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

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

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DATED: February 18, 2020

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PRELIMINARY STATEMENT[1]

Plaintiff fails to address most of the cogent reasons explained in Defendants' Opening Brief as to why a petition for a "fair value" determination pursuant to Section 262 of the Delaware General Corporation Law ("DGCL") is not an action "for" a "violation" of any "law regulating securities." Nothing Solera does say in its Answering Brief (cited as "AB") detracts from those reasons.

For example, Solera maintains that no allegation of wrongdoing is necessary for there to be a "violation" of Section 262 because a mere demand for appraisal inherently alleges that the *selling corporation* "contravened"—or "violated"—the rights of *its* stockholders to receive "fair value." This argument is flawed because, other than the obligation to provide notice of appraisal rights, Section 262 neither prohibits, nor dictates, any conduct that must be met by either the target or the acquirer, before or at closing. A party must be able to decide not to violate the law, but Solera's reading of Section 262 makes that impossible. Even a buyer, the party actually responsible for paying a judgment under Section 262, cannot do that *until* the Court of Chancery determines fair value, *after* a burden-balanced, neutral proceeding where liability and wrongdoing are not adjudicated.

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[1] Defined/abbreviated terms mean the same as in Defendants' Opening Brief.

Solera's attempts to distinguish *In re Verizon Insurance Coverage Appeals*, -- A.3d --, 2019 WL 5616263 (Del. Oct. 31, 2019), are also unavailing. Solera first argues that (unlike in *Verizon*) the definition of "Securities Claim" in the Primary Policy includes alleged violations of "common law." But the addition of the words "or common law"—*i.e.*, "any federal, state, or local statute, regulation, or rule, *or common law* regulating securities"—makes no difference because the "common law" in the definition is in the same bucket as any "statute, regulation, or rule." Both the definition in this case and the definition in *Verizon* require that whatever the source of law underlying a claim—a statute, regulation, rule, or the common law—it must *specifically* regulate securities, and Section 262 does not regulate securities. The added reference to "common law" in the Primary Policy does not expand the phrase "regulating securities," but is instead, bound by it. Thus, the rationale in *Verizon* applies here.

Relatedly, Solera also argues that (unlike the claims in *Verizon*) Section 262 specifically targets securities. This too is wrong because appraisal actions are purely creatures of statute, so any reference to the common law does not evade the holding in *Verizon*. In *Verizon*, this Court held that the phrase "regulating securities" is "limiting" and that it is targeted at things that are "specifically directed towards securities, such as the sale, or offer for sale, of securities," and is not directed at things "outside of the securities regulations area." 2019 WL 5616263, at *3.

Section 262 is a statutory substitute for the common law right to veto a merger, not a codification of some common law regulating securities.

Plaintiff's suggestion that this Court's holdings in cases such as *Dell*, *DFC*, and *Aruba* have changed the nature of appraisal proceedings is also wrong. The fact that this Court has repeatedly acknowledged that evaluation of fiduciary conduct is relevant in determining whether the price forged in the marketplace is the best indication of "fair value" does not fundamentally alter the nature of a Section 262 action or convert it to one "for" a "violation" regarding alleged misconduct during the sale process. Wrongdoing and liability are never adjudicated in a pure appraisal proceeding, like the Appraisal Action here.

Solera also maintains that, even though the principal value of the "fair value" award in the Appraisal Action is clearly not covered, the pre-judgment interest on that amount nevertheless satisfies the definition of "Loss" under the Primary Policy. This argument is flawed for the simple reason that the definition of "Loss" is not a grant of coverage and must be considered in tandem with the whole Policy. Because, as Solera concedes, the fair value payment did not constitute "Loss," the pre-judgment interest on that payment is likewise not a covered "Loss."

Finally, Solera asserts that the consent-to-defense-costs provision in the Primary Policy has an *implied* prejudice requirement. This contention is meritless. By its express terms, the consent-to-defense-costs provision does not contain a prejudice requirement. Moreover, any analogy to late-notice provisions or consent-to-settle provisions is inapposite as failure to abide by a consent-to-defense-costs provision does not cause a forfeiture of coverage but only bars defense costs incurred prior to tender.

ARGUMENT

I. A SECTION 262 APPRAISAL ACTION IS NOT A CLAIM "FOR" A "VIOLATION" OF ANY "LAW REGULATING SECURITIES"

A. An Appraisal Action Is Not A Claim For A "Violation" Of Anything

Solera asserts that the Appraisal Action is a claim "for" a "violation" of law because it involves redress for the seller's "contravention" of the rights of *its* stockholders under Section 262 of the DGCL to receive fair value in a merger. (AB at 23.) However, unlike a claim for failure to provide proper notice of appraisal rights, a Section 262 action seeking a "fair value" determination is not an action against the seller (*i.e.*, the insured here) for anything, and therefore, cannot constitute a Securities Claim.

As defined in the Policy, a "Securities Claim" is one "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*…." (JA157, § II(S) (emphasis added).) Relying on *Black's Law Dictionary*, the trial court 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* (11th ed. 2019)), and concluded that "a Securities Claim is not limited under the Policy to violations of law alleging wrongdoing." (*Id*. at 11.)

On appeal, Solera merely reiterates the trial court's reasoning, but fails to refute Defendants' analysis. To reiterate, "violation" and "wrongdoing" are synonymous. The same edition of *Black's* cited by the trial court 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* (11th ed. 2019). Accordingly, a "violation" of any law "regulating securities" constitutes wrongdoing. It follows *a fortiori* that an appraisal action, which does not adjudicate any wrongdoing or liability, cannot satisfy the definition of Securities Claim. No Delaware court has ever referred to a party as having "violated" Section 262 when rendering a fair value determination.

Moreover, it is settled law that an appraisal action is a <u>*neutral*</u> proceeding, where the <u>*sole*</u> issue is the "fair value" of the dissenter's shares on the date of the merger, and where <u>*each side*</u> bears the burden of proving its respective value contentions: "Unlike 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.'" *Reiss 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)).

The surviving corporation is the *sole* respondent in an appraisal action, but "[t]he real party in interest is the acquirer." *In re Stillwater Mining Co.*, 2019 WL 3943851, at *1 (Del. Ch. Aug. 21, 2019). Moreover, while fiduciary conduct can be reviewed, "*claims* for unfair dealing cannot be litigated in the context of a statutory appraisal action." *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 1994 WL 198726, at *2 (Del. Ch. May 16, 1994) (emphasis added). Because appraisal actions do not adjudicate liability for anything, including unfair dealing, they are not "for" a "violation" of any law, let alone a law "regulating securities."

Contrary to Solera's reading of Section 262, *the statute* does *not* require the seller (or its directors) to "secure fair value" for its stockholders at closing (AB at 28), nor does Section 262 require the buyer to provide a particular type of payment at the close. Section 262 merely confers on dissenting stockholder's the right to an independent appraisal of their shares from the Court of Chancery, which is a limited legislative remedy designed to substitute for a stockholder's right at common law to veto a merger by withholding consent. *See Alabama By-Products Corp. v. Cede & Co. on Behalf of Shearson Lehman Bros., Inc.*, 657 A.2d 254, 258-59 (Del. 1995). Accordingly, Solera's attempt to sweep cases involving claims for breaches of fiduciary duty under the ambit of Section 262 is entirely misplaced. *See Golden Telecom, Inc. v. Global GT LP*, 11 A.3d 214, 217 (Del. 2010) (rejecting attempt to "graft common law gloss" onto purely statutory remedy of appraisal).

Contrary to Solera's assertions (AB at 35-39), nothing in *DFC*, *Dell* and *Aruba* suggests that wrongdoing is now required in an appraisal action or changed the fundamental nature of appraisal actions. Although courts in appraisal proceedings (including the Appraisal Action here) have considered evidence relating to the deal process leading up to a merger, such evidence is only relevant to the weight a court accords the deal price when the court considers "all relevant factors" in search of the best indication of fair value. As this Court recently noted, *DFC* and *Dell* stand for "the traditional Delaware view … that the price a stock trades at in an efficient market is an important indicator of its economic value that should be given weight …." *Veriton Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 210 A. 3d 128, 138 (Del. 2019); *accord In re Appraisal of Panera Bread Co*., 2019 WL 5616263, at 52-53 (Del. Ch. Jan. 31, 2020) ("Indeed, Delaware Supreme Court precedent announced in *Aruba*, *Dell*, and *DFC* [does] not establish legal requirements for a sale process. A deal price serves as a persuasive indicator of fair value where the sale process bears objective indicia of fairness that rendered the deal price a reliable indicator of fair value.").

Accordingly, the deal process goes only to the weight that should be given to the deal price and in no way modifies the nature of an appraisal action to require an allegation of wrongdoing or violation of law. Even if litigants lather appraisal petitions with allegations of misconduct in connection with the sale process, that does not render those allegations elements of an appraisal claim and does not transform an appraisal action into a *claim* "for" a "violation" of a breach of duty in connection with the sale process.[2]

B. Solera's Attempts To Avoid The Holding In *Verizon* Are Unavailing Because Section 262 Does Not "Regulate Securities"

This Court's decision in *Verizon* provides clear support for Defendants' argument that an appraisal action is not a Securities Claim because Section 262 does not regulate securities.[3]

In *Verizon*, this Court construed the definition of "Securities Claim" in a D&O Policy 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. 2019 WL 5616263, at *7. The Court noted that the definition's terms "mirror those in a specific area of the law recognized as securities regulation" and that the phrase "regulating securities" is "limiting." *Id.* at *4-5. Accordingly, "common law or statutory laws outside the securities regulation area" do not fall

[2] The fact that discovery in an appraisal action *can* lead to a breach of fiduciary duty action (AB at 37-38) also does not transform the appraisal claim into a breach of fiduciary duty claim.

[3] The Court may address this issue because it falls squarely within the questions certified for appeal. (OB, Ex. C at 7 ("the meaning of 'Securities Claim' within a D&O policy and whether an appraisal action is such a claim").) Also, this Court's decision in *Verizon* was issued *after* the trial court's Opinion, and thus, this Court may address it in the interests of justice. Del. Supr. Ct. R. 8; *see also Sandt v. Del. Solid Waste Auth.*, 640 A.2d 1030, 1034 (Del. 1994).

within the plain meaning of the definition. *Id.* at *4. This Court found that laws that only ***incidentally*** impact the purchase or sale of securities would not fall under the definition of Securities Claim and cited affirmatively to traditional securities laws and regulations, such as state Blue Sky Laws and SEC Rule 10b-5, as those that would fall under the definition. *Id.* at *4. The import of *Verizon* is that actions such as appraisal proceedings, which may incidentally involve securities but do not regulate them, do not fall under the definition of Securities Claim in a D&O Policy.

Solera attempts to avoid the *Verizon* holding by first arguing that the definition in the Primary Policy here—which refers to "violation of any federal, state or local statute, regulation, or rule or *common law* regulating securities" (emphasis added)—is categorically different from the policy in *Verizon* that omits any reference to "common law." (AB at 44.) This makes no difference because both definitions require that whatever the source of the law upon which the claim is based, it must specifically regulate securities. *See Verizon*, 2019 WL 5616263, at *8-9. Although Section 262 touches on securities—because a merger involves the sale of all of the corporation's securities in a single transaction—it does not regulate them. At best, Section 262 regulates the notice that must be provided to stockholders, but that is not what this case is about.

Section 262 is simply a statutory substitute for the common law right of stockholders to veto a merger by withholding to consent. *Alabama By-Products*, 657 A.2d at 258-59. Section 262 is not a codification of some common law regulating securities. Because Section 262 is a statutory substitute for a common law right of stockholders that has nothing to do with the regulation of securities (and because appraisal rights, first created in 1899, predate the establishment of securities laws in general), an appraisal action in no sense constitutes a Securities Claim.

Moreover, the inclusion of "common law" in the definition of Securities Claim does not take this matter outside the holding in *Verizon* because a Section 262 action is not a common law claim. *Alabama By-Products*, 657 A.2d at 258 ("Under Delaware law, the appraisal remedy 'is entirely a creature of statute.'"). Thus, Solera's assertions that appraisal actions somehow incorporate common law doctrines, such as the *Schnell* doctrine (AB at 30, 45), is meritless. *Alabama By-Products Corp. v. Neal*, 588 A.2d 255, 258 n.1 (Del. 1991) ("[T]here is no basis for expanding the limited remedy which is provided for in the Delaware appraisal statute by the invocation of equitable principles," including "the doctrine of *Schnell*"). In so arguing, Solera mistakenly conflates appraisal actions with common law claims for breach of fiduciary duty. Notably, the latter are decidedly not Securities Claims under *Verizon* either. 2019 WL 5616263 at *7.

Solera next argues that, unlike the fiduciary duty, unlawful dividend, and fraudulent transfer claims in *Verizon*, an appraisal action specifically targets securities because "Section 262 does not apply in the absence of securities." (AB at 44.) This argument is circular. A merger involves securities, but so do all claims by stockholders because standing to bring such claims derives from stock ownership (*e.g.*, the unlawful dividend claim in *Verizon* could not have existed without the stock). To constitute a Securities Claim, *Verizon* requires that the statute or law actually regulate securities, which Section 262 does not do. If anything, Section 262 regulates mergers because Section 262 does not apply when just some stock (as opposed to the corporation) is being sold.

Also, when it comes to the issue of value, Section 262 does not regulate or provide relief for representations made in connection with the purchase or sale of a corporation, nor does it prescribe conduct that a company must undertake, or refrain from, to engage in a merger. The statute merely requires that the selling corporation give notice of appraisal rights (which is not at issue in this case) and imposes on the ***surviving entity*** the obligation to pay the amount later determined to be "fair value." That obligation does not exist until ***after*** the Court of Chancery makes its finding of fair value, which does not take place until ***after*** the merger closes. Therefore, Section 262 cannot regulate the transaction price for a seller.

Further, Section 262 does not "regulate" securities under the ordinary meaning of the term. As relevant, the verb "regulate" means "[t]o control (an activity or process) esp[ecially] through the implementation of rules." *Black's* (11th ed. 2019). Similarly, the noun "regulation" means "[c]ontrol over something by rule or restriction." *Id.* (11th ed. 2019); *see also* Bryan A. Garner, *Garner's Dictionary of Legal Usage* 790 (3d ed. 2009) (defining "regulation" typically as "a specific prescription by authority for the control or management of an agency, organization, system, or industry"). Thus, to qualify as a law "regulating securities" under *Verizon* and the plain meaning of "regulate," a law must specifically target securities and control or direct the securities industry or securities transactions by prescribing rules or restrictions that parties must follow. Simply put, Section 262 does not do that.

Lastly, Solera contends that the Bump-Up Claim Endorsement in the Primary Policy also distinguishes this case from *Verizon* because it—supposedly—signifies an intent to provide coverage for appraisal actions. In essence, Solera misreads the endorsement as expanding coverage and argues that the endorsement would have provided coverage if the Appraisal Action had resulted in a finding that the fair value of petitioners' shares was greater than the deal price. (AB at 53, n. 132.) This argument fails for two reasons.

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First, Solera incorrectly asserts that the Insurers conceded that the Appraisal Action constituted a Bump-Up Claim. ACE and Federal have never made such an admission and Solera relies on a letter provided by the Primary Insurer, XL (AB at 6; JA453), which does not bind ACE and Federal.

Second, the Bump-Up Endorsement in no way expands coverage to include any increase in the "fair value." The Bump-Up Claim Endorsement does not eliminate the requirement that a claim satisfy the definition of Securities Claim. Rather, the endorsement merely sets a higher retention for Bump-Up Claims in cases where the endorsement applies—*i.e.*, for claims that seek a Bump Up *in* an action that constitutes a Securities Claim, like a Section 14(a) claim under the Securities Exchange Act of 1934. Accordingly, Solera's assertion that the Bump-Up Claim endorsement signifies an intent to potentially provide coverage for Appraisal Actions is meritless.

II. INTEREST BASED ON AN UNCOVERED UNDERLYING JUDGMENT IS NOT COVERED UNDER THE POLICIES

Solera asserts that pre-judgment interest is included in the definition of "Loss," and thus, the $38.3 million interest award in the Appraisal Action is indemnifiable under the Policies. Agreeing with Solera, the trial court read the definition of Loss without reading the Policy as a whole and cited no legal authority for its ruling.

Courts routinely recognize that the purpose of pre-judgment interest awards, as in Section 262, is to compensate a payee for the time-value of the money that should have previously been paid. *See, e.g.*, *Brandin v. Gottlieb*, 2000 WL 100593, at *30 (Del. Ch. July 13, 2000). Therefore, the interest awarded against Solera is simply an extension of, and not separable from, the underlying purchase price, and Solera admits the "below-deal price 'fair value' amount was not a loss to Solera." (AB at 53.) The interest payment merely reflects Solera's benefit in holding the dissenting stockholders' ***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 *Verizon*, the interest in this matter should be covered. The trial court should not have even considered the alternative definition in *Verizon* because there was no finding that the definition of "Loss" was ambiguous. *See O'Brien v.*

Progressive Northern Ins. Co., 785 A.2d 281, 289-290 (Del. 2001) (noting that "extrinsic evidence will not be used where the clear language of the policy does not support an ambiguous reading" and finding that other language used in a later version of the policy was not evidence that the earlier version was ambiguous).

Solera claims that Delaware courts commonly consider alternative language from other policies when interpreting insurance policy provisions. (AB at 56.) However, its sole authority for this proposition, *Twin City Fire Insurance Co. v. Delaware Racing Association*, 840 A.2d 624, 629-30 (Del. 2003), merely compared the text of the policy exclusion to language in other policies <u>*after finding that the policy exclusion itself was ambiguous*</u>. *Id.* ("The <u>*ambiguity*</u> of the exclusion in the present policy is perhaps best underscored by comparing its language to the exclusion language interpreted ... in *Colson v. Louisiana State Racing Commission*.") (emphasis added). Because the trial court did not find that the definition of "Loss" was ambiguous, it erred in considering the language used in *Verizon*. Furthermore, by relying on language in another policy, Solera tacitly admits it cannot rely on the language in the Primary Policy to show a contractual expectation to pre-judgment interest.

Solera also argues that the Insurers seek to have it both ways by citing to *Verizon* in favor of the meaning of Securities Claim, while restricting reference to *Verizon* in connection with alternative definitions of Loss. This argument is likewise flawed. *Verizon* interpreted the phrase "regulating securities," and therefore, provides precedent for the scope of the definition of Securities Claim in the Primary Policy. In contrast, comparing the definition of Loss to definitions used in other policies, and using such extrinsic evidence to indicate the parties' intent in the present situation is improper when there is no finding of ambiguity. *See O'Brien*, 785 A.2d at 289.

Additionally, the trial court cited no cases in support of its finding that pre-judgment interest on a non-covered principal constitutes "Loss," and counsel have not located any Delaware case requiring an insurer to indemnify such amounts. Solera asserts in summary fashion that courts have allowed recovery in such circumstances (AB at 55); however, Solera only cites to *XL Specialty Insurance Co. v. Loral Space & Communication, Inc.*, 82 A.D.3d 108, 116 (N.Y. App. 2011), which is distinguishable.

In *Loral*, the insured was sued in a derivative action in connection with an alleged improper transaction where a controlling stockholder paid $300 million in exchange for preferred stock (with voting rights). *Id.* at 111. The court found that the transaction was unfair to the insured-corporation. Rather than award damages, the court *sua sponte* reformed the transaction such that the controlling stockholder received non-voting common stock for the same payment. *Id.* at 112. The insured then sought to recover defense expenses it incurred in the derivative action from its insurer. The subsequent coverage action involved coverage for a Securities Claim, but there the definition ***expressly included derivative actions*** and "Loss" was defined to include defense expenses. *Id.* at 115-16. The court noted that the insurers would have been much less likely to challenge coverage if a traditional damage amount were awarded and thus ordered the insurer to reimburse for defense costs even though the injunctive relief (the restructuring of the transaction) did not itself constitute "Loss." *Id.* at 115.

Unlike in *Loral*, the fair-value principal payment in this case is not a work-around replacement for monetary damages, but represents a category of an award that is expressly not included in "Loss" under the Policy. (JA156.) Therefore, in contrast to the attorney's fees in *Loral*, the pre-judgment interest on the fair value principal could never be tethered to an additional covered "Loss." The holding in *Loral* is limited to its unique factual circumstances and it is inapposite to this matter.

Solera does not even address the point that that the trial court erred by considering the definition of "Loss" without reference to other Policy provisions. When considered holistically, the only pre-judgment interest that is covered is interest that satisfies the requirements for coverage under the overall Policy—*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 overall Policy properly 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 for coverage under the Policy were met. Had the trial court construed "Loss" together with the overall Policy, it could not have concluded that pre-judgment interest based on an uncovered principal was indemnifiable Loss.[4]

[4] In addition, the trial court's decision undermines the purpose and effect of the Legislature's recent amendment of Section 262(h) to deal with appraisal arbitrage and to permit parties to pre-pay some consideration in advance of the Court of Chancery's determination of the "fair value," so as to mitigate interest that would otherwise accrue. *See* 8 *Del. C.* § 262(h).

III. SOLERA'S PRE-TENDER DEFENSE COSTS ARE NOT COVERED

Analogizing to late-notice and consent-to-settle provisions, Solera asserts that the trial court did not err in reading a prejudice requirement into the consent-to-defense-costs provision of the Policy. Solera argues that it is against the reasonable expectations of the insured for coverage to be barred under the consent-to-defense-costs provision in the absence of prejudice to the insurer.

Solera's argument is flawed for two reasons. First, the consent-to-defense-costs provision does not contain a prejudice requirement and the Policy should be applied according to its plain meaning. Second, Solera's analogies to late-notice and consent-to-settle provisions are inapposite because unlike those terms, failure to comply with the consent-to-defense-costs provision does not result in a total forfeiture of coverage, but only bars defense costs incurred prior to tender.

Solera waited to tender the Appraisal Action to the Insurers until almost two years *after* it was filed, *after* the policy period expired, and *after* the trial concluded. (JA1400-1404.) Section V of the Primary Policy clearly 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).) Thus, the Insured may not incur any defense costs before first obtaining the Insurer's consent. This contractual 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. The trial court undermined this purpose by erroneously analogizing to late-notice and consent-to-settle situations, and holding that under Delaware law, "Solera's breach of the consent clause does not automatically bar coverage" because a prejudice requirement would apply to the consent-to-defense provision of the policy to avoid a forfeiture of coverage. (Op. at 17.)[5]

Before the trial court's ruling, no Delaware court had held that a prejudice requirement applied to consent-to-defense-costs provisions. Indeed, it is well-settled that, unlike late notice:

> Even if a delay does not operate to relieve an insurer of its obligation to defend altogether, an insurer is not liable for the pre-tender costs of defense incurred by the insured *irrespective of the existence of prejudice*. Unless the insurance contract provides otherwise, an insurer is only responsible for defense costs incurred after tender of the suit.

14 *Couch on Insurance* § 200:34 (3d ed. 2019) (emphasis added); *see also Abrams v. RSUI Indemnity Co.*, 272 F. Supp. 3d 636, 641 (S.D.N.Y. 2017) (applying Delaware law).

[5] The trial court held that prejudice to the Insurers is *presumed*, but that Solera could attempt to rebut that presumption. (Op. at 17-18.)

In *Abrams*, the only case to consider this issue under Delaware law, the court applied 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. Here, as in *Abrams*, because there is no prejudice requirement in the text of the consent-to-defense-costs provision, a prejudice requirement should not be read into the Policy.

Solera seeks to avoid the express terms of the consent-to-defense-costs provision by arguing that the material prejudice requirement in a ***completely separate*** notice of claim provision (specifically added via endorsement) somehow imparts a prejudice requirement to the consent-to-defense-costs provision. (AB at

59-62.) Solera cites no case supporting this proposition, because none exists.[6] Indeed, it is fundamental under Delaware law that "[c]lear and unambiguous language in an insurance policy should be given its ordinary and usual meaning." *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A. 2d 1192, 1195 (Del. 1992).

Moreover, the parties knew exactly how to provide for a prejudice requirement when one was intended: the late-notice provision was modified by endorsement to include a material prejudice requirement. Thus, the absence of a prejudice requirement in the text of the consent-to-defense-costs provision demonstrates the parties' intent to not include such a requirement. *See Verizon*, 2019 WL 5616263 at *9 ("The parenthetical from another part of the policy should not be incorporated into the Securities Claim definition absent some indication to do so. On the contrary, referring to the common law elsewhere in the policy demonstrates that the parties knew how to expressly provide coverage for common law claims when that was intended."). Furthermore, Solera could not reasonably expect an

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[6] Solera relies solely on inapposite cases regarding consent-to-settle or late-notice provisions. *See State Farm Mut. Auto Ins. Co. v. Johnson*, 320 A.2d 345 (Del. 1974) (late notice); *Med. Depot, Inc. v. RSUI Indemn. Co.*, 2016 WL 5539879, at * 11 (Del. Super. Sept. 29, 2016) (late-notice); *Arch Ins. Co. v. Murdock*, 2019 WL 2005750, at *10-11 (Del. Super. May 7, 2019) (consent-to-settle); *Sun-Times Media Grp., Inc. v. Royal & Sun Alliance Ins. Co. of Canada*, 2007 WL 1811265, at *12-13 (Del. Super. June 20, 2017) (consent-to-settle); *Hall v. Allstate Ins. Co.*, 1985 WL 1137299, at *9-11 (Del. Super. Jan. 11, 1985) (consent-to-settle).

implied prejudice requirement here, when it negotiated for an express one in the notice provision.

Solera's analogy to other consent-to-settle and late-notice provisions is inapposite. Unlike late-notice provisions (which may result in forfeiture of _all_ coverage) or consent-to-settle provisions (which may result in forfeiture of all indemnity coverage), enforcement of the consent-to-defense-costs provision bars only defense costs incurred prior to tender. *See Lafarge Corp. v. Hartford Cas. Ins. Co.*, 61 F.3d 389, 400 n.19 (5th Cir. 1995) ("prejudice is only a factor when the insurer is seeking to avoid all coverage"); *Legacy Partners, Inc. v. Travelers Indem. Co. of Illinois*, 83 F. Appx. 183, 189 (9th Cir. 2003) (same).[7] In fact, the Defendant Insurers did not rely on the notice or consent-to-settle provisions in their motion for summary judgment. Moreover, various policy terms may limit coverage without constituting forfeitures.

Solera also asserts that because the Insurers have denied coverage for the Appraisal Action, they should be deemed to have unreasonably refused to consent to defense expenses if coverage is found to exist under the Policy. This makes no sense. Solera did not ask for consent to incur any defense expenses. Instead, it incurred them, litigated the Appraisal Action for over a year through trial and post-

[7] To the extent Solera is arguing that the consent provision operates as a forfeiture, that is only because Solera waited so long to tender. That is not a policy language problem; that is a self-inflicted Solera problem.

trial briefing, and then tendered on January 31, 2018. (Op. at 16.) Therefore, it was Solera that was unreasonable in waiting until after $13.5 million in defense costs had been incurred without asking for consent. Solera's after-the-fact request does not comply with its obligation to seek consent before incurring expenses.

Lastly, Solera asserts that because the Insurers denied coverage for an earlier and related class action, any request for consent would have been futile. This argument is also meritless. ACE and Federal did not deny coverage for the class action (JA356, JA374), and thus, did not give up any right to consent to Defense Expenses. Moreover, a denial as to one claim cannot obviate Solera's notice duties under the Policies as to a subsequent claim.

CONCLUSION

ACE and Federal respectfully request that this Court reverse the rulings of the trial court.

DATED: February 18, 2020

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