, circumstance or situation which has been the subject of any notice given prior to the Policy Period under any other policy or (b) any other Wrong Act whenever occurring, which, together with a Wrongful Act which has been the subject of such notice, would constitute interrelated Wrongful Acts" [Policy, Exclusion III.A.2 (emphasis added); SOF Exhibit A];
- "based upon, arising out of, directly *or indirectly*, resulting from or in consequence of, or in any way involving, actual or threatened seepage, pollution or contamination of any kind including . . ." [Policy, Exclusion III.A.3 (emphasis added); SOF Exhibit A];

- "based upon, arising out of, directly *or indirectly*, resulting from or in consequence of, or in any way involving, any Wrongful Act actually or allegedly committed subsequent to a Corporate Takeover" [Policy, Exclusion III.A.7 (emphasis added); SOF Exhibit A];

- "for, or arising out of, directly *or indirectly* (a) any prior or pending litigation, arbitration or other legal, administrative or regulatory proceeding . . . or (b) any fact, circumstance, situation, transaction or event underlying or alleged in such litigation, arbitration or proceeding . . ." [Policy, Exclusion III.A.8 (emphasis added); SOF Exhibit A];

- "for, or arising out of, directly *or indirectly*, any harassment, misconduct or discrimination by reason of or relating to race, creed, color, age, sex, sexual preference, national origin, religion, handicap, disability, or marital status" [Policy, Exclusion III.C.1 (emphasis added); SOF Exhibit A];

- "for, or arising out of, directly *or indirectly*, any Employment Practice Violation" [Policy, Exclusion III.C.2 (emphasis added); SOF Exhibit A];

- "for, or arising out of, directly *or indirectly*, liability assumed by the Assured by agreement, or under any contract, whether oral or in writing, including but not limited to . . ." [Policy, Exclusion III.C.3 (emphasis added); SOF Exhibit A];

- "for, or arising out of, directly *or indirectly*, the insolvency or bankruptcy of any Assured or of any claim or of any other firm or entity . . ." [Policy, Exclusion III.C.4 (emphasis added); SOF Exhibit A];

- "for, or arising out of, directly *or indirectly*, liability of an Assured to a person, corporation, partnership, or other legal entity . . ." [Policy, Exclusion III.C.5 (emphasis added); SOF Exhibit A];

- "for, or arising out of, directly *or indirectly*, any actual or alleged loss or fluctuation in value or failure to perform of any investment or transaction concerning any Securities or investments of any description, including . . ." [Policy, Exclusion III.C.6 (emphasis added); SOF Exhibit A];

- "for, or arising out of, directly *or indirectly*, any Wrongful Act committed or any Professional Services rendered after . . ." [Policy, Exclusion III.C.8 (emphasis added); SOF Exhibit A];

- "that is a Mortgage Fee Claim which alleged, arises out of, is based upon or is attributable to, directly *or indirectly*, any Wrongful Act committed prior to the date specified in Item I of the Declarations" [Policy, Exclusion III.C.11 (emphasis added); SOF Exhibit A];

- "for, or arising out of, directly *or indirectly*, any actual or alleged violation of any anti-trust or restraint of trade law or other law, rule or regulation which protects competition" [Policy, Exclusion III.C.20 (emphasis added); SOF Exhibit A];

- "for, or arising out of, directly *or indirectly*, representations or warranties, whether express or implied and actually or allegedly made by any Assured pertaining to future earnings or income" [Policy, Exclusion III.C.21 (emphasis added); SOF Exhibit A];

- "for, or arising out of, directly *or indirectly*, any actual or alleged false or misleading advertising" [Policy, Exclusion III.C.22 (emphasis added); SOF Exhibit A];
- "for, or arising out of, directly *or indirectly*, any projections or statements related to sales, earnings or future value" [Policy, Exclusion III.C.23 (emphasis added); SOF Exhibit A];
- "brought against any of the Directors and Officers of any Subsidiary or against any Subsidiary based upon, arising out of, directly or *indirectly* resulting from or in consequence of, or in any way involving . . ." [Policy, Exclusion III.C.37 (emphasis added); SOF Exhibit A].

If the term "paid to" was read to include not only fees paid directly to Assureds, but also to include those fees paid *indirectly* to Assureds, or subsequently received by an Assured in the form of principal and interest payments, then the Policy's various express references to various types of *indirect* conduct would be "superfluous." *Givati*, 960 N.Y.S.2d at 198. Put differently, Lloyd's would not have needed to expressly refer to *indirect* conduct in these various exclusions if it were the case that all referenced direct conduct impliedly included indirect conduct.

Moreover, that Lloyd's explicitly extended other exclusions to cover indirect conduct, but did not do so for the Mortgage Fee Exclusion confirms that this exclusion does not extend to the "indirect" receipt of fees by RFC. Had Lloyd's intended to exclude coverage based on the indirect receipt of fees, it could have done so easily, just as it did for other Policy provisions. *Cf Pattison v. Emp'rs Reinsurance Corp.*, 900 F.2d 986, 989 (6th Cir. 1990) ("Had the drafters of the policy intended to exclude actions based on negligence rather than contract or moneys constructively rather than actually received, [they] could readily have done so.").

Indeed, other insurers draft their policies to explicitly exclude coverage for the indirect relationship between claims and fees. *See, e.g.*, *Alps Prop. & Cas. Ins. Co. v. Merdes & Merdes P.C.*, No. 4:14-cv-00002-SLG, 2014 WL 7399105, at *9 (D. Alaska 2014) (emphasis added) (analyzing a fee exclusion for "any claim that seeks, whether directly *or indirectly*, the return, reimbursement or disgorgement of fees, costs, or other funds or property held by an Insured"); *Westport Ins. Corp. v. Black, Davis & Shue Agency, Inc.*, 513 F. Supp. 2d. 157, 165-66 (M.D. Pa. 2007) (emphasis added) ("The funds exclusion states that the policy shall not apply to any claim 'based upon, arising out of, attributable to, or directly *or indirectly* resulting from . . . the failure to collect, pay or return premiums.'").

As demonstrated by both other exclusions in the Lloyd's policy as well as the express language used by other insurance carriers in similar fees exclusions, Lloyd's *could* have selected similar language to achieve the results it now wants. Recognizing this oversight, Lloyd's now impermissibly seeks to re-write the Mortgage Fee Exclusion to account for indirect conduct, as it explicitly did in many other exclusions. *See Universal Am. Corp.*, 25 N.Y.3d at 680, 37 N.E.3d at 8 (noting that insurance contracts must be "read as a whole"). But it cannot. When drafting exclusions to coverage, precision matters. *See Lancer Indem. Co.*, 7 N.Y.S.3d at 494; *see also Entron*, 729 F.2d at 130; *U.S. Fidelity and Guar. Co.*, 683 F. Supp. at 1159.

C. The Only Money "Paid To" RFC Was Principal and Interest on Closed Loans, Not "Fees."

Finally, even under Lloyd's gloss, the money that Homecomings actually collected, months after closing, was simply interest and principal. [SOF ¶ 65] Interest and principal payments do not trigger the Mortgage Fee Exclusion.

These payments are plainly not "fees." The Merriam-Webster Dictionary defines "fee" as "a sum paid or charged for a service." *Fee*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/fee (last visited Mar. 16, 2018); *see also* Black's Law Dictionary (10th ed. 2014) (defining "fee" as "[a] charge or payment for labor or services, esp. professional services[]"). Insurers argue that the improper fees paid in full at closing were rolled into the loan principal and some portion of the borrowers' subsequent, monthly payments of principal include these improper fees, thus triggering the exclusion. Monthly repayments of loan principal, however, are not "fees"—*i.e.*, payments for services. As such, under the plain language of the exclusion, the post-closing payments of principal and interest by the borrowers does not trigger application of the Mortgage Fee Exclusion.

II. THE RETURN OF FEES EXCLUSION DOES NOT APPLY

For many of the same reasons addressed above, the Return of Fees Exclusion also does not exclude coverage. Specifically, the Return of Fees Exclusion provides, in relevant part, that "[u]nderwriters shall not be liable for Loss . . . in connection with any

Claim . . . for . . . fees . . . paid or payable by or to the Assured."[8] [Policy, III.C.9; SOF Exhibit A] Lloyd's argues that "[s]ome or all of the relief sought by the Underlying Claims" is precluded by this provision. [Lloyd's Answer, Affirmative Defense ¶ 6] But, this is incorrect.

Similar to the Mortgage Fee Exclusion, Lloyd's specifically drafted the Return of Fees exclusion to only apply to, as relevant here, loss in connection with a claim for "fees . . . *paid or payable . . . to* the Assured," in this case, RFC.[9] [Policy, III.C.9 (emphasis added); SOF Exhibit A] For at least two reasons, each of which is more fully addressed above, the Return of Fees Exclusion does not apply based on fees "paid to" RFC. First, and again, based on the plain language of the exclusion, none of the improper

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[8] In its entirety, the Return of Fees Exclusion provides that "[u]nderwriters shall not be liable for Loss . . . in connection with any Claim:" "for premiums, return premiums, fees, commissions, costs, expenses or other charges paid or payable by or to the Assured; provided, however, that this Exclusion shall not apply to Costs, Charges and Expenses in connection with a Mortgage Fee Claim which is otherwise covered under Insuring Clause I.D." [Policy III.C.9 (emphasis omitted); SOF Exhibit A]

[9] The use of the word "payable" does not change the analysis. *See, e.g., Energy Corp. of Am. v. Mackay Shields LLC*, No. 02-2431, 2003 WL 22939260, at *4-5 (4th Cir. Dec. 15, 2003) ("Likewise, Black's Law Dictionary defines a 'payable' sum of money as one 'that is to be paid.' Other federal courts in commercial settings have accepted this meaning of the term 'payable,' *i.e.*, the amount that must be paid at a specified date . . . . These definitions reveal that taxes 'payable' and taxes 'paid' differ not by amount, but by timing: taxes are 'payable' until the end of the year when they are discharged, at which time they become 'paid.' The amount of tax liability, however, is the same under both.") (internal citations omitted); *Chrzan v. W.C.A.B. (Allied Corp.)*, 805 A.2d 42, 46 (Pa. Commw. Ct. 2002) ("Furthermore, the definition of 'payable' goes on to indicate that 'payable' can refer to future obligations 'but, when used without qualification, [the] term normally means that the debt is payable at once . . . .") (internal citation and emphasis omitted); *State Farm Mut. Auto. Ins. Co. v. Klinglesmith*, 717 So.2d 569, 571 (Fla. Dist. Ct. App. 1998) (noting that "payable" in a statute "when used without qualification . . . normally means that the debt is payable at once, as opposed to 'owing'") (internal citation omitted).

fees were "paid to" the Assured, RFC.[10] Second, the Return of Fees Exclusion does not extend to the *indirect* receipt of fees.

Specifically, the undisputed facts establish that *no fees of any kind* were "paid to" RFC, as they must have been for the Return of Fees Exclusion to apply. The plain meaning of "paid to" the insured means fees paid directly to an individual or entity in return for services. As outlined above, MCR, along with other third-parties—not RFC—were paid the improper fees in full at closing in return for services rendered at or before closing. [SOF ¶¶ 46–48, 53–54] This is confirmed by, among other things, the Settlement Statements of class members. [SOF ¶ 50]

Nevertheless, Lloyd's has persisted in arguing the Return of Fees Exclusion applies because RFC *indirectly* received improper closing fees because such fees were "rolled" into loan principal when paid at closing. [*See* SOF ¶ 65] Not so. Once again, Lloyd's desired interpretation of the Return of Fees Exclusion as encompassing such *indirect* payments is contrary to the plain language of the Return of Fees Exclusion. As with the Mortgage Fee Exclusion, the plain language of the exclusion indicates that fees "paid to" an Assured refers only to fees paid *directly* to such Assured, not to fees paid indirectly to them months later as part of loan principal payments. *Alexander*, 136 F.3d at 86; *see also* Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/pay (last visited Mar. 16, 2018) (defining "paid"). This plain-language reading is consistent with the outcomes reached by courts interpreting similar

[10] There is no allegation that any fees were "paid or payable *by* . . . the Assured." [Policy, III.C.9 (emphasis added); SOF Exhibit A]

language. *See, e.g.*, *PNC Fin. Servs.*, 2014 WL 12602876, at *3 (holding that the term "paid or payable to an Insured . . . clarify to whom the fees . . . were originally paid").

Moreover, such a reading would be inconsistent with the Policy as a whole. As catalogued above, numerous other exclusions in the Policy state that they apply to claims "based upon, arising out of, directly *or indirectly* resulting from or in consequence of, or in any way involving" the excluded acts, or some variation on that phrase. If the term "paid to" includes not only fees paid directly to insureds, but also fees paid indirectly to insureds, then the Policy's multiple express references to various types of indirect conduct would be "superfluous." *Givati*, 960 N.Y.S.2d at 198; *see also Universal Am. Corp.*, 25 N.Y.3d at 680, 37 N.E.3d at 78 (stating that insurance contracts must be "read as a whole").

Accordingly, like the Mortgage Fee Claim Exclusion, coverage for RFC's payment of the *Mitchell* compensatory damages judgment is not excluded by the Return of Fees Exclusion.

III. THE FEE EXCLUSIONS ARE FEE-DISPUTE CARVE-OUTS AND DO NOT AFFECT COVERAGE

Finally, that neither Fee Exclusion applies makes sense in light of the business purpose of the Policy. This dispute centers on Insuring Clause 1.D. of the Lloyd's Policy, which is the "Errors and Omissions" ("E&O") portion of a combined liability insurance program Lloyd's sold to General Motors in December 2000. [SOF Exhibit A] "[E&O] policies are designed to insure members of a particular professional group from liability arising out of special risks such as negligence, omissions, mistakes, and errors inherent in

the practice of their profession." 9A Couch on Ins. § 131:42 (3d ed. 2013). E&O policies, however, generally preclude coverage for "fee disputes" that insured professionals, like RFC, have with their clients, here MCR. Paul S. White & Richard L. Neumeier, 4 New Appleman on Insurance, *Specific Types of Liability Insurance* § 25.06 (Law Library ed. 2009) ("White & Neumeier"); *see also* "Fee disputes exclusion," International Risk Management Institute, Inc., Glossary and Dictionary, https://www.irmi.com/online/insurance-glossary/terms/f/fee-disputes-exclusion.aspx (last visited Mar. 15, 2018) (defining "fee disputes exclusion" as "[a]n exclusion found within a significant minority of professional liability insurance policies that precludes coverage for claims made against professionals arising from a disagreement about the fees charged by such professionals"); [*see also* SOF Exhibit I at 11 (RFC's "Client Guide" that it issued to its clients, including MCR, "sets forth the terms and conditions upon which a Client will sell mortgage loans and servicing to GMAC-RFC")].

Insuring Clause I.D. of the Primary Policy is no different. It prohibits recovery of indemnity (not defense) for fee disputes between the insured and clients of its professional services through, among other things: an exclusion for the dispute over certain fees charged by mortgage professionals (*i.e.*, the Mortgage Fee Claims exclusion) and disputes over fees more generally (Return of Fees Exclusion). [*See* Policy, III.C.9, II.V, III.C.10; SOF Exhibit A]; *see also* White & Neumeier at 14 (Insurers seek to exclude fee disputes in by, among other things, including "a specific exclusion for claims involving fees, disgorgement of fees, and the like[.]").

In the end, that neither the Mortgage Fee Exclusion nor the Return of Fees Exclusion prevent RFC from recovering under the Policy is consistent with the purpose of those exclusions, which are aimed and preventing recovery of losses related to fee disputes between RFC and its professional services clients. Neither the *Mitchell* Action, nor the loss stemming from it, involved a dispute between the insured, RFC, and its client, MCR, over fees paid by MCR to RFC for its professional services.

Conclusion

For all of the foregoing reasons, the Trust respectfully requests that its Motion for Summary Judgment on Fees-Related Exclusions be granted.

Dated: March 16, 2018

Respectfully submitted,

PERKINS COIE LLP

By:/s/ *Selena Linde*

Selena J. Linde, Esq.
Vivek Chopra, Esq.
Alexis Danneman, Esq.
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone (202) 654-6200
Facsimile (202) 654-9952
SLinde@perkinscoie.com
VChopra@perksincoie.com
ADanneman@perkinscoie.com
Counsel for the ResCap Liquidating Trust

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2018, I caused a true and correct copy of the foregoing document to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

By: /s/ *Alexis Danneman*
PERKINS COIE LLP

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