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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE SOLERA INSURANCE COVERAGE APPEALS	:	No. 413,2019 No. 418,2019 COURT BELOW - SUPERIOR COURT OF THE STATE OF DELAWARE, C.A. No. N18C-08-315 AML CCLD

OPENING BRIEF OF DEFENDANTS-BELOW/APPELLANTS ACE AMERICAN INSURANCE COMPANY AND FEDERAL INSURANCE COMPANY

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NATURE OF PROCEEDINGS

This appeal involves the interpretation of a primary directors' and officers' insurance policy ("Primary Policy"), the terms of which are followed by excess policies ("Excess Policies") (collectively, the "Policies"), issued by Defendants-Below/Appellants ACE American Insurance Company ("ACE") and Federal Insurance Company ("Federal") (collectively, "Defendants," "Defendant Insurers," or "Insurers"). The central question presented is whether a stockholder appraisal action brought against Plaintiff-Below/Appellee Solera Holdings, Inc. ("Plaintiff," Solera," or the "Company") pursuant to Section 262 of the Delaware General Corporation Law ("DGCL") constitutes a "Securities Claim" as defined in the Primary Policy. The trial court held, among other things, that it does.

Solera was acquired by a private equity firm in March of 2016 and became a privately held entity (the "Merger"). Following the close of the Merger, certain dissenting institutional stockholders filed an appraisal petition (the "Petition") in the Court of Chancery seeking a determination of the "fair value" of their Solera shares (the "Appraisal Action"). The dissenting stockholders objected to the deal price of $55.85 per share, and alleged that the fair value of their shares was $84.65 per share, or an additional $114,826,204.80 over the deal price.

The Appraisal Action was tried in June of 2017, approximately six months *before* Solera first tendered the Action to its Insurers in January of 2018. On July 30, 2018, the Court of Chancery issued a post-trial opinion finding that the fair value of Solera's shares at the close of the Merger was only $53.95 per share, or $1.90 per share *less* than the deal price. *See In re Appraisal of Solera Holdings, Inc.*, 2018 WL 3625644 (Del. Ch. July 30, 2018). As a result, the dissenting stockholders received $215,099,782.95, which was $7,575,339.90 *less* than if they had accepted the deal price. The Court of Chancery also awarded pre-judgment interest of $38.3 million on the $215,099,782.95 principal amount of the judgment.

Solera then filed this action on August 31, 2018, contending that the Appraisal Action constitutes a covered "Securities Claim" under the Primary Policy. Solera did not seek coverage for the principal amount of the judgment ($215,099,782.95), but did seek coverage for (i) the $38.3 million in pre-judgment interest and (ii) the $13.5 million of defense costs incurred by Solera in the Appraisal Action, claiming each to be a covered "Loss" under the Policies.

The Defendant Insurers moved for summary judgment on the basis that:

1. The Appraisal Action does not constitute a "Securities Claim," as that term is defined in the Primary Policy, because it is not a claim made against the insured for the "violation" of any law "regulating securities." Rather, an appraisal action involves a post-closing determination of the "fair value" of a dissenter's shares, paid by the "surviving or resulting corporation," per 8 *Del. C.* § 262(i), after said determination, and does not involve a breach of, or require an inquiry into, any standard of conduct or violation of any law, right or duty;

2. Solera's obligation to pay pre-judgment interest per 8 *Del. C.* § 262(i) does not constitute a covered "Loss" because it is wholly derivative of, and has no independent basis separate from, the principal amount of the judgment, which even Solera admits does *not* constitute a covered Loss; and

3. Solera's defense costs are not covered because they were incurred prior to Solera's tendering of the Appraisal Action to the Defendant Insurers, and were incurred without the Defendant Insurers' prior consent, as required by the Policies.

In a July 31, 2019 Opinion (the "Opinion," Ex. A, cited as "Op."), the trial court held that:

1. The Appraisal Action constitutes a covered "Securities Claim" because that term's definition in the Primary Policy is not limited to claims of wrongdoing;

2. An award of pre-judgment interest is indemnifiable under the Policies, regardless of whether the principal amount of the judgment to which it is attached constitutes a covered Loss; and

3. Absent a finding of prejudice to the Insurers, Solera's breach of the consent clause is not a valid basis for the insurers to contend that such breach precludes coverage for the defense expenses.

On August 29, 2019, the trial court entered an interlocutory order implementing its Opinion. (Ex. B.) On September 26, 2019, the trial court granted the Defendant Insurers leave to appeal from its interlocutory order (Ex. C) and, on October 17, 2019, this Court granted the Defendant Insurers' petition to take this interlocutory appeal.

SUMMARY OF ARGUMENT

I. The trial court erred in holding that the Appraisal Action constitutes a "Securities Claim" under the Primary Policy because a Section 262 action is not an action "for" a "violation" of any "law regulating securities." Thus, neither the interest nor Solera's attorney's fees are covered.

The trial court construed the term "violation" to mean "a breach of the law and the contravention of a right or duty" (Op. at 11), but ruled that no allegation of wrongdoing was necessary for there to be a "violation." (*Id.*) This begs the following question: how can a violation of a law, right, or duty not constitute wrongdoing? The trial court then concluded, incorrectly, that a demand for appraisal inherently alleges that the subject corporation contravened the right of its stockholders to receive "fair value." Section 262, however, neither prohibits companies from engaging in any conduct, nor dictates any standard of conduct that must be met—and which can therefore be violated—by either the target or the acquirer, before or at closing.

This appeal is informed by this Court's recent rulings in *In re Verizon Insurance Coverage Appeals*, --- A.3d --- (Del. 2019), 2019 WL 5616263 (Del. Oct. 31, 2019), where the Court construed the definition of "Securities Claim" in a D&O policy—a definition nearly identical to the definition at issue in the present case—and held that fiduciary duty, unlawful dividend and fraudulent transfer

claims asserted in connection with a spinoff did not fall within the plain meaning of the definition.[1] In so holding, this Court emphasized that the definition of Securities Claim must be construed "as a whole" and in accordance with "the plain and ordinary meaning of the words used," and observed that the definition's terms "mirror those in a specific area of the law recognized as securities regulation." *Id.* at *4. The Court then characterized the phrase "regulating securities" as "limiting," and held:

> When we use the plain meaning of the words of the policy, and do not stretch their meaning to create an ambiguity, the regulations, rules, or statutes must be those that "regulate securities." As noted earlier, regulations, rules, or statutes that regulate securities are those specifically directed towards securities, such as the sale, or offer for sale, of securities. *They would not be directed at the common law or statutory laws outside the securities regulation area*.

Id. (footnote omitted) (emphasis added). Section 262 is the type of law contemplated by this holding because it does *not* "regulate securities."

Stockholders of a Delaware corporation have a right to directors who, at all times, satisfy their fiduciary duties in managing the corporation, including their situational duties to obtain the best price reasonably available in the event of a company sale. Stockholders also have a right to seek redress against directors who fail to satisfy their fiduciary duties. Delaware law is clear, however, that the

[1] In fairness, the trial court did not have the benefit of this Court's rationale in *Verizon* when issuing its Opinion.

corporation itself does not owe fiduciary duties; only the directors do. The corporation's obligations in connection with a merger are to comply with the formalities of the DGCL, and the company's charter and bylaws, and to ensure that its stockholders who have not demanded appraisal receive the merger consideration provided for in the transaction documents as negotiated and agreed to by its directors and approved by its stockholders.

With regard to Section 262, the corporation's only obligation is to ensure that its stockholders receive notice of appraisal rights as required by Section 262(d). Section 262 does not "regulate securities" and does not create a substantive right to receive any type of payment at the close of a merger. Rather, Section 262 is a limited legislative remedy designed as a *statutory* substitute for the stockholders' right at *common law* to prevent a merger by refusing to consent, which is exactly the type of statute this Court held should be excluded from the purview of laws "regulating securities." *See Verizon*, 2019 WL 5616263 at *4 (holding that "regulations, rules or statutes that regulate securities are those specifically directed towards securities" and "would not be directed at the common law or statutory laws outside the securities regulation area."). Indeed, Section 262 is addressed solely to the Court of Chancery, empowering that Court to independently appraise the shares of the subject corporation per Section 262(a) and (h) for those stockholders who dissent on the basis of price.

Section 262 does not impose any standards and does not regulate company conduct. An appraisal action is a ***neutral*** proceeding, which does not litigate liability or any issue of wrongdoing, where the sole issue is the "fair value" of the dissenter's shares on the date of the merger, and where ***each side*** bears the burden of proving its value contentions. The only payment or consideration obligation imposed by Section 262 comes well after the close of a merger. Pursuant to Section 262(i), the "surviving or resulting corporation" must pay the Court of Chancery's independent "fair value" determination, but that cannot occur until such a determination is made. Far from being a victim of a "violation" of Section 262, appraisal petitioners can, and often do (as in the Appraisal Action here), receive less than they would have been entitled to had they accepted the merger consideration.

By viewing the Appraisal Action as alleging that Solera contravened its stockholders' right to receive fair value, the Opinion below ignored numerous Delaware precedents holding that an appraisal does not involve an inquiry into any conduct, let alone wrongdoing. In that regard, the Opinion incorrectly treated the Appraisal Action as a claim against Solera, based on pre-Merger activity, for consummating the Merger at the deal price negotiated by its directors and approved by its stockholders. However, the valuation date under Section 262 is as of the date of a merger, not the date a merger agreement is executed. The only way

Section 262 can be violated is (i) if the selling corporation does not provide proper notice of appraisal rights per Section 262(d), or (ii) if the "surviving or resulting corporation" fails to pay the final "fair value" award per Section 262(i). Neither of those circumstances is at issue here.

It is for these reasons that the Appraisal Action does not seek redress "for" a "violation" of any law or rule "regulating securities." Indeed, no such allegation is made in the Petition, nor are such allegations required to be made per Section 262(e), and therefore, the Petition does not satisfy the definition of "Securities Claim."[2]

II. The trial court also erred in holding that, even though the principal amount of the final "fair value" award in the Appraisal Action is clearly not covered, the pre-judgment interest on that amount nevertheless constitutes a Loss under the Policies.

Logic dictates that the pre-judgment interest in the Appraisal Action is not a covered Loss. In appraisal cases, the purpose of the statutory interest provision is to compensate the petitioners for the delay in receiving the merger consideration that would otherwise be due at the close of the merger. Solera does not contend that the fair value payment—*i.e.*, the consideration for the shares—is a covered

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[2] Arguments II and III would become moot if the Court reverses the trial court on the Securities Claim issue.

Loss. Because the interest is derived solely from that admittedly uncovered amount, it too is not covered.

The trial court cited no precedent for holding that the pre-judgment interest nevertheless constitutes a Loss, and extensive research has not revealed any case in Delaware or elsewhere even remotely supporting such a proposition. Without authority, the trial court simply determined that the definition of "Loss" did not specify that pre-judgment interest had to be based on a *covered* judgment. But the trial court's construction of the contract language produces an absurd or commercially unreasonable result.

The trial court's analysis divorced the definition of "Loss" from the rest of the Primary Policy, as if it were a grant of coverage, which it is not. Instead, the Insuring Agreement constitutes the Insurers' promise to defray Loss. The applicable Insuring Agreement (Section I(C)) of the Primary Policy provides that "[t]he Insurer shall pay on behalf of the company Loss resulting solely from any Securities Claim made against the Company during the Policy Period for a Wrongful Act." Although the definition of "Loss" includes pre-judgment interest, this definition, when read in tandem with the grant of coverage, reflects that the only pre-judgment interest that is covered is interest that satisfies all of the requirements of the Insuring Agreement—*i.e.*, (1) Loss; (2) resulting solely from a Securities Claim; (3) first made during the Policy Period; and (4) for a Wrongful

Act. Construing "Loss" as an element of the Insuring Agreement, which the trial court failed to do, is what ties that term to the rest of the Policy and requires "Loss" to derive solely from covered matters.

Lastly, if the trial court's decision stands, it will conflict with public policy and the Legislature's recent amendment of Section 262(h), allowing pre-payment of fair value to mitigate any pre-judgment interest. Companies like Solera will attempt to profit from holding onto the merger consideration during appraisal actions, using it as an interest free loan while passing off the interest obligation to their insurers.

III. Solera's defense costs incurred prior to the time it tendered the Appraisal Action to the Defendant Insurers are not covered because they violate the unambiguous terms of the Primary Policy requiring the Insurer's consent prior to incurring defense costs. Solera litigated the case for over a year through a June 2017 trial and post-trial briefing before it ever tendered the case to the Insurers in January of 2018. (Op. at 16.) The Primary Policy expressly requires that "[n]o Insured may incur any Defense Expenses…without the Insurer's consent…." This provision enables the Insurers, who lack control of the defense, to exercise proactive oversight assuring that Policy proceeds are used prudently and minimizing disputes regarding the reasonableness of defense costs. Nothing in this provision conditions its application on prejudice to the Insurer.

The trial court erroneously analogized to inapposite late notice and consent-to-settle situations and held that under Delaware law, "Solera's breach of the consent clause does not automatically bar coverage." (Op. at 17.) The trial court then ruled that an implied prejudice requirement would apply to the consent-to-defense provision of the Primary Policy to avoid a forfeiture of coverage. (*Id.*)

There is no Delaware precedent for the trial court's imposition of a prejudice requirement. Moreover, unlike the notice-prejudice context to which the trial court analogized, but on which the Defendant Insurers did not rely in their motion, the consent-to-defense costs provision does not cause a complete forfeiture of coverage. It merely bars coverage for the fees incurred prior to the time that an insured tenders the claim to the insurer. Fees incurred after the tender would still be covered subject to the terms of the policy. Thus, the trial court's rationale does not apply.

STATEMENT OF FACTS

A. The Appraisal Action And Opinion Below

On September 13, 2015, Solera announced that Vista Equity Partners would acquire the Company for $55.85 per share. (JA61, ¶¶ 19-20.) Following a stockholder vote approving the Merger, the transaction closed on March 3, 2016, and the take-private transaction was completed. (JA61, ¶ 21.) Solera was the "surviving or resulting corporation" for purposes of Section 262(i) of the DGCL.

Before the Merger closed, several Solera stockholders submitted demands for appraisal pursuant to Section 262(d). Four days after the Merger closed—those stockholders filed the Appraisal Action against Solera in the Court of Chancery, seeking a fair value determination of their shares plus statutory interest (*i.e.*, 5% over the Federal Discount Rate, measured from the date of the Merger through the date the fair value is paid to the petitioners). (JA131-JA138.) Solera did not tender the Appraisal Action to any of the Insurers until almost two years later. (JA445-JA449 (Solera's first correspondence providing notice of the Appraisal Action dated January 31, 2018).)

The Appraisal Action was tried before Chancellor Andre Bouchard over five days in June of 2017. At trial, petitioners argued that the fair value at the close of the Merger was $84.65 per share. Solera argued that the fair value was $53.95 per

share (*i.e.*, the deal price of $55.85, less the per-share value of certain synergies obtained through the Merger).

Solera finally tendered the Appraisal Action to the Insurers on January 31, 2018, approximately six months *after* the trial was *completed*. (JA445-JA449.)

In its July 30, 2018 decision, the Court of Chancery agreed with Solera's argument that the fair value of its shares was $53.95 per share (*i.e.*, $1.90 per share *less* than the deal price). *See In Re Appraisal of Solera Holdings, Inc.*, 2018 WL 3625644 (Del. Ch. July 30, 2018). On August 20, 2018, the Court of Chancery directed Solera to pay that amount, plus statutory interest. Because the Appraisal Action involved 3,987,021 shares, the order required Solera to pay $215,099,782.95 as the fair value of those shares, plus interest, which amounted to $38,287,821.16. A final judgment was entered on August 20, 2018 (JA140-JA144), and Solera allegedly funded the total amount due—$253,487,604.56—on or about September 7, 2018. (JA61, ¶¶ 19-20.)

B. The D&O Insurance Policies

Solera obtained the following $55 million D&O insurance program for the Policy Period June 10, 2015 to June 10, 2016:

INSURER	LIMIT
XL[3]	$10 million (Primary)
ACE[4]	$5 million excess $10 million
Illinois National Ins. Co.	$5 million excess $15 million
Argonaut Ins. Co.	$5 million excess $20 million
Illinois National Ins. Co.	$5 million excess $25 million
Hudson Ins. Co.	$5 million excess $30 million
Endurance Am. Ins. Co.	$5 million excess $35 million
Zurich Am. Ins. Co.	$5 million excess $40 million
Liberty Ins. Underwriters, Inc.	$5 million excess $45 million
Federal[5]	$5 million excess $50 million

(JA146.) The ACE and Federal Policies, like the other Excess Policies, provide coverage on a claims-made basis and follow the form of the Primary Policy. Therefore, the coverage analysis focuses on the terms and conditions of the Primary Policy, but the analysis applies equally to the Excess Policies. The Policies provide that the Insured, and not the Insurers, bears the duty to defend.

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[3] A $1,250,000 million retention applies if the Appraisal Action constitutes a Securities Claim. A $2 million retention applies for any Securities Claim that is also a "Bump-Up Claim," pursuant to Endorsement No. 7.

[4] ACE issued Excess Insurance Policy Number DOX G23661950 007 to Solera for the policy period June 10, 2015 to June 10, 2016. (JA185-JA196.)

[5] Federal issued Excess Insurance Policy Number 8240-7270 to Solera for the policy period June 10, 2015 to June 10, 2016. (JA322-JA345.)

C. <u>**Coverage History**</u>

Solera waited to tender the Appraisal Action until January 31, 2018—almost two years after the Appraisal Action was filed, over eighteen months after the policy period expired, and approximately six months *after the trial concluded*. (JA445-JA449.) By letter dated April 17, 2018, Solera's primary D&O insurer, XL Specialty Insurance Company ("XL"), denied coverage for the Appraisal Action because: (i) the Appraisal Action does not constitute a "Securities Claim" and therefore does not trigger entity coverage under the Primary Policy; (ii) coverage is precluded pursuant to the Primary Policy's definition of "Loss" for any amount a court might assess against Solera in excess of the $55.85 deal price; (iii) no coverage exists for Solera's "Defense Costs" in the Appraisal Action because Solera did not obtain XL's prior written consent to incur those amounts; and (iv) Solera's notice of the Appraisal Action was untimely, causing XL to suffer material prejudice. (JA451-JA456.) Solera contested XL's denial of coverage.

On August 31, 2018, Solera filed the present action against the Insurers, alleging breach of contract and seeking a declaration that the Policies afford coverage for the statutory interest that Solera allegedly paid to the appraisal petitioners ($38.3 million) and for the defense expenses that Solera incurred in connection with the Appraisal Action ($13.5 million). (JA56-JA78.)

In its October 31, 2019 Opinion, the trial court held that the Appraisal Action was a Securities Claim, the pre-judgment interest on the merger consideration constitutes Loss and, absent prejudice, lack of consent did not preclude coverage for the pre-tender defense fees.

ARGUMENT

I. THE TRIAL COURT ERRED IN HOLDING THAT A SECTION 262 APPRAISAL ACTION IS A CLAIM "FOR" A "VIOLATION" OF "ANY LAW REGULATING SECURITIES" AND, THEREFORE, A "SECURITIES CLAIM" UNDER THE DEFENDANT INSURERS' D&O LIABILITY INSURANCE POLICIES

A. Question Presented

Whether an appraisal action under 8 *Del. C*. § 262 constitutes a "Securities Claim," which is defined in the Policy as a claim "for" any actual or alleged "violation of any federal, state, or local statute, regulation, rule, or common law regulating securities"? (Preserved at JA429-JA436.)

B. Standard And Scope Of Review

This Court reviews *de novo* the grant or denial of a summary judgment motion as well as questions of insurance contract interpretation. *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2001); *Genecor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 13 (Del. 2000).

C. Merits Of Argument

1. Applicable Principles Of Contract Construction

Under Delaware law, insurance policies "are construed as a whole, to give effect to the intentions of the parties." *AT&T Corp. v. Faraday Capital Ltd.*, 918 A.2d 1104, 1108 (Del. 2007). When the language of an insurance policy is "clear and unambiguous, the parties' intent is ascertained by giving the language its

ordinary and usual meaning." *Id.* at 1108. An insurance policy is not ambiguous merely because the parties do not agree on the proper construction, *see O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 288 (Del. 2001), and when construing the words, a court should "not stretch their meaning to create an ambiguity." *Verizon*, 2019 WL 5616263, at *4.

2. Obligations To Stockholders In Connection With A Merger

It is a fundamental precept of Delaware's corporate jurisprudence that stockholders of a Delaware corporation have a right to directors and officers who, at all times, satisfy their fiduciary duties in managing the corporation, including their situational duties in connection with the sale of a company to act reasonably and to obtain the best price reasonably available. *See RBC Capital Markets LLC v. Jervis*, 1129 A.3d 816, 849 (Del. 2015) ("'In the sale of control context, the directors must focus on one primary objective—to secure the transaction offering the best value reasonably available for the stockholders—and they must exercise their fiduciary duties to further that end.'") (quoting *Paramount Commc'ns Inc. v. QVC Network, Inc.*, 637 A.2d 34, 44 (Del. 1993)).

Stockholders also have a right to seek redress if a majority of their fiduciaries fail to satisfy their duties. *Id.* at 857 (affirming damages award where "[t]he Board violated its situational duty by failing to take reasonable steps to attain the best value reasonably available to the stockholders.").

It is also well-settled that the corporation itself does not owe fiduciary duties. *See In re Orchard Enters., Inc. S'holder Litig*., 88 A.3d 1, 54 (Del. Ch. 2014) ("The fiduciaries who serve the entity owe fiduciary duties; the entity that is served does not."); *Buttonwood Tree Value P'rs, .P. v. R.l. Polk & Co., Inc*., 2014 WL 3954987, at *4 (Del. Ch. Aug. 7, 2014) ("In fact, under settled Delaware law, '[f]iduciary duties are owed by the directors and officers to the corporation and its stockholders.' In other words, a corporation does not owe fiduciary duties to its stockholders."); *In re Wayport, Inc. Litig*., 76 A.3d 296, 322-23 (Del. Ch. 2013) ("Wayport is not liable for breach of fiduciary duty. As a corporate entity, Wayport did not owe fiduciary duties to its stockholders."). The directors and officers are the ones who owe fiduciary duties.

In contrast, the corporation's obligation in connection with consummation of a merger is to comply with Delaware's hierarchal corporate contract: the strictures of Subchapter IX (*i.e*., Sections 251-267) of the DGCL, as well as the corporation's charter and bylaws. *See, e.g*., *Sinchareonkul v. Fahnemann*, 2015 WL 292314, at *6 (Del. Ch. Jan. 22, 2015) ["The components of [the corporate] contract form a hierarchy, comprising from top to bottom (i) the [DGCL], (ii) the certificate of incorporation, and (iii) the bylaws."); *Quadrant Structured Prod. Co., Ltd. v. Vertin*, 2014 WL 5465535, at *3 (Del. Ch. Oct. 28, 2014) ("When evaluating corporate action for legal compliance, a court examines whether the

action _contravenes_ the hierarchical components of the entity-specific corporate contract, …") (emphasis added). The corporation must also ensure that its stockholders who have not demanded appraisal receive the merger consideration provided for in the transaction documents negotiated and agreed to by its directors and approved by its stockholders.

With specific regard to Section 262—which is part of Subchapter IX of the DGCL—the corporation's only obligation is to ensure that its stockholders receive proper notice of appraisal rights as required by Section 262(d). *See, e.g.*, 8 *Del. C.* § 262(d)(1) (providing that the corporation "shall notify each of its stockholders … with respect to shares for which appraisal rights are available pursuant to subsection (b) or (c) of this section that appraisal rights are available for any or all of the shares of the constituent corporations, and shall include in such notice a copy of this section . . ."); *see also Nebel v. Southwest Bancorp, Inc.*, 1995 WL 405750, *6 (Del. Ch. July 5, 1995) (discussing the requirements of 8 *Del. C*. § 262(d)(1)); *Turner v. Bernstein*, 1999 WL 66532, *6-7 (Del. Ch. Feb. 9, 1999) (distinguishing the statutory requirement that a corporation give notice of appraisal rights from the fiduciary duties owed by the former directors of the purchased corporation).

The notice requirements of Section 262 are not at issue in this case, but Delaware law also provides a cause of action if stockholders do not receive proper notice of appraisal rights. *See, e.g.*, *Berger v. Pubco Corp.*, 976 A.2d 132 (Del. 2009) (providing quasi-appraisal remedy); *Mehta v. Mobile Posse Inc.*, 2019 WL 2025231 (Del. Ch. May 8, 2019) (same).

3. The Purpose Of The Appraisal Statute And What Section 262 Provides

Aside from notice of appraisal rights, Section 262 does not create a substantive right for stockholders to receive any type of consideration at the close of a merger. Section 262 neither requires the seller (or even its directors) to secure a particular type of payment for its stockholders, nor does it require the buyer to provide a particular type of payment at the close. Rather, all Section 262 does is confer on stockholders who disagree with the merger price the right to an independent appraisal of their shares from the Court of Chancery, which is a limited legislative remedy designed as a substitute for a stockholder's right at common law to veto a merger by refusing to consent. *Alabama By-Products Corp. v. Cede & Co. on Behalf of Shearson Lehman Bros., Inc.*, 657 A.2d 254, 258-59 (Del. 1995) (explaining that appraisal is "a limited legislative remedy developed initially as a means to compensate shareholders of Delaware corporations for the loss of their common law right to prevent a merger or consolidation by refusal to consent to such transactions."); *see also Schenley Indus., Inc. v. Curtis*, 152 A.2d

300, 301 (Del. 1959) ("At common law no consolidation or merger of corporations could be effected except with the consent of all the stockholders."). Section 262 is intended to "provide shareholders dissenting from a merger on grounds of inadequacy of the offering price with a judicial determination of the intrinsic worth (fair value) of their shareholdings." *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1186 (Del. 1988).

Section 262 is addressed solely to the Court of Chancery, empowering that Court to independently appraise the shares of the subject corporation per Section 262(a) and (h) for those stockholders who dissent on the basis of price. *See* 8 *Del. C.* § 262(a) (dissenting stockholders "shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock …"); *id.* at § 262(h) ("Through such proceeding the Court shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with interest, if any, to be paid upon the amount determined to be the fair value.").

Moreover, an appraisal action is a *neutral* proceeding, where the *sole* issue is the "fair value" of the dissenter's shares on the date of the merger, and where *each side* bears the burden of proving their respective value contentions. Indeed, "[u]nlike in an action in which wrongdoing has been alleged, '[i]n a statutory appraisal proceeding, both sides have the burden of proving their respective

valuation positions by a preponderance of evidence.'" *Reis v. Hazlett Strip-Casting Corp.*, 28 A.3d 442, 456 (Del. Ch. 2011) (quoting *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 520 (Del. 1999)).

A Section 262 action thus does not litigate any issue of liability, let alone wrongdoing. This Court has repeatedly observed that "statutory appraisal is limited to the payment of fair value of the shares … by the surviving or resulting corporation," and "[a] determination of fair value does not involve an inquiry into claims of wrongdoing in the merger." *Technicolor*, 542 A.2d at 1189; *accord Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1143 (Del. 1989) (quoting *Technicolor*, 542 A.2d at 1189); *Pinson v. Campbell-Taggart, Inc.*, 1989 WL 17438, at *6 (Del. Ch. Feb. 28, 1989) ("[L]iability need not be established in an appraisal, because no inquiry is made into claims of wrongdoing in the merger."); *Kaye v. Pantone, Inc.*, 395 A.2d 369, 374 (Del. Ch. 1978) ("The sole issue raised by an action seeking an appraisal should be the value of the dissenting stockholder's stock").

In *Technicolor*, this Court denied the plaintiff-stockholders' attempt to enlarge an appraisal action to include claims for conspiracy, illegality, fraud, and breach of fiduciary duty, stating that:

> [I]n an appraisal action under Section 262, the only litigable issue is the determination of the value of the appraisal petitioners' shares on the date of the merger, the only party defendant is the surviving corporation and

> the only relief available is a judgment against the surviving corporation for the fair value of the dissenters shares. In contrast, a fraud action asserting fair dealing and fair price claims affords an expansive remedy and is brought against the alleged wrongdoers to provide whatever relief the facts of a particular case may require. . . . Statutory appraisal is limited to the payment of fair value of the shares . . . by the surviving or resulting corporation. . . . In contrast, in a fraud action seeking monetary relief for unfair dealing, the focus of the suit is whether wrongdoing can be established.

542 A.2d at 1187-89. Delaware courts consistently distinguish appraisal actions from fiduciary actions on the basis that allegations of wrongdoing are not adjudicated in an appraisal proceeding.[6] Thus, Section 262 does not impose any standard on companies and does not regulate their conduct in any manner.

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[6] *See, e.g.*, *In re Trados Inc. Shareholder Litigation*, 73 A.3d 17, 35 (Del. Ch. 2013) ("The breach of fiduciary duty claim seeks an equitable remedy that requires a finding of wrongdoing. The appraisal proceeding seeks a statutory determination of fair value that does not require a finding of wrongdoing."); *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 1994 WL 198726, at *2 (Del. Ch. May 16, 1994) ("Thus, claims for unfair dealing cannot be litigated in the context of a statutory appraisal action."); *In re Appraisal of Dell, Inc.*, 2016 WL 3186538, at *25-28 (Del. Ch. May 31, 2016), *aff'd in part, rev'd in part on other grounds*, *sub nom. Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, 177 A.3d 1 (Del. 2017) ("[W]hile the transaction particulars undergirding appraisal are related to and can sometimes overlap with those relevant to the fiduciary duty class action, the emphasis is crucially different. In a fiduciary duty class action, the court is faced with the question of holding individual directors personally liable for having breached their duties to the stockholders. . . . An appraisal action asks a substantially more modest question: did the stockholders get fair value for their shares in the merger? If not, the acquirer must make up the difference, but no one is held personally liable."); *see also Austell v. Smith*, 634 F. Supp. 326, 329 (W.D.N.C. 1986) (the statutory appraisal mechanism is a "no fault" proceeding that allows shareholders to exchange their shares for fair value).

The real party in interest in an appraisal action is not the target, or even the surviving corporation if the transaction is structured such that the target is the surviving or resulting corporation. *In re Stillwater Mining Company*, 2019 WL 3943851 (Del. Ch. Aug. 21, 2019) ("The respondent in an appraisal proceeding is technically the surviving corporation, but the real party in interest is the acquirer. The petitioners' true opponent in this proceeding was [the buyer]."). This is reflected in the payment obligation imposed by Section 262, which comes well after the close of a merger. Pursuant to Section 262(i), the "surviving or resulting corporation" must pay the Court of Chancery's independent "fair value" determination, but that cannot occur, and the obligation cannot be "contravened," until such a determination is made. This case is not about a failure to actually pay the "fair value" award under Section 262(i), and the buyer is not an Insured under the Policies.[7]

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[7] The closing of the Merger was a change of control, and here, the Primary Policy states: "If during the Policy Period there is a Change in Control, the coverage provided under this Policy shall continue to apply but only with respect to a Claim against an Insured for a Wrongful Act committed or allegedly committed up to the time of the Change in Control … ." (JA163, § VI(D)(5).)

Finally, although dissenting stockholders can receive more than the deal price negotiated by faithful fiduciaries in an arms-length transaction,[8] far from being a victim of any type of "violation" of Section 262, dissenting stockholders can also, and often do (as in the Appraisal Action here), receive less than they were entitled to upon consummation of a merger: "Of the 34 cases that went to trial between 2006 and 2018, 16 resulted in awards above the deal price and 18 resulted in awards at or below the deal price." *Appraisal Litigation in Delaware: Trends in Petitions and Opinions*, CORNERSTONE RESEARCH (2019), at *8, https://www.cornerstone.com/publications/reports/appraisal-litigation-delaware-2006-2018. To state the obvious, victims of wrongs or violations who fail to prove their case end up with legal bills and no recovery, but they do not end up in a worse position, which illustrates the unique neutrality of an appraisal action.

4. The Appraisal Action Does Not Fall Within The Plain And Ordinary Meaning Of "Securities Claim"

Solera seeks coverage for the Appraisal Action under Insuring Agreement I(C) of the Primary Policy, which affords "entity" coverage for "Loss resulting solely from any Securities Claim first made against [Solera] during the Policy

[8] *See In re Trados*, 73 A.3d at 78 ("A court could conclude that a price fell within the range of fairness and would not support fiduciary liability, yet still find that the point calculation demanded by the appraisal statute yields an award in excess of the merger price.").

Period for a Wrongful Act."[9] (JA153, § I(C).)

Section II(S) of the Primary Policy defines "Securities Claim" to mean:

> a Claim, other than an administrative or regulatory proceeding against or investigation of the Company:
>
> (1) made against any Insured *for any actual or alleged violation* of any federal, state or local statute, regulation, or rule or common law *regulating securities*, including but not limited to the purchase or sale of, or offer to purchase or sell, securities, which is:
>
> (a) brought by any person or entity resulting from the purchase or sale of, or offer to purchase or sell, securities of the Company; or
>
> (b) brought by a security holder of the Company with respect to such security holder's interest in the Securities of the Company; or
>
> (2) brought derivatively on behalf of the company by a security holder of the Company.
>
> Notwithstanding the foregoing, the term Securities Claim shall include an administrative or regulatory proceeding against, or a formal investigation of, the Company, but only if and only during the time that such formal investigation or proceeding is also maintained against an Insured Person.

(JA157, § II(S) (emphasis added).)

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[9] Because no Insured Persons were defendants in the Appraisal Action, Solera does not contend that any insuring clause other than Insuring Agreement I(C) applies.

Solera seeks coverage under subsection (1) of this definition,[10] but there is no coverage because the Appraisal Action was not "made against any Insured *for any actual or alleged violation* of any federal, state or local statute, regulation, or rule or common law *regulating securities*." *Id.* (emphasis added). The Appraisal Action is thus not a "Securities Claim" and does not trigger coverage under any of the Policies.

In interpreting a nearly identical definition of Securities Claim, this Court held that "common law or statutory laws outside the securities regulation area" do not fall within the plain meaning of the definition. *Verizon*, 2019 WL 5616263 at *4. Section 262 is a statutory law substituting for a common law right, *see Alabama By-Products*, 657 A.2d at 258-259, and it is not "directed specifically towards securities laws for 'regulating securities.'" *Verizon*, 2019 WL 5616263 at *6. The Appraisal Action is therefore outside the purview of the definition of Securities Claim in the Primary Policy.

5. The Appraisal Petition Does Not Allege A "Violation" Of Law Or Rule "Regulating Securities"

There are several compelling and independent reasons why the Opinion below is in error and why the Appraisal Action does not allege a "violation" of anything, let alone a "violation" of a "law regulating securities."

[10] The rest of the definition does not apply here because the Appraisal Action does not constitute an administrative or regulatory proceeding, or a derivative action.

First, the Petition in the Appraisal Action alleges no misconduct or violations by Solera or its management in connection with the Merger. (JA131-JA133, ¶¶ 2-9.) The only conduct alleged in the Petition is that the Merger closed and the only claim for relief in the Petition is for the Court of Chancery to make a "fair value" determination under Section 262—which is all the statute requires to be pled—and the Court of Chancery found that an amount <u>*less than*</u> the deal price constituted fair value.[11] The Appraisal Action at issue here is no different than any of the multiple appraisal cases discussed above holding that appraisal actions do not litigate liability or involve any wrongdoing.[12] Given the great weight of these

[11] Under established Delaware law, courts only look to the actual allegations in the complaint to determine coverage under the Policy. *See Cont'l Cas. Co. v. Alexis I. du Pont Sch. Dist.*, 317 A.2d 101, 103 (Del. 1974).

[12] Although courts in appraisal proceedings (including the subject Appraisal Action) have considered evidence relating to the price negotiation process leading up to a merger, such evidence is only relevant to the weight a court should accord the deal price when it considers "all relevant factors" when determining a fair value. *See Dell*, 177 A.3d at 30 ("The transaction process exemplifies many of the qualities Delaware courts have found favor affording substantial, if not exclusive, weight to deal price in the fair price analysis"); *Veriton Partners Master Fund, Ltd. v. Aruba Networks, Inc.*, 210 A.3d 128, 137 (Del. 2019). Furthermore, evidence of the deal process is outside the four corners of the appraisal Petition, which is the focus of the coverage analysis. *See Cont'l Cas.*, 317 A.2d at 103 ("In determining whether the third-party's action against the insured states a claim covered by the policy, we must look to the allegations of the complaint. The test is whether the complaint alleges a risk within the coverage of the policy.") (internal citations omitted).

authorities, a Section 262 proceeding does not involve any "violation" of Delaware law and thus does not constitute a Securities Claim under the Primary Policy.

Second, without giving appropriate weight to the neutral, burden-balanced nature of an appraisal proceeding, where no wrongdoing or liability is litigated, the trial court relied on *Black's Law Dictionary* and determined that "violation simply means, among other things, a breach of law and the contravention of a right or duty." (Op. at 11 & n.31 (citing *Black's Law Dictionary* (11th Ed. 2019).) The trial court then concluded that "a Securities Claim is not limited under the Policy to violations of law alleging wrongdoing." (Op. at 11.) That begs the following question: how can violating the law or contravening legal rights or duties not be wrongful?

Contrary to the trial court's rationale, "violation" and "wrongdoing" are synonymous. Indeed, the same edition of *Black's* defines "wrongful conduct" as "[a]n act taken in violation of a legal duty; an act that unjustly infringes on another's rights." *Black's Law Dictionary* (11th Ed. 2019). Accordingly, by definition, a "violation of a law regulating securities" constitutes wrongdoing. It follows that an appraisal action, which does not adjudicate any wrongdoing or violation, cannot satisfy the definition of Securities Claim.

The trial court's reference to certain strict liability provisions of the Securities Exchange Acts of 1933 and 1934 as "laws regulating securities that can be violated without any showing of scienter or wrongdoing" (Op. at 11) is beside the point because those laws actually regulate securities transactions. It is also only partially correct. Scienter may not be required, but if one contravenes the statute's prohibition it indeed constitutes wrongdoing. For example, 15 U.S.C. §§ 77e(a) and (c) impose strict liability on sellers of unregistered securities, and a failure to register *violates* the statutes' proscriptions. Thus, a party who sells an unregistered security engages in wrongdoing—regardless of whether the liability is strict and without a finding of scienter—because such conduct is prohibited.

In stark contrast, Section 262 neither prohibits any conduct nor prescribes any acts to be taken or standards of conduct to be met regarding payment to stockholders at the close of a merger. In that regard, Section 262 cannot be said to "regulate securities" like the strict liability provisions of the securities laws cited by the trial court. On its face, Section 262 is directed solely to the Court of Chancery to independently appraise shares with no finding beyond anything other than the standalone going-concern value of the subject company on the date the merger closed. *See* 8 *Del. C.* § 262(h).

Third, the trial court stated that "[u]nder Delaware law, shareholders have the right to receive 'fair value' for their shares when they are cashed out of their positions through certain types of mergers or consolidations" (Op. at 12), but Section 262 does not command any consideration payment that can be violated by failing to satisfy it at closing.[13] The trial court then held that, "[b]y its very nature, a demand for appraisal is an allegation that the company contravened that right by not paying shareholders the fair value to which they are entitled" (*Id.*), but an appraisal petition merely asks the Court of Chancery to determine the fair value of a dissenter's stock and the directives in Section 262 are addressed to the Court of Chancery. *See* 8 *Del. C.* § 262(g)-(i). To reiterate, appraisal proceedings are solely neutral valuation proceedings. *Technicolor*, 542 A.2d at 1189.

The trial court's view of an appraisal action as alleging that the company contravened a shareholder's right to receive fair value incorrectly treats appraisal as a claim against the insured target company based on its directors' pre-merger

[13] As noted *supra*, stockholders are entitled to (i) directors who satisfy their fiduciary duties and (ii) adherence to the strictures of the DGCL, charter and bylaws. The only payment stockholders are entitled to at closing is the merger consideration negotiated by the directors and approved by the stockholders. Section 262 does not change that, unlike other provisions of the DGCL that actually mandate a "fair value" payment at the time of the corporate action. *See, e.g.*, 8 *Del. C.* § 155 ("A corporation may, but shall not be required to, issue fractions of a share. If it does not issue fractions of a share, it shall (1) arrange for the disposition of fractional interests by those entitled thereto, (2) pay in cash the *fair value* of fractions of a share as of the time when those entitled to receive such fractions are determined . . .") (emphasis added).

activity in negotiating the deal. However, the only way for Section 262 to be violated is (i) if the selling corporation does not provide proper notice of appraisal rights per Section 262(d),[14] or (ii) if the "surviving or resulting corporation" fails to pay the final "fair value" award per Section 262(i). Neither is at issue here, and the latter cannot be satisfied or violated until after the fair value determination has been made. Appraisal thus only determines the value of the shares on the date of the merger; the only respondent is the surviving corporation; and the only available relief is a <u>*post-closing/post-appraisal*</u> judgment against the surviving corporation for fair value. *See* 8 *Del. C*. § 262(e), (f) and (i). The trial court's reading of the appraisal Petition as alleging a "contravention" or "violation" is therefore not consistent with the statutory language itself and this Court's pronouncements about the nature of appraisal.

Accordingly, the trial court incorrectly held that the Appraisal Action necessarily alleges a violation of law.

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[14] In every instance where Delaware courts have used the word "violation," or iteration thereof, when discussing Section 262, it has involved failures to follow the <u>*procedures*</u> outlined in the statute. *See, e.g.*, *Nebel v. Southwest Bancorp, Inc*., 1995 WL 405750, at *6 (Del. Ch. July 5, 1995); *Tansey v. Trade Show News Networks, Inc*., 2001 WL 1526306 (Nov. 27, 2001); *Borruso v. Commc'ns Telesystems Intern*., 753 A.2d 451 (Del. Ch. Sept. 24, 1999); *Pubco Corp*., 2008 WL 2224107, *4; *Skeen v. Jo-Ann Stores, Inc*., 750 A.2d 1170, 1171 n.1 (Del. May 3, 2000); *Mobile Posse*, 2019 WL 2025231, at *5, *7; *City of North Miami Beach Gen. Emps. Ret. Plan v. Dr Pepper Snapple Group, Inc*., 189 A.3d 188 (Del. Ch. June 1, 2018); *Gilliland v. Motorola, Inc*., 859 A.2d 80, 85 (Del. Ch. 2004).

6. <u>The Appraisal Action Is Not "For" A Violation</u>

The definition of Securities Claim also requires that a matter be "for" a violation of a law regulating securities. Because the Appraisal Action does not allege that Solera is liable for any wrongdoing and does not seek any relief for such liability, it cannot be "for" a violation of law and thus is not a Securities Claim. *See RSUI Indem. Co. v. Desai*, 2014 WL 2347821, at *4 (M.D. Fla. Sept. 2, 2014) (holding that, to constitute a claim "for" a wrongful act, "the written demand must seek redress in response to, or as a requital of, a wrongful act"). As discussed above, the Court of Chancery's obligation in an appraisal action is not to grant "relief" to any party as redress "for" any wrongdoing or violation by the opposing party. Rather, the Court's only obligation is to independently appraise the dissenter's shares to determine fair value in a neutral proceeding where each side bears the burden of proof and the real party-in-interest is the buyer.

II. THE TRIAL COURT ERRED IN HOLDING THAT PRE-JUDGMENT INTEREST IS INDEMNIFIABLE UNDER THE POLICIES REGARDLESS OF WHETHER THE UNDERLYING JUDGMENT CONSTITUTES A COVERED "LOSS"

A. Question Presented

Whether pre-judgment interest pursuant to 8 *Del. C.* §262(i), based on an underlying "fair value" judgment that Solera concedes was not covered, nonetheless constitutes indemnifiable Loss under the Policies? (Preserved at JA436-JA438.)

B. Standard And Scope Of Review

The applicable standard of review and governing rules of contract interpretation are the same as Argument I.B, *supra*.

C. Merits Of Argument

Solera contends, and the trial court agreed, that pre-judgment interest is included in the definition of "Loss," and thus, the $38.3 million interest award from the Appraisal Action, is indemnifiable under the Policies. Solera does not dispute, however, that the "fair value" judgment itself is not covered Loss, presumably because Solera recognizes that this payment reflects part of the new

owner's acquisition costs.[15] The trial court based its decision solely on a limited reading of the definition of Loss, without reading the Policy as a whole, and without citing any legal authority for its ruling.

Courts routinely recognize that the purpose of pre-judgment interest awards, like Section 262's statutory interest provision, is to compensate a payee for the time-value of the money that should have been paid at some point in the past. *See, e.g.*, *Brandin v. Gottlieb*, 2000 WL 100594, at *30 (Del. Ch. July 13, 2000) ("the obvious purpose of awarding pre-judgment interest [is] to ensure that the [payee] is fully compensated for the loss of the time value of her money"); *CertiSign Holding, Inc. v. Kulikovsky*, 2018 WL 2938311, at * 29 (Del. Ch. June 7, 2018) (same). Therefore, the interest awarded against Solera is simply an extension of, and not separable from, the underlying purchase price payment. Indeed, in this case, the interest is based, not on an amount in excess of the deal price, but on a portion of the deal price itself because the Court of Chancery subtracted the value of synergies from the deal price in determining and awarding fair value.

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[15] *See Ryerson, Inc. v. Federal Ins. Co.*, 796 F. Supp. 2d 911, 914 (N.D. Ill. 2010), *aff'd*, 676 F.3d 610, 615 (7th Cir. 2012) (an adjustment in the price one company paid to purchase another company constituted uninsurable loss); *Safeway, Inc. v. Nat'l Union Fire Ins. Co.*, 1992 U.S. Dist. LEXIS 22499 at *25 (N.D. Cal. Mar. 31, 1992) *aff'd*, 64 F.3d 1282 (9th Cir. 1995) (recognizing that a merger-related dividend providing additional consideration to an acquired company's shareholders did not constitute "Loss" under a D&O policy).

Because the interest is derivative of, and an extension of, the admittedly uncovered consideration for the shares, logic dictates that the interest should not be covered any more than the underlying principal. In other words, the interest payment is not "Loss" incurred by Solera, but merely reflective of Solera's benefit in holding the plaintiffs' uninsured deal consideration for a longer period than permitted under the merger agreement. Nevertheless, the trial court held that, because the definition of "Loss" did not specify that pre-judgment interest had to be based on a "covered" judgment as in the policy in another case,[16] the interest in this matter should be covered. The trial court cited no authority for this ruling and counsel have not located any Delaware case requiring an insurer to indemnify pre-judgment interest awarded on an uncovered principal.

It is not logical or commercially reasonable for a policy to cover the time-value of an amount that is itself not covered under the policy. *See XO Commc'ns, LLC v. Level 3 Commc'ns, Inc.*, 948 A.2d 1111, 1123 (Del. Ch. 2007) ("[A] contract should not be interpreted to produce a result that is absurd [or] commercially unreasonable..."); *Textron Inc. v. Acument Glob. Techs., Inc.*, 108 A.3d 1208, 1222 (Del. 2015) (affirming interpretation of purchase agreement "in a

[16] The trial court looked to (Op. at 14) the policy in *Verizon Commc'n Inc. v. Ill. Nat. Ins. Co.*, 2017 WL 1149118 at *2 n. 13 (Del. Super. Mar. 2, 2017), a case this Court subsequently reversed on other grounds. That aside, the trial court should not have strayed from the four corners of the Primary Policy in this case.

reasonable manner that is supported by substantial extrinsic evidence and commercial logic.").

The trial court also improperly analyzed the definition of "Loss" divorced from the rest of the policy language, as if it were a grant of coverage. The applicable Insuring Agreement in Section I(C) of the Primary Policy, which does grant coverage, provides that "[t]he Insurer shall pay on behalf of the company Loss ***resulting solely*** from any Securities Claim made against the Company during the Policy Period for a Wrongful Act." (JA153, § I(C) (emphasis added).) Although the definition of "Loss" includes pre-judgment interest, the definition must be read in tandem with the Insuring Agreement. *See Morris James LLP v. Continental Cas. Co.*, 928 F. Supp. 2d 816, 823 (D. Del. 2013) ("The court must read the insurance contract as a whole, give effect to all provisions therein, and interpret the terms in a common sense manner.").

The only pre-judgment interest that is covered is interest that satisfies all of the requirements of the Insuring Agreement, *i.e.* (1) Loss; (2) resulting solely from a Securities Claim; (3) first made during the Policy Period; and (4) for a Wrongful Act. Construing "Loss" as a part of the Insuring Agreement is what ties that term to the rest of the Policy and requires "Loss" to derive from covered matters. The trial court was incorrect in finding that pre-judgment interest constitutes indemnifiable "Loss" without finding that the other requirements of the Insuring

Agreement were met. Had the trial court construed "Loss" together with the Insuring Agreement, it could not have concluded that pre-judgment interest based on an uncovered principal was nevertheless indemnifiable Loss.

In addition, the trial court's decision undermines the purpose and effect of the Legislature's recent amendment of Section 262(h) to permit parties to pre-pay the fair value of the shares in advance of the Court of Chancery's determination of that fair value so as to mitigate the interest that would otherwise accrue. *See* 8 *Del. C.* § 262(h). If the trial court's decision is allowed to stand, no companies will make such pre-payments because they will be able to profit from holding onto their cash—essentially an interest free loan—while passing off the interest obligation to their insurers. This would likely increase rather than decrease the incidence of appraisal actions and also increase coverage litigation.

For those reasons, this Court should reverse the trial court and hold that pre-judgment interest based on an uncovered judgment is not covered.

III. THE TRIAL COURT ERRED IN HOLDING THAT SOLERA'S DEFENSE COSTS ARE COVERED BECAUSE, REGARDLESS OF PREJUDICE, THOSE COSTS WERE INCURRED BOTH PRIOR TO SOLERA'S TENDERING OF THE APPRAISAL CLAIM TO THE INSURERS AND WITHOUT THE INSURERS' PRIOR CONSENT

A. Question Presented

Whether coverage for Solera's $13.5 million in defense costs through trial of the Appraisal Action is barred, regardless of any prejudice, because they were incurred both prior to Solera's tendering of the Action to the Insurers and without the Insurers' prior consent? (Preserved at JA438-JA440.)

B. Standard And Scope Of Review

The applicable standard of review and governing rules of contract interpretation are the same as Argument I.B, *supra*.

C. Merits Of Argument

Even if the Appraisal Action were a Securities Claim, the Insurers were still entitled to summary judgment that Solera's defense costs incurred through post-trial briefing in the Appraisal Action are not covered because Solera incurred those costs before it tendered the Action to the Insurers. As the trial court noted, Solera litigated the case for over a year through a June 2017 trial and post-trial briefing before it ever tendered the case to its Insurers. (Op. at 16.)

Section V of the Primary Policy, however, unambiguously requires that: "No Insured may incur any Defense Expenses in Connection with any Claim . . . without the Insurer's consent, such consent not to be unreasonably delayed or withheld. . . ." (JA160, § V(B).) This requirement enables the Insurer, which lacks the right to control the defense, to exercise proactive oversight assuring that the Policy proceeds are used prudently and minimizing disputes regarding the reasonableness of defense fees. Nevertheless, undermining that purpose, the trial court erroneously analogized to late notice and consent to settle situations and held that under Delaware law, "Solera's breach of the consent clause does not automatically bar coverage," and that an implied prejudice requirement would apply to the consent-to-defense provision of the policy to avoid a forfeiture of coverage. (Op. at 17.)

Before the trial court's Opinion, no Delaware Court had held that pre-tender defense costs are covered absent prejudice to the insurer. Indeed, it is well-settled that "an insurer is not liable for the pre-tender costs of defense incurred by the insured irrespective of the existence of prejudice. 14 *Couch On Insurance* § 200:34 (West 2019); *see*, *e.g.*, *Abrams v. RSUI Indemnity Co.*, 272 F. Supp. 3d 636, 641 (S.D.N.Y. 2017) ("The clear import of these repeated and unambiguous references to consent prior to coverage is that any expenses incurred by the

insureds prior to providing notice would be voluntarily paid by the insureds and thus properly disclaimed by the defendant.") (applying Delaware law).

In *Abrams*, the court applied Delaware law to a similar consent-to-defense-costs provision in a D&O policy and found that the insured failed to comply with the unambiguous terms of the policy by waiting for over a year and incurring over $3.5 million in legal fees before tendering the lawsuit to the insurer. 272 F. Supp. 3d at 641. The court also noted that Delaware courts interpreting policy provisions pursuant to the laws of other jurisdictions "have enforced without issue the plain terms of insurance policies requiring insurer consent prior to the payment of defense costs." *Id*. at 642 (citing *In re Viking Pump, Inc.*, 148 A.3d 633, 675 (Del. 2016)); *Liggett Grp. Inc. v. Affiliated FM Ins. Co.*, 2001 WL 1456818 at *4 (Del. Super. Sept. 12, 2001); *Mine Safety Appliances Co. v. AIU Ins. Co.*, 2014 WL 605490, at *4-5 (Del. Super. Jan. 21, 2014). The *Abrams* court, therefore, explicitly rejected the insured's argument that prejudice was required as "without merit." *Abrams*, 272 F. Supp. 3d at 641.

The trial court's analogy to other policy provisions (Op. 16-17) is inapposite. Unlike late notice provisions, which may result in forfeiture of <u>*all*</u> coverage, or consent-to-settle provisions, which may result in forfeiture of any indemnity coverage, enforcement of the consent-to-defense-costs provision here bars only defense costs incurred prior to tender. *See Lafarge Corp. v. Hartford Cas. Ins. Co.*,

61 F.3d 389, 400 (5th Cir. 1995) ("prejudice is only a factor when the insurer is seeking to avoid all coverage); *Legacy Partners, Inc. v. Travelers Indem. Co.*, 83 F. Appx. 183, 189 (9th Cir. 2003) (same). Indeed, the Defendant Insurers did not rely on the notice or consent-to-settle provisions in their motion for summary judgment.

It is fundamental Delaware law that "[c]lear and unambiguous language in an insurance policy should be given its ordinary and usual meaning." *Rhone-Poulenc Basic Chemicals Co. v. American Motorists Ins. Co.*, 616 A. 2d 1192, 1995 (Del. 1992); *accord O'Brien v. Progressive Northern Ins. Co*., 785 A.2d 281, 291 (Del. 2001). Here, the trial court acknowledged that Solera breached the consent provision. (Op. at 1, 17.) Accordingly, the consent-to-defense-costs provision of the Primary Policy should be enforced according to its terms without imposing a prejudice requirement found nowhere in its language. In that event, the insurers' motion for summary judgment dismissing the claim for coverage as to the $13.5 million in defense costs should have been granted.

CONCLUSION

For the reasons set forth above, ACE and Federal respectfully request that this Court reverse the rulings of the trial court denying their motion for summary judgment.

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