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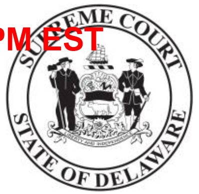

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE SOLERA INSURANCE	:	No. 413,2019
COVERAGE APPEALS	:	No. 418,2019
	:	
	:	Court Below-Superior Court
	:	of the State of Delaware
	:	C.A. No. N18C—08-315 AML CCLD

REPLY BRIEF OF APPELLANT
ILLINOIS NATIONAL INSURANCE CO.

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 3

I. The Appraisal Action Is Not a Claim "for any Actual or Alleged Violation" of Law 3

A. The Appraisal Action Did Not Seek Relief Based on a Violation of Section 262 3

B. The Appraisal Action Did Not Seek Relief Based on a Violation of the Common Law 7

C. The Factual Record in the Appraisal Action Did Not Transform It Into a Claim for a Violation of Law 11

D. The Appraisal Action Did Not Seek Relief Based on any Violation of Law, "Wrongful" or Otherwise 17

II. The Appraisal Action Is Not a Claim for a Violation of any Law "Regulating Securities" 19

CONCLUSION 25

TABLE OF CITATIONS

Cases

A.W. Fin. Servs., S.A. v. Empire Res., Inc.,
981 A.2d 1114 (Del. 2009) 16

Ala. By-Prod. Corp. v. Cede & Co. on Behalf of Shearson Lehman Bros.,
657 A.2d 254 (Del. 1995) 8

Ala. By-Prods. Corp. v. Neal,
588 A.2d 255 (Del. 1991) 8, 9

Andra v. Blount,
772 A.2d 183 (Del. Ch. 2000) 7

Arnold v. Soc'y for Sav. Bancorp, Inc.,
678 A.2d 533 (Del. 1996) 16

Aspen Advisors LLC v. United Artists Theatre Co.,
861 A.2d 1251 (Del. 2004) 8

ATP Tour, Inc. v. Deutscher Tennis Bund,
91 A.3d 554 (Del. 2014) 21

Cede & Co. v. Technicolor, Inc.,
542 A.2d 1182 (Del. 1988) 6-8

Del. Ins. Guar. Ass'n v. Christiana Care Health Servs., Inc.,
892 A.2d 1073 (Del. 2006) 21

Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd,
177 A.3d 1 (Del. 2017) .... *passim*

DFC Glob. Corp. v. Muirfield Value Partners, L.P.,
172 A.3d 346 (Del. 2017) .... *passim*

Matter of ENSTAR Corp.,
604 A.2d 404 (Del. 1992) 8

Golden Telecom, Inc. v. Glob. GT LP,
11 A.3d 214 (Del. 2010) 8

Halliburton Co. v. Erica P. John Fund, Inc.,
573 U.S. 258 (2014)..11

Mehta v. Mobile Posse, Inc.,
2019 WL 2025231 (Del. Ch. May 8, 2019) 7

Michigan Carpenters Council Health & Welfare Fund v. C.J. Rogers, Inc.,
933 F.2d 376 (6th Cir. 1991) 20, 21

In re Orchard Enters., Inc. S'holder Litig.,
88 A.3d 1 (Del. Ch. 2014) 10

In re Appraisal of Panera Bread Co.,
2020 WL 506684 (Del. Ch. Jan. 31, 2020) 15

Pilot Life Ins. Co. v. Dedeaux,
481 U.S. 41 (1987)..22

Renzi v. State,
320 A.2d 711 (Del. 1974)...17

Schnell v. Chris-Craft Indus., Inc.,
285 A.2d 437 (Del. 1971)..9, 21

In re Stillwater Mining Co.,
2019 WL 3943851 (Del. Ch. Aug. 21, 2019)..6, 15

Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.,
210 A.3d 128 (Del. 2019).. 13-14

Verizon Ins. Coverage Appeals,
2019 WL 5616263 (Del. Oct. 31, 2019).. *passim*

Weinberger v. UOP, Inc.,
457 A.2d 701 (Del. 1983)...9

Zutrau v. Jansing,
2014 WL 3772859 (Del. Ch. July 31, 2014),
aff'd, 123 A.3d 938 (Del. 2015) 7

Statutes

8 *Del. C.* § 155 6-7

8 *Del. C.* § 170 20

8 *Del. C.* §173 20

8 *Del. C.* § 174 20

8 *Del. C.* § 262(d)..4, 6

8 *Del. C.* § 262(d)(1) 4

8 *Del. C.* § 262(i)..4

13 *Del. C.* §1512(c)..5

13 *Del. C.* § 1513(a)..5

21 Del. Laws 445, 462-63, ch. 273, § 56 (1899) 9

29 U.S.C. § 1144(b)(2)(A) 22

Rules

Delaware Rule of Evidence 404(b)..17

Other Authorities

Black's Law Dictionary
(11th ed. 2019).. 17-19

Garner's Dictionary of Legal Usage
119 (3rd ed. 2009)..18

Walter C. Noyes, *A Treatise on the Law of Intercorporate Relations*
§ 51 (1902)..10

INTRODUCTION

The question presented in Illinois National's appeal is straightforward: Is the Appraisal Action a "Claim … made against [Solera] for any actual or alleged violation of any … statute … or common law regulating securities"?[1] The answer is no. Appraisal under Section 262 concerns the relationship between stockholders and the corporation in the context of mergers and consolidations; it affords an optional, no-fault mechanism whereby dissenting stockholders may decline the deal consideration and instead receive the "fair value" of their shares, as determined by the Court of Chancery. Appraisal requires no "violation" of any law, let alone a law "regulating securities."

Remarkably, Solera's principal position is *not* that the Appraisal Action involved a "violation" of Section 262 itself, or that Section 262 is a "statute … regulating securities." Instead, for the first time on appeal, Solera argues that the Appraisal Action under Section 262 somehow is a Claim for a "violation" of the *common law*—either inherently or on the particular facts of this case. With respect to the "regulating securities" requirement, Solera similarly argues that Section 262 regulates securities only in *combination* with the common law.

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

These novel arguments would turn Delaware appraisal law on its head. Appraisal under Section 262 is "entirely a creature of statute," *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd*, 177 A.3d 1, 20 (Del. 2017) (quotation marks omitted), reflecting a *derogation* from the common law. Determining "fair value" in an appraisal action does not require a legal "violation," and while petitioners may support their particular valuation positions with evidence that directors and officers conducted a less-than-robust sales process, such evidence cannot change the basis of the relief sought. Furthermore, the term "regulating securities" is limited to laws that are directed towards securities and prescribe mandatory rules or restrictions—not laws that are directed towards mergers and consolidations and provide dissenting stockholders with an optional, no-fault valuation mechanism.

Solera's arguments cannot be reconciled with the policy language, which provides entity coverage only for a Securities Claim, the language and history of Section 262, or this Court's appraisal jurisprudence. This Court should reverse.

ARGUMENT

I. The Appraisal Action Is Not a Claim "for any Actual or Alleged Violation" of Law

As Illinois National's opening brief explained, the Appraisal Action is not a "Claim … made against [Solera] for any actual or alleged violation" of law because it was a no-fault valuation proceeding that did not seek relief for any past unlawful conduct. Read charitably, Solera's brief offers four responses. Each mischaracterizes Illinois National's arguments, Section 262, this Court's case law, or some combination thereof.

A. The Appraisal Action Did Not Seek Relief Based on a Violation of Section 262

Illinois National explained in detail why appraisal actions are not Claims "for any actual or alleged violation" of Section 262. Br. 17-33. Remarkably, Solera now appears to accept that appraisal actions do not involve any "actual or alleged violation" of Section 262 *itself*. Rather, in Solera's view, "minority shareholders have the *common law* right to be compensated fairly," and "Section 262 affords such shareholders a *remedy* for the infringement of that [common-law] right." Opp. 2 (emphases added).[2] Solera thus contends that the relevant "violation" is a "breach of common law duties," which is then "enforce[d]" or "addressed by Section 262."

[2] "Opp." refers to the Answering Brief of Plaintiff-Below/Appellee Solera Holdings, Inc.

Opp. 3, 32. But to the extent Solera's brief can be read to suggest that the Appraisal Action was a Claim "for a[] … violation" of Section 262 itself, that argument fails. Indeed, Solera largely ignores Illinois National's arguments about the statute.

The text of Section 262 undisputedly does not command the parties in any merger or consolidation to ensure that the deal price reflects "fair value." The statute also undisputedly describes appraisal as an optional mechanism, which dissenting stockholders may "elect[]" at their discretion. 8 *Del. C.* § 262(d)(1). And Solera accepts that, no matter how far "fair value" diverges from the deal price, the statute does not authorize enjoining or unwinding any transaction, instead providing only for monetary relief limited to those specific stockholders who "perfect[]" their appraisal rights. § 262(d); *see* Br. 20-22.

Solera accordingly is forced to argue that Section 262 somehow requires a violation "inherently," Opp. 21-22, 32—that is, by implication, not expressly. Solera relies principally on the statutory command that the Court of Chancery "shall direct payment of the fair value of the shares" appraised. Opp. 2, 27 (emphasis removed) (quoting § 262(i)). As Solera acknowledges, however, that language "does not create a right … at the time of the merger, instead providing for the dissenting stockholders to receive fair value at the conclusion of the appraisal process." Opp. 27-28. An appraisal action therefore cannot be a Claim "for a[] …

violation" of the duty to pay the amount directed by the Chancery Court, as that duty to pay cannot arise until the appraisal case concludes.

In a similar vein, Solera emphasizes that appraisal actions do not merely determine the amount of "fair value," but also direct surviving corporations to pay that amount. Opp. 27. But that merely reflects that by electing appraisal, dissenting stockholders forego the negotiated deal consideration. Whether there is an appraisal or not, dissenting stockholders must receive *some* payment for their shares. The only questions are how much it will be and who decides.

Solera also ignores that other Delaware statutes direct monetary payments without requiring violations of the law. Br. 23. Partition, for example—which Vice Chancellor Glasscock has analogized to appraisal—can involve distributing the proceeds from the sale of jointly owned property without any legal violation. Similarly, divorce courts routinely divide marital property and award alimony "without regard to marital misconduct." 13 *Del. C.* §§ 1512(c), 1513(a). No-fault proceedings, as the name suggests, do not require any underlying violation. Solera has no response.

Solera cannot even maintain a consistent account of what the "violation" here was and who committed it. At times, Solera suggests that the violation was the former "Solera's failure to obtain fair value for [stockholders'] shares." Opp. 49. But elsewhere, Solera quotes the Superior Court's statement that the violation was

Vista's failure to "pay[] shareholders the fair value to which they are entitled." Opp. 2 (quoting Ex. A at 11). Solera's inconsistency reflects that "[t]he respondent in an appraisal proceeding is technically the surviving corporation, but the real party in interest is the acquirer." *In re Stillwater Mining Co.*, 2019 WL 3943851, at *1 (Del. Ch. Aug. 21, 2019). That disconnect itself is powerful evidence that Section 262 does not provide a remedy for a violation of law. Br. 24.

Of course, the General Assembly *could* have designed Section 262 to prohibit setting merger consideration at lower than "fair value." The General Assembly undisputedly did just that with respect to fractional shares in Section 155. Section 262 itself mandates that corporations "shall notify" relevant stockholders, but lacks any similar prescriptive requirement about the deal price. § 262(d); *see* Br. 25-27. Solera asserts that those are "distinction[s] without a difference," Opp. 27 n.68, but under the policy language, the distinction between lawful and unlawful, between a "violation" and the lack thereof, is dispositive. Paying less than "fair value" in lieu of issuing fractional shares is unlawful under Section 155. Failing to provide notice is unlawful under Section 262(d). Failing to obtain or pay "fair value" in a merger or consolidation, however, is *not* unlawful under Section 262 and therefore does not "violat[e]" that statute.

Finally, Solera attempts to brush aside the extensive case law holding that an appraisal action "does not involve an inquiry into claims of wrongdoing," *Cede &*

Co. v. Technicolor, Inc., 542 A.2d 1182, 1189 (Del. 1988), and does not require proof of "wrongdoing or liability on anyone's part," *Andra v. Blount*, 772 A.2d 183, 192 n.22 (Del. Ch. 2000) (quotation source omitted). Br. 27-30. Most strikingly, Solera does not dispute that before the decision below, no court had *ever* stated that Section 262's references to "fair value" reflect a legal requirement that a party or transaction can "violat[e]." *See* Br. 30. This point bears emphasis. Courts have stated that parties or transactions "violat[ed]" Section 155 and the notice requirement in Section 262(d). *See Zutrau v. Jansing*, 2014 WL 3772859, at *42 (Del. Ch. July 31, 2014), *aff'd*, 123 A.3d 938 (Del. 2015); *Mehta v. Mobile Posse, Inc.*, 2019 WL 2025231, at *5 (Del. Ch. May 8, 2019). But in the 121-year history of the appraisal statute, spanning hundreds of reported cases, Solera cannot identify a single decision stating—even in dicta—that any party or transaction actually or allegedly "violat[ed]" the statute by setting the deal price too low. This case should not be the first.

B. The Appraisal Action Did Not Seek Relief Based on a Violation of the Common Law

As explained, Solera appears to accept that the Appraisal Action did not involve any "violation" of Section 262, arguing instead that it somehow involved a violation of *common law*. Solera never articulated any such argument below, nor did the Superior Court adopt it. Solera's pivot is telling.

It would be difficult to overstate how novel Solera's argument is. Section 262's text does not state that it affords a statutory remedy for a common-law violation, and Solera cites no authority suggesting as much. To the contrary, this Court has repeatedly held that appraisal is "entirely a creature of statute."[3] And far from grounding Section 262's concept of "fair value" in the common law, this Court has *rejected* attempts to "graft common law gloss" onto that purely statutory term. *Golden Telecom, Inc. v. Glob. GT LP*, 11 A.3d 214, 217 (Del. 2010).

Solera's newfound argument also contradicts Section 262's history. It is undisputed that Section 262 did *not* emerge as a statutory remedy for underlying violations of some common-law right to fair compensation. Rather, as Solera acknowledges, Section 262 "was developed as a *substitute* for a stockholder's right at common law to veto a merger by refusing to consent." Opp. 27 (emphasis added; quotation marks omitted); *see* Br. 22-23. Indeed, under the original appraisal statute, fair value was not even adjudicated by a court—it was determined by a panel of "three disinterested persons, one of whom shall be chosen by the stockholder, one by the directors of the consolidated corporation[,] and the third by the two selected

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[3] *Dell*, 177 A.3d at 20 (quotation marks omitted); *see Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1264 n.29 (Del. 2004); *Ala. By-Prod. Corp. v. Cede & Co. on Behalf of Shearson Lehman Bros.*, 657 A.2d 254, 258 (Del. 1995); *Matter of ENSTAR Corp.*, 604 A.2d 404, 413 (Del. 1992); *Ala. By-Prods. Corp. v. Neal*, 588 A.2d 255, 256 (Del. 1991); *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1186 (Del. 1988).

as aforesaid." 21 Del. Laws 445, 462-63, ch. 273, § 56 (1899). The enactment of the appraisal statute represented a *derogation* from the common law, not a codification or expansion of it.

Straying even further afield, Solera invokes "*other* obligations of corporations under Delaware common law"—in particular, the so-called "*Schnell* doctrine" and the "'quasi-appraisal' remedy." Opp. 29-31 (emphasis added). But *Schnell* and quasi-appraisal were never mentioned in the petition or any other part of the Appraisal Action here, and Solera cites no case suggesting they play a role in *any* appraisal action under Section 262. Solera's reliance on these concepts, moreover, is ahistorical. "The General Assembly created the appraisal remedy in 1899," while *Schnell* was decided in 1971, and quasi-appraisal was first recognized in 1983. *Dell*, 177 A.3d at 19; *see Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437 (Del. 1971); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983). Solera never explains how Section 262 could serve to remedy "violation[s]" of common-law principles that were not recognized until more than 70 years after the statute was enacted.

Solera also misunderstands both *Schnell* and quasi-appraisal. *Schnell* is an equitable doctrine independent from Section 262. This Court has held that "there 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*." *Ala. By-Prod.*, 588 A.2d at 258 n.1. As for quasi-appraisal, that moniker

"is simply a short-hand description of a measure of damages," denoting "the quantum of money equivalent to what a stockholder would have received in an appraisal." *In re Orchard Enters., Inc. S'holder Litig.*, 88 A.3d 1, 42 (Del. Ch. 2014).

Solera also asserts that the "purpose of Section 262 is to protect minority shareholders from exploitation in the merger process." Opp. 28. But this Court has consistently described Section 262's purpose as compensating stockholders for the loss of their common-law veto rights. *See Dell*, 177 A.3d at 19; Br. 22-23. Regardless, this case turns not on Section 262's purpose, but on how it achieves that purpose—by providing dissenting stockholders with an optional, no-fault valuation mechanism. To the extent appraisal in some circumstances might function *ex ante* as a "check" or "deter[rent]" against exploitation, it does so by giving dissenting stockholders the *ex post* option of "a cash exit at fair value." Opp. 28 (quotation marks omitted). As one treatise from around the time of the statute's enactment explained, Section 262 gives dissenting stockholders "the privilege of selling out instead of embarking in the new enterprise." Walter C. Noyes, *A Treatise on the Law of Intercorporate Relations* § 51, at 84 (1902). The statute does not provide a remedy for any underlying common-law violation.

Solera also never addresses the expansive breadth of its position, which would effectively delete the words "violation" and "statute, regulation, or rule" from the

Securities Claim definition altogether. Solera argues in essence that so long as a cause of action is broadly consistent with common-law principles, it qualifies as a Claim "for a[] … violation" of the "common law." But *every* cause of action has some kind of common-law antecedent, parallel, or analogue. The paradigmatic Securities Claim, for example—a private lawsuit brought under SEC Rule 10b-5—has roots in common-law fraud. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 286 n.1 (2014). Solera does not identify any type of Claim that would not, in Solera's view, involve a "violation" of the "common law." Solera's position thus violates "the fundamental rule of contract interpretation to give effect to all terms of the instrument." *In re Verizon Ins. Coverage Appeals*, 2019 WL 5616263, at *6 (Del. Oct. 31, 2019) (quotation marks omitted).

C. The Factual Record in the Appraisal Action Did Not Transform It Into a Claim for a Violation of Law

Unable to show that the Appraisal Action inherently required a "violation" of Section 262 or the common law, Solera attempts to salvage the decision below on a ground the Superior Court expressly declined to reach—namely, that "the petitioners in the … Appraisal Action did allege misconduct by Solera in the sales process, and presented extensive evidence attempting to prove those allegations." Opp. 35; *see* Ex. A at 9-10 n.22. That argument fails on multiple levels.

To begin with, Solera's argument rests on its assertion that "the entirety of the record of the underlying dispute" is relevant to this Court's coverage determination.

Opp. 40. But under the governing policy language, that is wrong. Nothing in the factual record could possibly establish that the Appraisal Action was brought "for a[] … violation" of law. As Illinois National explained, the word "for" conveys that a "violation" must constitute the basis of the relief sought or, at a minimum, an essential element of recovery. Br. 19. The basis of the relief sought and the essential elements of recovery, however, are determined by the governing law, not the record the parties happen to develop. Regardless of the evidence presented, the Appraisal Action was an action "for" a statutory appraisal, not any violation of the common law.

Solera asserts that the "undefined preposition 'for' did not create a separate element … needed to meet the definition of Securities Claim." Opp. 49. But a court construing a contract is no more at liberty to ignore an "undefined preposition" than any other part of speech. The word "for" appears on the face of the policy; it therefore must be "give[n] effect" and cannot be rendered "illusory or meaningless." *Verizon*, 2019 WL 5616263, at *6 (quotation marks omitted).

Alternatively, Solera suggests that "'for' is simply a shorter way of stating 'by reason of' or 'related to.'" Opp. 50. But Solera cites no authority supporting that "for" can broadly mean "related to." And Solera acknowledges that the phrase "by reason of" carries a connotation of "causation," Opp. 50, which "for" does not. Solera attempts to exploit that causal connotation, suggesting that an allegedly

flawed sales process "caus[ed]" or motivated the petitioners to bring the Appraisal Action. Opp. 50-51. But Solera cites no evidence about the petitioners' motivations. And regardless, that is not what the word "for" conveys—as used here or in common parlance. The government prosecuted Al Capone "for" tax evasion, even if Eliot Ness and the Untouchables were *motivated* by Capone's various other crimes. So too here, the Appraisal Action was "for" a no-fault valuation of the petitioners' shares, not any breach of duty.

This Court's recent jurisprudence does not alter the analysis. Solera contends that, "despite the appraisal statute's superficial indifference to wrongdoing," this Court's decisions in *DFC*, *Dell*, and *Aruba* now require appraisal petitioners to prove "a defective sales process" under "common law fiduciary duty standards." Opp. 36-37. Solera even suggests that, because "appraisal petitioners now must prove a defective sales process," this Court's pre-*DFC* appraisal cases are no longer good law. Opp. 3, 38. That is wrong. Nothing in this Court's recent cases purports to overrule the decades of precedent holding that appraisal actions do not adjudicate wrongdoing. *DFC*, *Dell*, and *Aruba* held that particular public-company appraisals by the Court of Chancery improperly discounted the deal price in ways that were inconsistent with the particular facts presented and with certain corporate finance principles. *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 348-51 (Del. 2017); *Dell*, 177 A.3d at 5-6; *Verition Partners Master Fund Ltd. v. Aruba*

Networks, Inc., 210 A.3d 128, 139-30, 134-39 (Del. 2019). Delaware courts have a "long history of giving important weight to market-tested deal prices" and "have for years applied corporate finance principles … in appraisal proceedings." *Id.* at 135-36.

Solera misconceives this Court's appraisal jurisprudence in several additional ways. First, Solera suggests that the deal price now serves as a "default measurement" of fair value, which petitioners must "overcome" with evidence that it is unreliable. Opp. 3, 36-37. Not so. A "default" that must be "overcome" is another way of describing a presumption, and "there is no presumption in favor of the deal price." *DFC*, 172 A.3d at 349; *see Dell*, 177 A.3d at 21-22. Appraisal actions are "[u]nlike other cases," where the party bearing the burden of proof loses if it "fails to persuade the court that the evidence tilts its way." *Dell*, 177 A.3d at 19-20. The deal price may be a reliable valuation metric, but the judgment in an appraisal proceeding always must reflect the *Court of Chancery's* "*independent* assessment of fair value"—not any presumption, default, or burden of proof. *Id.* at 21 (quotation marks omitted).

Second, to the extent particular appraisal petitioners cannot, "as a practical matter," adequately support their valuation positions without "show[ing] deficiencies in the sale process," Opp. 36, there is no requirement that those deficiencies must rise to the level of a breach of fiduciary duty or other "violation"

of law. "[T]he appraisal endeavor is[,] by design, a flexible process," and this Court has refused to define "the precise preconditions" under which the deal price is reliable. *Dell*, 177 A.3d at 21-22 (quotation marks omitted). *DFC*, *Dell*, and *Aruba* thus "do[] not establish legal requirements for a sale process." *In re Appraisal of Panera Bread Co.*, 2020 WL 506684, at *19 (Del. Ch. Jan. 31, 2020) (quotation marks omitted). Reading them to do so would cripple dissenting stockholders in appraisal actions, requiring them to satisfy the higher standards for proving a breach of fiduciary duty. Indeed, Solera's interpretation would render statutory appraisal actions redundant with common-law breach-of-fiduciary-duty suits.

At most, Solera quotes one cherrypicked line about breach-of-fiduciary-duty standards from the Court of Chancery's decision in *In re Stillwater Mining Co.*, 2019 WL 3943851, at *24, which is now on appeal to this Court. Opp. 37. Even in *Stillwater*, however, the Court of Chancery recognized that proving a full-blown fiduciary breach is *not* a prerequisite for undermining the reliability of the deal price. To the contrary, the court expressly stated that "the deal price would provide persuasive evidence of fair value" if the sale process were "sufficient to satisfy enhanced scrutiny, *and if there were no other factors that undermined the sale process*." *Stillwater*, 2019 WL 3943851, at *30 (emphasis added).

Third, to the extent the record in some appraisal actions may include evidence of something like a fiduciary breach, that breach necessarily would be attributable

to individual D&Os, not the corporation itself. "Under Delaware law, [a] corporation does not owe fiduciary duties to its stockholders." *A.W. Fin. Servs., S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1128 n.36 (Del. 2009). For that reason, when "[t]he only defendant is the corporate entity"—as is the case in every appraisal action—"there are no fiduciary duty claims." *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 678 A.2d 533, 539 (Del. 1996). Here, moreover, Solera does not dispute that the plain meaning of the policy language requires a Securities Claim to involve a violation *by Solera*. Br. 19. To the extent the Appraisal Action involved evidence of an alleged fiduciary breach, Solera was not the alleged perpetrator. Any notion that the Appraisal Action against Solera was effectively a breach-of-fiduciary-duty claim thus conflicts with black-letter law. And regardless, breach-of-fiduciary-duty claims are not Securities Claims in any event, since *Verizon* squarely holds that fiduciary duties do not "regulat[e] securities." 2019 WL 5616263, at *7; *see infra* pp. 20-24.

Finally, even if an appraisal petitioner were to successfully show a full-blown "violation" of law in the underlying deal process in a particular case, that showing would serve only an evidentiary function. In Solera's own words, the robustness of the sales process goes to "the weight to be given to the deal price" and provides "another relevant factor" for the court to consider "in determining whether the petitioners were offered fair value in the merger." Opp. 17-18, 30. Introducing

evidence about the reliability of the deal price as a measure of fair value cannot change the legal basis of the relief an appraisal action seeks or the essential elements of recovery. By analogy, in a criminal case, introducing evidence of a prior crime under Delaware Rule of Evidence 404(b) does not change what the criminal charges are "for." *See, e.g.*, *Renzi v. State*, 320 A.2d 711, 712 (Del. 1974) (in a prosecution "*for* possession of a narcotic drug with intent to sell," state properly presented evidence of prior drug sale for purpose of showing the requisite intent to sell (emphasis added)). The Appraisal Action was a proceeding for an impartial, no-fault determination of fair value, not "for any … violation" of law.

D. The Appraisal Action Did Not Seek Relief Based on any Violation of Law, "Wrongful" or Otherwise

Finally, Solera offers a perfunctory defense of the Superior Court's reasoning below. According to Solera, "[t]he Superior Court properly rejected the Insurers' argument that the word 'violation' is freighted with an implication of 'wrongdoing' or 'wrongful conduct.'" Opp. 1; *see id.* at 24-26.

But Illinois National's arguments do not depend upon any such implication. Br. 30-33. It is common ground on this appeal that the term "violation" denotes "[a]n infraction of breach of the law; a transgression," or "[t]he act of breaking or dishonoring the law; the contravention of a right or duty." Opp. 24 (quoting *Black's Law Dictionary* (11th ed. 2019)); *see* Br. 18; Ex. A at 11. Under that reading, a lawsuit is not a Claim "for a[] … violation" unless it seeks relief on the ground that

Solera engaged in unlawful conduct. The Appraisal Action did not do that—it invoked an optional, no-fault valuation mechanism. Br. 18-19.[4]

To the extent Illinois National's briefing or its cited cases employ terms like "wrongdoing," Solera never states plainly how that term is relevantly different from the term "violation." *See* Br. 32-33. Solera ignores that the same edition of Black's Law Dictionary cited by the insurers, the Superior Court, and Solera defines "wrongful conduct" as "[a]n act taken in violation of a legal duty." *Black's Law Dictionary* (11th ed. 2019); *see* Ex. A at 11 n.31; Br. 33.

At most, Solera suggests—without stating outright—that "wrongdoing" might require a "showing of scienter," thereby excluding "strict liability offense[s]." Opp. 25 (quotation marks omitted); *see* Ex. A at 11 & n.33. But that alleged distinction is nonresponsive to Illinois National's principal argument—"that appraisal actions do not seek relief for *any* type of unlawful conduct in the triggering merger or consolidation, whether purposeful, reckless, negligent, strict liability, or otherwise." Br. 33. The Appraisal Action is not a Claim "for any … violation" of law.

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[4] Solera asserts that Illinois National mischaracterized the discussion of "violation" in a treatise. Opp. 24 n.59. In fact, under an entry for "Breach … And Its Near-Synonyms," the treatise states that "*Violation* connotes a more serious disregard of the law or a willful indifference to the rights of others," Bryan A. Garner, *Garner's Dictionary of Legal Usage* 119 (3d ed. 2009)—just as Illinois National represented, Br. 18.

II. The Appraisal Action Is Not a Claim for a Violation of any Law "Regulating Securities"

Even if the Appraisal Action were a Claim "for a[] … violation" of law, it still is not a Claim for a violation of a law "regulating securities." In *Verizon*, this Court held that the term "regulating securities" is limited to laws whose "regulatory purpose" is "specifically directed towards securities." 2019 WL 5616263, at *5, 7. And the plain meaning of the word "regulate" is "[t]o control (an activity or process), esp[ecially] through the implementation of rules." *Black's Law Dictionary* (11th ed. 2019). Here, Section 262's purpose is specifically directed towards the relationship between dissenting stockholders and the corporation in the context of mergers and consolidations—not securities. Br. 37-41. And even if it were specifically directed towards securities, Section 262 does not prescribe mandatory rules or otherwise control how securities transactions must be conducted. Instead, it provides dissenting stockholders with an optional mechanism for valuing their shares. Br. 42-43.

In response, despite contending in its "violation" argument that the Appraisal Action involved a violation of the common law, Solera now focuses on the statute. For example, Solera asserts that Section 262 creates a cause of action "for '[a]ny stockholder of a corporation,'" "uses the term 'stock or 'share' some seventy-five times," and "imposes liability." Opp. 43-44, 48 (quoting § 262(a)). Those arguments are in considerable tension with Solera's earlier argument that the

Appraisal Action involves a "violation" not of Section 262 itself, but of petitioners' purported "common law right to be compensated fairly." Opp. 2. The policy requires a Securities Claim to involve a "violation" of the *same law* that "regulat[es] securities." Solera cannot mix and match.

Regardless, Solera's statutory arguments fail. In arguing that Section 262 is specifically directed towards securities, Solera relies on the notion that "Section 262 does not apply in the absence of securities." Opp. 44. But the same could be said of the unlawful dividend provisions at issue in *Verizon*. Those provisions collectively use variants of "share" and "stock" dozens of times. *See* 8 *Del. C.* §§ 170, 173, 174. And because they govern dividends—a payment made "upon the shares of [a corporation's] capital stock," *id.* § 170(a)—they cannot apply where securities are absent. Yet *Verizon* held that the dividend provisions are not laws "regulating securities" because their purpose is to "regulate dividends, not securities." 2019 WL 5616263, at *7. Here, to the extent Section 262 "regulat[es]" anything at all, it regulates mergers and consolidations, not securities. *See* Br. 39; Opp. 28.

Solera acknowledges dismissively that Section 262 "appears in the DGCL and not in the Delaware Securities Act," asserting that "[w]here [the statute] falls in the Delaware Code is not what matters." Opp. 43; *see* Br. 40-41. But this Court in *Verizon* relied on *Michigan Carpenters Council Health & Welfare Fund v. C.J. Rogers, Inc.*, 933 F.2d 376, 383-84 (6th Cir. 1991), which—in this Court's words—

held "that the Michigan Business Corporation Act does not 'regulate securities' under ERISA … because Michigan separately adopted the Michigan Uniform Securities Act." *Verizon*, 2019 WL 5616263, at *5 n.43. If codifying provisions outside the state securities act supported that those provisions did not "regulate securities" in *Michigan Carpenters* and *Verizon*, then it supports the same conclusion here.

In one cryptic sentence, Solera seems to suggest that even if Section 262 itself is not directed towards securities, as *Verizon* requires, quasi-appraisal and the *Schnell* doctrine close the gap. Opp. 45. But quasi-appraisal and *Schnell* have nothing to do with statutory appraisal actions under Section 262. Quasi-appraisal is "a measure of damages," *Orchard*, 88 A.3d at 42, not a law "regulating securities." And *Schnell* is an equitable doctrine that applies even if securities are absent or incidental. *E.g.*, *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 558 (Del. 2014) (validity of non-stock corporation's bylaws); *Del. Ins. Guar. Ass'n v. Christiana Care Health Servs., Inc.*, 892 A.2d 1073, 1078 n.20 (Del. 2006) (sham transaction). A *Schnell* claim thus "do[es] not depend on a security being involved," and therefore is just like the breach-of-fiduciary-duty and "equity-based" unjust enrichment claims *Verizon* squarely held are not Securities Claims. 2019 WL 5616263, at *6-7. In effect, Solera contends that the same basic allegations and theories cannot be covered as Securities Claims in a fiduciary or unjust enrichment

action, but can be covered in an appraisal action. That tortured position is transparently an outcome in search of a principle.

Solera's attempts to distinguish *Verizon* fall flat. Solera first offers that "regulating securities" has a different meaning in this case because the policy here, unlike in *Verizon*, encompasses common-law violations. Opp. 44-46. But *Verizon* relied first and foremost on the "plain and ordinary meaning" of the term "regulating securities," which the Court found to be "unambiguous." 2019 WL 5616263, at *3-4. *Verizon* also relied on the anti-superfluity canon and the Securities Claim definition's structure, *id.* at *6, which is the same here as in *Verizon*, Br. 38. *Verizon* also cited case law interpreting ERISA's preemption savings clause, which encompasses all state "law"—common or statutory. 29 U.S.C. § 1144(b)(2)(A); *see Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987) (addressing "the Mississippi common law of bad faith"). *Verizon*'s reasoning applies here with full force.

Solera also asserts that the Primary Policy is different because it includes an endorsement regarding "Bump-up Claims" alleging "inadequate consideration in any merger or acquisition." JA173; *see* Opp. 46-47. That endorsement is not a grant of coverage; it merely changes the applicable "[r]etention[]" for certain types of otherwise covered Claims. JA173. And while Solera seems to suggest that all Bump-up Claims are Securities Claims, that is incorrect—the policy expressly provides that a "Bump-up Claim" can be a "Securities Claim" or a "Claim, other

than a Securities Claim." JA173. Solera also emphasizes XL's preliminary coverage letter acknowledging that the Appraisal Action meets the definition of a "Bump-up" claim and therefore, if covered, would be subject to a special retention. Opp. 6, 14, 46-47. But the letter makes clear that the Appraisal Action does not meet the definition of a Securities Claim. JA573-74. That the Appraisal Action is a Bump-up Claim in no way suggests that it is a Securities Claim.

Finally, Solera has no convincing response to the fact that, by its terms, Section 262 does not prescribe rules for how securities transactions must be conducted. Solera does not dispute that in order to "regulat[e] securities," a law must do more than merely direct itself towards securities. Br. 42. Solera also appears to concede that Section 262 itself "does not regulate by prescribing rules." Opp. 47. While Solera again attempts to fall back on the common law, it acknowledges that the common-law principles supposedly underlying Section 262 do not regulate securities in any "prescriptive sense." Opp. 4.

Instead, Solera creatively argues that Section 262 and the common law "regulat[e] securities" in *combination* with one another. Opp. 47-48. That is beyond the pale. If neither Section 262 nor the common law "regulat[es]" securities by itself, then they cannot do so together.

More fundamentally, as explained, appraisal under Section 262 does not require any actual or alleged violation of any prescribed legal requirement—

common-law, statutory, or otherwise. It merely allows dissenting stockholders to decline the deal consideration and instead receive the "fair value" of their shares as determined by the Court of Chancery. For that reason, the Appraisal Action is not a "Claim … made against [Solera] for any actual or alleged violation of any statute … or common law regulating securities."

CONCLUSION

The decision of the Superior Court should be reversed.

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