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IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE TRAVELERS INDEMNITY COMPANY,	)	
Appellant,	)	
v.	)	No. 420, 2017
CNH INDUSTRIAL AMERICA, LLC,	)	**PUBLIC VERSION** **FILED JANUARY 18, 2018**
Appellee.	)	

ANSWERING BRIEF ON APPEAL OF PLAINTIFF-BELOW/APPELLEE CNH INDUSTRIAL AMERICA, LLC

Dated: January 3, 2017

REED SMITH LLP

Brian M. Rostocki (No. 4599)
John C. Cordrey (No. 5324)
1201 Market Street, Suite 1500
Wilmington, DE 19801
Telephone: (302) 778-7500
Facsimile: (302) 778-7575

OF COUNSEL:

James M. Davis
Thomas A. Marrinson
Evan T. Knott
Emily E. Garrison
10 S. Wacker Drive, 40th Floor
Chicago, Illinois 60606
Telephone: (312) 207-1000
Facsimile: (312) 207-6400

James C. Martin
225 Fifth Avenue
Pittsburgh, PA 15222
Telephone: (412) 288-3131
Facsimile: (412) 288-3063

Counsel for CNH Industrial America LLC

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NATURE OF THE PROCEEDINGS

Since 2008, when CNH Industrial America LLC ("CNH") first notified Travelers Indemnity Company ("Travelers") of asbestos personal injury lawsuits against it, CNH has tried to obtain a defense from Travelers. After years of futility, in July 2012, CNH filed this insurance coverage action against, among others, Travelers in its role as insurer of J.I. Case Company ("J.I. Case"). The money judgment from which Travelers appeals arose because of motions for summary judgment brought by CNH under a single policy that Travelers issued separately and directly to J.I. Case Company for the 1972-73 policy period (the "J.I. Case Policy"), and the Superior Court properly applied Wisconsin law in reaching its rulings under these motions.

For its part, Travelers filed two summary judgment motions. The first sought a blanket application of Texas law, not to any particular issue or even to the case as a whole, but to the policies that Travelers issued, and ignored the expectations of the parties as they related to the sole entity whose liabilities and insurance rights were at issue, J.I. Case. The second argued that there had been no effective transfer of J.I. Case's rights to coverage under the Travelers policies to CNH.

On August 15, 2015, the Superior Court entered an Order denying both of Travelers' summary judgment motions, holding that Wisconsin law governed the policies and claims at issue, and that CNH acquired the rights to coverage under Travelers' policies. That same day, the Superior Court held that Travelers has a duty to defend CNH in the underlying asbestos lawsuits, but deferred entering judgment. After additional briefing and a one-day bench trial, the Superior Court resolved the remaining issues in CNH's favor, and thereafter entered a Rule 54(b) judgment against Travelers for $13,047,415.31 (the "Judgment"). The Judgment is well-supported by the record and controlling law and should be affirmed.

Travelers' appeal raises four issues: (i) whether the Superior Court properly applied Wisconsin law to a dispute over an insurance relationship centered in Wisconsin, based on liabilities arising out of J.I. Case's Wisconsin operations, and that hinged on a separate policy that Travelers issued to J.I. Case alone; (ii) whether Travelers waived its notice and cooperation defenses by consistently refusing to defend under that policy; (iii) whether Travelers is required to pay CNH for post-denial defense costs (erroneously described by Travelers as "pre-tender" defense costs); and (iv) whether Travelers was properly denied discovery of a confidential settlement agreement between CNH and another of its insurers,

CNA, under other policies issued directly to J.I. Case in Wisconsin. Each of these issues was correctly decided, after reasoned analysis, by the Superior Court.

Issue 1: Applicability of Wisconsin Law. The linchpin of Travelers' appeal—its choice-of-law argument—is an exercise in misdirection that improperly seeks to shift focus away from the issues involving Travelers' obligations under the J.I. Case Policy that were central to the Judgment, and relies on a distorted depiction of the record. The Superior Court correctly rejected Travelers' request for a blanket choice-of-law ruling divorced from the issues presented, recognizing that those issues focused almost exclusively on J.I. Case, liabilities arising from J.I. Case's Wisconsin operations, and the J.I. Case Policy that was issued to J.I. Case in Wisconsin. The Superior Court also correctly rejected Travelers' attempt to manufacture facts tying the J.I. Case Policy and Travelers' relationship with J.I. Case to Texas, based on unsupported assertions made by a Travelers employee who lacked relevant personal knowledge.

As the Superior Court noted, "[i]t is J.I. Case, a Wisconsin corporation, that was the insured and that possessed the indemnification rights against Travelers that CNH now seeks to enforce." (A00002171.) Not only did a Wisconsin corporation hold the indemnification rights, but the contract's place of performance and subject matter "most definitely" were in Wisconsin, as was the

domicile, residence, nationality, place of incorporation and place of business. (A0002172.) As the Superior Court correctly summarized, "the risk of loss here and the situs of the insured is in Wisconsin." (A00002171.) Wisconsin also is "where the relevant information would come from" and the parties would "not be expecting it otherwise." (A00002171.) In reaching that result, the Superior Court joined some very good company, as reflected in similar, earlier decisions in the same case from then-President Judge Vaughn and former Justice Ridgely, in his role as a Special Discovery Master. Together, the record and well-settled Delaware choice-of-law principles establish that Wisconsin law applies here.

Issue 2: Waiver of Notice and Cooperation Conditions. Travelers' argument that it can rely on its notice and cooperation conditions to avoid coverage for claims that post-dated its denial of coverage for asbestos claims distorts the record. CNH gave Travelers timely notice of asbestos claims against it in 2008, [redacted]

Travelers' "investigation" became an eight-year campaign of coverage denial, for which the Superior Court properly relieved CNH of compliance with the notice and cooperation conditions. [redacted] (A00002693.) Travelers could have intervened in the underlying actions or filed its own declaratory judgment action to resolve any questions it had about coverage. Instead, Travelers did nothing, and its persistent refusal to defend had the exact consequence that Travelers intended, forcing CNH to "go it alone" and expend its own resources for the asbestos suits. Wisconsin law unambiguously provides that an insurer waives its policy defenses in such circumstances, just as the Superior Court held.

Issue 3: Post-Denial Defense Costs. Travelers' effort to avoid payment of what it labels as "pre-tender" defense costs is just more misdirection. As the record reveals, the costs that Travelers seeks to avoid are not "pre-tender;" they are costs that were incurred *after* the May 2008 tender of 112 asbestos cases that Travelers wrongfully chose not to defend. The Superior Court correctly recognized that Travelers' failure to defend the initial 112 cases rendered futile any further tender of cases, and refused to accept the fiction that Travelers would

have done anything other than deny coverage (as it has in this litigation) for later-filed asbestos cases, too.

Issue 4: Discovery of Confidential Settlement. Travelers' claim that the Superior Court abused its discretion in denying Travelers discovery of the confidential settlement between CNH and CNA is yet more misdirection. Travelers says that it seeks the settlement to further a purported right to equitable contribution and to avoid what it calls a "double-recovery" by CNH. Wisconsin law establishes, however, that equitable defenses like contribution and set-off are unavailable in breach-of-contract cases (as opposed to the personal injury cases cited by Travelers). In breach-of-contract cases like this one, Wisconsin law provides that the breaching party (Travelers) must abide by the entirety of its contractual agreements without consideration of a potential "double-recovery" by its insured. That result preserves Wisconsin's public policy requiring insurers to promptly comply with their obligations and avoids providing breaching insurers with a windfall at the expense of insurers who do fulfill their obligations.

Through five years of litigation, the Superior Court, with careful attention to the record and applicable law, painstakingly took on one meritless defense by Travelers after another and brought its delaying tactics to a close. This Court

should affirm the Judgment so that CNH can finally obtain the policy benefits it is owed. Affirmance is warranted and respectfully urged.

SUMMARY OF THE ARGUMENTS

1. Denied. The Superior Court correctly applied Delaware choice-of-law principles in deciding that Wisconsin law applied to resolution of the issues that resulted in the Judgment.

2. Denied. The Superior Court properly determined that Travelers' failure to either accept coverage (with a reservation of rights), intervene in the underlying actions, or seek a declaratory judgment regarding its defense obligations waived its right to assert that there was any alleged breach of the notice and cooperation conditions it its policies.

3. Denied. The costs that Travelers tries to characterize as pre-tender defense costs actually post-date its denial of coverage and thus are recoverable.

4. Denied. Travelers is not entitled to discovery concerning the confidential CNA settlement agreement because it has no right to assert defenses of equitable set-off or double recovery.

COUNTERSTATEMENT OF THE FACTS

I. THE SEPARATE, WISCONSIN-BASED RELATIONSHIP BETWEEN TRAVELERS AND J.I. CASE

J.I. Case was established in 1842 and first incorporated in Wisconsin in 1880. (A00000188-209.) J.I. Case's principal place of business, as well as the headquarters of its manufacturing operations, always have been in Wisconsin. *Id.* In 1970, it became a wholly owned subsidiary of Tenneco, Inc. ("Tenneco"). *Id.*

As Travelers' own corporate designee admitted, [redacted] (*See* Travelers' Statement of Undisputed Facts ("Travelers' SoF") at ¶ 5; A00000417; A00000526-653; *see also* B005222.) Marsh and McClennan, the broker which negotiated this policy, was located in Chicago at the time. (B005409-5410.) Tenneco is ***not*** an insured under the J.I. Case Policy. (A00000527-653.)

There is no record evidence showing that the J.I. Case Policy was part of the "Tenneco Insurance Program." There is no record evidence that Tenneco procured the J.I. Case Policy, that the J.I. Case Policy was negotiated or managed in Texas, or that Tenneco paid the premiums for the J.I. Case Policy from Texas. For these reasons, there also is no record evidence J.I. Case, Travelers or Tenneco, for any reason, would have expected Texas law, rather than Wisconsin law, to govern J.I. Case's rights under this policy. [redacted]

[redacted] (A00000417; A00000503; B005409-5410; B005411-5412.)

The lone witness on whom Travelers relies for its arguments regarding placement of the Travelers policies, Gary Bennett, conceded that he has no personal knowledge regarding: [redacted] (A00000415; B005413; B005415-5418.)

Travelers' assertion that the J.I. Case Policy was [redacted] *See* Appellant The Travelers Indemnity Compay's Opening Brief at 10 (hereinafter, "Op. Br."). Mr. Bennett may have averred in his affidavit that [redacted] (A00000435-38.) Indeed, he conceded that he [redacted]

[redacted] (B005414; B005419.) What's more, Travelers' own corporate designee, Erik Sandberg, confirmed in his deposition testimony [redacted] (B005222.)

Travelers not only fails to mention this testimony, but also improperly attempts to bootstrap the J.I. Case Policy into the so-called "Tenneco Insurance Program," separately issued by Travelers by citing numerous statements in and documents attached to Mr. Bennett's Affidavit that the Superior Court properly struck from the record. *See* Op. Br. at 8-12. The Superior Court properly ruled that Mr. Bennett lacked personal knowledge regarding both the J.I. Case Policy and Tenneco policies prior to the time he took charge of the Tenneco account in October 1977. (A00001962-69.)[1]

[1] Among the paragraphs relied on by Travelers that the Superior Court properly struck from Mr. Bennett's Affidavit because they concerned matters prior to October 1977 were: Paragraph 5 [redacted]); Paragraph 28 [redacted]); Paragraph 32 ([redacted]); Paragraph 42 ([redacted]. (A00001968.)

In addition to the J.I. Case Policy, Travelers issued a number of policies—covering January 1, 1973 through September 1, 1986—that list Tenneco as the first "Named Insured" on the Declarations page (A00000417-20; A00000454-525; A00000655-1131), but under which J.I. Case also is listed as a "named insured" (the "Tenneco Policies"). (*Id.*) The vast majority of these policies are irrelevant, however, as there is no dispute that most of them were exhausted prior to this coverage litigation even being filed. (A00002705-2711.)

As importantly, Travelers ignores the fact that throughout the entire coverage period of the Tenneco Policies, too, the relationship between J.I. Case and Travelers was direct, extensive, centered in Wisconsin and independent of Travelers' relationship with Tenneco. In particular, the J.I. Case relationship with Travelers [redacted] (*See* B005645-48; B005680-82; B005687-89) [redacted] These Special Account Instructions [redacted]

[redacted] (*Id.* (emphasis added).)

Travelers' personnel also visited regularly with J.I. Case in Wisconsin, including: [redacted]

Further, in 1980, Travelers and J.I. Case agreed that [redacted] (B005710) [redacted]

In contrast to the explicit, agreed Wisconsin-based connections between Travelers and J.I. Case with regard to product liability claims like most of the

asbestos claims at issue here, there is not a single document reflecting any coordination between the parties in Texas with respect to such claims.

II. TRAVELERS' CLAIMS HANDLING FOR CNH CLAIMS INVOLVING HISTORICAL J.I. CASE LIABILITIES

In 1994, Tenneco underwent a reorganization, transferring its farm and construction equipment businesses and certain subsidiaries, including J.I. Case, to an entity now known as CNH. (A00000191.) The 1994 reorganization transferred certain assets of J.I. Case to CNH, including rights under the Travelers' policies. (A00001372-1414.) The same was true for the asbestos liabilities that gave rise to the underlying asbestos suits. (*Id*.; A00000199-200.)

Although this appeal concerns asbestos bodily injury lawsuits for products allegedly manufactured, sold, supplied, or distributed by J.I. Case, or from alleged exposure on J.I. Case's premises (the "Underlying Asbestos Suits"), Travelers' claims handling relationship with CNH for liabilities arising out of J.I. Case's historical operations involved more than asbestos exposure. (B000287-4986.)

A. Travelers Recognizes Its Duty to Defend CNH Against the Hearing Loss Claims Arising From the J.I. Case Equipment

In the 1990s, CNH, like many manufacturers of agricultural equipment, was sued in connection with claims alleging noise-induced hearing loss that occurred prior to 1994 and that involved alleged exposure to noise from equipment manufactured by historical companies no longer in operation, like J.I. Case (the "Hearing Loss Claims"). (B000281-82; B004987-5006.) [redacted]

[redacted] (B000282; B005007-15; B005209-5211.)

[redacted] (B000282.)

B. Travelers Refuses to Defend the Underlying Asbestos Suits

[redacted]

CNH naturally turned to Travelers for J.I. Case Underlying Asbestos Suits, and provided notice of 112 Underlying Asbestos Suits to Travelers in May 2008. (B000283; A00000257-68.) The notice letter detailed the corporate history of J.I. Case from its origins through the years it was owned by Tenneco and subsequent reorganization as CNH. Importantly, the undisputed record evidence confirms that this letter attached a copy of the "1994 '*Reorganization Agreement Among Tenneco Inc., Case Corporation and Case Equipment Corporation*,'" the most salient transactional document on which the Superior Court based its decision that the rights to coverage under the J.I. Case Policy were transferred from J.I. Case to CNH. (*Id.*; B000283; B006585-88; A00000257-68; A00000188-209; A00001372-1414.)

[redacted] (B000282-83; A00000257-68; B006631-32.) [redacted] (B006631-32.) [redacted] *Id.*

CNH thereafter made repeated attempts to obtain a defense from Travelers for the asbestos lawsuits to no avail. Those efforts included correspondence: (a) tendering the defense of additional Underlying Asbestos Suits; (b) requesting settlement authority for those claims; (c) providing updates on the allegations, testimony, and status of the Underlying Asbestos Suits; (d) requesting reimbursement for counsel fees, and (e) providing agreements and other information regarding CNH's corporate history, including a second CD copy of the 1994 Reorganization Agreement and other corporate history documents. (B000282-85; A00000257-68; B005016-5196.)

In response, Travelers declined to assume CNH's defense and instead

repeatedly advised CNH to [redacted] (*See, e.g.*, B005766-67; B006012-15; B006444-46; B006381-84; B006393-96; B006430-32; B006397-6400; B006378-80; B006439-41; B006408-09; B001636-37; B006414-15; A00002693.)

As a result of Travelers' stonewalling, CNH had to hire its own defense counsel. (B000281; B000285.) But CNH regularly updated Travelers on settlement demands (and made requests for settlement authority), trial dates, fees incurred, and litigation status. It likewise made regular requests for reimbursement of defense costs. (A00000314-15; B000282.) Travelers never objected to or otherwise questioned CNH's defense efforts or its defense costs. (A00000315.)

III. THE SUPERIOR COURT PROCEEDINGS INVOLVING DEFENSE AND COVERAGE FOR THE UNDERLYING ASBESTOS SUITS

On July 11, 2012, CNH filed this coverage action against Travelers, CNA and other primary and excess insurers, seeking defense costs and coverage for losses incurred in the Underlying Asbestos Suits under numerous policies issued directly to J.I. Case, as well as policies issued to Tenneco. (A00000189.) Choice of law was hotly contested. CNA and Travelers pressed for Texas law, on the theory that Tenneco had its principal place of business and implemented its insurance program there. The motivation for Texas law was apparent. The insurers argued that under that state's precedents, any assignment of coverage from J.I. Case to CNH was void, thereby negating coverage for most of the claimed losses. For its part, CNH argued that Wisconsin law should apply given that J.I. Case had its principal place of business there and Wisconsin plainly was the parties' agreed center of gravity for product liability claims. Wisconsin law regarding assignment of policy rights would, in turn, preserve CNH's right to coverage, rather than result in a forfeiture of paid-for coverage.

A. The CNA Choice-of-Law Ruling

The choice-of-law issue first arose when CNH moved for summary judgment against CNA under policies issued to J.I. Case between 1965 and 1971. (A0000056-154.) The Superior Court, in an opinion authored by now-Justice

Vaughn, held that CNA's policies imposed a duty to defend CNH against certain Underlying Asbestos Suits. (A00000209.) The Court also held that CNH's coverage dispute with CNA, for reasons directly analogous to those involving the present dispute with Travelers, would be governed by Wisconsin law. (A00000188-209.)[2]

B. The Travelers Choice-of-Law and Duty-to-Defend Rulings

Several months after the CNA ruling, CNH filed motions for partial summary judgment against Travelers seeking a defense of the Underlying Asbestos Suits (and reimbursement of already-incurred defense costs) under the J.I. Case Policy only. (A00000223-224.) Travelers, for its part, filed a motion for summary judgment concerning choice-of-law. (A00000332-69.) In a comprehensive oral ruling on choice-of-law, the Superior Court held that Wisconsin law would govern issues arising under the J.I. Case Policy and two unexhausted Tenneco Policies under which CNH also was a "named insured". (A00002166-75.) This ruling, in all its particulars, tracks Delaware's applicable choice-of-law principles.

[2] Following the choice-of-law determination, CNH and CNA settled their coverage dispute and CNH's claims against CNA were dismissed. (A00002882-83.)

First, consistent with Delaware precedent, the Court opined that the location of the named insured, J.I. Case, was the most important factor in determining the choice of law for the issues actually presented:

> Tenneco is not the relevant party in this dispute. It is J.I. Case, a Wisconsin corporation, that was the insured and that possessed the indemnification rights against Travelers that CNH now seeks to enforce.

(A00002171.) The Court also held, under Wisconsin law, that CNH had validly obtained rights under the relevant Travelers' policies.[3] (A00002172-74.)

Second, the Superior Court recognized that each choice-of-law factor is not given equal weight under Delaware law. (A00002168) ("you don't total up the number of contacts on one side and…say it's four here and one here. You have to go through what is the most significant"). Instead, in complex coverage disputes like this one, controlling precedent provides that the most significant of these factors is "the principal place of business of the insured because it is the situs which links all the parties together." (A00002168, citing *Liggett Group Inc. v. Affiliated FM Ins. Co.*, 788 A.2d 134, 137 (Del. Super. Ct. 2001)). On that critical factor, the Court concluded—based on undisputed facts—that J.I. Case's principal

[3] Travelers disputed the validity and scope of the insurance assignment to CNH below, but does not do so on appeal.

place of business was in Wisconsin, thereby favoring Wisconsin law. (A00002169.)

Third, the Court noted that the underlying asbestos plaintiffs "did not bring asbestos claims against Tenneco; instead they bought their claims against J.I. Case, the insured company that produced and manufactured the agricultural and construction equipment that caused injury." (A00002170.) Further, "J.I. Case was the only insured under [the] general liability policy for the period January 1, 1972 to January 1, 1973" (*i.e.*, the J.I. Case Policy) that "possessed the indemnification rights against Travelers that CNH now seeks to enforce." (A00002171.) Thus, under the policies that were actually relevant to the parties' dispute, J.I. Case "was the situs that links all the parties together, and Wisconsin law applies." (A00002169.)

Fourth, the Court observed that there was no choice-of-law provision in the policies and that, as the drafter of the policies, "[i]f Texas was that important [to Travelers], it would be in this contract." (A00002171.)

In a later motion for sanctions against CNH heard by former Justice Ridgely (serving as Special Discovery Master), Travelers attempted to portray the tardy production of a small number of non-impactful documents as a watershed event that required overturning every prior ruling against it, and took a second

shot at having Texas law apply to the J.I. Case Policy.[4] Justice Ridgely was fully versed in the parties' choice-of-law arguments and rebuffed Travelers' effort, noting that the "late production of documents … would not change the result reached by the Court on choice of law." (A00002636.) Justice Ridgely concluded that the key facts had not changed and that the record continued to support the Superior Court's decision that Wisconsin law should apply. (A00002636.)

In response to CNH's motion for partial summary judgment regarding Travelers' duty to defend, brought solely under the J.I. Case Policy, the Superior Court found that Travelers had a duty to defend CNH against the Underlying Asbestos Claims. (A00002197.) Even faced with this ruling, Travelers did not assume CNH's defense or pay amounts due for past defense costs, which by that time included [redacted] for defense costs incurred since May 2008, and nearly [redacted] in prejudgment interest. Travelers did not offer to pay all of CNH's defense costs, even though it did not dispute liability for more than [redacted] of the amount CNH sought. (A00002402.)

[4] Although Travelers' sanction motion was fully briefed and fully resolved after a nearly day-long hearing by a reasoned decision by Justice Ridgeley, Travelers continues to try to raise sanctions-related issues that have nothing to do with this appeal. *See* Op. Br. at 47. In actuality, the sanctions proceeding is relevant only for the fact that it reinforced the Superior Court's choice-of-law determination.

C. Travelers' Continued Efforts to Evade Its Obligations

After losing the duty-to-defend motion, Travelers embarked on a new tactic to avoid its obligations. It sent CNH a check totaling a little over $1.6 million, advising CNH that the payment should be allocated to costs of settling cases that CNH had settled six years earlier (with CNH's own money), purporting to dictate to which policies such payments should be allocated for purposes of exhausting coverage under certain policies (A000002182-2185), and informing CNH that the payments should be treated as if Travelers had made them in 2009, thereby cutting off Travelers' liability for post-2009 defense costs. (*Id*.) CNH raised Travelers' absurd allocation gambit with the Superior Court, which gave Travelers' manipulation short shrift:

> Travelers' duty to defend terminates only after Travelers (not CNH) exhausts its applicable limits of liability. Travelers cannot unilaterally declare its duty to defend terminated retroactively due to a settlement paid for by CNH. Instead, Travelers' duty to defend would only terminate on the date Travelers made its payment to CNH — *i.e.*, reimbursed CNH for the payments CNH made to satisfy a claim.

(A00002698.)[5]

Undeterred, Travelers next turned to its late notice and cooperation defenses, but came up empty again. The Superior Court found that Travelers' had

[5] Travelers does not attempt to reverse this ruling on appeal.

waived those defenses by refusing to defend the underlying suits. (A00002684-98.) Relying on black letter Wisconsin law, the Court observed:

> In Wisconsin, … [t]he insurers' duty to defend is broader than the insurer's duty to indemnify…. Any doubts about the duty to defend are to be resolved in favor of the insured. (A00002689.)
>
> Importantly, Travelers did not follow the clearly defined practice under Wisconsin law for contesting the need to provide a defense or to indemnify. When there was a question as to the duty to defend or to indemnify, Travelers should have defended CNH, the purported policy holder, subject to a reservation of rights or intervened in the underlying lawsuit and requested a bifurcated trial on the issue of coverage, moving to stay liability proceedings until the coverage matter was resolved. Travelers cannot provide an instance where it followed this procedure. (A00002693.)

Further, the Court found that Travelers' attempted reliance on purported breaches of policy conditions and failure by CNH to provide information was merely a subterfuge, given Travelers' insistence that Texas law applied, barred any assignment of coverage, and thus negated any obligations Travelers might have to defend CNH:

> …. Travelers engaged in a practice that shifted the burdens from the insurer to the insured. Travelers consistently issued "full reservation of rights" letters and waited for CNH to provide Travelers information regarding ownership, assignment and consent. Moreover, Travelers told CNH in these letters that CNH should "please take the steps you deem necessary to protect your interests in these matters." This "process" meant that CNH, and not Travelers, took on the duty to defend claims while the issue of coverage was addressed.

> The Court notes that, in hindsight, this whole practice of requesting information from CNH seems extremely futile. Travelers took the "legal" position that, under Texas law, the anti-assignment provisions of the relevant policies barred CNH from being an insured party under the policies absent Travelers' consent. The Court is unaware of any evidence in the record that shows Travelers ever provided written consent to the assignment of the policies to CNH. Travelers must have known that from the outset (or soon thereafter). So, the requests by Travelers and the attempts, if any, by CNH to collect information were wasted efforts from day one. (A00002693.)

These rulings, too, failed to alter Travelers' conduct, as Travelers persisted in refusing to defend or pay all of CNH's past costs.

D. The Post-Denial Defense Costs Ruling, the Final Damages Ruling, and Entry of Rule 54(B) Judgment

Travelers next argued that it was not required to provide defense costs for individual post May-2008 asbestos suits unless and until those suits had been individually tendered to Travelers, even though Travelers had refused to provide coverage for any asbestos suits actually tendered to it. (A00002818-68.) The Superior Court rejected Travelers' argument and held that defense costs incurred after CNH's May 2008 notice to Travelers were recoverable, given Travelers' election in response to the originally-tendered lawsuits:

> [T]he insurer has a choice. The insurer can either intervene, they can start their own coverage declaratory judgment action, or they can act at their own peril. And if they're wrong, they have waived everything.

* * *

> The way that I viewed Wisconsin law, and I think it's very consistent, is 30 days within May 2nd, 2008, Travelers should have done one of three things. They chose the third. They could have intervened and made a coverage decision then, they could have started their own declaratory judgment action and had it done then, or they go on at their own peril. They chose to go on at their own peril. And I think that that's the time when it becomes pre- and post-tender. Well, that's what I hold. It's May 2nd, 2008.

(A00002842.)

This ruling, too, failed to result in payment from Travelers, necessitating yet another ruling from the Superior Court, this one on April 16, 2017, regarding contractual damages owed to CNH. (A00003203-17.) Ultimately, the Superior Court entered a final judgment under SUPER. CT. R. 54(b) against Travelers in the amount of $13,047,415.31.[6] (A0003247-50.)

[6] Travelers disputed the reasonableness of CNH's defense costs below, but does not do so on appeal or otherwise challenge the amount of damages awarded by the Superior Court.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY HELD THAT WISCONSIN LAW GOVERNED THE ISSUES RAISED BY THE MOTIONS THAT RESULTED IN THE JUDGMENT FROM WHICH TRAVELERS APPEALS

A. Question Presented

Did the Superior Court properly determine Wisconsin law governed the issues raised by the motions that resulted in the Judgment? (A00000210-247, A00001480-1511.)

B. Standard and Scope of Review

This Court reviews questions of law on the Superior Court's grant of summary judgment *de novo*. *See Shook & Fletcher Asbestos Settlement Trust v. Safety Nat. Cas. Corp.*, 909 A.2d 125, 128 (Del. 2006).

C. Merits Argument

This Court, like the Superior Court, should reject Travelers' request for a blanket ruling that Texas substantive law applies, and instead determine choice of law with reference to the particular issues presented. Delaware does not adjudicate choice-of-law issues in the abstract, unmoored from the particular facts and issues presented for resolution. Rather, choice-of-law disputes must be determined under the "most significant relationship" test on an issue-by-issue basis, which the Superior Court recognized in correctly observing that "the

outcome of choice of law issue[s] turns on the specific facts of each case." (A00002168.)

Here, the Judgment that Travelers seeks to overturn arises not from issues involving Tenneco or the so-called Tenneco Insurance Program but rather: (i) involves insurance coverage for liabilities arising from operations and equipment of J.I. Case, a Wisconsin-based company, (ii) centers primarily on a single policy that Travelers separately issued in Wisconsin to J.I. Case alone, and (iii) concerns [redacted] The Superior Court had ample justification for applying Wisconsin law based on its well-supported finding that J.I. Case, not Tenneco, is the pivotal party in this coverage dispute. (A00002171.) Simply put, "it is J.I. Case, a Wisconsin corporation, that was the insured and that possessed the indemnification rights against Travelers that CNH now seeks to enforce." (*Id.*)

1. Delaware Choice of Law Principles Require Application of the Restatement's "Most Significant Relationship" Test On an Issue-by-Issue Basis

Delaware employs the most significant relationship test of the Restatement (Second) of Conflict of Laws to resolve choice-of-law issues. *Certain Underwriters at Lloyds, London v. Chemtura Corp.*, 160 A.3d 457, 465 (Del.

2017). Where, as here, the "principal location of the insured risk" is scattered across two or more states, Delaware courts look to the five main factors under Section 188 of the Restatement for deciding what law governs a contract that is silent on that issue: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. *Id.*, *Liggett*, 788 A.2d at 138. In looking at those factors, a Delaware Court should "not simply add up the number of contacts in applying these factors, but instead weigh them in the unique circumstances of the case at hand." *In re Am. Int'l Group, Inc.*, 965 A.2d 763, 819 (Del. Ch. 2009), *aff'd sub nom., Teachers' Ret. Sys. of La. v. Pricewaterhouse,* 11 A.3d 228 (Del. 2011).

Importantly, Section 188 of the Restatement implicitly recognizes that these factors are not applied in the abstract, as Travelers advocates here, but rather to determine "the law ***applicable to an issue***." Restatement (Second) of Conflict of Laws § 188(2) (1971) (emphasis added). Delaware law is in accord, and requires that these choice-of-law factors be applied "on an issue by issue basis, with the result that the law of one state may be determined to apply to one issue and the law of a different state to another issue in the same case." *Pittman v. Maldania*,

Inc., 2001 WL 1221704, at *3 (Del. Super. Ct. July 31, 2001); *see also Collins & Aikman Corp. v. Stockman*, 2010 WL 184074, at *4 (D. Del. Jan. 19, 2010) ("choice-of-law determinations should be made as to each claim in a case—not to the case as a whole") (citing Restatement (Second) of Conflicts § 188; *Whitwell v. Archmere Acad., Inc.*, 463 F.Supp.2d 482, 485 (D.Del.2006) ("Because choice of law analysis is issue-specific, different states' laws may apply to different issues in a single case….")).

Moreover, Delaware courts will not apply the law of another state that is "repugnant to the settled public policy of [Delaware]." *Sinnott v. Thompson*, 32 A.3d 351, 357 (Del. 2011).

2. The Superior Court Correctly Held That Wisconsin Law Governs Travelers' Defense Obligations

After examining each of the foregoing Restatement factors, the Superior Court drew the only defensible conclusion to the choice-of-law issue—that Wisconsin law governs Travelers' obligation to defend CNH against historicial liabilities of J.I. Case. As the Court observed: "Plaintiffs did not bring asbestos claims against Tenneco; instead they brought their…claims against J.I. Case, the insured company that produced and manufactured the agricultural and construction equipment that caused injury." (A00002170.) As a result:

> Wisconsin has a strong interest in applying its law to the current issue. The case involves a corporation with its principal base of business in Wisconsin. It was transferred to a company with its principal base – place of business in Wisconsin. Now, CNH seeks to enforce indemnification rights, the same rights J.I. Case would have invoked in Wisconsin…. Texas' interest in applying its law exists only by virtue of Tenneco being a Texas corporation. However, Tenneco is not the relevant party in this dispute. It is J.I. Case, a Wisconsin corporation, that was the insured and that possessed the indemnification rights against Travelers that CNH now seeks to enforce.

(A00002170-71.)

The record evidence supported this view, particularly as it related to the handling of product liability claims involving J.I. Case. *See supra* at 12-14. There was no evidence to the contrary.

The Superior Court's ruling followed the persuasive and on point reasoning of then-President Judge Vaughn's prior analysis regarding the CNA policies and of former Justice Ridgely, who "wrote a wonderful opinion in *Liggett* that I think is really the best decision in Delaware with respect to the discussion, and it's *Liggett* that Justice Vaughn relied upon in this analysis." (A00002167.) Consistent with *Liggett*, the Superior Court noted that "the most significant factor for conflict of law analysis in a complex insurance case where multiple insurers and multiple risk is the principal place of business of the insured because it is the

situs which links all the parties together." *Liggett*, 788 A.2d at 138. (A00002168.)

On this record, as the Superior Court expressly declared, the analogy to *Liggett* is compelling. There, the Superior Court held that North Carolina law applied because Liggett's tobacco manufacturing operations and marketing functions that were alleged to have created the insured risks were located exclusively in North Carolina for the entire period issue. *Liggett*, 788 A.2d at 139. The court so held even though, like here, some of the policies at issue were sold to corporate parents of Liggett and those parents were "located in other states when they secured their insurance policies." *Id.*

Travelers argues that Texas law applies to its policies because that is where Tenneco, the parent company, put its own insurance program in place. But there is no reason to embrace that view in a case like this one, where the corporate parent has no involvement in the underlying claims or relationship to the coverage dispute at issue. The coverage dispute here involves liability claims for J.I. Case's products, not Tenneco's products, under policies assigned to a Wisconsin-based company, CNH. The link to Tenneco's insurance program in Texas for only some of the policies at issue in the case, can hardly be deemed the most significant factor for choice-of-law purposes here.

Although J.I. Case's principal place of business in Wisconsin is a critical factor for choice-of-law purposes, it is not the only factor that supports application of Wisconsin law. The domicile, residence, nationality, place of incorporation and place of business of the relevant insured—J.I. Case—all support application of Wisconsin, not Texas, law. (A00002172.)

Likewise, the place of performance of Travelers' Policies was in Wisconsin, and the location of their subject matter was "most definitely in Wisconsin." (A00002172.) The record evidence shows that the place of performance for J.I. Case product liability claims, like the asbestos claims at issue here, was Wisconsin, not Texas. [redacted] *See supra* at 12-13. There thus was no reason for the parties to expect that their relationship as to product liability claims would be governed by anything other than Wisconsin law. As the Superior Court correctly found, "the risk of loss here and the situs of the insured is in Wisconsin…[and] J.I. Case and Tenneco would not be expecting it otherwise. That's where they were located. That's where the relevant information would come from." (A00002171.) In line with these expectations, the 1994 Conveyance Agreement that transferred insurance rights to CNH was expressly governed by Wisconsin, not Texas, law. (B005332-

5344.) Indeed, Travelers could not have expected that Texas law would apply to the parties' relationship or it would never have accepted defense of the Hearing Loss Claims on behalf of CNH. There simply is no evidence that the parties expected Texas law to apply to their relationship.

Moreover, under the J.I. Case Policy that is central to the parties' dispute and that was the basis for the monetary award here, there is nothing connecting Texas to the two remaining Restatement factors, the place of contracting and place of negotiation of the contract. *See supra* at 9-14. Travelers' own corporate designee admitted that [redacted]

(B005222.)

Given Delaware's issue-by-issue approach to choice-of-law issues, it also is important to note that the Judgment may be upheld simply on the basis that the Superior Court correctly resolved CNH's motions, which sought relief solely under the J.I. Case Policy, not any other policies. *See Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 334 (Del. 2012) (Supreme Court "may affirm a grant of summary judgment on grounds other than those on which the trial judge relied"); *Hercules Inc. v. AIU Ins. Co.*, 783 A.2d 1275, 1277 (Del. 2000) (appellee could defend Superior Court's final judgment in its favor with any

argument supported by the record); *Haley v. Town of Dewey Beach*, 672 A.2d 55, 58–59 (Del. 1996) (appellee who does not cross-appeal may defend judgment with any argument supported by the record, even if it questions trial court's reasoning or relies upon precedent disregarded by trial court). It is indisputable that Wisconsin law applies to the issues raised by those motions, given the lack of record evidence that the J.I. Case Policy was part of the "Tenneco Insurance Program," that Tenneco procured that policy, that it was negotiated or managed in Texas, or that Tenneco paid the premiums for it from Texas. There are simply no record facts that support any expectation by J.I. Case or Travelers that issues regarding defense of J.I. Case product liability claims under the J.I. Case Policy would somehow be governed by Texas law.

3. The Delaware Authority Cited By Travelers Does Not Warrant Reversal

Travelers derides the Superior Court's holding as promoting an unworkable and indefensible choice-of-law "road trip." *See* Op. Br. at 36. In so arguing, Travelers places great weight on this Court's decision in *Chemtura Corp.*, 160 A.3d 457, implying that *Chemtura* marks a sea-change in Delaware's choice-of-law approach that rejects the Superior Court's approach here. But the reasoning and holding in *Chemtura* only serve to reaffirm the Superior Court's analysis.

Chemtura, unlike this case, involved environmental insurance coverage and the question, not present here, of whether the court should apply the different laws of each different state where environmental sites were located. There was no attempt, like that by Travelers here, to apply the law of a parent corporation's place of business where the parent corporation's liabilities were not at issue and the parent company was not a party to the case. There, Chemtura had purchased Uniroyal, which had its principal place of business in New York from 1952 through 1965, and in Connecticut from 1975 through 1986 (although Uniroyal maintained a New York office during that timeframe as well). *Id.* at 461. In ruling that New York law applied, this Court reasoned that at "the outset of [its] insurance program, United States Rubber Company was the named insured and New York was its principal place of business. After United States Rubber changed its name to Uniroyal, it maintained a New York address until November 7, 1972." *Id.* at 467-68. Thus, this Court aligned itself with prior decisions looking to the location of the principal place of business at the time the policies were issued. *Id.* at 467-68.

The facts here compel application of Wisconsin law under the reasoning applied in *Chemtura*. As three judges have agreed here, the law of the principal place of business is the most important factor and here that principal place of

business was Wisconsin, where the headquarters of J.I. Case was located from the 1950s to today. Consistent with the approach in *Chemtura*, the Superior Court applied the law of the state where the *named insured* (here, J.I. Case) maintained its principal place of business when the policies were issued. J.I. Case continued to maintain an office—indeed, its headquarters—in Racine, Wisconsin even after it became a subsidiary of Tenneco in the early 1970s and was always listed separately as a named insured under all of the Tenneco policies.

What's more, the undisputed facts establish that it was the parties' expectations (which Delaware law, including the ruling in *Chemtura*, seeks to protect) [redacted] The Superior Court's choice-of-law determination thus is in complete harmony with this Court's ruling in *Chemtura*.

Travelers attempts to muddle the remaining Delaware cases it cites by improperly extending the holdings of those cases beyond their plain limits. For instance, Travelers contends that in *Sequa Corp. v. Aetna Cas. & Sur. Co.*, 1995 WL 465192 (Del. Super. Ct. July 13, 1995) "the Court rejected the insured's argument that the law of the state where the corporate subsidiary had its headquarters should apply." *See* Op. Br. at 35. Not so. There, a corporate parent —Sequa—and one of its subsidiaries—Chromalloy—sought coverage for eight

environmental sites. The insurers argued for New York law, which was the state of the parent's (Sequa's) principal place of business. *Id.* The insureds argued for application of Delaware law, based on that being the corporate parent's (Sequa's) state of incorporation or, alternatively, for a "site based approach" (*e.g.*, applying the laws of the eight states where they were sued on a site-by-site basis). *Id.* None of the parties argued for applying the law of Missouri, where the subsidiary (Chromally) had its principal place of business prior to its merger with Sequa, at which time its headquarters moved to the same state (New York) as that of the parent company. *Id.* at *3.

Sequa is distinguishable from this case on multiple grounds. In *Sequa*, unlike here, the parent corporation, Sequa, was a party to the coverage action, and both the parent and subsidiary thus were making claims under the policies. *Id.* at *1. Here, by contrast, Tenneco is not a party to this action and is not seeking coverage. Moreover, here, unlike in *Sequa*, the relevant subsidiary has never relocated to the parent company's home state, but has always been located in a different state (Wisconsin). Perhaps most importantly, the insureds in *Sequa* did not even argue that the law of the subsidiary's principal place of business should apply, and there was no evidence, like that here, that centered the relationship

between the subsidiary and the insurer in the same state as the subsidiary's principal place of business.

Travelers attempts to contort *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1991 WL 236936, at *1 (Del. Super. Ct. Oct. 29, 1991) to its purposes, as well, but that case, again, did not involve the question of coverage for claims brought only against an insured subsidiary. The policyholder there (Monsanto) argued for Delaware law for its own claims, because Delaware was the state of its incorporation, whereas the insurers argued for Missouri law based on Monsanto's principal place of business, or Massachusetts law based on the broker's location *Id.* No party in *Monsanto* argued for the application of the law of a corporate subsidiary's location, because there was no issue of subsidiary insurance coverage presented. If anything, *Monsanto* stands for the proposition that the Court should apply the law of the state of the involved insured's principal place of business, which here would be Wisconsin.

N. Am Philips Corp. v. Aetna Cas. & Sur. Co., 1994 WL 555399 (Del. Sept. 2, 1994), is similarly unhelpful to Travelers. *N. Am Philips* involved a choice-of-law dispute between an entity based in New York and defendant insurers who were located in sixteen different states. There, the court held that New York had the "most significant relationship" to the underlying environmental liabilities

imposed against North American Philips because New York was the state where the majority of significant contacts occurred, including North American Philip's principal place of business and headquarters. *Id.* at *7. Thus, *N. Am. Philips*, unlike this case, involved underlying liabilities against the parent (Philips) rather than any of its subsidiaries, and did not involve insurance policies separately issued to subsidiaries.

Finally, Travelers cites *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76 (Del. Ch. 2009). But *Viking Pump* involved the narrow question of what state's law should apply after a company, Houdaille, moved its headquarters from New York to Florida. *Id.* at *88. The court concluded that the parties' expectations are properly based on the location of the insured risk at the time the policy was issued. Here, that focus leads irrefutably to Wisconsin, where J.I. Case's operations remained at all relevant times. *Viking Pump* teaches that an insuring relationship, like that here, that was initiated and originally anchored in Wisconsin, should remain anchored there, despite any later, collateral relationship between J.I. Case's parent company and Travelers. Tenneco's later involvement at the parent level should not alter the parties' justified expectations, at policy issuance, that Wisconsin law would apply to any disputes involving only the J.I. Case's liabilities or any policies issued separately to J.I. Case.

4. Travelers' Opening Brief Distorts the Record and Relies on Inadmissible Assertions

In an attempt to dodge the facts that support applying Wisconsin law, Travelers relies on unsupported statements made in an affidavit by its former employee, Gary Bennett, that were properly stricken by the Superior Court. As noted at page 11 above, Mr. Bennett readily admitted [redacted] (A00001891-97.) The Superior Court granted CNH's motion to strike significant portions of Mr. Bennett's affidavit, given the lack of foundation for some of his assertions. (A00001962-69.)

Although Travelers has not specifically appealed from that ruling, it nevertheless cites to the stricken portions of Mr. Bennett's affidavit, based on a footnote arguing that the Superior Court's exclusionary ruling was "erroneous." But that passing footnote does not give Travelers a license to go outside of the record. This Court's rules and precedent are clear that "[a]rguments in footnotes do not constitute raising an issue in the 'body' of the opening brief." *See Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1264 (Del. 2012); *see also*

SUPR. CT. R. 14(d). As such, Travelers has waived any argument regarding the Superior Court's exclusionary ruling, and its citation to Mr. Bennett's affidavit without accounting for the Superior Court's ruling is improper.

In any event, as demonstrated above, the Superior Court's ruling on the motion to strike was well-founded. And the ***admissible*** record evidence demonstrates that the Superior Court correctly held that a host of undisputed facts require application of Wisconsin, not Texas, law to the coverage issues presented by the motions that resulted in the Judgment here.

5. Texas Law Cannot Apply Because It Is Contrary to Delaware Public Policy

Even assuming, *arguendo*, that Texas law might otherwise apply to the anti-assignment issue, it should not be applied here because voiding coverage on this basis would be contrary to Delaware public policy. *Sinnott v. Thompson*, 32 A.3d 351, 357 (Del. 2011); *Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1161 (Del. 2010) (a foreign jurisdiction's laws may not be used to interpret a contractual provision "in a manner repugnant to the public policy of Delaware").

In *Viking Pump*, the Court of Chancery refused to apply an anti-assignment clause in the way Travelers urges here because doing so would have violated New York public policy. The Court found that the insurer's argument was "at odds with New York's public policy, because it could hamstring markets for the sale of

corporate assets and lead to insufficient recoveries for tort plaintiffs in situations when insurance to cover the plaintiffs' claims was bought and paid for." *Id.* There is no reason to believe that the public policy of Delaware—a state where many publicly traded corporations are organized and on whose law many such corporations rely in areas of corporate governance and corporate transactions—would favor hamstringing sales of corporate assets or voiding insurance coverage already bought and paid for, to the potential detriment of tort plaintiffs.

Rather, the argument championed by Travelers would bring about the very type of insurance forfeiture and insurance company windfall that Delaware courts have long disfavored. *See, e.g., Pac. Ins. Co. v. Higgins*, 1993 WL 133181, at *4 (Del. Ch. Apr. 15, 1993) (refusing to apply limitations defense from underlying tort case to insurer where it would "grant a windfall to insurers"); *Deutsche Bank Trust Co. Amers. v. Royal Surplus Lines Ins. Co.*, 2012 WL 2898478, at *23 (Del. Super. July 12, 2010) (refusing to provide "windfall" to primary carrier by requiring excess carrier to defend); *Annestella v. GEICO Gen. Ins. Co.*, 2014 WL 4229999, at *3 (Del. Super. Aug. 18, 2014) (recognizing "Delaware's public policy against forfeitures of insurance contracts in the absence of prejudice."); *Viking Pump, Inc.*, 2 A.3d at 123-24 (application of non-cumulation of policy limits rule and *pro rata* allocation "would … grant the insurer a windfall.").

II. THE SUPERIOR COURT PROPERLY HELD THAT TRAVELERS' REFUSAL TO DEFEND THE INITIAL SUITS AGAINST CNH WAIVED TRAVELERS' RIGHT TO ASSERT LATE NOTICE AND LACK OF COOPERATION DEFENSES AS TO LATER-FILED UNDERLYING ASBESTOS SUITS

A. Question Presented

Did the Superior Court properly determine on summary judgment that Travelers' failure to defend the initial suits against CNH resulted in a waiver of its rights to deny coverage for later-filed suits under the notice and cooperation provisions in the Travelers Policies? (A00000210-247, A00000274-312; A00002284-2325, A00002389-2397, A00002398-2416.)

B. Standard And Scope Of Review

This Court reviews questions of law raised on summary judgment *de novo*. *See Shook*, 909 A.2d at 128.

C. Merits Argument

Undisputed evidence supports the Superior Court's decision that Travelers waived compliance with the notice and cooperation conditions of its policies because it failed to defend CNH after it was originally notified of the Underlying Asbestos Suits.

When CNH tendered 112 asbestos product suits to Travelers in May 2008, Travelers knew that CNH was seeking coverage as a successor by assignment from J.I. Case and previously had provided coverage to CNH under the same

policies for the product-related Hearing Loss Claims. (B000282; B005007-5015.) Once the asbestos product claims were tendered, Travelers had three choices under Wisconsin law. It could: (1) intervene in the underlying lawsuit and request a hearing on coverage and liability issues; (2) defend the insured while reserving its rights to contest coverage; or (3) decline to defend and risk the consequences. *See, e.g., Newhouse by Skow v. Citizens Sec. Mut. Ins. Co.*, 501 N.W.2d 1, 6 (Wis. 1993); *see also Precision Cable Assemblies LLC v. Central Resistor Corp.*, 2001 WL 1008155, at *5 (Wisc. Ct. App. Sept. 5, 2001).

Where, as here, an insurer selects the third option and declines to defend its insured, one of the "consequences" the insurer faces under Wisconsin law is waiver of its right to contest coverage. *Precision Cable*, 2001 WL 1008155, at *5. Thus, as the Superior Court summarized:

> When coverage disputes arise, Wisconsin law favors a procedure by which the insurer defends the policyholder subject to a reservation of rights or intervenes in the underlying lawsuit and requests a bifurcated trial on the issue of coverage, moving to stay liability proceedings until the coverage matter is resolved. If an insurer reserves rights, the insured has the right to control the defense. If an insurer uses these procedures, the insurer runs no risk of breaching its duty to defend. Although the insurer is not required to follow such procedures, it declines to do so at its own peril.

(A00002689-90.)

Here, the record establishes that Travelers took the option of acting at its own peril, rather than defending under a reservations of rights, intervening in the underlying suits or filing its own declaratory judgment action. That election, in turn, waived Travelers' notice and lack of cooperation defenses and relieved CNH of futile compliance with the notice and cooperation conditions in the policies as to later-filed lawsuits.[7] *Newhouse*, 501 N.W.2d at 6.

1. Controlling Law Establishes That Travelers Waived Its Coverage Defenses Because It Refused to Provide CNH With a Defense To Any Underlying Asbestos Suits

Travelers does not deny, because it cannot, that after May 2008, it never assumed CNH's defense. Travelers claims there is no breach, however, because it did not deny coverage, but rather has been conducting an eight-year coverage "investigation." As the Superior Court recognized, Travelers' assertion lacks credulity. (A00002684-98.) CNH repeatedly attempted to obtain a defense, but

[7] Travelers makes much of CNH's purported failure to notify it about asbestos product claims that preceded the May 2008 tender by CNH. *See* Op. Br. at 12-15. But it is of no moment that CNH was first sued as a defendant in asbestos litigation in 1996 because Wisconsin law is settled that each of the Underlying Asbestos Suits constitutes a separate "occurrence." *See Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613, 622-23 (Wis. 2009). Travelers fails to cite any case supporting the notion that an insured loses coverage for later occurrences by failing to give notice of earlier, different occurrences, and CNH does not seek coverage from Travelers for any asbestos claims filed prior to those it tendered to Travelers in May 2008.

Travelers steadfastly refused and told CNH to fend for itself. Travelers is accountable for the consequences of this choice under Wisconsin law.

The purported rationale for Travelers' "continuing investigation" strains credulity as well. Travelers asserts (without any citation to the record) that "CNH did not provide any documents purporting to support an alleged assignment until after this coverage litigation began." *See* Op. Br. at 50. This assertion is untrue, and that is why the Superior Court rejected it below. The record is clear that Travelers was aware of CNH's corporate history, including the passage of J.I. Case assets to CNH (A00000257-68.)

[redacted] (B006585-88; B000283; A00000257-68; A00000188-209; A00001372-1414.) The 1994 Reorganization Agreement, in turn, formed the basis of the Superior Court's determination (not appealed by Travelers) that the rights to the J.I. Case Policy and Tenneco Policies transferred from J.I. Case to CNH. There was nothing further to "investigate."

Further, the record shows that Mr. Dorion, [redacted] (*Id.*; B006602-05.) [redacted]

[redacted]

(B006620-21.)

[redacted], as well as the Superior Court's analysis of duty-to-defend law: whatever questions Travelers may have had with regard to corporate history issues, they did not absolve Travelers from its duty to defend; rather, Travelers should have accepted its duty to defend, while reserving its rights on corporate history issues. [redacted]

[redacted] (B006589-99; A00001839-46.)

Travelers also asserts, without explaining why it matters, that it did not understand until after this litigation commenced in 2012 that CNH acquired rights under the Travelers policies by way of an assignment. *See* Op. Br. at 47. Travelers' argument mischaracterizes a single sentence in the May 2008 tender letter to Travelers as implying that CNH sought rights to coverage as a successor by merger to J.I. Case, when in fact CNH merely referred to itself as [redacted] (Emphasis added). (A00000258.)

As "evidence" that its purported "confusion" on this issue had some importance, Travelers argues that CNH's own broker, Mr. Dorion, advised CNH [redacted] But this assertion stretches the record. Although Mr. Dorion at one point [redacted] (B006521; B006610.) [redacted]

[redacted] (B006521; B006605-10; B006546; B006552.)

As both Ms. Rohrman and Mr. Dorion also testified, [redacted] (B006605-10; B006546; B006552.)

At bottom, Travelers' argument about wording is misdirection because it ignores the fact that the May 2, 2008 tender letter attached the 1994 Reorganization Agreement, the very document which the Superior Court found explicitly and unambiguously provided for a broad transfer to CNH of the J.I. Case asbestos liabilities and rights to coverage under policies covering J.I. Case. (A00000188-209.) Travelers' argument that its duty to defend was somehow excused despite its receipt of this document, and that the Superior Court should instead have focused on how Travelers' duty to defend may have been affected by

irrelevant emails that Travelers did not even know about at the time of CNH's tender, lacks merit.

The record confirms all that is required to trigger a defense. Travelers knew that there was a ***possibility*** that CNH had succeeded to rights under the J.I. Case Policy. Once Travelers knew of this possibility, its duty to defend was triggered. *Fireman's Fund Ins. Co. of Wis. v. Bradley Corp*., 660 N.W.2d 666, 673 (Wis. 2003) (possibility of coverage triggers duty to defend).

2. Undisputed Record Facts and Wisconsin Law Require Rejection of Travelers' Claims that It Was Prejudiced by a Purported Inability to Investigate Due to Late Notice

Although Travelers' opening brief attempts to make the case that Travelers somehow was prejudiced by the timing of notice, the facts and Wisconsin law require rejection of its position. Wisconsin law makes clear that where, as here, an insurer consciously chooses not to participate in the defense of its insured, it cannot complain that it was prejudiced by the timing of notice. *Bradley Corp. v. Zurich Ins. Co.*, 984 F.Supp. 1193, 1203 (E.D.Wis.1997). In *Bradley*, the court rejected an insurer's argument that it was prejudiced by a nine-month delay in notice because the insurer "had the opportunity to participate in the methods of discovery and case strategy but failed to do so." *Id*. The court noted that although the insurer claimed that if notice had been provided earlier it "could have" moved

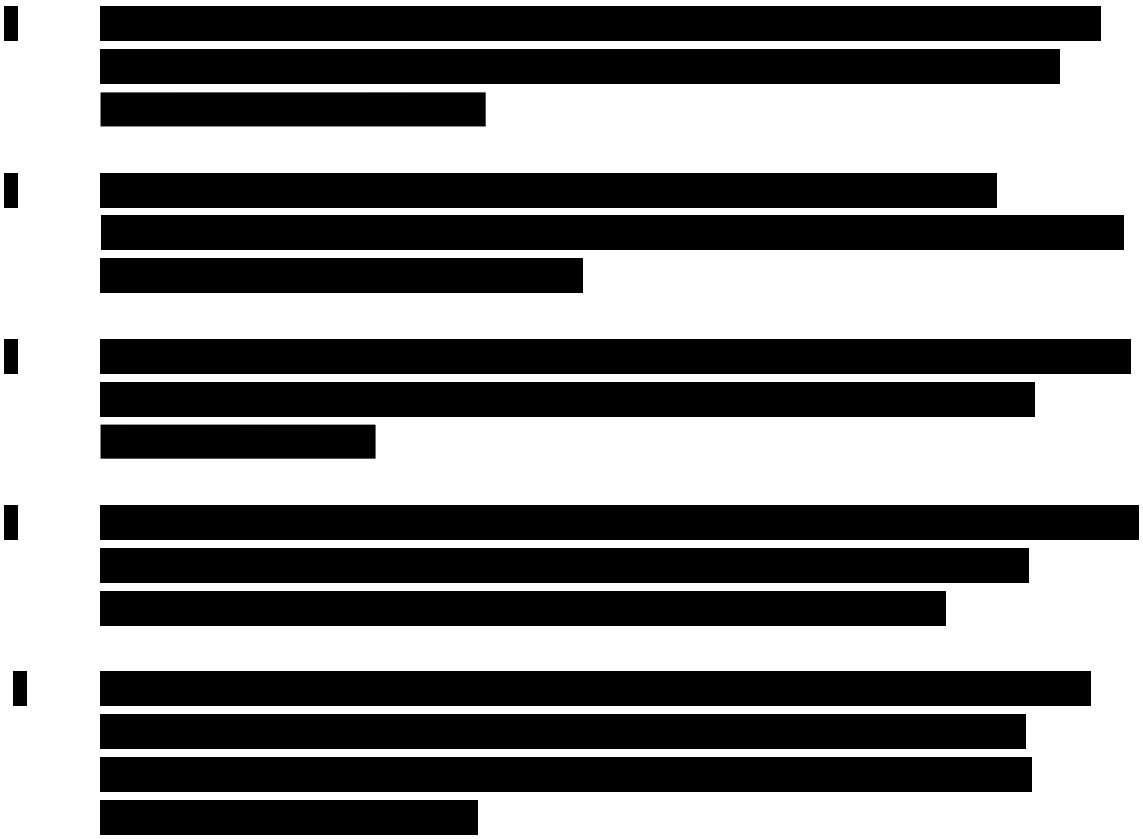
to intervene, selected its own counsel, or managed the lawsuit, the insurer submitted "no evidence of any kind that it could not have done those things [when it did receive notice] or that it in fact was prevented from so doing." *Id.* at 1204. The reasoning in *Bradley* finds a parallel in this case.

To begin with, even in the face of the Superior Court's rulings rejecting Travelers' anti-assignment defense, Travelers could not articulate when, if ever, it might recognize CNH's rights to coverage under the Travelers policies (and, indeed, maintains its "no coverage" position to this day). Travelers' own corporate representative [redacted] (B005766; B006160-62; B006207-08) [redacted]); (B006159-60) [redacted]).

The record is undisputed, and even this very appeal by Travelers makes one thing abundantly clear: earlier notice to Travelers of any single lawsuit would

only have resulted in an earlier denial of coverage for that suit, and prejudice cannot be established for that reason.

Although the above, alone, is sufficient to show a lack of prejudice, the record also establishes that Travelers cannot show prejudice with respect to any particular case it was asked to defend. In this regard, when asked about individual asbestos cases or compilations of data concerning asbestos cases:



Any attempt by CNH to give further notice would have engendered the same inaction by Travelers because Travelers has yet to admit that it has an obligation to defend even one of the Underlying Asbestos Suits. These facts

underscore the lack of prejudice to Travelers and provide yet another basis for rejecting Travelers' policy defenses. *See also Rentmeester v. Wisconsin Lawyers Mut. Ins. Co.*, 473 N.W.2d 160, 164 (Wis. App. Ct. 1991) (no prejudice to insurer notified over a year late where it had opportunity to conduct discovery, prepare for trial, and did not "elaborate on how it was prejudiced by its inability to participate….").

That timing issues were completely irrelevant to Travelers' failure to defend is further established by the fact that Travelers never intervened or defended CNH in ***any*** of the underlying lawsuits, even where Travelers did not contest the timing of notice. (*See* B005271.) CNH sent multiple notice letters to Travelers on dozens and dozens of Underlying Asbestos Suits, and in letter-after-letter acknowledging CNH's notices, Travelers declined to assume CNH's defense and instead [redacted] (*See, e.g.*, B005766-67; , B006012-6015; B006444-46; B006381-84; B006393-96; B006430-32; B006397-6400; B006378-380; B006439-6441; B006408-09; B001636-37; B006414-15.)

Where, as here, an insurer's inaction establishes that it will not fulfill its duty to defend, the insurer cannot argue timing or consent-related defenses based on the insured's purported failure to perform futile gestures. *Bradley*, 660 N.W.2d

at 684 ("[T]he clear and uncontroverted evidence in the record is that the timing of Bradley's notice would not have changed the Insurance Company's decision to deny its duty to defend."). *See also Flintkote Co. v. General Acc. Assur. Co. of Canada*, 480 F.Supp.2d 1167, 1176 (N.D. Cal. 2007) (insurer's decision not to defend, even without explicit denial of claim, has same result as explicit denial for purposes of holding that insurer waived its defense under voluntary payments provision) (internal citations omitted).

Travelers' argument also ignores the fact that its refusal to defend was a material breach of contract that excused CNH from further compliance with any "notice" or "cooperation" provisions in Travelers' policies. *Capitol Indem. Corp. v. St. Paul Fire & Marine Ins. Co.*, 357 F.Supp. 399, 413 (W.D. Wis. 1972) ("It would be inequitable to allow S.P.I. to avoid its contractual obligation to defend the insured by creating the impression that it would be futile for the insured to forward the complaint"); *Ricchio v. Oberst*, 251 N.W.2d 781, 787 (Wis. 1977) (buyer was excused from tendering purchase price to seller after he repudiated purchase agreement by selling property to third party because buyer's performance would have been futile); *Logan v. City of Two Rivers*, 278 N.W. 861, 862 (Wis. 1938) (plaintiff entitled to interest on claim for non-payment even though no demand was made on defendant because the "law does not require the

doing of a futile and useless act" where the defendant "was resisting payment of plaintiff's claim and denying all liability"); *J.I. Case Threshing Machines Co. v. Johnson*, 122 N.W. 1037, 1038 (Wis. 1909) ("It is a rule of law thoroughly established by many decisions that the positive declaration by one party of a determination which would render a prescribed act by the other futile excuses a specified performance or tender of that act."); *see also Radcliffe v. Network Amer. Life Ins. Co.*, 96 Wash. App. 1002, at *6 (Wash. App. Ct. June 14, 1999) ("It would have been futile for Radcliffe to continue submitting claims that would not be paid, and the law does not require performance of a futile act.").

In short, as the Superior Court recognized, Travelers has unflinchingly refused to extend a defense for the Underlying Asbestos Suits despite having had multiple opportunities to do so, that refusal continues to this day, and such a refusal results in a waiver of Travelers' defenses. Were the law otherwise, an insurer could sit back (for eight years), interminably plead a false need to "investigate" even when its conduct and litigation positions make abundantly clear that there is no set of facts under which it would have accepted a defense, leave its insured to defend itself, and yet still insist on the insured's futile fulfillment of policy conditions. Wisconsin law says "not so fast." It gives the insurer the opportunity to protect its rights, by intervening in the underlying action, filing a

declaratory judgment action or defending subject to a reservation of rights. The record here, however, demonstrates that Travelers chose none of these options and instead elected to dig in and assert a host of coverage defenses. Having done so, it has waived the defenses it now attempts to assert.

III. THE SUPERIOR COURT PROPERLY HELD THAT CNH WAS ENTITLED TO RECOVER ITS POST-DENIAL DEFENSE COSTS

A. Question Presented

Did the Superior Court properly hold that CNH was entitled to recover the defense costs it incurred after Travelers failed to provide a defense, even if CNH purportedly delayed tendering individual lawsuits after Travelers' failure to defend? (A00000274-312; A00002398-2406.)

B. Standard And Scope Of Review

This Court reviews questions of law on summary judgment *de novo*. *See Shook*, 909 A.2d at 128.

C. Merits Argument

Travelers cannot support its attempt to avoid payment of what it incorrectly characterizes as "pre-tender" defense costs. The costs that Travelers seeks to avoid paying were not "pre-tender;" they are costs that were incurred ***after*** the May 2008 tender of the initial 112 cases that Travelers refused to defend. Travelers' failure to defend was pervasive and continuing and rendered futile the further tender of cases filed after May 2008. For the same reasons noted above that establish Travelers' waiver of its notice and cooperation defenses, Travelers cannot avoid payment of defense costs for such later-filed cases on the basis that they include "pre-tender" defense costs. *See supra* at 45-58.

Travelers cites to one Wisconsin case, *Towne Realty v. Zurich*, 548 N.W.2d 64 (Wis. 1996), in support of its argument on this issue. *Towne Realty*, however, is factually distinguishable and nothing in that case forecloses recovery of post-denial defense costs like those sought here. In *Towne Realty*, the insured sought coverage for a single, unique underlying breach-of-contract lawsuit. *Id.* at 65. Unlike here, there was no allegation in *Towne Realty* that the insured had previously sought a defense for a similar lawsuit (let alone dozens of such lawsuits), only to be met by the insurer's refusal to defend. *Towne Realty* simply does not involve facts like those here in which an insurer presented with a host of largely similar asbestos claims, makes clear through inaction and letters telling to the insured to fend for itself, that it will not cover any such claims and thus engages in an anticipatory breach.

The record here establishes that Travelers would have denied coverage in any event given its position (now rejected by the Superior Court but maintained by Travelers here) that CNH did not have rights under the policies:

[redacted]

(*See* B005766; B005825.) In essence, Travelers attempts, as it did below, to create a fictitious category of "pre-tender" costs based on the fantasy that—had post-May 2008 cases only been tendered to it in a more timely manner—it would have defended those cases.

Based on this fantasy, Travelers asks this Court to fashion a rule that would impose on insureds the need to engage in futile, years-long efforts to notify insurers about claims the insurers already have refused to defend. This is neither the law, nor would it be good public policy or do anything to protect insurers. As noted above, as a matter of law, an insurer ***cannot*** be prejudiced by late notice or lack of cooperation if it would have denied coverage anyway. *See Int'l Flavors & Fragrances, Inc. v. Valley Forge Ins. Co.*, 738 N.W.2d 159, 160 (Wis. App. Ct. 2007); *see also Fireman's Fund*, 660 N.W.2d at 683 (insurer not prejudiced as a matter of law where timing of notice would not have changed its decision not to defend the suit); *Sun-Times Media Group, Inc. v. Royal & SunAlliance Ins. Co. of Canada*, 2007 WL 1811265, at *13 (Del. Super. Ct. June 20, 2007) (finding no prejudice where insurer failed to prove the outcome of the underlying case would have been different had there been cooperation).

Here, Travelers has continued to repudiate its defense obligations since May 2008, blithely advising CNH to "take the necessary steps you deem necessary to protect your interests in the lawsuits." There are no "pre-tender" defense costs sought by CNH under these circumstances.

IV. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING DISCOVERY OF THE CONFIDENTIAL CNA SETTLEMENT AGREEMENT

A. Question Presented

Did the Superior Court abuse its discretion in rejecting Travelers' attempt to circumvent Delaware's well-established policy of encouraging and promoting settlements by protecting their confidentiality when the requesting party lacks any basis for discovery thereof? (A00001451-1464; A00002202-2219; A00002870-2879.)

B. Standard And Scope Of Review

This Court reviews a trial court's decision denying discovery solely to determine whether there was an abuse of discretion. *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1089 (Del. 2006).

C. Merits Argument

The Superior Court properly denied, on two occasions, Travelers' attempt to discover details of the confidential settlement with CNA. (A00001959-61; A00002699-2704.) Travelers challenges the Superior Court's exercise of its discretion based on its supposed right to assert equitable defenses, including setoff, contribution and exhaustion that would foreclose CNH from obtaining what it calls "double recovery." *See* Op. Br. at 60. This is more misdirection.

First, Delaware courts only allow discovery of confidential settlement agreements where the relevance of the information in the settlement agreement outweighs the goal of encouraging and promoting settlements. *See, e.g., Council of Unit Owners of Sea Colony East v. Freeman Assoc.*, 1990 WL 128185, at *3 (Del. Super. Ct. Oct. 3, 1990). Delaware and Wisconsin both require the party seeking discovery to make a "particularized showing" that the relevance of the settlement outweighs its confidentiality. *Block Drug Co., Inc. v. Sedona Laboratories, Inc*., 2007 WL 1183828 (D. Del. Apr. 19, 2007) ("the focus of Rule 408 is to recognize the strong public policy favoring settlement and to promote that policy," and therefore "[c]ourts in this circuit and others…have ***required a more 'particularized showing'*** that the evidence sought is relevant and calculated to lead to the discovery of admissible evidence." *Id*. at *1 (emphasis added); *Wisconsin Elec. Power Co. v. Northern Assur. Co. of Amer.*, 2007 WL 4631363, at *1 (W.D. Wis. Oct. 31, 2007) (denying discovery of settlement agreement until issues of insurers' liability were resolved).

That particularized showing is absent here. Although CNH denies that it is seeking any double recovery, Travelers' "double recovery" refrain carries no weight under Wisconsin law. Wisconsin "embraces policies which allow the insured to receive the benefit of the premiums paid for coverage that he or she had

the foresight to purchase," such that the insured "should receive that benefit regardless of whether he is able to obtain payment for the same loss from another source." *Gronik v. Balthasar*, 2015 WL 4647938, at *2 (E.D. Wis. Aug. 6, 2015) (internal quotations omitted); *see also Plastics Eng'g Co.*, 759 N.W.2d at 627 ("there can be no pro rata approach to the duty to defend"). In this case, the Superior Court's reliance on *Gronik* and *Plastics Engineering* is all that is needed to support its discretionary denial of Travelers' requested discovery.

Second, Travelers gets no further with its argument that "Wisconsin Courts have rejected double recoveries as against public policy." *See* Op. Br. at 60. As the Superior Court noted, Travelers' cited cases involve personal injury claims, not claims for breach of contract:

> CNH is entitled to sue a contracting party for any breach of the contract that that party entered into with CNH. This is not a situation where there are joint-tortfeasors or multiple insurers fighting over which insurer must indemnify a defendant so that the plaintiff is made whole. Here, CNH is suing different contracting parties for breaching their respective contracts with CNH.

(A00002702.)

Here, as in *Gronik*, Travelers' policies obligate it to cover certain types of bodily injury claims, and do "not limit that coverage only to situations in which [CNH is] unable to obtain payment for the damage from elsewhere." 2015 WL 4647938, at *2. Because Travelers' professed concerns of a potential "double

recovery" are unfounded, the CNA settlement has no particularized relevance and the Superior Court's exercise of discretion should be affirmed for this reason, as well.

Third, even if Travelers could pursue equitable remedies against CNH here (which CNH disputes), it has failed to articulate any fact or circumstance that could support an equitable setoff under Wisconsin law. "Generally, a 'setoff' is an equitable counterclaim against a plaintiff used to reduce a defendant's damages by an amount ***plaintiff already owes defendant*** arising from an independent transaction or claim." *Gronik*, 2015 WL 4647938, at *1. Travelers' attempt at setoff does not meet this definition. Travelers does not claim CNH owes it any outstanding debt; rather, it argues that CNH's recovery from CNA relieves Travelers, in whole or in part, from its independent obligation to pay for losses purportedly encompassed by CNH's settlement with CNA. As in *Gronik*, this does not meet the definition of a "setoff" under Wisconsin law. *Id.* Accordingly, the Superior Court's exercise of discretion can be affirmed on this independent ground.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the Superior Court's Judgment in CNH's favor.

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Respectfully submitted,

/s/ John C. Cordrey

Brian M. Rostocki (No. 4599)
John C. Cordrey (No. 5324)
REED SMITH LLP
1201 Market Street, Suite 1500
Wilmington, DE 19801
Telephone: (302) 778-7500
Facsimile: (302) 778-7575

OF COUNSEL:
James M. Davis
Thomas A. Marrinson
Evan T. Knott
Emily E. Garrison
REED SMITH LLP
10 S. Wacker Drive, 40th Floor
Chicago, Illinois 60606
Telephone: (312) 207-1000
Facsimile: (312) 207-6400

James C. Martin
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
Telephone: (412) 288-3131
Facsimile: (412) 288-3063

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