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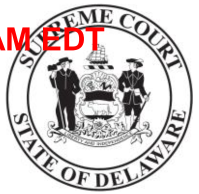

IN THE SUPREME COURT OF THE STATE OF DELAWARE

--	)	No. 558,2018
IN RE VERIZON INSURANCE	)	No. 561,2018
COVERAGE APPEALS	)	No. 560,2018
	)	
	)	Court Below—Superior Court of the
	)	State of Delaware
	)	C.A. No. N14C-06-048 WCC (CCLD)
	)	
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APPELLANTS ILLINOIS NATIONAL INSURANCE CO. AND NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PA'S REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

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INTRODUCTION

The insurers' main appeal presents three questions of contract interpretation. First, does the phrase "regulation, rule or statute regulating securities" in the Idearc Runoff Policy encompass statutes and common-law principles that are not directed at securities activities specifically? Second, does the term "purchase or sale … of … any security" encompass a transaction that, by Verizon's own admission, was designed not to involve any purchase or sale of securities? Third, does the term "brought by a security holder" encompass a lawsuit brought by a party that holds no relevant securities? If the answer to the first of these questions is "no," then this Court must reverse, and the Court need not address any other issue, including Zurich's separate appeal, Verizon's cross-appeal, or any of the voluminous extrinsic evidence that clogs Verizon's 90-page brief. If the answer to the two remaining questions is "no," the same result holds.

Verizon attempts to bury the controlling policy language and undisputed facts under a mountain of irrelevant extrinsic evidence. And rather than meeting the issues head on, Verizon repeatedly mischaracterizes the insurers' arguments, the record, and the law. Verizon asserts, for example, that the insurers are attempting to avoid contractual duties based on public policy. They are not. Verizon contends that the insurers requested discovery into extrinsic evidence about the meaning of the Securities Claim definition. They did not. Verizon states that this Court recently

described a breach-of-fiduciary-duty claim as a "state securities law claim." It did not. Verizon repeatedly quotes a statement about "[a]ll spin transaction liability" to imply that this language appears in the policy itself. It does not. Time and again, Verizon's brief muddies the matters at the heart of this case. But no amount of misdirection can change the plain language of the policy.

In its afterthought of a cross-appeal, Verizon argues that the Superior Court miscalculated its award of prejudgment interest. Controlling precedent forecloses that argument. But this Court need not even address it. These consolidated appeals should begin and end with the text of the Securities Claim definition. Under that plain language, the *U.S. Bank* Action is not a Securities Claim, and Verizon's separate defense costs are not covered.[1]

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[1] Capitalized terms have the same meaning as in the insurers' Opening Brief ("Br.").

SUMMARY OF ARGUMENT ON CROSS-APPEAL

1. Denied. The Superior Court erred in concluding that the *U.S. Bank* Action is a Securities Claim, but it correctly calculated prejudgment interest. Under Delaware law, prejudgment interest accrues from when payment is due, and a payment of insurance policy proceeds is not due from the insurer until the insured makes an unequivocal demand. The Superior Court correctly determined that Verizon did not make an unequivocal demand for payment until—at the earliest—requesting mediation in January 2014.

ARGUMENT

I. The *U.S. Bank* Action Is Not a "Securities Claim"

Verizon is not entitled to reimbursement of its defense costs in *U.S. Bank* because that lawsuit does not satisfy either prong of the policy's Securities Claim definition—(1) *U.S. Bank* did not allege a violation of any "regulation, rule or statute regulating securities," and (2) *U.S. Bank* did not concern a "purchase or sale" of securities and was not brought "by a security holder." Verizon's contrary arguments mischaracterize the insurers' positions, distort the policy language, and contravene settled principles of contract interpretation.

A. The *U.S. Bank* Action Did Not Allege a Violation of a "Regulation, Rule or Statute Regulating Securities"

1. The *U.S. Bank* Action Did Not Allege a Violation of any Law "Regulating Securities"

a. Laws of General Application Do Not "Regulate Securities"

It is common ground on this appeal that to "regulate" means "to control (an activity or process)." Verizon Br.46 (quotation marks omitted).[2] A regulation, rule, or statute "regulating securities" thus must control *securities*, as opposed to non-securities activities. In other words, it must be directed at securities specifically, rather than other matters generally. This plain meaning forecloses Verizon's

[2] "Verizon Br." refers to Verizon's Answering Brief on Appeal and Opening Brief on Cross-Appeal.

contention that a law "regulating securities" broadly includes any law that "is applicable and … will enjoin [a securities] transaction," or any law "one must follow when engaging in securities transactions." Verizon Br.21, 46, 51 (quotation marks omitted).

The structure of the Securities Claim definition also defeats Verizon's expansive interpretation. As the insurers explained, Verizon's interpretation would render the "regulating securities" requirement superfluous in light of the separate requirement that a Securities Claim also must either arise from a "purchase or sale" of securities or be brought "by a security holder." *See* Br.20-21. Verizon acknowledges the "fundamental rule of contract interpretation that all terms be given effect and that no terms be rendered superfluous," and concedes that the "regulating securities" requirement must "provide[] a distinct limitation on the type of claims that will constitute Securities Claims." Verizon Br.44, 51. Verizon contends, however, that its interpretation does not render the "regulating securities" requirement superfluous because "a plaintiff who sues a defendant for stealing securities owned by the plaintiff" would satisfy the "security holder" requirement, but the resulting claim "would not involve a violation of a law regulating securities." Verizon Br.51.

That response falls flat because even in that scenario, the "security holder" requirement continues to render the "regulating securities" requirement superfluous

under Verizon's reading. To state the obvious: one must not steal when engaging in securities transactions, and theft would be grounds for a court to enjoin or unwind a securities transaction. Under Verizon's interpretation, therefore, a claim for securities theft *would* involve an alleged violation of a law "regulating securities." Verizon asserts that its interpretation excludes this type of claim from the Securities Claim definition, but in fact it does not. The *only* response Verizon offers for why its interpretation does not render the "regulating securities" requirement entirely superfluous thus fails. That glaring failure alone is sufficient grounds for this Court to reverse.[3]

Neighboring language confirms the insurers' reading. The Securities Claim definition covers alleged violations of regulations, rules, or statutes "regulating securities (including, but not limited to, the purchase or sale or offer or solicitation of an offer to purchase or sell securities)." JA1316. Contrary to Verizon's assertion, the insurers have never argued that the Securities Claim definition is "limited" to laws regulating *only* the activities listed in that parenthetical. Verizon Br.49-50; *see*

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[3] It is telling that the only scenario where Verizon even asserts (albeit wrongly) that the "regulating securities" requirement has independent meaning is quite far-fetched. In Verizon's view, the Securities Claim definition includes a "regulating securities" requirement *solely* to clarify that the policy does not cover a company's separate defense costs if: (1) a D&O engages in criminal theft of a security; (2) the D&O does so in his official capacity; (3) the victim files a civil suit; *and* (4) the victim sues not only the individual D&O, but also the company itself. That scenario is fanciful, and so is Verizon's argument.

id. at 46. The parenthetical instead is illustrative—it lists the *kinds* of activities that a law "regulating securities" would cover. Br.19-20. Verizon in effect argues that because the parenthetical contains the words "including, *but not limited to*," this Court should ignore it entirely. But why does the Securities Claim definition include this parenthetical at all, except to help show that a law "regulating securities" means a law directed at *securities*-related activities? In its 90-page brief, Verizon never explains.

Verizon also never persuasively addresses the absurd results that follow from its interpretation. As the insurers explained, under Verizon's interpretation, suits alleging civil extortion or identity theft could be Securities Claims, and even domestic relations laws would be laws "regulating securities." Br.25, 33. In response, Verizon asserts that "[l]aws governing theft or divorce do not regulate securities *in any sense*." Verizon Br.50 (emphasis added). The insurers agree. Under Verizon's broad interpretation, however, laws governing identity theft, larceny, extortion, and divorce—and any number of other non-securities subjects—*would*, counterintuitively, be considered laws that "regulat[e] securities." Securities-related activities are not exempt from such laws, so to the extent these laws apply, they are "laws one must follow when engaging in securities transactions," per Verizon's interpretation. And if violated, any of these laws could provide grounds to "enjoin" or unwind the transaction. Verizon offers no coherent distinction between laws

prohibiting theft, divorce, and the like and the laws at issue in *U.S. Bank*. Verizon cannot address the absurd results of its interpretation by wishing them away.

It is no answer that the Idearc Runoff Policy covers wrongful acts committed by D&Os only in their official capacity. *See* Verizon Br.50-51. As the insurers' opening brief made clear, D&Os certainly could commit identity theft or extortion in their official capacity. Br.25. And setting aside the official capacity requirement, Verizon's position logically entails that laws governing identity theft and divorce somehow "regulat[e] securities." That is untenable.

Nor does it matter that litigation over identity theft and extortion is unlikely to "aris[e] from the Idearc spin-off." Verizon Br.50 (quotation marks omitted). While the Idearc Runoff Policy covers *Verizon's* D&Os only for wrongful acts "arising from the divestiture of [Idearc] from [Verizon]," JA1312, it covers *Idearc's* D&Os for *all* wrongful acts, arising from the spinoff or otherwise, JA1276. Moreover, this case is about more than just the Idearc Runoff Policy. The Securities Claim definition appears in a standard policy form incorporated into D&O insurance policies across the country. If accepted, Verizon's interpretation could have far-reaching ramifications.

Verizon tries to turn the tables, arguing that the insurers' reading of "regulating securities" would exclude Supreme Court decisions interpreting federal securities law or rules promulgated by the New York Stock Exchange ("NYSE"),

because the Supreme Court decisions and NYSE rules cover non-securities matters. Verizon Br.48-49. That critique is baseless. To begin with, to determine whether an alleged violation of, say, Rule 10b-5, as interpreted by the Supreme Court, is a Securities Claim, the question is not whether Supreme Court precedent "regulat[es] securities," but whether Rule 10b-5 does. Rule 10b-5 is the source of the relevant obligation; Supreme Court precedent merely interprets that obligation.[4]

And the Idearc Runoff Policy would *never* cover Verizon's separate costs for defending against an alleged violation of NYSE rules. The Idearc Runoff Policy's Preset Allocation clause applies only to Securities Claims that are "jointly made and maintained" against both a D&O and an entity, JA1318, and NYSE rules impose obligations only on listed corporations themselves, not D&Os, *see NYSE American Listing Agreement*, NYSE, https://bit.ly/2CvdSMX (last visited Mar. 21, 2019). More fundamentally, the insurers never argued that "regulating securities" means "regulating *only* securities." A law regulates securities if it is directed at the securities industry or the integrity of securities markets, *see* JA4346 at 69:7-70:15 (Hamermesh)—even if it also touches on non-securities matters as well.

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[4] While the insurers acknowledged below that *Barnard*, which alleged violations of Rule 10b-5, may have been a securities claim, *see* Verizon Br.22-23, that is irrelevant here. Verizon has conceded that the defense costs in *Barnard* are not covered under the Idearc Runoff Policy. Br.15 n.2.

Finally, Verizon mischaracterizes the relevance of Delaware's "stay-in-your-lane" policy and the danger that expanding entity coverage will erode coverage for individual D&Os. The insurers do not assert that this Court should rely on those public policy considerations to "avoid [the insurers'] contractual obligations." Verizon Br.40. These policy considerations instead merely inform what those contractual obligations actually entail. *See SBC Interactive, Inc. v. Corp. Media Partners*, 714 A.2d 758, 761 (Del. 1998) (interpreting arbitration agreement in light of "public policy" favoring arbitration); *DeLucca v. KKAT Mgmt., L.L.C.*, 2006 WL 224058, at *7 (Del. Ch. Jan. 23, 2006) (interpreting indemnification agreement in light of "public policy" favoring indemnification). Notably, Verizon does not dispute that Delaware's "stay-in-your-lane" policy is more consistent with the insurers' interpretation.

b. Courts Have Consistently Held that General Laws Do Not "Regulate Securities"

Other courts confronting the same or similar language in an insurance policy or statute have concluded that generally applicable laws that merely happen to touch upon securities do not "regulate" securities. In construing materially identical language in ERISA's preemption savings clause, for example, the U.S. Supreme Court expressly rejected Verizon's reading and adopted the insurer's reading instead. "A common-sense view of the word 'regulates,'" the Court explained,

"lead[s] to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987). The Sixth Circuit has applied this interpretation to the phrase "regulates … securities." *Michigan Carpenters Council Health & Welfare Fund v. C.J. Rogers, Inc.*, 933 F.2d 376, 383-84 (6th Cir. 1991); *see* Br.23-24 & n.4 (citing additional cases).

Verizon attempts to distinguish *Dedeaux* and its progeny on the ground that "the statutory analysis [in *Dedeaux*] involve[d] standards and concerns not applicable to … insurance policy interpretation." Verizon Br.53. But the Supreme Court expressly applied "a common-sense understanding of the phrase 'regulates insurance,'" 481 U.S. at 50, and Verizon gives no reason why this Court should abandon common sense here.

The interpretive principles applicable to the ERISA preemption savings clause, moreover, parallel the principles Verizon advocates here. Just as, in Verizon's view, courts must resolve ambiguities in an insurance policy in favor of coverage, Verizon Br.38, courts apply a presumption against preemption, "presum[ing] that Congress did not intend to pre-empt areas of traditional state regulation." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985) (discussed at *Dedeaux*, 481 U.S. at 46-57). That presumption would counsel a broad reading of the ERISA savings clause. Nevertheless, the Court in *Dedeaux* held that

the word "regulates" carries a narrow meaning, encompassing only laws that are "specifically directed toward th[e] industry" in question. *Dedeaux*, 481 U.S. at 50. Here too, even if Verizon were correct about the governing interpretive principles—and it is not, *see infra* pp.27-28—this Court should give the word "regulating" the same "common sense meaning" applied by the U.S. Supreme Court, encompassing only laws that are "specifically directed toward" the securities industry.

Other courts interpreting similar policy language consistently have agreed with the insurers' interpretation. *See* Br.22 (citing cases). Verizon attempts to distinguish these cases on their facts, Verizon Br.53-54 & n.131, but the courts interpreted the *legal* meaning of "regulating securities" to exclude general laws not directed at securities-related activities specifically. *See XL Specialty Insurance Co. v. Loral Space & Communication, Inc.*, 918 N.Y.S.2d 57, 64 (N.Y. App. Div. 2011) ("[t]he entire fairness rule" for fiduciary breaches "is not a rule regulating securities" because "[i]t is a standard to review corporate transactions" generally); *Kollman v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, 2007 WL 2344825, at *4 (D. Or. Aug. 13, 2007) ("[C]onduct may include stock transactions without stating a claim for a securities violation."), *aff'd*, 542 F. App'x 649 (9th Cir. 2013); *Herbalife Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa*, No. 2:06-cv-6312, slip op. at 54 (C.D. Cal. Sept. 19, 2007) (similar). Verizon attempts to distinguish *Kollman* on the ground that Oregon law barred consideration of "the complaint's factual

allegations." Verizon Br.54. But in fact the *Kollman* courts *did* "consider whether the complaint's allegations, without amendment, could impose liability for conduct covered by the policy." 542 F. App'x at 649. Verizon also asserts that *Herbalife* involved a pyramid scheme, not "securities-related transactions," Verizon Br.54, but "investments in a pyramid scheme [a]re … securities," *Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 784 (9th Cir. 1996).

The one contrary case Verizon cites, *The Doe Run Resources Corp. v. American Guarantee & Liability Insurance Co.*, 2011 WL 13103983 (Mo. Cir. Nov. 7, 2011), contains only two sentences of conclusory analysis. The policy there, moreover, imposed a "duty to defend," which is "broader than the duty to indemnify" at issue here. *Id.* at *1; *see infra* pp.20-22. The *Doe Run* court thus concluded that allegations about a scheme to exercise "complete domination of [a company's] finances, policies, and business practices" "establish[ed] *the potential* for coverage." *Id.* at *3 (emphasis added). The question here, by contrast, is whether the *U.S. Bank* Action *actually* alleged a violation of a law "regulating securities." It did not.

c. Verizon Cannot Elide the Fact that *U.S. Bank* Alleged Violations Only of General Laws

Applying these principles here, the *U.S. Bank* Action is not a Securities Claim because U.S. Bank alleged violations of laws imposing generally applicable legal duties, not laws "regulating securities."

Verizon does not dispute that the fiduciary causes of action in *U.S. Bank* alleged violations of general common-law duties that govern many circumstances having nothing to do with securities. Br.26-27. Verizon instead observes that fiduciary duties may "control or direct securities transactions" in ways that "complement[], and [are] not precluded by, federal securities law." Verizon Br.61-62 (quotation marks omitted). But just because fiduciary duties *apply to* securities transactions does not establish—as the Securities Claim definition requires—that they constitute a regulation, rule, or statute "regulating securities." Even one of Verizon's own cases distinguishes between "securities claims" and counts for "breach of fiduciary duty." *Sun-Times Media Grp., Inc. v. Royal & Sunalliance Ins. Co. of Canada*, 2007 WL 1811265, at *10 (Del. Super. Ct. June 20, 2007).

Contrary to Verizon's assertion, this Court in *Citigroup Inc. v. AHW Inv. Partnership*, 140 A.3d 1125, 1133 (Del. 2016), did *not* describe an alleged breach of fiduciary duty as a type of "state securities law claim." Verizon Br.62. *Citigroup* concerned whether a "holder claim"—that is, "a cause of action by persons wrongfully induced to *hold* stock instead of selling it"—is direct or derivative. 140 A.3d at 1132 (quotation marks omitted). This Court observed that holder claims "have often been treated" by certain *commentators* "as state securities law claims" under state "*blue sky laws*," such as "New York's Martin Act or the Florida Securities and Investor Protection Act"—that is, state laws that regulate securities

specifically. 140 A.3d at 1132-33 & n.40 (emphasis added, footnote omitted). This Court did not adopt that characterization itself, and certainly did not do so as to any fiduciary cause of action. Indeed, the parties in *Citigroup* "agreed … that no breach of fiduciary duty claim [wa]s at issue." *Id.* at 1134.

Verizon's arguments about the DGCL's unlawful dividend provisions fare no better. Verizon does not dispute that these provisions "protect[] the integrity of a corporation's stated capital," as well as creditors who "have extended credit to [the] corporation" in "rel[iance] on stated capital." *Johnston v. Wolf*, 487 A.2d 1132, 1134 (Del. 1985); Br.28. Verizon asserts that these provisions *also* protect "innocent stockholders who receive unlawful dividends," Verizon Br.63, but its cited authorities do not support that characterization. *See EBS Litig. LLC v. Barclays Glob. Inv'rs, N.A.*, 304 F.3d 302, 306 (3d Cir. 2002) (discussing statute-of-limitations issues); *In re Buckhead Am. Corp.*, 178 B.R. 956, 972 (D. Del. 1994) (noting that the dividend provisions "protect[] the integrity of a corporation's stated capital" (quotation marks omitted)). Verizon never explains how prohibiting "overly generous dividends," Verizon Br.63, protects shareholders. As the district court in *U.S. Bank* itself held, the dividend provisions "protect the rights of creditors"—not its shareholders—and provide a "cause of action" to "the corporation's creditors." *U.S. Bank Nat. Ass'n v. Verizon Commc'ns Inc.*, 892 F. Supp. 2d 805, 822 (N.D. Tex. 2012), *aff'd*, 761 F.3d 409 (5th Cir. 2014).

Nor does it matter that unlawful dividends can take the form of "stock purchases or redemption." Verizon Br.63 n.154. "[M]ost courts have adopted an expansive view of what constitutes a dividend under the Delaware unlawful dividend statute." *U.S. Bank*, 892 F. Supp.2d at 822. Unlawful dividends can be paid in any form of "property"—including, say, a car or a medical device. 6 *Del. C.* § 173. Yet no one would seriously contend that the dividend statute is a law "regulating motor vehicles" or a law "regulating medical devices." For the same reason, it also is not a law "regulating securities." As Verizon's own expert explained, the dividend statute is a "regulation of capital," not securities. JA5157.

State and federal fraudulent transfer statutes likewise do not "regulat[e] securities." Verizon does not dispute that the fraudulent transfer statutes invoked by U.S. Bank—TUFTA and sections 544(b) and 550 of the Bankruptcy Code—serve to protect creditors and prohibit fraudulent transfers of all kinds, involving securities or not. Br.29. Verizon also does not dispute that under its interpretation, those provisions would "regulat[e]" not only securities, but also livestock and any other property that can be the subject of a fraudulent transfer. *Id.* Perhaps realizing how absurd that sounds, Verizon now no longer even argues that TUFTA or sections 544(b) and 550 "regulat[e] securities."

Instead, Verizon relies solely on a different bankruptcy provision, the "safe harbor" of section 546(e), Verizon Br.63, which prohibits a bankruptcy trustee from

avoiding transfers of "margin payment[s]" or "settlement payment[s]" that were "made … in connection with a securities contract," 11 U.S.C. § 546(e). But U.S. Bank never alleged that Verizon or Dierckson "violat[ed]" section 546(e). Verizon successfully invoked section 546(e) as a *defense* against U.S. Bank's fraudulent transfer counts. *See U.S. Bank*, 892 F. Supp. 2d at 814-17. Indeed, because section 546(e) provides a securities-related "safe harbor" that *precludes* the application of fraudulent transfer laws, it actually demonstrates that—even under Verizon's broad reading—such laws do not "regulat[e] securities." In light of section 546(e)'s safe harbor, fraudulent transfer statutes are not laws that "one must follow when engaging in securities transactions." Verizon Br.46, 51. Verizon's reliance on section 546(e) is self-defeating.[5]

d. Verizon Misapplies Basic Principles of Contract Interpretation and Insurance Law

The phrase "regulating securities" does not encompass any of the counts asserted in *U.S. Bank* under any legal framework. Throughout its brief, however, Verizon mischaracterizes the governing principles of contract and insurance law, in three ways.

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[5] As below, Verizon does not dispute that the unjust enrichment and alter ego counts in *U.S. Bank* did not allege violations of laws "regulating securities." *See* Br.29-30. Verizon never explains why those counts differ in this respect from the other counts. If these counts do not involve laws "regulating securities," as Verizon apparently concedes, neither do the other *U.S. Bank* counts.

First, Verizon misallocates the burden of proof. Like the Superior Court, Verizon asserts that it is the insurers' burden to "show that [their] view is the *only* fair and reasonable reading of the policy language." Verizon Br.39; *see* Ex.C at 27. Verizon suggests that once it made a *prima facie* showing that its reading was reasonable, the burden shifted to the insurers to "negat[e]" that showing. *Id.* at 55. Not so. It is "hornbook law" that "the insured has the burden of proving that its claimed loss falls within the coverage of the insurance policy." 17A Couch on Insurance § 254:11 (3d ed. Dec. 2018 Update). The burden shifts to the insurer *only* if the insurer seeks to avoid coverage under an *exclusion*. *See E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997). Because there is no exclusion at issue here, it remains Verizon's burden at all times to establish not just a *prima facie* case, but that it is actually entitled to coverage. Br.17-18.

Second, Verizon asserts that "policy language must be evaluated as it would be viewed by an average reasonable insured, consistent with an insured's reasonable expectation of coverage, rather than given an undisclosed special or technical meaning." Verizon Br.38. But the insurers have never argued that any term in the Securities Claim definition has an "undisclosed special … meaning." The limiting phrase "regulating securities" appears in plain sight and must be given *some* non-superfluous meaning. Nor is there is any divergence between a careful, "technical" reading of the Securities Claim definition and the reasonable expectations of an

average insured. The Idearc Runoff Policy is a public company D&O policy; the average insured thus is a publicly held corporation, aided by a broker, an internal risk management department, and in-house and outside counsel. Verizon itself is a multinational conglomerate, ranking sixteenth on the Fortune 500 list of the largest U.S. companies. *Fortune 500*, Fortune, http://fortune.com/fortune500/list/ (last visited Mar. 15, 2019). It blinks reality to suggest that an insured like Verizon lacks the sophistication necessary to parse the Securities Claim definition in a careful, precise way.

And while the insurers maintain that their reading reflects the plain, ordinary meaning of the policy language, there would be nothing wrong with giving the Securities Claim definition in this contract between sophisticated parties a "technical" interpretation. Verizon asserts that this Court's decision endorsing a "literal and technical interpretation" in *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1171 (Del. 1995), is inapposite because that case "ha[d] nothing to do with insurance." Verizon Br.38 n.96. But just like the corporate charter in *Cinerama*, the Idearc Runoff Policy is a technical corporate document, "drafted by experts who count on [their words] being respected in a precise and literal way." 663 A.2d at 1171. Regardless, the Supreme Court has held that the insurers' reading of the word "regulating" accords with "common[ ]sense." *Dedeaux*, 481 U.S. at 50. The ordinary and technical readings of the "regulating securities" requirement thus are the same.

Third, Verizon conflates the distinction in insurance law between a duty to defend and a duty to indemnify. Verizon Br.39-40. As Verizon's own cases make clear, "an insurer's duty to defend is broader than its duty to indemnify." *Blue Hen Mech., Inc. v. Atl. States Ins. Co.*, 2011 WL 1598575, at *3 (Del. Super. Ct. Apr. 21, 2011), *aff'd*, 29 A.3d 245 (Del. 2011). The Superior Court correctly recognized that the Idearc Runoff Policy here "expressly disclaim[s]" any "'duty to defend.'" Ex.C. at 13-14 (quoting JA1317). The policy instead "expressly obligate[s] *the Insureds* to 'defend and contest any Claim made against them,' with the Insurers agreeing only to 'advance … *covered* Defense Costs' within ninety days of receiving 'such defense bills.'" *Id.* at 14 (quoting JA1317) (emphasis by Superior Court). To establish coverage here, therefore, Verizon must demonstrate that all the elements of "covered Defense Costs"—including all elements of the Securities Claim definition—are "actually established." *Blue Hen Mech.*, 2011 WL 1598575, at *3. To be sure, to determine whether Verizon has made that showing, a court must consider the allegations in the underlying complaint. But that is just because the Idearc Runoff Policy defines a Securities Claim in terms of what violations the underlying complaint "alleg[es]." JA1316.

Verizon argues for a more relaxed standard because the Idearc Runoff Policy obligates the insurers to "advance" defense costs even before the underlying action is finally adjudicated. Verizon Br.40 n.100. But again, the insurers' advancement

obligation is limited to "covered Defense Costs"—here, costs Verizon incurred in defending against an *actual* Securities Claim. Moreover, while courts sometimes liberally construe insurers' advancement duties based on how the underlying case potentially *could* proceed, insureds must, when the underlying case ends, pay back any advances that fall outside the policy coverage. *See Brady v. i2 Techs. Inc.*, 2005 WL 3691286, at *3 (Del. Ch. Dec. 14, 2005) (noting that advancement functions as "an option to borrow").

The Idearc Runoff Policy thus expressly provides that "[a]dvance payments by the insurer shall be repaid … by each and every Insured Person or Organization … in the event and to the extent any such Insured Person or Organization shall not be entitled under this policy to payment of such Loss." JA1317. And Verizon filed this suit in 2014, after *U.S. Bank* concluded in 2013. So even if Verizon somehow sought "advance[ment]" of defense costs in this case rather than simple indemnification, to the extent *U.S. Bank* is not *actually* a Securities Claim, Verizon immediately would have to pay those advances back to the insurers.

For these reasons, Verizon's assertion that U.S. Bank potentially *could* have alleged a violation of Rule 10b-5, Verizon Br.24, 47, is beside the point.[6] Even the

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[6] Contrary to Verizon's assertion, Verizon Br.24, 47, the insurers' expert testified only that U.S. Bank alleged a "misrepresentation to the market," JA4502 at 103:8-15 (Hamermesh), and did not address Rule 10b-5's other elements. Notably, U.S. Bank could not have established reliance under Rule 10b-5. U.S. Bank sued on

Superior Court did not rely on such needless speculation. The *U.S. Bank* Action is over, and the allegations are not going to be amended. Because the laws U.S. Bank actually alleged were violated do not include any laws "regulating securities," the *U.S. Bank* Action is not a Securities Claim.

2. "Regulation, Rule or Statute" Does Not Encompass Common-Law Duties

If this Court concludes that the *U.S. Bank* Action did not allege a violation of any law "regulating securities," then all other issues in these consolidated appeals are moot, and this Court need go no further. But to the extent the common-law counts in *U.S. Bank* could be said to allege violations of laws "regulating securities," they fall outside the Securities Claim definition for an additional, independent reason—common-law duties are not "regulation[s], rule[s] or statute[s]."

As the insurers explained, the canon of *noscitur a sociis* dictates that, whatever broad meaning "rule" might carry in the abstract, when used in the phrase "regulation, rule or statute," it refers to an administrative rule promulgated by an executive or administrative agency. Br.36-37. Verizon does not dispute that its

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behalf of parties standing in the shoes of Idearc, and the participants in the alleged scheme included Idearc directors, whose knowledge is imputed to Idearc. Br.7; *see, e.g.*, *Maldonado v. Flynn*, 597 F.2d 789, 795 (2d Cir. 1979). U.S. Bank also may have determined that it could not satisfy Rule 10b-5's "purchase or sale" requirement. *See* 17 C.F.R. § 240.10b-5; *infra* pp.35-39. Whatever the reason, the salient point is that U.S. Bank did not *actually* allege a violation of Rule 10b-5 or any other law "regulating securities."

reading—whereby "rule" encompasses *any* legal command, including common-law duties—would render the neighboring words "regulation" and "statute" superfluous. *Id.* Verizon instead responds that the insurers' reading also creates superfluity, because if "rule" referred only to administrative rules, "it would be subsumed within the term 'regulation.'" Verizon Br.43-44. But legal parlance often refers to "rules and regulations" together to comprehensively denote any and all authoritative legal commands—substantive, procedural, and otherwise—promulgated by an executive or administrative agency. All but one of the major securities statutes cited in the insurers' opening brief use the word "rule" alongside "regulation" in just this way. *E.g.*, 15 U.S.C. § 77a(a)(15)(ii) ("rules and regulations"); *see also* Br. 38. Verizon points to no similarly common practice of using the word "rule" alongside "regulation" or "statute" in a manner consistent with Verizon's interpretation.

There is no tension between the insurers' invocation of *noscitur a sociis* and their contention that the Securities Claim definition is unambiguous. *Contra* Verizon Br.43 n.109. Even if the word "rule" were ambiguous in the abstract, context and *noscitur a sociis* resolve any ambiguity and make clear that, as used in the Securities Claim definition here, the word is limited to administrative rules.

That reading accords with the settled principle that where a legal text "includes particular language in one section … but omits it in another section …, it is generally presumed that [the drafters] act[ed] intentionally and purposely in the

disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). The Idearc Runoff Policy mentions "common" law five times, but *not* in the relevant portion of the Securities Claim definition. Br.37-38. Verizon responds that the insurers' cases applying that principle involved statutes, not contracts. Verizon Br.43 n.110. But the principle—often known as the "negative-implication canon" or by the Latin *expressio unius est exclusio alterius*—is a general one applicable to legal texts of all kinds. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012). It has been applied to an insurance policy. *See Weight Loss Healthcare Ctrs. v. OPM*, 655 F.3d 1202, 1210 (10th Cir. 2011).

Verizon also asserts that the use of the term "law (common or statutory)" elsewhere in the policy suggests that "common law" is "one type of law understood to be included within the broader term if otherwise unmodified." Verizon Br.44. But the Securities Claim definition does not refer to "law"; it refers to a "regulation, rule or statute." The express references to "common" law elsewhere in the policy reinforce that although common-law duties are a type of law, they are not "regulation[s], rule[s] or statute[s]."

Verizon creatively hypothesizes that the phrase "statute, rule or regulation" refers to "all types of laws from the three branches of government," including "legislatively-adopted 'statutes,' administratively-adopted 'regulations,' and judicially adopted 'rules' of common law." Verizon Br.43. But for that interpretation

to make sense, the word "rule" would have to refer *only* to judicially adopted common law rules, excluding, for example, all SEC rules. That proposition contradicts the decision below, as well as the rest of Verizon's appellate brief, which argues that "rule" refers to *any* authoritative legal command. *E.g.*, Verizon Br.42.

Verizon also contends that reading the word "rule" to refer to administrative rules somehow ignores the word "any" in the term "any … regulation, rule or statute." *See* Verizon Br.42. Contrary to Verizon's assertion, *id.*, the insurers included the word "any" in multiple recitations of the policy language in their opening brief. Br.11, 21, 25. The problem for Verizon is that while the word "any" may denote a "catchall" phrase, it does not "define what [the phrase] catches." *Small v. United States*, 544 U.S. 385, 388 (2005) (quotation marks omitted). Here, the Securities Claim definition encompasses alleged violations of "any … regulation, rule or statute," but the word "any" does not resolve whether common-law duties constitute a "regulation, rule or statute" in the first place.

The dictionary definitions on which Verizon relies, Verizon Br.42 & nn.104-06, are similarly unhelpful. Verizon acknowledges that at least one defines "rule" as referring to administrative rules. *Id.* at 42 n.106. To be sure, other definitions encompass common-law duties, *id.*, but all that shows is that, in the abstract, it is possible for the word "rule" standing alone to refer to a broad set of legal commands.

That is the beginning, not the end, of the interpretive analysis. Here, "rule" must be read in context, in conjunction with the words that surround it.

Verizon's reliance on an XL Specialty policy at issue in another case, Verizon Br.44-45, 57 & n.113, fails for similar reasons. The Securities Claim definition in that policy expressly encompasses any "regulation, statute or rule *(whether statutory or common law)*." *AR Capital, LLC v. XL Specialty Ins. Co.*, 2018 WL 6601184, at *7 (Del. Super. Ct. Dec. 12, 2018) (emphasis added). No language remotely resembling the phrase "whether statutory or common law" appears in the pertinent portion of the Securities Claim definition here. A manuscript endorsement in a different policy issued by a different insurer has no bearing on the meaning of the Securities Claim definition in *this* policy, which contains "very different contract language." *Lillis v. AT&T Corp.*, 2007 WL 2110587, at *13 (Del. Ch. July 20, 2007). In context, as used in the Securities Claim definition of the Idearc Runoff Policy, "rule" does not encompass common-law duties.

3. Verizon Misconstrues *Contra Proferentem* and the Extrinsic Evidence

If this Court concludes that the Securities Claim definition is unambiguous, the Court need not concern itself with *contra proferentem* or the voluminous extrinsic evidence on which Verizon so heavily relies. To the extent the Court reaches those issues, however, Verizon's arguments do not withstand scrutiny.

Puzzlingly, Verizon asserts that the Superior Court did not rely on the doctrine of *contra proferentem* because, in Verizon's view, the court "did not need to rely on that doctrine" given that "*all* of the [extrinsic] evidence supported Verizon's reading." Verizon Br.3. But the Superior Court expressly invoked "the doctrine of *contra proferentem*" and ultimately concluded, not that Verizon's interpretation was correct, but that, after "resolving any uncertainty in [Verizon's] favor," Verizon's interpretation was "reasonable." Ex.C. at 21, 30.

As a fallback, Verizon offers that *contra proferentem* "may be applied" here because "neither Verizon nor its brokers played any role in drafting th[e] language" of the Securities Claim definition. Verizon Br.15, 56 n.135. That is highly misleading. Verizon does not dispute that Verizon and its broker chose the 2/2000 Form and the Securities Claim endorsement for this policy; that the policy includes 32 endorsements, including one custom-drafted by Verizon's broker; that Verizon and its broker declined to purchase an available form endorsement that indisputably would have broadened the Securities Claim definition; or that Verizon had equal bargaining power to the insurers. Br.41. In these circumstances, Verizon is like a patron of a buffet-style restaurant, who takes food from numerous available serving dishes and even orders a custom-made omelet from an omelet station. That patron could say that he had no "role in preparing" his meal because he did not cook it, but he could not plausibly disclaim any role in his choices. Verizon's assertion that it

had no "role in drafting" the language here is similarly misleading. Verizon and its broker literally chose the policy's constituent parts.

Ultimately, Verizon's arguments boil down to extrinsic evidence, which is irrelevant given that the policy language is unambiguous. Verizon repeatedly asserts that the insurers requested discovery into extrinsic evidence regarding the meaning of the Securities Claim definition, Verizon Br.28, 55, but that is untrue. The insurers have *always* maintained that *U.S. Bank* unambiguously is not a Securities Claim. *See* JA1790-1801. In their opposition to Verizon's first summary judgment motion, the insurers acknowledged the potential for factual disputes only about *other* issues—such as the extent to which Diercksen's and Verizon's *U.S. Bank* defense costs were "jointly incurred," and how to make a "fair and equitable allocation" between Diercksen's covered defense costs and Verizon's non-covered costs. JA1805-06, 1811.

The insurers also never stipulated to a bench trial on the summary judgment record. *Contra* Verizon Br.40-41. The insurers expressly argued that, at a minimum, the affidavit from the primary drafter of the 2/2000 Form precluded summary judgment to Verizon. AR11. The insurers thus "presented argument to the Court that there [wa]s an issue of fact material to the disposition" of Verizon's motion, which is all Rule 56(h) requires.

Verizon also misconstrues all six categories of extrinsic evidence on which it relies. First, Verizon cites testimony about what various lay and expert witnesses believed the Securities Claim definition means. *E.g.*, Verizon Br.16-17, 19-21, 42-43. Much of that testimony does not say what Verizon contends. As just one example, Verizon asserts that the "[i]nsurers' witnesses … admitted that the term 'rule' in the definition can include a judicial or common law rule." Verizon Br.17. But in support, Verizon cites testimony where, when asked, "[W]as it your understanding that a rule could be either a statutory rule or could also encompass a common law rule," the witness responded, "No, I do not have that understanding," and then confirmed that he "d[id]'t know one way or another." JA3367 at 201:11-23. Regardless, the testimony is irrelevant. As Verizon acknowledges, "[t]he meaning and application of insurance policy language is a question of law," Verizon Br.37, and "it is improper for witnesses to opine on legal issues governed by Delaware law," *United Rentals, Inc. v. RAM Holdings, Inc.*, 2007 WL 4465520, at *1 (Del. Ch. Dec. 13, 2007). Even the Superior Court did not rely on this testimony below.

Second, Verizon relies on two previous policy forms. Verizon Br.56-57. The 5/1995 Form offered Securities Claim coverage for alleged violations of the 1933 or 1934 Act, "rules or regulations promulgated thereunder," or "the securities laws of any state, or any foreign jurisdiction." JA2505. That language is narrower than the

Securities Claim definition in the Idearc Runoff Policy, which encompasses other federal securities laws beyond the 1933 and 1934 Acts, such as the Investment Advisors Act, 15 U.S.C. § 80a-1 *et seq.*, and the Investment Company Act, 15 U.S.C. § 80b-1 *et seq*. Nothing prohibited the insurers from using different language at different times to provide similar (but not identical) coverage.

The 4/1998 Form, which immediately preceded the 2/2000 Form, is even less helpful to Verizon. Verizon asserts that by using the phrase "whether statutory or common law," the 4/1998 Form somehow shows that "rule" as used in the 2/2000 form includes common-law duties. Verizon Br.44, 57 & n.113. But the 4/1998 Form does *not* provide that a "rule" may be "statutory or common law"—it provides that a "*law*, regulation or rule" may be "statutory or common law." JA2544 (emphasis added). No one disputes that common-law duties are a type of "law." *See supra* p.25. But they are not a type of "rule," as used in the Idearc Runoff Policy. Indeed, the primary drafter stated under oath that the express reference to "common law" in the 4/1998 Form was intentionally deleted for the 2/2000 Form in order "to … restrict coverage." JA4157.

Third, Verizon relies on "marketing and press materials" stating that the 2/2000 Form provided "enhanced" securities coverage. Verizon Br.57-58 (quoting JA3038-40). But Verizon does not dispute that under both Verizon's and the insurers' readings of the Securities Claim definition, the 2/2000 Form *did* provide

enhanced securities coverage. Br.43-44. Verizon expressly acknowledges that the 2/2000 Form "includ[es] certain administrative and regulatory proceedings previously excluded from the prior definitions." Verizon Br.18. The marketing materials thus prove nothing—they are *equally* consistent with Verizon's *and* the insurers' interpretations.

Fourth, Verizon relies on the preliminary coverage letter regarding Celutel. Verizon Br.58-59. Verizon does not dispute that relying on a coverage letter regarding a separate lawsuit would have troubling policy consequences, punishing insurers for granting coverage and incentivizing them to scrutinize even the most minor coverage claims. Br.44. Verizon contends that it is not attempting to "estop" the insurers from denying coverage, Verizon Br.58, but the effect is the same. Moreover, the letter was issued years *after* the negotiation of the Idearc Runoff Policy, Br.45, and while Verizon asserts that a single letter can show a relevant "course or performance or construction," Verizon Br.59 n.142, one of its own cited cases states that "the alleged practice must have occurred on more than one occasion," *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 127 (Del. Ch. 2009). Verizon also questions the author's testimony that the Celutel letter was a "mistake," asking why no mistake was noted in the file. Verizon Br.59. But Verizon ignores the insurers' explanation—no mistake was noted because the Celutel lawsuit settled for less than 1% of the $7.5 million retention. Br.45.

Fifth, Verizon repeatedly quotes a statement that Verizon wanted coverage for "[a]ll spin transaction liability (VIS and VZ related)," often in ways suggesting that this language appears in the policy. *See* Verizon Br.12, 13, 59. It does not. That language appears *only* in an internal email between an Illinois National underwriter and his supervisor, who informally described the entire Idearc Runoff Policy in four one-line bullet points. JA2718. The quoted snippet, moreover, refers to Verizon's desire for "spin transaction liability" coverage for Verizon's *D&Os*, not for Verizon itself.

The requested coverage for Verizon's D&Os is implemented in Endorsement #3, which has nothing to do with the Securities Claim definition. Drafted specifically for this policy by Verizon's own broker, Endorsement #3 provides that the term "Organization" includes Verizon, "but solely for Wrongful Acts alleged against [Verizon] arising from the divestiture of [Idearc] from [Verizon]." JA1312, 4263. Contrary to Verizon's assertion, Verizon Br.13, the insurers discussed this language multiple times in their opening brief, explaining that it serves to extend coverage to Verizon's D&Os in addition to Idearc's. Br.8-9, 46. The fact that Verizon's D&Os are covered, but only for liabilities arising from the divestiture, has no bearing on whether the *U.S. Bank* Action alleged a violation of a "regulation, rule or statute regulating securities."

Finally, Verizon asserts that because the Form 10 mentions fraudulent transfers and unlawful dividends, the insurers must have agreed to cover those risks as Securities Claims. Verizon Br.59-60. But the policy mentions the Form 10 only as the document to which the Distribution Agreement is attached as an exhibit. Br.46. Verizon responds that the Form 10 was more than a convenient way to reference the Distribution Agreement because the insurers insisted on reviewing the Form 10 as part of their underwriting. Verizon Br.60. But Verizon acknowledges that the Form 10 also discloses other "financial and business risks" that the Idearc Runoff Policy indisputably does not cover as Securities Claims. *Id.* n.146. Verizon responds that Verizon was "not seeking coverage" for those other risks, *id.*, but that is wrong—to the extent those risks could result in litigation, Verizon sought and obtained coverage for the individual D&Os. And while it is true that Verizon did not seek *Securities Claim* coverage for all risks identified in the Form 10, that just begs the question. If the Form 10 itself gives no indication which risks the parties did and did not intend to cover under the Securities Claim definition, then the Form 10 is irrelevant to the issue at hand.

Verizon asserts that one insurer declined to offer coverage after reviewing the Form 10, but there is no evidence that the Form 10 was the "cause[]" of the insurer's decision. Verizon Br.60. And even if the Form 10 *were* a cause, there is no evidence that the withdrawing insurer, or any other insurer, believed based on the Form 10

that fraudulent transfer or unlawful dividend counts would be covered as Securities Claims. Verizon's argument rests on pure speculation.

B. The U.S. Bank Action Fails Other Elements of the Securities Claim Definition

In addition to alleging a violation of a "regulation, rule or statute regulating securities," a Securities Claim also must (1) allege, arise out of, be based upon, or be attributable to a "purchase or sale" of securities, or (2) be "bought by a security holder." JA1317. *U.S. Bank* falls short on both counts.

1. The *U.S. Bank* Action Did Not Concern a "Purchase or Sale" of Securities

U.S. Bank arose from an alleged fraudulent transfer, not any "purchase or sale" of securities. Verizon does not dispute that, for tax reasons, it purposefully designed the divestiture of Idearc as an internal reorganization rather than an "outright sale." *U.S. Bank*, 892 F. Supp. 2d at 808; Br.49. Verizon also does not dispute that it repeatedly told the *U.S. Bank* court, the SEC, and its own shareholders that the divestiture did not involve a securities purchase or sale. Br.50. In Verizon's own words:

- "[T]he Spin-off was not a sale." JA4196.
- "The [*U.S. Bank*] Complaint nowhere alleges that [Verizon] or Diercksen solicited a single individual or entity to buy Idearc stock." JA4193.
- "[A]s part of the Spin-Off, [Verizon] distributed, without charge, the shares of Idearc to its own existing shareholders; it did not sell a single share to anyone, whether existing shareholder or third-party investor." *Id.*

- "[T]he very first page of the Information Statement attached to the Form 10 specified that '[t]his information statement does not constitute an offer to sell or the solicitation of an offer to buy any securities.'" *Id.*
- "The spin-off … will occur through a tax-free distribution by Verizon of all of its shares of [Idearc's] common stock to Verizon's shareholders." JA2786.

The *U.S. Bank* court understood Verizon's position: "The defendants do not argue that the spin-off was a sale. If the spin-off was a sale, then Verizon would have been subject to billions in tax liability." JA4198 n.6.

Verizon does not address these admissions. Instead, like the Superior Court, Verizon focuses on tangential transactions involving sales of fractional shares and exchanges of Verizon and Idearc debt instruments. Verizon contends that Endorsement #3 covers all "component steps" of "the Transactions," Verizon Br.66, but "the Transactions" is a term devised by Verizon's counsel; it appears nowhere in Endorsement #3 or anywhere else in the Idearc Runoff Policy. In fact, Endorsement #3 refers to the "component steps" of "the divestiture of [Idearc] from [Verizon]"—*i.e.*, the distribution of Idearc stock to Verizon's shareholders. JA1312. This slippage between "the Transactions" (Verizon's term) and "the divestiture" (the actual policy language) appears throughout Verizon's brief. Verizon Br.9-12, 32, 59, 65-68 & nn.160-61.

The fractional share sales and debt exchanges were not any component part of the divestiture, as the Distribution Agreement incorporated by reference in

Endorsement #3 makes clear. The Distribution Agreement provides that the fractional shares were to be sold *after* the distribution, and not by Verizon itself, but by the transfer agent "on behalf of" Verizon's shareholders. Distribution Agreement §3.4, *available at* https://bit.ly/2Fl2GTD. Thus, even before the sales of fractional shares, the divestiture was complete, and Idearc was owned by Verizon's shareholders, not by Verizon itself. As for the debt exchanges, the Distribution Agreement does not even require those exchanges to take place. The Distribution Agreement merely notes that—again, *after* the divestiture—Verizon "*intends* to exchange [Idearc debt] for outstanding Verizon debt obligations." *Id.* § 2.6(b) (emphasis added). Verizon thus conflates the "divestiture" with separate "Transactions" that were contemplated to occur *after* the divestiture.

Regardless, even if these tangential transactions *were* "component steps" of the divestiture under Endorsement #3, *U.S. Bank* did not arise from them. Verizon asserts that the debt exchanges were the "crux" of the *U.S. Bank* Action, Verizon Br.67, but that assertion lacks a supporting citation for a reason. As Verizon's own expert agreed, the gravamen of the *U.S. Bank* complaint lies in the pre-spinoff internal asset transfer between Verizon and Idearc, Br.51; the debt exchanges occurred "[f]ollowing the Spin-Off." JA1653. It is irrelevant that the debt exchanges may have been part of how some creditors came to hold Idearc debt. *Contra* Verizon Br.67. That debt may have been exchanged or resold any number of times before it

came into the hands of the ultimate creditors, but that does not mean that *U.S. Bank* arose from all of those unknown intermediate transactions. The "purchase or sale" requirement limits Securities Claims to SEC investigations and enforcement actions and classic private securities actions—not fraudulent-transfer-type actions like *U.S. Bank*.

For these reasons, Verizon's attempt to distinguish *Federal Insurance Co. v. Campbell Soup Co.*, 885 A.2d 465 (N.J. Super. Ct. App. Div. 2005), fails. Verizon Br.67-68. *Campbell* squarely held that a claim regarding a spin-off transaction was not covered under an insurance policy because the claim was not, "'in whole or in part, … based upon, arising from or in consequence of' … '[a] purchase or sale of … any securities.'" 885 A.2d at 467 (quoting policy language). "[N]o reasonable corporation," the court explained, "could have … believed" that such policy language would cover a spin-off. *Id.* at 469-70. So too here.

In *IDT Corp. v. U.S. Specialty Insurance Co.*, 2019 WL 413692 (Del. Super. Ct. Jan. 31, 2019), decided after the insurers' filed their opening brief, Judge Wallace adopted *Campbell*'s reasoning, holding that a claim regarding a spin-off was not a covered Securities Claim under a U.S. Specialty policy because the claim did not "'arise[] from the purchase or sale of … any securities.'" *Id.* at *12-13 (quoting policy language). Citing *Campbell* and other cases discussed in the insurers' opening brief, the court noted that "federal and various state courts have consistently held

that a spin-off is not a 'purchase or sale of securities' … because it does not affect a fundamental change in the stockholders' holdings." *Id.* at *13 & n.141. The court also explained that "the word 'spin-off' is merely a short-hand term … for a certain type of dividend," and thus, "in Delaware statutory terms, a 'spin-off' is a dividend paid in the property of the parent corporation, *not* a sale of its securities." *Id.* Because *U.S. Bank* concerned a spin-off, not a purchase or sale of securities, it is not a Securities Claim.

2. U.S. Bank Was Not a "Security Holder"

U.S. Bank also was not brought "by security holder." JA1317. Verizon does not dispute that the *U.S. Bank* Action was brought solely by U.S. Bank, which did not hold any relevant security. Br.51-52. That should end the matter.

Verizon responds that U.S. Bank sued "on behalf of Idearc note holders and the Idearc estate" and "was the *only* entity or individual that could bring such a claim." Verizon Br.69. But the Securities Claim definition indisputably requires a Securities Claim to be brought "by" a security holder, not on their behalf. Br.52. The factual circumstances here do not change the unambiguous policy language.

Verizon also asserts that "finding that [U.S. Bank] was not a security holder would negate … Endorsement 7's provision that the bankruptcy of an Organization 'shall not relieve the Insurer of any of its obligations hereunder.'" Verizon Br.69 (quoting JA1319). But as the insurers explained, recognizing that U.S. Bank was not

a security holder would not "relieve" the insurers of any obligation. Br.52-53. The relevant portion of the Securities Claim definition did not cover lawsuits brought by non-security holders before Idearc's bankruptcy, and it does not obligate coverage afterwards either. The bankruptcy clause ultimately has nothing to do with the Securities Claim definition—it merely helped ensure that in the event of Idearc's or Verizon's bankruptcy, policy proceeds would go first to individual D&Os and not to the estate and other creditors. Br.53-54.[7]

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[7] Zurich and Verizon dispute whether the Superior Court properly entered final judgment without conducting further proceedings on whether Verizon's defense costs were reasonable or jointly incurred with Diercksen. Zurich Br.23-33; Verizon Br.70-78. Should this Court reverse and allow for additional proceedings on those matters, the remaining insurers reiterate that they should be allowed to participate fully in those proceedings. *See* JA5952 n.4.

II. If the *U.S. Bank* Action Were a "Securities Claim," the Superior Court Awarded the Correct Amount of Prejudgment Interest

A. Question Presented

Did the Superior Court correctly determine that prejudgment interest, if any, would accrue from when Verizon unequivocally demanded payment by demanding mediation? Yes. (Preserved at JA5959- JA5966.)[8]

B. Scope of Review

This Court reviews legal issues relating to the calculation of prejudgment interest *de novo*. *See Chrysler Corp. v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1037 (Del. 2003).

C. Merits

The Superior Court correctly held that an award of pre-judgment interest begins to accrue when the insured party demands payment. The law governing the accrual date for prejudgment interest in insurance disputes is well-established: "As a general rule, interest accumulates from the date payment was due to a party. For insurance claims, interest accumulates from the date a party actually demands payment." *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254, 1262 (Del. 2010) (footnote omitted). And because prejudgment interest is an

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[8] Illinois National argued below that no award of prejudgment interest beyond its $15 million policy limit was appropriate because Verizon's complaint did not plead consequential damages. JA5968-79. Illinois National maintains that that position is correct, but is not pressing that position in this appeal.

"extraordinary award" that applies only when a party "unjustifiably refuses to live up to its obligation," *id.*, the demand for payment must be "unequivocal," *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 508 (Del. 2001). This is a high bar, and even a complaint filed against an insurer can be insufficient to trigger the accrual of prejudgment interest. *See Stonewall*, 996 A.2d at 1262.

Here, the Superior Court correctly held that Verizon failed to make an unequivocal demand for payment until January 2014 *at the earliest*. Illinois National and National Union issued a preliminary coverage determination regarding *U.S. Bank* on June 21, 2011. JA1713. They explained that while Diercksen's defense costs would be covered (subject to the $7.5 million retention), Verizon's defense costs would not because *U.S. Bank* was not a Securities Claim. JA1715. More than a year elapsed before Verizon responded. In the interim, after Illinois National requested an update on Diercksen's defense costs, Verizon began providing copies of defense cost invoices, expressly for the sole purpose of "commenc[ing] discussions with respect to allocation." AR63. These invoices thus did not constitute a demand for payment of any kind. At a minimum, they certainly were not a demand for payment of *Verizon's* separate defense costs.

On August 9, 2012, Verizon responded to the preliminary coverage determination, but even then, it did not demand payment. Verizon instead "request[ed] that [Illinois National] clarify" its determination with a "complete

explanation of the basis for its position." JA1721. Verizon sent additional invoices to Illinois National until November 16, 2012, at which point the invoices exceeded Illinois National's policy limit. Verizon continued to make clear these invoices were to facilitate "discussions with respect to allocation," and made no demand for payment of its own defense costs. AR60. Over the next two years, Verizon sought additional coverage determinations from excess insurers, who adopted Illinois National's coverage determination. JA221-22.

It was not until January 9, 2014, that Verizon made something resembling a demand for payment for Verizon's defense costs by invoking the Idearc Runoff Policy's Alternative Dispute Resolution provision. In particular, Verizon sent a letter to the American Arbitration Association, copying the insurers, to "request[] mediation of [Verizon's] disputes with [the insurers]." JA223. Illinois National could not possibly have "unjustifiably refused to pay" Verizon's separate defense costs before receiving that letter in January 2014. *Stonewall*, 996 A.2d at 1262. The Superior Court did not err in concluding that Verizon's mediation request "is the clearest demand for payment and therefore the proper accrual date." Ex.B. at 25.

Verizon asserts that interest began to accrue when Verizon "incurred and paid" the defense costs at issue, citing various cases for the general rule that prejudgment interest accrues from when payment was "due." Verizon Br.86-87 (quotation marks omitted). But Verizon ignores this Court's holding that in

insurance disputes, "no payment [i]s due until [the insured] ma[kes] an unequivocal request for payment." *Hercules*, 784 A.2d at 508; *see also Stonewall*, 996 A.2d at 1262; *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 & n.10 (Del. 1992). Verizon attempts to distinguish this Court's precedents on their facts, Verizon Br.88 & n.197, but each case calculates interest from the date of an unequivocal demand.

The defense invoices cannot satisfy that standard. Verizon Br. 87-88. Verizon points to no evidence suggesting that those invoices constituted a demand for payment for *Verizon's* defense costs, as opposed to Diercksen's, which the insurers had agreed to cover. Indeed, Verizon confirmed that the purpose of these invoices was to establish a basis for "allocation," which presupposes a distinction between Diercksen's covered costs and Verizon's non-covered costs. Moreover, Verizon began sending these invoices before it even disputed the insurers' preliminary determination that Verizon's defense costs were not covered.[9]

The Superior Court's calculation of prejudgment interest was correct. If this Court rejects the insurers' other arguments, the award of prejudgment interest should stand.[10]

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[9] Even if the invoices did constitute an unequivocal demand for payment of Verizon's separate defense costs, payment would not have been due until the retention were exhausted and "ninety (90) days [passed] after the receipt by the insurer of such defense bills." JA1317.

[10] Illinois National agrees with Verizon that the Superior Court properly applied Delaware law to the issue of prejudgment interest, and adopts Verizon's arguments

CONCLUSION

The judgment of the Superior Court should be reversed. If the Court affirms the decision below that the *U.S. Bank* Action is a Securities Claim, it also should affirm the Superior Court's award of prejudgment interest.

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in this regard. Verizon Br.79-82; *contra* Zurich Br.33-38. Illinois National also maintains that, to the extent the Superior Court awarded prejudgment interest, it correctly held that each defendant is responsible for its proportional share. Ex.B at 31; *see* JA5954. Should this Court conclude that Verizon is not entitled to prejudgment interest from Zurich, the Court should make clear that Illinois National is not responsible for prejudgment interest in Zurich's stead.

CERTIFICATE OF SERVICE

Kurt M. Heyman, Esquire, hereby certifies that, on April 22, 2019, the foregoing Public Version of Appellants Illinois National Insurance Co., and National Union Fire Insurance Co. of Pittsburgh PA Reply Brief on Appeal and Answering Brief on Cross-Appeal was served electronically upon the following:

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