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IN THE SUPREME COURT OF THE STATE OF DELAWARE

RSUI INDEMNITY COMPANY, Plaintiff Below, Appellant/Cross-Appellee, v. DAVID H. MURDOCK and DOLE FOOD COMPANY, INC., Defendants Below, Appellees/Cross-Appellants,	))))))))))))	No. 154,2020 Court Below - Superior Court of the State of Delaware C. A. N16C-01-104 EMD CCLD

APPELLANT'S REPLY BRIEF ON APPEAL AND
<u>CROSS-APPELLEE'S ANSWERING BRIEF ON CROSS-APPEAL</u>

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NATURE OF PROCEEDINGS REGARDING CROSS-APPEAL

RSUI stands on its Nature of Proceedings recitation in its Opening Brief and has no further comment on Appellees/Cross-Appellants David Murdock's and Dole Food Company, Inc.'s (together, "Murdock") Nature of Proceedings.

CROSS-APPELLEE'S SUMMARY OF ARGUMENT

1. Denied. The Superior Court appropriately granted summary judgment in RSUI's favor Murdock's bad faith claim. Murdock's argument focuses on the wrong conduct and ignores the appropriate standard in Delaware, which places the burden of proof on Murdock to establish before trial that RSUI's coverage positions clearly lacked reasonable justification. Murdock did not satisfy this burden, and RSUI clearly had reasonable grounds to refuse coverage for Murdock.

2. Denied. The Superior Court appropriately determined that Murdock was collaterally estopped from disputing or relitigating the facts adjudicated in *In re Dole Food Co., Inc. Stockholder Litig.*, 2015 WL 5052214 (Del. Ch. Aug. 27, 2015) (the "*Chancery Decision*" or "*Decision*") (A0388). The *Decision* satisfied all required elements of issue preclusion under the collateral estoppel doctrine such that Murdock could not relitigate those findings before the Superior Court.

STATEMENT OF FACTS REGARDING CROSS-APPEAL

RSUI stands on its Statement of Facts recitation in its Opening Brief and has no further comment on Murdock's Statement of Facts.

ARGUMENT

RSUI'S REPLY ARGUMENT ON APPEAL

The common thread throughout Murdock's Answering Brief and Cross Appeal (hereinafter "Answering Brief") is that this Court should not consider in any fashion Vice Chancellor Laster's *Chancery Decision*. Despite the fact that this dispute is almost exclusively based on the impact of the *Decision*, Murdock's Answering Brief pays almost no attention to the findings of law and fact the Vice Chancellor reached. Murdock first treats the *Decision* as if it makes no findings of fact or law whatsoever, because Murdock chose to settle the matter after the *Decision* was entered but before unrelated aspects of the case were concluded (the *Appraisal* Action portions). Murdock then treats the *Decision* as if it did not find that Murdock and Carter committed fraud, because a cause of action for breach of fiduciary duty does not *necessarily* require a finding of fraud. Murdock continually proclaims himself and Carter innocent, contradicting the Vice Chancellor's findings, and argues that Delaware law permits him essentially to wipe out the Vice Chancellor's findings by "settling" the case for 100% of the Vice Chancellor's award (plus interest) and thereby avoid any consequences of having committed fraud.

This is not only contrary to established Delaware law, it also offends traditional notions of the role the courts serve as stewards of justice. If parties were permitted to erase by settlement embarrassing or disparaging verdicts and effectively remove them from any consideration, the courts' institutional purpose and the public trust would be undermined.

Murdock's discounting of the *Chancery Decision* pervades his arguments on appeal because the factual and legal findings are damning and dispositive to the insurance issues. Murdock can only attempt to draw the Court's attention away from the *Decision* because California law plainly demonstrates that Murdock's and Carter's fraud, and all liabilities stemming from that fraud, are uninsurable. Delaware law and public policy equally disfavor insurance for fraud. The policies at issue contain fraud exclusions that apply on their face. Accordingly, Murdock ignores his fraud and treats it as a non-event, going so far in his Cross Appeal to ask this Court to treat the *Decision* as if the facts adjudicated have no collateral estoppel effect, which essentially seeks to nullify the *Decision* completely, including the nine-day trial that preceded it, and require parties to relitigate previously adjudicated facts.

These are questions of substantial importance in California and Delaware, as Murdock's arguments offer other potential fraudulent actors a step-by-step guide of how to obtain insurance recovery for fraud. Accordingly, and for the reasons that follow, RSUI's Appeal should be granted and the Cross Appeal should be denied.

I. THE TRIAL COURT ERRED IN APPLYING DELAWARE LAW INSTEAD OF CALIFORNIA LAW.

The choice of law question has developed into a very significant question in Delaware insurance jurisprudence. Despite this Court's recent decisions that undermine the Superior Court's analysis, the Superior Court's decision has been followed by two other Delaware trial courts to misguidedly hold that state of incorporation is the overriding choice of law factor in Delaware under directors and officers insurance policies.

As noted in RSUI's Opening Brief, the Superior Court's decision creates an impermissibly inflexible rule that is contrary to the Restatement (Second) of Conflicts of Law, which this Court has held is the law in Delaware. Most of the arguments raised by Murdock in the Answering Brief were addressed in RSUI's Opening Brief. (*See* Op. Br. at 15-28). To the extent Murdock raises new arguments, RSUI addresses them here.

A. The Applicable Restatement Factors Favor Application of California Law.

This Court emphasized in two recent decisions that the choice of law analysis focuses on the formation of the contract and, in the case of insurance policies, where the policies were procured and managed. *See generally Travelers Indem. Co. v. CNH Indus. Am., LLC*, 191 A.3d 288 (Del. 2018) ("*CNH*"); *Certain Underwriters at Lloyds, London v. Chemtura Corp.*, 160 A.3d 457 (Del. 2017) ("*Chemtura*").

Despite this clear precedent, Murdock offers little discussion of the facts surrounding formation and management of the contracts. Instead, Murdock focuses on a single factor – Dole's state of incorporation in 2012 – and attempts to stretches that single fact across all the Restatement Section 6 principles (with no discussion of the Section 188 factors) to argue that Dole's insurance policies had a more significant relationship with Delaware than they actually did. (*See* Ans. Br. at 20-27). Murdock deemphasizes Section 188 of the Restatement and the factors identified by this Court in *CNH* and *Chemtura* in favor of the more general considerations contained in Section 6.

Murdock's analysis defies Delaware law and the Restatement principles. First, no Delaware precedent holds that the Section 6 principles have elevated importance over and above the Section 188 factors. Section 188 explicitly states that the contacts identified are "to be taken into account in applying the principles of § 6 to determine the law applicable to an issue." Restatement (Second) of Conflict of Laws § 188(2) (1971). Section 188 goes further to state "[i]f the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied." *Id.*, § 188(3). Accordingly, Section 188 indicates that courts are to analyze the Section 6 principles <u>by looking to the factors identified in Section 188</u>. This Court in *Chemtura* recognized this as the proper analysis, describing the Section 6 principles as "general considerations" that are used to weigh the importance of the Section 188 factors. *Chemtura*, 160 A.3d at 465. Instead of recognizing that the Section 188 factors guide the Section 6 principles, Murdock ignores Section 188 altogether.

Murdock's Section 6 argument is also flawed. Murdock points to the single factor that Dole was incorporated in Delaware in 2012 as satisfying all the Section 6 principles, while ignoring California's substantial interests. (*See* Ans. Br. at 24-25). Murdock claims that the unremarkable fact that Delaware (like all other states) authorizes corporations to purchase insurance demonstrates "substantial interest in its law being applied to interpret D&O policies of Delaware corporations." *Id*. No Delaware precedent states that the mere authorization of the purchase of insurance demonstrates "substantial interest" in Delaware law applying to interpret that insurance, to the exclusion of all other considerations. The only trial court decisions on this subject simply follow the faulty analysis of *Mills Ltd. P'ship v. Liberty Mut. Ins. Co.*, 2010 WL 8250837 (Del. Super. Nov. 5, 2010). *See Pfizer Inc. v. Arch Ins. Co.*, 2019 WL 3306043, at *7-8 (Del. Super. July 23, 2019) (relying on *Mills* and the policy's ADR provision favoring Delaware law); *Calamos Asset Mgmt., Inc. v. Travelers Cas. and Sur. Co. of Am.*, 2020 WL 3470473, at *3-5 (D. Del. June 25, 2020) (ignoring insured's headquarters and following *Mills*). This Court should reject the reasoning in *Mills*. (*See* Op. Br. 24-28). If legislatures intended for these empowering statutes to impact choice of law, they would have so indicated by statute.

Murdock argues that (i) because Murdock and Carter's duties were subject to Delaware law, Delaware has a substantial interest in interpreting D&O insurance, and (ii) the "situs of the stock at issue in the underlying lawsuits was Delaware" impacts the analysis. *Id.* Both of those arguments are contrary to this Court's repeated statements that underlying liabilities do not impact the choice of law analysis for insurance policies. *CNH*, 191 A.3d 288, ¶ 15. These arguments also ignore that the policies at issue provide much broader coverage than just liabilities that might arise under Delaware law. RSUI explained this in its Opening Brief, noting the broad range of coverage afforded, including for "Securities Claims" under federal law. (*See* Op. Br. at 25-27). Notably, Murdock ignores this point in his Answering Brief, likely because he has no counter argument, and even described the RSUI Policy as providing "broad coverage subject only to some narrow exclusions." (Ans. Br. at 1).

Murdock ignores the interests of California under the Section 6 principles, despite its overwhelming interest established by Section 188. Murdock accuses RSUI of not addressing Section 6 (Ans. Br. at 20), overlooking that the Section 188 factors are designed to address Section 6. In any event, California's interests under Section 6 are well established. Principle 6(c), the relevant policies of other interested states, strongly favors California. It is inarguable that California has a strong interest in regulating insurance issued and procured in its state and to its residents, including Dole. Murdock has never disputed that the policies here are subject to California insurance regulation. California has a strong interest in defining insurable conduct for its residents, and has an express statute addressing willful conduct. Conversely, principle 6(b) does not favor Delaware because it has no specific statute in place addressing insurance for willful acts, and Delaware's insurance regulations do not apply to the policies.

Murdock's analysis regarding principle 6(d), justified expectations, is misleading because it intentionally ignores facts demonstrating the expectations of the parties were that California law would apply. As explained in RSUI's Opening Brief, the policies were negotiated for, procured, issued, and delivered in California, and provided insurance for directors and officers working at Dole's California headquarters. (*See* Op. Br. at 21-22). There is no evidence that Dole had any expectation that Delaware law would apply. *Id.* In fact, Murdock's "insurance recovery counsel" invoked California statutes and case law as applicable to RSUI's contractual obligations after the *Chancery Decision* was issued. (A0478-85). The AXIS Policy also used California Amendatory endorsements. (A0445).

Murdock acknowledges that, in the context of contracts, the protection of justified expectations is of considerable importance. (Ans. Br. at 26, *citing*

Chemtura, 160 A.3d at 468). The reality is that Dole never viewed Delaware law as remotely applicable until the *Chancery Decision* concluded Murdock and Carter committed fraud. This required Murdock to opportunistically pivot to Delaware law to escape application of California's Insurance Code Section 533. Murdock offered no evidence of any such contrary expectations below.

The unique rule that Murdock asks this Court to create – that state of incorporation is the overriding factor for choice of law and D&O policies – would be unique and unprecedented in the United States. Despite this, Murdock asks this Court to believe that Dole had a justified expectation in 2012 that the then-non-existent rule would apply to its policies negotiated, procured, and managed in California. That is illogical and not supported by any evidence.

B. The AXIS Policy's Definition of "Loss" is Not a Choice of Law Clause and Does Not Mandate Application of Delaware Law.

Murdock devotes a single paragraph to argue that the AXIS Policy's amended definition of "Loss" constitutes a choice of law clause that negates any analysis under the Restatement. (Ans. Br. at 20). Murdock never raised this argument before the Superior Court and therefore it should be deemed waived. *See Beebe Med. Ctr., Inc. v. Bailey*, 913 A.2d 543, 550 (Del. 2006).[1]

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[1] The only time Murdock even characterized this sub-paragraph as a "choice of law provision" was in response to RSUI's Motion to Vacate and Revise the Superior Court's choice of law determination, which was Murdock's *third* brief addressing choice of law. (A2296-300). Even then, Murdock did not argue the definition of

Even if the argument was not waived, it is incorrect. Choice of law clauses can be found in insurance contracts (typically in the "Conditions" section), but one would not expect to find such a clause in a sub-paragraph in the Definitions section of the policy. Part 5 of the amended definition in the AXIS Policy states that "Loss" does not include:

> 5. matters uninsurable under the law applicable to this Policy, provided:
>
>   a. the law of the jurisdiction most favorable to the insurability of such matters shall apply; provided further such jurisdiction is: (i) where such amounts were awarded or imposed; (ii) where any **Wrongful Act** underlying the **Claim** took place; (iii) where either the Insurer or any **Insured** is incorporated, has its principal place of business or resides; or (iv) where this Policy was issued or became effective; […]

(A450). The use of the word provided in the definition makes it clear that the "choice" is exclusively linked to the limitation on the definition of "Loss" immediately above that choice, and not to interpretation and construction of the Policy as a whole.[2] In this case, the "choice" is not available to Murdock. The Court must begin with the analysis of choice of law to determine how the policies will be

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"Loss" was a complete choice of law provision that negates the Restatement analysis. Instead, he argued that the provision dictates that California Insurance Code Section 533 does not apply, even if the Restatement analysis leads to the conclusion that California law applies to the Policy generally. (A2300-04).

[2] The Superior Court also did not view the definition of "Loss" as a choice of law provision, noting the policies did not contain a choice of law provision. (Op. Br., Ex. B at 15).

interpreted generally, and then interpret the sub-part of the definition of "Loss" through the lens of the applicable state law.

The Restatement dictates that California law applies, and California law inserts Section 533 into the policy and forbids dilution of that public policy via other provisions. This is critical, because Murdock attempts to invoke the sub-part of the definition of "Loss" precisely to escape application of Section 533, which <u>cannot be contracted around</u>. (Op. Br. at 30-36); *J.C. Penney Cas. Ins. Co. v. M.K.*, 52 Cal.3d 1009, 1019 (1991). Nor can a court construe "a contractual exclusionary clause… more narrowly in favor of coverage than section 533." *Marie Y. v. Gen. Star Indem. Co.*, 110 Cal. App. 4th 928, 952-53 (Ct. App. 2003). Thus, the fact that California law applies defeats Murdock's argument that the definition of "Loss" operates to "contract around" Section 533. Tellingly, Murdock never addresses the long-established rule that Section 533 applies completely independent of the policy provisions.

Even if the provision constituted a true choice of law provision, Murdock's argument runs afoul of Section 187 of the Restatement. The Court of Chancery in *Ascension Ins. Holdings, LLC v. Underwood* discussed Section 187 at length:

> where the parties enter a contract which, absent a choice-of-law provision, would be governed by the law of a particular state (which I will call the "default state"), and the default state has a public policy under which a contractual provision would be limited or void, the Restatement recognizes that allowing the parties to contract around that public policy would be an unwholesome exercise of freedom of

> contract. In other words, the Restatement is generally supportive of choice-of-law provisions, but recognizes that allowing parties to circumvent state policy-based contractual prohibitions through the promiscuous use of such provisions would eliminate the right of the default state to have control over enforceability of contracts concerning its citizens.

2015 WL 356002, at *2 (Del. Ch. Jan. 28, 2015); *see also Cabela's LLC v. Wellman*, 2018 WL 5309954, at *7 (Del. Ch. Oct. 26, 2018); *Millett v. Truelink, Inc.*, 2006 WL 2583100, at **3-4 (D. Del. Sept. 7, 2016).

Murdock dismisses application of these cases by claiming that California has no interest in insurance issued in its state generally, or the insurability of willful conduct committed in its state specifically. (Ans. Br. at 31-33). As discussed above, the idea that California has no interest in insurance policies negotiated, procured, and managed in its state contradicts the Restatement. Dole has long maintained its headquarters in Westlake Village, California, and the very directors and officers the policies insured worked at that headquarters. These circumstances match almost exactly with *Ascension*, where the parties were a California resident and a Delaware LLC with its headquarters in California. 2015 WL 356002, at *3. The agreement not to compete would have applied in California, *id*., just as the policies here insured conduct taking place in California. The non-compete agreement conflicted with a fundamental California policy embodied in statute, *Id*. at *3-4, just as insurance for fraud conflicts with a fundamental policy embodied in Section 533.

Furthermore, the only contact with Delaware in *Ascension* was the state of organization and the only competing interest in Delaware was a "strongly contractarian" approach to contract law. *Id*. at *4. The court held that this contractarian interest was not enough to outweigh California's clearly stated interest, noting:

> The entire purpose of the Restatement analysis is to prevent parties from contracting around the law of the default state by importing the law of a more contractarian state, unless that second state also has a compelling interest in enforcement. In other words, in every instance where the parties seek to circumvent application of the law of the default state, the state whose law was chosen and is asked to enforce the contract will have the interest of protecting freedom to contract. It would be a tautology to suggest that such an interest alone, arising in every case, can trump the public interest of the default state, which, by definition, has the greatest contacts with the contract at issue; otherwise, the Restatement test would be meaningless, and the default state would lose its ability to constrain pernicious enforcement of contract rights.

Id. at *5.

Murdock offers no compelling reason why Delaware would have an interest that would categorically override a fundamental insurance policy statute in California, the state where the policy was issued and performed. Murdock's only substantive argument is to briefly claim that *Downey Venture v. LMI Ins. Co.*, 66 Cal. App. 4th 478 (2d Dist. 1998), holds that California does not impose Section 533 outside its state. (Ans. Br. at 32). That is a misapplication and oversimplification of *Downey Venture*.

First, *Downey Venture* dealt with a comprehensive general liability policy where the locations of the risks were nationwide. *Id*. at 487, 514. The policy expressly covered malicious prosecution, *id*. at 486, but Section 533 precludes indemnification for malicious prosecution because it requires intentional wrongful acts. *Id*. at 506. Because of this, the insured argued that the express coverage grant for malicious prosecution was illusory and the insurer should be estopped from relying on Section 533 to deny coverage. *Id*. at 509-512. The court discussed why the illusory argument was incorrect, because significant coverage existed for malicious prosecution claims aside from indemnity, including coverage for vicarious liability, defense costs, and malicious prosecution taking place in other states. *Id*. at 512-516.

In this context, *Downey Venture* discussed *Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc.*, which stated: "Where a multiple risk policy insures against risks located in several states, it is likely that the courts will view the transaction as if it involved separate policies, each insuring an individual risk, and apply the law of the state of principal location of the particular risk involved." 17 Cal. Rptr. 2d 713, 719 (Cal. App. 4th Dist. 1993). It is in this context that the *Downey Venture* court noted that Section 533 may not always apply to claims that arise in other states, because if the principal location of a risk is in another state, the court felt California may have a lesser interest in applying Section 533. 66 Cal. App. 4th at 514-515. The malicious prosecution at issue in *Downey Venture* took place in California, however, and thus Section 533 applied. *Id*.

Here, as in *Downey Venture*, the principal location of the insured risk is exclusively California. There is no evidence suggesting that any of Dole's insured directors or officers ever worked in Delaware. The conduct at issue took place entirely in California at Dole's headquarters. Given these undisputed facts, the *Downey Venture* analysis supports the application of Section 533 here. The purpose of Section 533 is to discourage willful torts, and reflects a "fundamental public policy to deny insurance coverage for willful wrongs." *Id*. at 499. Because Murdock's and Carter's willful conduct took place in California, the purpose of Section 533 squarely applies and California has a very strong interest in enforcement of its "fundamental public policy."

II. FRAUD IS UNINSURABLE IN CALIFORNIA AND DELAWARE.

Just as Murdock distances himself from the substantial contacts between California and the insurance contracts, he distances himself from the fraud Vice Chancellor Laster found after a nine-day trial. While RSUI's Opening Brief discussed at length the *Chancery Decision's* findings, (Op. Br. at 8-11), Murdock's Answering Brief devotes very little discussion to those findings and characterizes them as nothing more than a finding Murdock and Carter were "liable for breach of their duties of loyalty." (Ans. Br. at 9, 35, 77). This is belied by the *Decision's* text, in which the words "fraud" or "fraudulent" appear <u>twenty</u> times. (*See generally* A0387-0427).

Murdock flatly misrepresents the *Decision*, claiming "nowhere in the Memorandum Opinion does the court specifically state that Mr. Murdock engaged in fraud." (Ans. Br. at 77). The *Decision* both contextually and expressly finds that Murdock committed fraud, stating, for example:

> The result is a price $1.98 per share higher than the $13.50 per share Murdock paid. **<u>But because the defendants engaged in fraud</u>**, […] the plaintiffs are entitled to the full incremental $2.74 per share in damages. […] The $2.74 per share figure suggests that Murdock and Carter's pre-proposal efforts to drive down the market price **<u>and their fraud</u>** during the negotiations reduced the ultimate deal price by 16.9%.

(A0419).

Given this context, Murdock's strategy is clear. Murdock asks this Court to ignore the *Chancery Decision* and treat it as a complete non-event not worthy of this

Court's consideration. They treat a 106-page post-trial opinion as though 99% of the decision is *dicta*, and only the last paragraph actually means anything. This is a remarkable position to take, given the extensive amount of resources devoted to the *Stockholder* Litigation and the very extensive and detailed findings of the Vice Chancellor. Murdock argues that the *Decision* is entitled to no credence or weight, not because of any legal rule but because the findings are damning and dispositive to the insurance issues presented. He must escape those findings in order to gain insurance coverage for fraud. If the *Decision* is applied as written, it is indisputable that California law does not permit insurance indemnity for Murdock's and Carter's fraud and any liability stemming from that fraud. This fraud should also be uninsurable under Delaware law.

A. California Law Precludes Coverage for Fraud.

RSUI's Opening Brief discussed why California Insurance Code Section 533 precludes coverage for the *Stockholder* and *San Antonio* settlements. (Op. Br. at 30-37). Predictably, Murdock's Answering Brief largely avoids discussing California cases that analyze Section 533, and instead relies on other circumstances to dismiss Section 533 altogether and claim it is not applicable to the policies.

1. Application of California Law Should Not Be Remanded.

First, Murdock asks this Court to remand the issue and not evaluate it because they claim the Superior Court did not make a decision on the application of Section

533. (Ans. Br. at 33). That is incorrect. The Superior Court clearly held that there was a conflict between California law and Delaware, stating “Delaware and California law conflict regarding whether an insurance policy covers a directors willful or wanton actions.” (Op. Br., Ex. B at 18). The Superior Court chose to apply Delaware law, which the Superior Court interpreted as allowing insurance for fraud. (*Id.* at 15-21). If the Superior Court felt that Section 533 did not apply to preclude coverage, it would have found a false conflict between Delaware and California law and would never have undertaken the conflict of law analysis. *Compare Deuley v. DynCorp Intern., Inc.*, 8 A.3d 1156, 1161 (Del. 2010). Therefore, the Superior Court acknowledged that the result would be different if California law applied, i.e., insurance would not be available to Murdock.[3]

Murdock’s request that this Court remand the question should be disregarded as a stall tactic designed to convince this Court to ignore Section 533 and Murdock’s and Carter’s fraud, and instead cause RSUI to incur further burdensome and unnecessary litigation costs. The issue was fully presented and addressed before the Superior Court. It should be addressed here.

[3] The Superior Court’s summary judgment ruling on bad faith also indicates the Superior Court viewed California law as providing a complete defense to coverage, because the Superior Court identified RSUI’s application of California law as a reasonable basis to deny coverage. (Ans. Br., Ex. 1 at 11).

2. Policy Provisions Cannot Limit Application of Section 533.

Murdock's primary argument regarding Section 533 is that they can escape its application by pointing to policy provisions that they insist alter or limit Section 533. First, they claim that sub-part in the definition of "Loss" evades the requirements of Section 533, (Ans. Br. at 30-33), then they claim that the Profit/Fraud Exclusion somehow establishes a "burden of proof" limiting application of Section 533. (Ans. Br. at 33-35).

These arguments are unsupported and contrary to established California law. Section 533 is "an implied exclusionary clause which by statute is to be read into all insurance policies," regardless of the policy's language. *J.C. Penney*, 52 Cal. 3d at 1019 (citations omitted). Because "Section 533 reflects a fundamental public policy of denying coverage for willful wrongs," and the "parties to an insurance policy therefore cannot contract for such coverage," a court "need not" and should not "decide whether coverage would be excluded by the explicit policy exclusion in the absence of section 533." *Id.* at 69 n.8. *Accord Unified W. Grocers, Inc. v. Twin City Fire Ins. Co.*, 457 F.3d 1106, 1112 (9th Cir. 2006); *Marie Y.*, 110 Cal. App. 4th at 952-53.

RSUI presented these principles at length in its Opening Brief, (*see* Op. Br. at 30-31), noting the fault in such arguments. *Id*. at 35-36. Murdock fails to counter these arguments. The only new argument Murdock presents is that the *Downey*

Venture case purportedly permits parties to agree to contractual limitations of Section 533's impact by mischaracterizing a passage from the case. (Ans. Br. at 32-33). The passage quoted stands for nothing more than the proposition that Section 533 does not necessarily preclude an insurer's <u>duty to defend</u> allegations of willful conduct if it contracted to provide such a defense. *See Downey Venture*, 66 Cal. App. 4th at 507-508. The passage does <u>not</u> state that parties can contract for limitations on the application of Section 533 to <u>indemnity</u> for willful acts. In fact, *Downey Venture* and every other Section 533 case cited to this Court state the exact opposite.

3. Murdock's Straw Man Arguments Should Be Disregarded.

Several points raised by Murdock are straw man arguments that falsely characterize positions not actually taken by RSUI and then attempt to dispel those arguments. The Court should disregard those arguments.

First, Murdock appears to argue that RSUI has wrongly denied coverage for defense costs incurred prior to the *Chancery Decision* finding fraud, therefore its application of Section 533 should fail. (Ans. Br. at 34). That is not true – RSUI has never taken the position that Murdock's pre-*Decision* defense costs are not covered because of allegations of fraud.

Murdock also claims that RSUI has argued the underlying claims require "proof of the requisite willfulness." (Ans. Br. at 35). Not so – RSUI argued that the required elements of the underlying cause of action do not matter if the Court actually finds fraud. (Op. Br. at 33-35). Here, the Vice Chancellor actually found fraud, therefore Section 533 applies. RSUI's Opening Brief addressed the importance of the Vice Chancellor's fraud findings to his rejection of affirmative defenses and justification for the award amount. (Op. Br. at 34). Murdock ignores those facts in his Answering Brief.

Murdock's claim that the *Decision* lacks findings of "willfulness" can be rejected by reading the *Decision*. (Ans. Br. at 35-36). The *Decision* is replete with express findings of fraud, intentional conduct, and bad faith. Murdock appears to take the position that the magic words "willful fraud" must appear in the *Decision* in order for Section 533 to apply. (Ans. Br. at 35). Murdock offers no support that the phrase "willful fraud" is required or is somehow different from "fraud," and fails to acknowledge that fraud is inherently willful in nature.

Murdock's argument with respect to *San Antonio* rests on the misguided notion that the *Decision* has no collateral estoppel effect. Murdock argues that because recklessness can satisfy the scienter element of Section 10(b) of federal securities claims, Section 533 does not apply to *San Antonio*. (Ans. Br. at 36). In order to prevail on this argument, Murdock must convince the Court to throw out the *Chancery Decision* for purposes of this insurance dispute. The *Decision* clearly established that the conduct complained of in *San Antonio* was fraudulent, intentional, and performed in bad faith. Murdock claims that, because he denied the allegations, Section 533 cannot apply. (Ans. Br. at 35). But these allegations were already confirmed by Vice Chancellor Laster after a nine-day trial, 1,800 exhibits, ten witnesses, three experts, twenty-nine depositions, and 668 pages of pre-trial and post-trial briefs. (A0388). Murdock cannot deny already-established facts surrounding these allegations or his fraud.

B. Delaware Law Precludes Coverage for Fraud.

Murdock's only arguments under Delaware law are that the general principles of public policy and insurance outlined in *Whalen v. On-Deck, Inc.*, 514 A.2d 1072, 1072 (Del. 1986) mean that only the Legislature can determine that fraud is uninsurable, and that the Legislature "has indicated that fraud *is* insurable." (Ans. Br. at 29-30).

Murdock argues that the Delaware Legislature has empowered corporations to insure against fraud because 8 *Del. C.* § 145(g) permits corporations to purchase insurance "against any liability." *Id.* Murdock offers no support for this gross overinterpretation of a general statute authorizing corporations to purchase D&O insurance. Murdock offers no argument addressing Delaware's long-held "inveterate and uncompromising" public policy stating directors and officers should not be permitted to retain the profits from their ill-gotten gains. (*See* Op. Br. at 37-39, *citing Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939); *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 445 (Del. 1996); *In re Tri–Star Pictures, Inc., Litig.*, 634 A.2d 319, 334 (Del.

1993) and *Oberly v. Kirby*, 592 A.2d 445, 463 (Del. 1991) (*en banc*)). Permitting insurance for fraud does exactly this – Murdock was found to have defrauded Dole's stockholders out of $148 million in share value, (A0388), and now he asks RSUI to pay the bill.

Murdock's reliance on *Whalen* is also misplaced. *Whalen* involved an issue "novel to the Delaware courts" of whether to create a new public policy (not at issue in this case) of denying insurance for punitive damages, *id.* at 1072, with this Court noting no evidence existed of a public policy against such insurance. *Id*. at 1074. A public policy against permitting indemnification for ill-gotten gains has existed in Delaware since at least the *Guth* decision in 1939. A public policy established by Delaware courts for decades remains valid if the Legislature has not passed a specific statute addressing it.

Moreover, insurance for punitive damages is a very different issue from that presented here. Punitive damages can be assessed for a variety of reasons in a variety of circumstances and does not always require intentional conduct. *See Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 529 (Del. 1987) (finding it appropriate to submit punitive damages claims for jury consideration where the alleged conduct is reckless in nature); *In re Phar-Mor, Inc Securities Litigation*, 892 F.Supp. 676, 695 (W.D. Pa. 1995) (denying summary judgment by finding "punitive damages maybe awarded for reckless conduct"). In contrast, fraud is necessarily intentional. This

Court noted in *USAA Cas. Ins. Co. v. Carr* the "well-established common law principle that an insured should not be allowed to profit, by way of indemnity, from the consequences of his own wrongdoing" in a context where no announced Delaware public policy applies. 225 A.3d 357, 362 (Del. 2020), *quoting Hudson v. State Farm Mut. Ins. Co.*, 569 A.2d 1168, 1170 (Del. 1990). Permitting insurance for fraud is antithetical to the entire concept of fortuitous liability insurance. Fraud is intentional and necessarily not fortuitous. Allowing insurance for fraud would allow persons to reap rewards from their intentional acts.

C. RSUI Preserved the Question of Insurability of Fraud

Murdock confusingly asserts that "RSUI did not preserve the question of whether the settlements were insurable under the Policy's choice-of-law provision." (Ans. Br. at 28). This is incorrect for several reasons. First, as discussed above, Murdock did not properly preserve the argument that the AXIS Policy's amended definition of "Loss" constituted an enforceable choice of law provision. (*See* Section I.B., *supra*). Second, RSUI addressed why the definition of "Loss" does not change the analysis at least twice before the Superior Court. (A2453-57; A2484-91). Third, Murdock's statement concerning preservation appears to be limited to whether fraud is insurable under Georgia or New Hampshire law, which are RSUI's principal place of business and state of incorporation, respectively. (Ans. Br. at 32). If that is the case, Murdock fails to note that <u>neither</u> party discussed the law of New Hampshire or Georgia at any point, therefore Murdock never established fraud is insurable in those states and waived these arguments just as much as RSUI purportedly did.

III. THE PROFIT/FRAUD EXCLUSION APPLIES.

Murdock's argument with regard to the Profit/Fraud Exclusion is an exercise in advanced semantics in characterizing a 106-page bench decision after a nine-day trial as something other than an adjudication. This argument is just as unfounded as their repeated claim that the *Chancery Decision* contained no findings of fact or law except for the very last paragraph. Murdock strains to mischaracterize and misapply the *IBP/Tyson* cases because they are fatal to his argument and demonstrate that Murdock's gambit to buy out an unfavorable decision to erase findings of fraud is not permitted in Delaware.

A. This Court Can and Should Address Application of the Profit/Fraud Exclusion to the *San Antonio* Action.

Murdock's first argument is procedural – this Court should not review the Profit/Fraud Exclusion in the context of *San Antonio* because it was not specifically reviewed by the Superior Court. (Ans. Br. at 40). Murdock fails to advise the Court <u>why</u> the Superior Court did not have the opportunity to apply the Exclusion to *San Antonio*, which is crucial to contextualizing Murdock's challenge.

The Profit/Fraud Exclusion was first addressed by the Superior Court in the context of Murdock's Motion to Dismiss. The Superior Court determined that Murdock's challenge to RSUI's subrogation count required the Court to analyze the Profit/Fraud Exclusion, and the Court did so in a ruling dated December 21, 2016. (Op. Br., Ex. A at 10-16). At that time, the *San Antonio* Action was still in active litigation and was not yet a subject of the insurance litigation. (*See* A0971-73). Murdock settled *San Antonio* in principle on January 9, 2017 and the insurance dispute over *San Antonio* was not added to this lawsuit until Dole filed an Amended Counterclaim on April 18, 2017. (A0873-917).

Accordingly, the Profit/Fraud Exclusion insofar as it impacts *San Antonio* was not addressed in December 2016. Once *San Antonio* was added to the litigation, the Superior Court had already determined that the Exclusion did not apply and therefore constituted law of the case. *See State v. Wright*, 131 A.3d 310, 321 (Del. 2016). The Superior Court's having already determined that the Exclusion did not apply to the *Chancery Decision*, it would have been futile for RSUI to argue that the Exclusion applied to a follow-on collateral estoppel litigation based on the same *Decision* findings. *See E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 711 A.2d 45, 55 (Del. Super. 1995) ("A party seeking to have the Court reconsider the earlier ruling must demonstrate newly discovered evidence, a change of law, or manifest injustice."). That issue had already been decided by the Superior Court and it would have been a waste of judicial resources for RSUI to make such an assertion.

With this context in mind, this Court should hold either (1) the issue was not waived because the Court addressed the Exclusion in such a way that precluded further argument once *San Antonio* was added to the litigation, and therefore the issue was "fairly presented below" within the meaning of Rule 8; or (2) the interests of justice exception contained in Rule 8 applies. The exception applies because (1) the issue is outcome determinative, and (2) this Court's consideration of the issue will promote judicial economy by avoiding the necessity of reconsidering an issue that the Superior Court has already effectively decided. *Sandt v. Delaware Solid Waste Auth.*, 640 A.2d 1030, 1034 (Del. 1994).

Stated differently, the issue presented is a discrete legal issue that the Superior Court already addressed broadly, is outcome determinative, and determining that the Superior Court did not decide the issue would only result in a remand because the Exclusion was asserted by RSUI as applicable to *San Antonio*, and it was by mere happenstance that the Superior Court did not specifically address it. Murdock should not be allowed to avoid this question altogether by mere procedural quirk when the record is clear that the Superior Court would have found the Exclusion inapplicable in any event.

B. The Plain Language of the Exclusion Applies.

Murdock criticizes RSUI for not discussing any "insurance law" in its Opening Brief (Ans. Br. at 38). This is because the language at issue in the Profit/Fraud Exclusion is clear and unambiguous, and therefore analysis of basic tenets of insurance law is unnecessary. For example, Murdock cites cases stating "exclusionary provisions are construed strictly against the insurer when the policy language is ambiguous[,]" (*Id*. at 39), but never argues or explains why the Exclusion is purportedly ambiguous, as is his threshold burden to establish.

Clear and unambiguous language in an insurance policy should be given its ordinary and usual meaning. *Rhone-Poulenc Basic Chemicals Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992). A contract is not ambiguous simply because the parties do not agree upon its proper construction. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings. *Id*. at 1196.

Here, whether or not the *Chancery Decision* constituted an "adjudication" that became "final and non-appealable" does not present any question of ambiguity in interpreting the insurance contract. It is a simple statement of Delaware procedural law. This is why RSUI's Opening Brief focuses on Delaware cases discussing the impact settlement has on prior interlocutory orders, and correctly notes that settlement renders those orders final and non-appealable. (Op. Br. at 44-49).

Recognizing RSUI's statements of law are correct, Murdock engages in semantics and sophistry in an attempt to convince the Court that the *Decision* was somehow not an "adjudication." Murdock's argument elevates form over substance and conflates "adjudication" with the process of entering a technical "final judgment," arguing a 106-page post-trial decision with findings of fact, conclusions of law, and awards of damages, was not an "adjudication" because other unrelated issues remained in the case. (Ans. Br. at 41-43). This is illogical.

The Chancery Court Rules themselves indicate "adjudicate" means something different than "final judgment", expressly permitting courts to "adjudicate[] fewer than all the claims or the rights and liabilities of fewer than all the parties." *See* Chancery Court Rule 54(b). As this Court noted in *Tyson Foods, Inc. v. Aetos Corp.*, 809 A.2d 575, 580 (Del. 2002) ("*Tyson I*"), the policy underlying the final judgment rule is one of efficient use of judicial resources through disposition of cases as a whole, rather than piecemeal. There is nothing in the Rules or Delaware jurisprudence conflating adjudication of discrete issues with a final judgment.

Furthermore, the conflation of "final judgment" and "adjudication" violates commonly accepted principles of contract construction. The Exclusion uses the phrase "final and non-appealable adjudication." "Adjudication" cannot independently mean "final judgment" because it renders the word "final" meaningless surplusage. *Kuhn Const., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396 (Del. 2010).

There is no legitimate argument that the *Decision* did not "settle finally (the rights and duties of the parties to a court case) on the merits of the issue raised." (*See* Ans. Br. at 42, *citing State v. Anderson*, 1993 WL 777373, at *2 (Del. Fam. Ct. Dec. 23, 1993)). The extremely detailed *Decision* addressed all claims pending against

Murdock and Carter and held them to have committed fraud. Murdock's argument gives no credence to these findings and dismisses them as a non-event and irrelevant.

C. Murdock's Settlement of *Stockholder* Does Not Escape the Profit/Fraud Exclusion.

In its Opening Brief, RSUI discussed at length the principles stated by this Court and then-Vice Chancellor Strine in the *IBP/Tyson* cases, holding that settlements agreed upon after an adjudication cannot be used to vacate that adjudication or avoid its consequences. (*See* Op. Br. at 44-49, *citing In re IBP, Inc.*, 793 A.2d 396, 398-399. (Del. Ch. 2002) ("*IBP*"); *Tyson I*, 809 A.2d 575; *Tyson Foods, Inc. v. Aetos Corp.*, 818 A.2d 145 (Del. 2003) ("*Tyson II*") (collectively "*IBP/Tyson*")). Murdock's Answering Brief counters *IBP/Tyson* by misconstruing their facts and holdings and pointing to other inapplicable case law.

1. The *IBP/Tyson* Cases Are Directly on Point.

Murdock distorts the *IBP/Tyson* cases, which involve materially identical circumstances to those presented here. *IBP* involved Tyson Foods' motion to vacate a post-trial opinion entered after a nine-day trial, in which the Court of Chancery rejected Tyson Foods' claims arising out of a merger dispute and ordered specific performance of the merger agreement. 793 A.2d at 398-399. Within days of the post-trial opinion, Tyson and IBP settled the case and Tyson reached preliminary agreement with a class of IBP stockholders to settle their claims against Tyson for no monetary damages. *Id*. On June 27, 2001, the Court entered an order implementing the specific performance decision in a manner that reflected the parties' settlement agreement. *Id*. The Court also scheduled a hearing to consider the IBP stockholder class settlement. *Id*. However, after the post-trial opinion but before formal stipulations of settlement were filed, federal securities suits were filed against Tyson and Tyson directors and officers. *Id*. Those federal securities suits relied on the post-trial opinion findings to support the claims. *Id*. Tyson subsequently sought to vacate the post-trial opinion out of fears that the Federal plaintiffs would use it for its collateral estoppel effect. *Id*. at 401.

RSUI extensively discussed how Vice Chancellor Strine ruled on the legal arguments raised in Tyson's motion, and this Court's two rulings affirming the Court of Chancery in *Tyson I* and *Tyson II*. (*See* Op. Br. at 44-49). RSUI does not repeat that discussion here.

Murdock claims that *IBP/Tyson* should be ignored because they did not discuss the Profit/Fraud Exclusion, and proceeds to misapply those cases. (Ans. Br. at 47-50). Murdock highlights the first sentence of the *IBP* decision: "I decline to vacate a post-trial judicial opinion at the instance of a party whose own voluntary decision to settle rendered moot the issues decided by that opinion." (Ans. Br. at 48). Murdock argues this means that settlements such as Murdock's render post-trial opinions "meaningless, not transformed into a final adjudication[.]" (Ans. Br. at 48). A complete reading of *IBP* shows this is incorrect. The *IBP* Court clearly discussed mootness from the perspective of Tyson's ability to vacate the post-trial opinion and challenge its findings, not mootness of the findings themselves. The Court discussed at length the rule of vacatur under both Delaware and federal law, noting the United States Supreme Court has held "mootness by reason of settlement does not justify vacatur of a judgment under review." *IBP*, 793 A.2d at 397, *citing U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994).

The *IBP* Court and subsequent appellate rulings by this Court do not state that the post-trial opinion became moot at time of settlement and therefore is not part of the final judgment. They say the opposite – that settlement causing a final judgment to be entered caused all previous interlocutory orders to become final. As this Court stated in *Tyson I*:

> We are not persuaded that Tyson's argument justifies departure from this Court's jurisprudence on mootness. Preliminarily, we note that the Court of Chancery findings which may be subject to collateral estoppel will evade review because Tyson elected not to exercise its right of appeal from the August 3 order. Thus, to a degree Tyson's present predicament is self-imposed. At the time of the settlement hearing before the Court of Chancery, Tyson was aware that the federal plaintiffs were attempting to use the factual findings in the post-trial opinion.

809 A.2d at 582.[4] If it were true that the "mootness" discussed in *IBP/Tyson* applied to nullify the factual findings in the post-trial opinion, the courts would have stated

[4] Similarly, Murdock was aware of the *San Antonio* plaintiffs' desire to use the *Chancery Decision* as collateral estoppel at the time he finally settled the *Stockholder* Litigation and chose to forego appeal. (*See* A0891-92; A0932-46).

so, because such a ruling would have negated the prejudice Tyson was claiming as support for vacatur – that the post-trial opinion could be treated as collateral estoppel. Under Murdock's theory, *IBP/Tyson* reach incorrect conclusions.

Tyson's attempt to vacate its post-trial opinion sought essentially the same relief Murdock seeks here – an invalidation of Vice Chancellor Laster's post-trial opinion. The fact that Murdock's challenge arises in an insurance context and not vacatur is of no moment. All of the sound public policy reasons the *IBP/Tyson* courts discussed for denying vacatur apply equally here and show that the *Chancery Decision* became final and non-appealable when Murdock chose to settle.

2. Murdock's Other Case Law is Distinguishable.

Murdock's principal counter-authority is *Crescent/Mach I Partners, L.P. v. Dr Pepper Bottling Co. of Texas*, 962 A.2d 205 (Del. 2008) ("*Crescent*"). (Ans. Br. at 43-44). Murdock overstates and misapplies *Crescent* to imply that this Court has permitted parties to use settlement to vacate interlocutory judicial decisions.

In *Crescent*, the Court of Chancery entered a post-trial decision in an appraisal action, and the parties thereafter settled for an amount that was based on that decision. *Id*. at 206-207. After the settlement, a disinterested financial analyst discovered that the Court of Chancery had miscalculated numbers in the decision

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Murdock was also aware that several of its insurers, including RSUI, viewed the *Decision* as dispositive to insurance coverage. (A0887).

that led to an inflated damages award of more than $3 million. *Id*. at 207. Defendants then sought to reopen the case, notwithstanding the settlement, to get the numbers corrected (and, therefore, to alter their own settlement and escape its consequences). *Id*. at 207-208.

By selectively quoting from *Crescent*, Murdock tries to create the appearance that this Court decided (contrary to *IBP/Tyson*) that a settlement following a trial court's decision renders the trial court's work of no legal effect. On the contrary, *Crescent* relied on, applied and extended *IBP/Tyson*. *Id.* at 208-209. It ruled that settlement not only makes the prior decision final, it moots any further dispute between the parties in a way that divests the trial court of jurisdiction even to correct a mathematical error. *Id.* Justice Jacobs cited *IBP/Tyson* to rule that "by settling, the parties contractually ***gave up*** their right to contest pre-settlement rulings, even if those rulings were erroneous," and that "'[m]ootness by reason of settlement' is the term of art used to ***reject*** post-settlement efforts to vacate presettlement rulings," not to assume they never occurred. 962 A.2d at 209 & n.11, 12 (emphasis added).

Murdock's other case authority offered to escape the Profit/Fraud Exclusion is inapposite because they expressly did not involve settlements occurring <u>after</u> trial and issuance of a post-trial opinion adjudicating the defendants committed fraud. *See National U. Fire Ins. Co. v. Continental Illinois Corp.*, 666 F. Supp. 1180 (N.D. Ill. 1987) (underlying litigation settled prior to trial); *PepsiCo, Inc. v. Continental*

Casualty Co., 640 F. Supp. 656, 660 (S.D.N.Y. 1986) (same); *Wojtunik v. Kealy*, 2011 WL 1211529, at *1, 8 (D. Ariz. Mar. 31, 2011) (same); *U.S. Bank Nat'l Ass'n v. Indian Harbor Ins. Co.*, 68 F. Supp. 3d 1044, 1050 (D. Minn. 2014) (same); *AT&T v. Clarendon Am. Ins. Co.*, 2008 WL 2583007, at *2 (Del. Super. Feb. 11, 2008) (case settled in the middle of trial). Moreover, Judge Jurden in *AT&T* rejected Murdock's argument. In *AT&T*, the settlement occurred mid-trial, and therefore the jury was dismissed before it reached a verdict. *Id*. Judge Jurden agreed the Exclusion did not apply under those circumstances and held that the insurer was not entitled to litigate fraud in the follow-on coverage litigation. *Id*. at *7. However, the Court also indicated that under facts presented here, the Exclusion could apply, stating "[t]rial culminating in a verdict in the underlying lawsuit … would be an "adjudication," under the Exclusion. *Id.* at *7.

Lastly, Murdock claims that, because the settlement agreement states he did not admit liability, RSUI cannot argue Murdock committed fraud. Ans. Br. at 46. Murdock appears to believe that his self-serving (and near-universal) settlement recitation denying liability somehow overrides the factual findings of Vice Chancellor Laster. As then-Vice Chancellor Strine stated, this argument converts the *Chancery Decision* into a species of property that Murdock believes he can buy. *IBP*, 793 A.2d at 408-409. Murdock waived the right to challenge or deny the Court of Chancery's findings when he chose to settle and forego appeal.

D. The Profit/Fraud Exclusion Applies Equally to *San Antonio*.

Murdock's only substantive argument with respect to how the Exclusion applies to *San Antonio* is that there was no adjudication in *San Antonio*, therefore the Exclusion cannot apply. (Ans. Br. at 40). Murdock offers no counter to RSUI's argument that *San Antonio* arose directly out of the *Chancery Decision* findings, and that both *San Antonio* plaintiffs and defendants acknowledged it was framed as follow-on collateral estoppel litigation. (Op. Br. at 12, 48). Murdock focuses instead on the phrase "in the underlying action" contained in the Exclusion to imply that the adjudication must arise in each and every action for which coverage is claimed.

This is a strained and unnatural reading of the Exclusion and Murdock offers no authority supporting the interpretation. The broad scope of the exclusion is for any Loss "based upon, arising out of, or attributable to … any deliberately … fraudulent act … if established by a final and non-appealable adjudication adverse to the Insured in the underlying action." (A0453). The *San Antonio* settlement clearly was based upon, arose out of, and was attributable to the findings of fraud adjudicated in the *Stockholder* Action. The phrase "in the underlying action" was clearly not intended to limit the Exclusion's application from follow-on collateral estoppel litigation for the same conduct. The purpose of the exclusion is clearly to exclude coverage for fraud <u>actually committed</u>, but preserve defense coverage for mere <u>allegations</u> of fraud. In fact, the plain purpose of the "underlying action" language is to acknowledge that an insurer cannot attempt to adjudicate the fraud in a follow-on coverage litigation, as the *AT&T* court held. 2008 WL 2583007, at *7.

If the Court were to follow Murdock's proffered interpretation, it would reward fraudulent actors for settling follow-on collateral estoppel litigation without insurer consent, the motive for which clearly was to create a predicate for insurance coverage and avoid the Profit/Fraud Exclusion. It would provide fraudulent actors yet another avenue to reward themselves for their fraud.

IV. THE ALLOCATION PROVISION SHOULD BE ENFORCED AS WRITTEN.

Most of the arguments presented by Murdock regarding operation of the policies' allocation provision are the flip side of arguments RSUI raised in its Opening Brief. (*Compare* Op. Br. at 50-57 *with* Ans. Br. at 51-59). Accordingly, RSUI respectfully refers this Court to its Opening Brief in response to most of Murdock's arguments. Overall, Murdock ignores the language Dole actually agreed to in favor of the "Larger Settlement Rule" – a judicially-created insurance rule that contradicts the plain language of the AXIS Policy.

Murdock primarily offers the same conclusion that the Superior Court reached, stating that the Allocation Provision requires nothing more than the parties to use their "best efforts", and if the parties cannot agree on allocation, the Provision does not mandate a particular method of allocation. (Ans. Br. at 51-55). This argument violates a basic tenet of contract law: contracts are not to be interpreted in a way that renders provisions illusory or meaningless. *In re Verizon Ins. Coverage Appeals*, 222 A.3d 566, 575 (Del. 2019). As explained in RSUI's Opening Brief, such an interpretation nullifies the Allocation Provision's selection of the "relative exposure rule" by requiring the parties to reach agreement on allocation, otherwise the Provision is completely ineffective. (Op. Br. at 54). This conclusion would nullify the Provision, because one party can unilaterally decide not to negotiate allocation, causing the Provision to not apply.

Murdock's authority for this argument is a series of cases he claims use the same "best efforts" language contained in the Allocation Provision. (Ans. Br. at 53). Review of these cases show this is incorrect, because the policies used substantially different allocation language. In *Safeway Stores, Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, the allocation provision read:

> With respect to the settlement of any claim made against the Company and the Insureds, the Company and the Insureds and the Insurer agree to use their best efforts to determine a fair and proper allocation of the settlement amount as between the Company and the Insureds.

Safeway Stores, Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh, Pa., 64 F.3d 1282, 1289, n.15 (9th Cir. 1995). The language was essentially the same in Murdock's other two case cites. *See Owens Corning v. Natl. Union Fire Ins. Co. of Pittsburgh, PA*, 257 F.3d 484, 492 (6th Cir. 2001); *Silicon Storage Tech., Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh*, 2015 WL 7293767, at *6 (N.D. Cal. Nov. 19, 2015). In fact, the *Owens Corning* court expressly noted that different legal principles of calculating allocation exist, but the language at issue did not designate which principle applied. 257 F.3d at 492.

Here, the Allocation Provision expressly invokes the "relative exposure rule" when it <u>requires</u> the parties to "take into account the relative legal and financial exposures of the Insureds in connection with the defense and/or settlement of the Claim." (A0440-A0441). Murdock ignores this language entirely, and does not address RSUI's case law discussing the application of the relative exposure rule.

(Op. Br. at 53). Murdock offers this Court no compelling reason why they should be permitted to apply a judicially-created allocation rule in place of the rule the parties contracted for.

Lastly, Murdock argues that RSUI wrongly “resurrects” consent issues it withdrew when RSUI discussed its lack of consent to the settlements in the context of allocation. (Ans. Br. at 54-55). Murdock misunderstands the point. RSUI noted that even the Superior Court recognized that RSUI did not have an opportunity to attempt to negotiate allocation and consent to settlement. (Op. Br. at 54). Given these undisputed facts, it would be inconsistent and inequitable to deprive RSUI of its contractual right to seek allocation under the relative exposure rule simply because the parties did not reach an agreement. This does not “resurrect” RSUI’s challenge to whether Murdock breached the policies’ consent clause.

RSUI'S ARGUMENT ANSWERING CROSS-APPEAL

I. THE SUPERIOR COURT CORRECTLY GRANTED SUMMARY JUDGMENT FOR RSUI ON BAD FAITH.

A. Question Presented:

Did the Superior Court correctly determine that no genuine dispute of material fact existed that RSUI did not breach the implied covenant of good faith and fair dealing?

RSUI preserved its arguments concerning bad faith in its briefs filed in support of its second summary judgment motion. (A2162-69; A2484-88).

B. Scope of Review:

Whether the Superior Court properly granted summary judgment is reviewed *de novo*. *Enrique v. State Farm Mt. Auto. Ins. Co.*, 142 A.3d 506, 511 (Del. 2016).

C. Merits of the Argument:

The Superior Court correctly granted summary judgment in RSUI's favor, finding that there was no genuine dispute of material fact that RSUI had reasonable grounds for denying coverage. (Ans. Br., Ex. 1 at 11-12). The Superior Court correctly concluded that several of RSUI's grounds for refusal were reasonable, including its application of the Profit/Fraud Exclusion, California Insurance Code Section 533, and Murdock's alleged failure to comply with the policies' consent and cooperation provisions. (*Id.*). The Superior Court rightly acknowledged the unique and novel insurance issues presented in this case, and concluded as a matter of law that RSUI had reasonable grounds to assert its coverage positions. (*Id.*).

1. Murdock Ignores the Appropriate Legal Standards and Focuses on the Wrong Facts.

Murdock's challenge on appeal focuses almost entirely on the subjective testimony of the RSUI claims handler, Robert Hennelly, and wholly ignores the Superior Court's conclusions as to the objective reasonableness of RSUI's coverage positions. (Ans. Br. at 63-66). Murdock also mostly ignores the principles of law that govern a bad faith claim under Delaware law.

The claimant bears the burden of proof on its bad faith claim. *Bennett v. USAA Cas. Ins. Co.*, 158 A.3d 877, ¶ 13 (Del. 2017). To maintain a claim for bad faith, the claimant must show that the insurer's coverage position <u>clearly lacks reasonable justification</u>. *Enrique*, 142 A.3d at 511 (emphasis added). Reasonable conduct is at the core of whether there has been a breach of the implied covenant of good faith and fair dealing. *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 446–47 (Del. 2005). "The ultimate question is whether at the time the insurer denied liability, there existed a set of facts or circumstances known to the insurer which created a bona fide dispute and therefore a meritorious defense to the insurer's liability." *Davidson v. Travelers Home & Marine Ins. Co.*, 2011 WL 7063521, at *2 (Del. Super. Ct.

Dec. 30, 2011) (emphasis added), *citing Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 369 (Del. Super. Ct. 1982).[5]

Where the issue to be tried is one of disputed fact, the question of bad faith refusal to pay should not be submitted to the jury unless it appears that the insurer did not have reasonable grounds for relying upon its defense to liability. *Casson*, 455 A.2d at 369. Absent a finding that no reasonable grounds for denial existed, the insured fails to establish an actionable claim and is susceptible to summary resolution by the Court. *Baker v. State Farm Mut. Auto. Ins. Co.*, 1993 WL 258920, at *2 (Del. Super. Ct. June 30, 1993), *aff'd*, 640 A.2d 655 (Del. 1994).

Murdock addresses none of these standards in his Answering Brief and instead attempts to raise the specter of purportedly disputed facts as to what Mr. Hennelly did and did not do in order to revive the bad faith claim. Accordingly, Murdock ignores the substantial role Delaware courts play as the gatekeeper of bad faith claims before they reach a jury, and the heavy burden of proof he was required to overcome to defeat summary judgment. Murdock was required to raise more than a dispute of one or two specific facts in order to defeat summary judgment. Murdock was required to establish that RSUI's determination not to pay "clearly lacked reasonable justification." *Enrique*, 142 A.3d at 511. Absent proving RSUI had no

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[5] RSUI noted in its motion before the Superior Court that California standards for bad faith are similar to Delaware standards. (A2162).

reasonable grounds to take the positions it did, the bad faith claim does not go to a jury and summary judgment is appropriate. *Casson*, 455 A.2d at 369.

It is in the context of those standards that the Superior Court granted summary judgment. In the Court's role as gatekeeper for the bad faith claims, it correctly determined that RSUI's coverage positions were objectively reasonable, even if they ultimately were determined to be incorrect. (Ans. Br., Ex. 1 at 10-12). To be clear, the Superior Court only needed to find that one of RSUI's coverage positions was reasonable. It found RSUI had at least four reasonable bases to refuse payment. Notably, Murdock offered no evidence or argument before the Superior Court or in this appeal attempting to demonstrate why each of RSUI's coverage positions "clearly lacked reasonable justification." Murdock's argument essentially boils down to the following: at the end of the day Murdock prevailed on all coverage issues, meaning RSUI's positions were ultimately wrong, therefore RSUI's positions were unreasonable at the time they were taken. This is not the standard and turns the concept of bad faith on its head and instead imposes strict liability on insurers for taking coverage positions that eventually turn out to be incorrect.

Murdock's only other argument is to claim, without support, that RSUI's coverage defenses are "after-the-fact" justifications. (Ans. Br. at 63-64). This is a baseless assertion and Murdock offers no support in the record or anywhere else supporting their characterizations of RSUI's positions as "after-the-fact."

Murdock cannot legitimately dispute the complexity of the issues raised in this coverage litigation and that RSUI had a reasonable basis to assert coverage was not available for the *Stockholder* and *San Antonio* Settlements. As discussed above, RSUI's decision to apply California law was more than reasonable, it was correct. Even so, a subsequent determination that Delaware law applies does not retroactively render RSUI's position unreasonable. *See Neilson v. Mut. Life Ins. Co.*, 1997 WL 447910, at *4 (D. Del. June 20, 1997). RSUI's extensive analysis of Delaware law demonstrates that insurability of fraud in Delaware is at least questionable. Furthermore, a finding of fraud after trial is extremely rare. Even rarer is a situation where an insured settles after a post-trial opinion finding fraud for 100% of the award and without insurer consent. Notwithstanding the uniqueness of these circumstances, Murdock argues that RSUI committed bad faith.

What Murdock actually seeks is for the bad faith claims to go to a jury and bypass the trial court as gatekeeper. The reason Murdock asks the Court to rule this way is clear – lay jurors may have difficulty understanding the complexity of insurance disputes and fail to appreciate whether an insurer's stated position is objectively "reasonable." Delaware law prevents bad faith cases from going before a jury unless a heavy burden of proof is met for exactly this reason.

2. Murdock Wrongly Implies that the Superior Court Was Only Entitled to Review Mr. Hennelly's Testimony.

Murdock impliedly asserts that the only available evidence before the Superior Court was Mr. Hennelly's testimony, and therefore the Court could not consider other evidence or authority establishing the reasonableness of RSUI's positions. (Ans. Br. at 64-66). That is incorrect for the reasons stated above. It also emphasizes the confusion that could be raised by bringing these issues directly before a jury without the trial court acting as objective gatekeeper.

Murdock asks the Court for the opportunity to confuse a jury with what Mr. Hennelly supposedly did or did not do and then ask the jury to conclude RSUI committed bad faith solely on this basis. This ignores that RSUI's asserted coverage positions were analyzed and reached in consultation with outside counsel, which is of course permissible and by no means evidences any bad faith. Mr. Hennelly did not testify to advice he received from counsel, as is his and RSUI's right. In the proceedings below, Murdock argued that RSUI must waive the attorney-client privilege and assert an "advice-of-counsel" defense in order to rely on the objective reasonableness of their coverage defenses. (A2423-24). That is not the standard in Delaware and Murdock cites no authority for that proposition.

A lay jury is not equipped to evaluate whether an insurer's legal defenses to coverage are objectively reasonable or "clearly lack reasonable justification," and is equally unequipped to understand the nuances of attorney consultation and the nature of privilege. Murdock's arguments essentially assert that these issues should have been put to a jury instead of the trial court. This is incorrect under Delaware law.

II. THE SUPERIOR COURT CORRECTLY DETERMINED THAT THE COLLATERAL ESTOPPEL DOCTRINE APPLIES TO THE *CHANCERY DECISION*.

A. Question Presented:

Did the Superior Court correctly determine that the Memorandum Opinion had collateral estoppel effect, which fully adjudicated Dole's conduct in the *Stockholder* Action?

RSUI preserved the issue in its first summary judgment motion and briefs filed in support. (A0977-80; A1289-91).

B. Scope of Review:

Whether the Superior Court properly applied collateral estoppel is reviewed *de novo*. *Crossan v. Travelers Ins. Co.*, 128 A.3d 991 (Del. 2015).

C. Merits of the Argument:

Murdock's argument concerning collateral estoppel attempts to shift focus from the facts Vice Chancellor Laster found in the *Chancery Decision* to the causes of action at issue there and in this coverage litigation. Murdock's argument essentially asks this Court to require the facts in *Stockholder* to be relitigated, which is the exact scenario the doctrine exists to prevent.

1. The Elements of Collateral Estoppel Are Met.

The Superior Court gave proper deference to the *Chancery Decision* with respect to Murdock's conduct. Collateral estoppel "provides repose by preventing the relitigation of an issue previously decided." *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1216 (Del. 1991); *Betts v. Townsends, Inc.*, 765 A.2d 531, 534 (Del. 2000); *M.G. Bancorp., Inc. v. Le Beau*, 737 A.2d 513, 520 (Del. 1999). This bar applies when:

> (1) The issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Betts, 765 A.2d at 535.

First, contrary to Murdock's argument, the issues presented as relevant to this coverage dispute <u>are</u> identical. Vice Chancellor Laster found that Murdock and Carter committed fraud. RSUI does not offer Murdock's and Carter's fraud to collaterally prove some other conduct. RSUI offered the findings of the *Chancery Decision* to establish that Murdock and Carter committed fraud. Murdock treats this "identical" requirement as if it means the cases need to be exactly alike in every fashion. Such a strict interpretation of the "identical" requirement would essentially mean that collateral estoppel almost never applies, because it is almost always a different party with different circumstances that is attempting to assert issue preclusion against a party that has already had the opportunity to litigate the issue.

Second, the *Stockholder* Action was finally adjudicated on the merits for the reasons discussed in *IBP/Tyson* and at length above. Furthermore, "for purposes of issue preclusion (as distinguished from merger and bar), 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." Restatement (Second) of Judgments §13 (1982) (emphasis added). The decision need not have been appealable. Instead, "'[f]inality' in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." *Aiello v. Wilmington*, 470 F. Supp. 414, 419-20 (D. Del. 1979).

Third, Murdock was a party to the *Stockholder* Action and Dole was a party to the *Appraisal* Action, which was consolidated with *Stockholder.* Even if Dole had not been a party, Dole and Murdock, its 100% owner, would still be in privity. "[P]rivity practically is assumed for sole-owner corporations." *Isr. Discount Bank v. Higgins*, 2015 WL 5122201, at *10 (Del. Ch. Aug. 31, 2015) (*citing Orange Bowl Corp. v. Jones*, 1986 WL 13095, at *3 (Del. Super. Ct. Oct. 16, 1986)).

Fourth, there is no credible dispute that Murdock and Carter had the opportunity to fully present their case with respect to *Stockholder*, and they are therefore bound by the factual findings. *Michell v. Cook,* 2001 WL 1729136, at *2 (Del. Super. Dec. 10, 2001) (citing *Chrysler Corp., v. New Castle County,* 464 A.2d 75, 79 (Del. Super. 1983)).

Murdock applies the wrong standard by applying *res judicata* principles, i.e., whether limited legal conclusions are similar throughout the *Stockholder* Action, the *San Antonio* Action, and this litigation. Instead, the doctrine of collateral estoppel provides that:

> once an ***issue*** is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.

Hercules Inc. v. AIU Ins. Co., 783 A.2d 1275, 1278 (Del. 2000) (emphasis added). The Superior Court limited its application of collateral estoppel to the <u>factual issues</u> addressed in the *Chancery Decision*. (Op. Br., Ex. B at 15).[6]

2. The Chancery Decision Applies to the San Antonio Action.

Murdock argues that the "issues" presented in *San Antonio* are different than *Stockholder,* therefore collateral estoppel cannot apply. (Ans. Br. at 74-76). In support, Murdock refers to the causes of action in each complaint, arguing that the causes of action rely on different elements. Murdock again mistakes collateral estoppel for *res judicata* and ignores the fact that, even though different causes of action were plead, both the *Stockholder* Action and the *San Antonio* Action allege

[6] Murdock also claims that the Superior Court's Decision is "impermissibly vague." (Ans. Br. at 73-74). There is nothing vague about the Superior Court's determination that Murdock and Dole were collaterally estopped from relitigating the <u>facts</u> found in the *Decision*.

the same basic facts that Dole and Murdock artificially depressed Dole's stock price with respect to the going-private transaction. (*See* A0387-88; A1131, ¶ 1).

Dole then attempts to argue that, for collateral estoppel to apply, the *Decision* needed to address each misleading statement found in the *San Antonio* Action. As noted, once an ***issue*** is determined, that determination is "conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Hercules*, 783 A.2d at 1278. The *Decision* determined that Carter made intentionally false disclosures on Dole's behalf, in concert with Murdock, to drive down the share price before the going-private transaction, (A0388), and determined that these false disclosures constituted fraud (A0420). These same false disclosures were raised in the *San Antonio* Action as entire passages of the *Decision* were quoted and referenced. (A1148). That these disclosures amounted to fraud is conclusive as to both actions, based on the reasoning in *Hercules*.

Further, RSUI's complaint is necessarily based on the *Decision's* findings of fact. Namely, does the finding of fraud against Murdock and Carter preclude coverage under the RSUI Policy? (A0379-82, ¶¶ 66-74). The fraud underlying the going-private transaction is the through-line among all the cases. The facts are the same, even if the causes of action are not, which is sufficient to apply collateral estoppel. *Hercules*, 783 A.2d at 1278.

CONCLUSION

For the reasons stated above, RSUI prays that its Appeal be granted and the Cross-Appeal be denied.

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