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IN THE SUPREME COURT OF THE STATE OF DELAWARE

U.S. SPECIALTY INSURANCE COMPANY, *Defendant Below, Appellant,* v. PFIZER INC., *Plaintiff Below, Appellee.*	No. 352, 2020 On Appeal from the Superior Court of the State of Delaware, C.A. No. N18C-01-310 PRW (CCLD) (Wallace, J.)

REPLY BRIEF OF APPELLANT U.S. SPECIALTY INSURANCE COMPANY

Of Counsel:

Douglas M. Mangel
Joseph A. Bailey III
Gabriela Richeimer
CLYDE & CO US LLP
1775 Pennsylvania Avenue NW
Suite 400
Washington, DC 20006
(202) 747-5100

Carmella P. Keener (#2810)
COOCH AND TAYLOR, P.A.
1007 N. Orange Street, Suite 1120
P.O. Box 1680
Wilmington, DE 19899-1680
ckeener@coochtaylor.com
(302) 984-3816

Attorneys for Defendant-Appellant U.S. Specialty Insurance Company

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INTRODUCTION[1]

The key issue on appeal is whether policy provisions like the Prior Notice and Specific Litigation Exclusions must be applied according to their plain language, as required under well-settled rules of policy interpretation, or whether Delaware law instead permits the application of a "fundamentally identical" standard that materially narrows their reach. If the Court applies the exclusions as written, then it should reverse the ruling below because the *Morabito* action shares multiple factual connections with the *Garber* action and the related circumstances that were reported by Pfizer under its 2002-2003 insurance program. If the Court upholds the application of a "fundamentally identical" standard, then a conflict of law exists and the Court must consider whether Delaware law applies to every D&O policy issued to a Delaware corporation or to all such policies containing an ADR provision requiring consideration of Delaware law, even if all other choice of law factors weigh strongly in favor of applying another state's laws.

Pfizer argues that Delaware law requires the application of a "fundamentally identical" standard to all "related claim" exclusions containing the words "related" or "interrelated," without regard to their particular language. While lower Delaware courts have made this determination in several decisions, that result is contrary to

[1] Capitalized terms are defined in U.S. Specialty's Opening Brief ("Br."). Pfizer's Answering Brief is referenced as "Pfizer Br."

well-settled principles of policy interpretation in Delaware and the laws of every other state to have considered the issue. The exclusions are not limited to claims that are "fundamentally identical" to prior claims or notices, and instead apply broadly to any claims that arise out of or in any way relate, ***even in part***, to any wrongful acts or circumstances noticed to any prior insurer or that are related to *Garber*. Because Pfizer cannot contest the breadth of these provisions, it instead asserts that a faithful application of the policy language would cause the exclusions to bar coverage in ***all*** cases. It would not. The exclusions can be applied as written here without vitiating coverage for a variety of other potential claims.

Pfizer's additional efforts to escape the exclusions similarly lack merit. For instance, the original complaints in *Garber* and *Jewell*, not the later-filed *Garber* Consolidated Complaint, were the subject of Pfizer's notice under the earlier 2002-2003 Program, and these original complaints expressly alleged a failure to disclose the cardiovascular risks associated with Celebrex. *Morabito* alleges related failures to disclose the same risks. Moreover, Pfizer's focus on the additional allegations in *Morabito* ignores that the exclusions apply based on commonalities, and that additional key commonalities exist between *Morabito* and *Garber*, including related efforts beginning around the same time to misrepresent the safety of the COX-2 inhibitor drugs in order to induce their purchase over cheaper alternatives, misrepresentations in the same CLASS study, and related subsequent statements

building upon those misrepresentations. Pfizer's suggestion that U.S. Specialty's claims adjuster admitted that there is no overlap between *Morabito* and the earlier complaints is wrong and misrepresents the record. Finally, the extent to which other insurers provided coverage here—or leveraged their defenses for discounts that Pfizer refused to disclose—is irrelevant. The plain language of the Exclusions bars coverage for *Morabito* and applicable law requires that language to be applied as written.

To the extent a choice of law analysis is required, Pfizer's attempts to defend the Superior Court's application of Delaware law lack merit. Pfizer urges this Court to weigh a single contact, Pfizer's state of incorporation, as overriding every other contact that is relevant to resolving choice of law determinations pursuant to this Court's decision in *Certain Underwriters at Lloyds, London v. Chemtura Corporation*, 160 A.3d 457, 466 (Del. 2017). Here, however, just as in *Chemtura*, Pfizer is a "New York-based business seeking nationwide coverage, the contracts were obtained through a New York broker, and [the insured's] New York headquarters was listed on the policies." *Id*. Accordingly, just as in *Chemtura*, this Court should reverse the Superior Court and apply New York law to resolve any conflict.

ARGUMENT

I. THE PRIOR NOTICE AND SPECIFIC LITIGATION EXCLUSIONS BAR COVERAGE FOR THE *MORABITO* ACTION.

Pfizer's claim for coverage fails because the Prior Notice and Specific Litigation Exclusions bar coverage for *Morabito*. Pfizer's arguments to the contrary ignore the plain, broad language of the Exclusions, established rules requiring the application of that language as written, and the multiple factual connections between *Morabito* and the prior noticed circumstances and related acts alleged in *Garber*.

A. The Exclusions Apply to Claims Sharing A Common Factual Nexus With Prior Noticed Circumstances or *Garber*

U.S. Specialty's Opening Brief discussed the multiple respects in which the Exclusions' plain language is unambiguously broad: the Prior Notice Exclusion applies to any claim "***where all or part*** of such claim is, directly or indirectly, based on, attributable to, ***arising out of, resulting from, or in any matter relating to*** wrongful acts ***or any facts, circumstances or situations*** of which notice of claim or occurrence which could give rise to a claim has been given [under any prior policies]," and the Specific Litigation Exclusion applies to any "any Claim(s) alleging, ***arising out of***, based upon, attributable to or ***in any way related directly or indirectly, in part or in whole,*** to a … ***related Wrongful Act*** alleged in [*Garber*], regardless of whether or not such Claim involved the same or different Insureds, …

legal causes of action, … claimants, … venue, or … forum." A179 and 144 (emphasis added); Br.22-27.

Pfizer does not dispute the broad triggering language used in these provisions and in particular does not assert any ambiguity in the language stating that the Exclusions bar coverage for claims that fall even "in part" within their scope. A179; A144. This language means exactly what it says. *See RSUI Indem. Co. v. WorldWide Wagering, Inc.*, 2017 WL 3023748, at *7 (N.D. Ill. Jul. 17, 2017) (under Delaware law, this language means that "the claims … only need to arise out of the [subject of the exclusion] in part"), *reh'g denied*, 2017 WL 4512922 (N.D. Ill. Oct. 10, 2017).

Pfizer similarly does not deny that the words "any," "related," and "arising out of" have the same, broad meaning that courts have repeatedly ascribed to those terms. "Any" means "any." *See, e.g., Weaver v. Axis Surplus Ins. Co.*, 2014 WL 5500667, at *12 (E.D.N.Y. Oct. 30, 2014), *aff'd*, 639 F. App'x 764 (2d Cir. 2016); *Pereira v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 525 F. Supp. 2d 370, 378 n.16 (S.D.N.Y. 2007), *aff'd sub nom. Pereira v. Gulf Ins. Co.*, 330 F. App'x 5 (2d Cir. 2009). Pfizer does not deny that "related" and "relating" include both logical and causal connections, *see, e.g., Fed. Ins. Co. v. DBSI, Inc. (In re DBSI, Inc.)*, 2011 WL 3022177, at *4 (Bankr. D. Del. Jul. 22, 2011), or that "arising out of" means "'originating from,' 'having its origin in,' 'growing out of,' or 'flowing from[,' or]

'incident to, or having connection with.'" *Goggin v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2018 WL 6266195, at *4 (Del. Super. Ct. Nov. 30, 2018) (quoting *Pac. Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1256 n.42 (Del. 2008)). Nor does Pfizer deny that because the Exclusions use the word "or" to separate the multiple factual relationships, the Exclusions are satisfied where any of those relationships are present. *See Nomura Holding Am., Inc. v. Fed. Ins. Co.*, 45 F. Supp. 3d 354, 363-64 (S.D.N.Y. 2014), *aff'd*, 629 F. App'x 38 (2d Cir. 2015).

Instead of contesting the breadth of this language, Pfizer embraces it and asserts that it would cause the Exclusions to bar coverage for all suits based on the mere mention of Pfizer and/or Celebrex. Pfizer Br.23-24. This is a strawperson. U.S. Specialty is ***not*** asserting that the Exclusions can apply merely because of such superficial commonalities. U.S. Specialty instead has noted that the Exclusions apply here because of multiple, substantive commonalities: *Morabito* at least in part arises out of or relates to the same or related failures to disclose the cardiovascular risks of Pfizer and Pharmacia's COX-2 inhibitors as the original *Jewell* and *Garber* complaints, as well the CLASS study, some of the same statements regarding that study, and the same or related efforts to spur the sale of these drugs, beginning around the same time period, by representing that they were not subject to the same risks as less costly alternative NSAIDs. *See* Br.31-35; § II.C, *infra*. Applying the Exclusions on the basis of such commonalities does not render coverage illusory.

The Policy must be construed under the facts of this case, not under hypothetical situations involving weaker factual connections. *See Morgan Stanley Grp. v. New England Ins. Co.*, 225 F.3d 270, 278 (2d Cir. 2000); *cf. Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 940 (Del. Ch. 2013) (concluding it would be "imprudent and inappropriate" to address "purely hypothetical situations").

Pfizer also asserts that a "different lens" must be used to interpret exclusions so they are construed narrowly and in favor of an insured's expectations of coverage. Pfizer Br.24. Exclusions, however, must still be applied according to their plain language. *Elegant Slumming, Inc. v. NGM Ins. Co.*, 2011 WL 6000764, at *6 (Del. Super. Ct. Nov. 30, 2011), *aff'd*, 59 A.3d 928 (Del. 2013); *Behrens v. City of New York*, 720 N.Y.S.2d 64, 65 (App. Div. 2001). Moreover, this Court has concluded that "[an insurance] policy will be read in accordance with the reasonable expectations of the insured '***so far as its language will permit***.'" *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 927 (Del. 1982) (emphasis added) (quoting *State Farm Mut. Auto. Ins. Co. v. Johnson*, 320 A.2d 345, 347 (Del. 1974)). "[T]he [reasonable expectations] doctrine is not a rule granting substantive rights to an insured when there is no doubt as to the meaning of policy language." *Id.*; *see also Century Sur. Co. v. Franchise Contractors, LLC*, 2016 WL 1030134, at *12 (S.D.N.Y. Mar. 10, 2016).

B. The "Fundamentally Identical" Standard Is Erroneous

Instead of applying the Exclusions as written, Pfizer urges this Court to apply a "fundamentally identical" standard. Pfizer Br.24-25. The Court should reject such a standard because it is incompatible with the plain policy language, contravenes established rules of construction, conflicts with the results reached by every other state that has considered the issue, and frustrates the purpose of the Exclusions.

1. The Standard Conflicts With The Exclusions' Plain Language And Well-Settled Rules Of Policy Interpretation

Pfizer describes the "fundamentally identical" standard as inquiring whether "differences aside, at their core, do the two claims concern the '***same*** subject' or Wrongful Acts." Pfizer Br.3, 27 (emphasis added). Pfizer tellingly admits elsewhere in its brief that the relevant question is broader—whether the acts alleged in *Garber* and *Morabito* are "***related***." Pfizer Br.22 (emphasis added). That formulation is still not faithful to the plain language, which more broadly applies to claims that even in part arise out of or in any way relate to any Wrongful Acts or circumstances noticed to any prior insurer or to related Wrongful Acts with *Garber*. A179; A144. The Exclusions unambiguously are not limited to claims that "at their core … concern the '***same*** subject' or Wrongful Acts."

The "fundamentally identical" standard is not rooted in ***any*** policy's language, and instead owes its origins to dicta lifted out of context from a prior decision, which Delaware lower courts later applied as a "one size fits all" replacement for all policy

provisions requiring a "relatedness" analysis. That prior decision, *United Westlabs*, held that the "fundamentally identical" nature of certain acts was ***sufficient*** to satisfy a similar provision. *United Westlabs, Inc. v. Greenwich Ins. Co.*, 2011 WL 2623932, at *10-11 (Del. Super. Ct. Jun. 13, 2011). Because the court did not hold that such a relationship is ***necessary*** for such provisions to apply, the Superior Court erred in relying upon *United Westlabs* as support for its decision, as Pfizer implicitly concedes with its "*cf.*" cite to that case. Ex. C at 24, n.82; Pfizer Br.24.

As U.S. Specialty previously noted and Pfizer does not dispute in response, the phrase "fundamentally identical" was subsequently taken out of context from *United Westlabs* and used as dicta in *Sempris*, and then used to limit the plain, broad language of the provision at issue in *Medical Depot*. Br.28 (discussing *RSUI Indem. Co. v. Sempris, LLC*, 2014 WL 4407717 (Del. Super. Ct. Sept. 3, 2014) and *Med. Depot, Inc. v. RSUI Indem. Co.*, 2016 WL 5539879 (Del. Super. Ct. Sept. 29, 2016)). In a subsequent and otherwise distinguishable decision, *Providence* (Pfizer Br.25) relied upon *United Westlabs* and *Medical Depot* in concluding that "related" really means "fundamentally identical." *Providence Serv. Corp. v. Ill. Union Ins. Co.*, 2019 WL 3854261, at *2 (Del. Super. Ct. July 9, 2019).[2] And most recently, the Superior Court relied upon the decision below to justify application of the

[2] While *Providence* also held that the insurer's rationale for applying the exclusion in that case would have rendered coverage illusory (Pfizer Br.25; *Providence*, 2019 WL 3854261, at *4), the same is not true here. *See* §I.A, *supra*.

"fundamentally identical" standard to limit the reach of another broad policy provision. *See Northrop Grumman Innovation Sys., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 347015, at *8, *11-12 (Del. Super. Ct. Feb. 2, 2021) (declaring that the "'fundamentally identical' test is settled law on relatedness" in Delaware).

The "fundamentally identical" standard has been reflexively applied by lower courts in this state, without regard to the policy language to which it is applied, and is incompatible with the well-established rule of construction in Delaware, New York, and elsewhere that plain, broad language in insurance policies must be applied as written. *In re Solera Ins. Coverage Appeals*, 240 A.3d 1121, 1132 (Del. 2020); *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 69 (Del. 2011); *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 291 (Del. 2001); *Chen v. Ins. Co. of the State of Pa.*, -- N.E.3d. --, 2020 WL 6875983, at *2 (N.Y. Nov. 24, 2020).

Courts that have faithfully applied these principles to similar policy provisions, including Delaware courts, have thus rejected policyholder attempts to replace the broad language of those provisions with the equivalent of a "fundamentally identical" standard, and instead have applied those provisions as written. For instance, in *AT&T*, the court held that the exclusions applied to claims sharing a common factual nexus, even if they did not "involve precisely the same parties, legal theories, 'Wrongful Act[s],' or requests for relief." *AT&T Corp. v. Clarendon Am. Ins. Co.*, 2006 WL 1382268, at *15 (Del. Super. Ct. 2006), *rev'd on*

other grounds sub nom. AT & T Corp. v. Faraday Capital Ltd., 918 A.2d 1104 (Del. 2007). Other courts have reached the same conclusion under similar broad provisions. *See, e.g.*, Br.29 at n.4 (citing cases). *TIAA-CREF*, which Pfizer cites for the correct proposition that "[t]he greater the similarities and relatedness between cases, the more likely subsequent claims are to relate back to an initial claim" (Pfizer Br.32), also did not apply a "fundamentally identical" standard, and instead reasoned that "***[g]iven [the policy] language***, whether a claim relates back to an initial claim turns on the ***similarity and relatedness*** of the facts between the initial case and each subsequent case." *TIAA-CREF Individual & Institutional Servs., LLC v. Ill. Nat'l Ins. Co.*, 2016 WL 6534271, at *13 (Del. Super. Ct. Oct. 20, 2016) (emphasis added).

2. The Standard Conflicts With New York Law

If the Court holds that Delaware law requires application of the "fundamentally identical" standard without regard to the plain policy language, then a conflict of law exists because New York law requires a different result.

Pfizer asserts that under New York law, a "sufficient factual nexus" test applies in lieu of the particular language used in a "related claim" provision. Pfizer Br.29-30. It does not. While some federal district courts have applied such a test under New York law, the Second Circuit Court of Appeals has admonished that a "sufficient factual nexus" test cannot apply as a substitute for a policy's actual language. *Nomura*, 629 F. App'x at 39-40 (criticizing trial court's use of a "factual

nexus" test instead of applying the plain language of the provision at issue). Under New York law, when a policy provision applies to claims "arising from … the same or related facts [or] circumstances," the "relevant inquiry" thus is whether the claims "aris[e] from … the same or related facts [or] circumstances." *Id*. Moreover, even when certain New York courts have applied a "sufficient factual nexus" test, that test is satisfied where "logically connected facts and circumstances demonstrate a factual nexus" between claims. *Quanta Lines Ins. Co. v. Investors Capital Corp.*, 2009 WL 4884096, at *14 (S.D.N.Y. Dec. 17, 2009) (citation omitted), *aff'd sub nom. Quanta Specialty Lines Ins. Co. v. Investors Capital Corp.*, 403 F. App'x 530 (2d Cir. 2010). Even that standard is far more expansive than the "fundamentally identical" standard and is met here in any event.

Pfizer's reliance on the extent to which some New York decisions have applied similar policy provisions in the presence of a "complete overlap" of allegations or identical facts or acts (Pfizer Br.31) again confuses whether such a close factual relationship is necessary or merely sufficient. New York courts repeatedly have held that the presence of additional allegations in a subsequent claim, or the presence of differences between otherwise related claims, does not defeat the application of similar policy provisions to bar coverage. *See*, *e.g.*, *Pereira*, 525 F. Supp. 2d at 378 n.16 (because the exclusion applied to claims that "in any way" involved facts alleged in prior litigation, "[i]t is therefore not necessary for [the

insurer] to demonstrate a complete overlap between the claims and the alleged facts in order to preclude coverage"); *Zunenshine v. Exec. Risk Indem., Inc.*, 1998 WL 483475, at *5 (S.D.N.Y. Aug. 17, 1998) (rejecting policyholder's argument that "a claim would be excluded only if it were based on an identical lawsuit," reasoning that "[n]othing in the Policy requires that a claim involve precisely the same parties, legal theories, [w]rongful [a]cts"), *aff'd*, 182 F.3d 902 (2d Cir. 1999); *Weaver*, 2014 WL 5500667, at *12 ("it is 'immaterial' that one claim may involve additional facts or allegations because all that is required is 'any' common fact [or] circumstance").

3. The Standard Conflicts With The Purpose Of The Exclusions

Finally, Pfizer asserts that the "fundamentally identical" standard is consistent with the purpose of the Exclusions. Pfizer does not dispute that this purpose is to allow insurers to protect against the risk that existing claims may only be the tip of the iceberg, thereby allowing insurers to issue renewal policies to policyholders against whom claims have been made and to do so for a lower premium. Br.30; Pfizer Br.27; *DBSI, Inc.*, 2011 WL 3022177, at *3. The "fundamentally identical" test only protects insurers against the tip of the iceberg. It does not protect against the often more substantial and submerged risks associated with claims that are related but not identical. That defeats the purpose of these provisions, as evidenced by their plain, broad language.

C. Pfizer's Attempts To Minimize The Multiple Factual Connections That Trigger The Exclusions Lack Merit

Pfizer's attempts to minimize the multiple factual connections between *Morabito* and the notice to the 2002-2003 Program and *Garber*, and Pfizer's related efforts to disregard the contents of that prior notice, are without merit.

First, Pfizer asserts that the notice of circumstances to the 2002-2003 Program is irrelevant because the Prior Notice Exclusion refers to a "notice of claim or occurrence which could give rise to a claim," which Pfizer asserts is limited to notices of claims and notice of "occurrences" under occurrence-based policies. Pfizer Br.35-36. That is not a reasonable reading of the phrase "occurrence which could give rise to a claim" in a claims-made policy, which includes notices of circumstances that could give rise to a claim. *See, e.g.*, *XL Specialty Ins. Co. v. Settoon Towing, LLC*, 2013 WL 2455940, at *5 (E.D. La. June 5, 2013).

Second, Pfizer asserts there is "no support" to apply the Prior Notice Exclusion based on the original *Garber* and *Jewell* complaints instead of the *Garber* Consolidated Complaint. Pfizer Br.35. In fact, the Exclusion requires analysis of the "wrongful acts [and] facts, circumstances or situations" noticed under prior policies, A179, and the notice to the 2002-2003 Program referred to the original *Garber* and *Jewell* complaints. A786-789. The *Garber* Consolidated Complaint was not even filed until months ***after*** the notice. *Id*.; A475-513.

Third, Pfizer claims that the prior notice only referred to a potential claim for successor-liability following Pfizer's acquisition of Pharmacia. Pfizer Br.2, 16. However, the notice actually states that because Pfizer co-marketed Celebrex, "a likelihood exists that a similar action or actions against Pfizer may ensue on behalf of ***Pfizer*** and/or Pharmacia shareholders alleging ***similar*** wrongful acts or circumstances and ***similar*** types of claims." A788 (emphasis added). *Morabito*, not the earlier-filed *Jewell* (Pfizer Br.28), was that action.

Fourth, Pfizer writes off the alleged failures to disclose cardiovascular risks in the original *Garber* and *Jewell* complaints as a "few mentions of cardiovascular issues." Pfizer Br.3, 36. In fact, the putative class periods in both securities class action complaints began and ended with misrepresentations and corrective disclosures relating at least in part to cardiovascular risks. A720 ¶38; A713-714 ¶16; A738-739 ¶66; A760-763 ¶26; A771-773 ¶48-49. Those risks thus played a key role in the original complaints.

Fifth, Pfizer does not deny that the *Garber* and *Jewell* Complaints, the *Garber* Consolidated Complaint, and *Morabito* all alleged that Pfizer and Pharmacia purposefully misrepresented the safety of their COX-2 inhibitor drugs in order to induce their purchase over cheaper alternative NSAIDs. A708-717 ¶¶2-5, 8-10, 17-23; A753-773 ¶¶3-5, 25-26, 44, 48-50; A476-482 ¶¶2-4, 7-14; A218-226 ¶¶1-17. In

this additional respect, *Morabito* arose out of circumstances noticed to the 2002-2003 Program and related Wrongful Acts with *Garber*.

Sixth, while Pfizer acknowledges that each of the complaints focused in part on misrepresentations in the CLASS study—another commonality—Pfizer emphasizes that *Morabito* involved many more misrepresentations continuing over a longer time period. Pfizer Br.33. The presence of additional allegations, however, does not destroy the multiple commonalities that exist or the relatedness of the later misrepresentations to the earlier misrepresentations. *See* Br.34-35 (citing cases).

Finally, Pfizer represents that the U.S. Specialty claims examiner admitted that *Morabito* did not arise from the *Garber* "complaints," relying on an initial claims note that the U.S. Specialty claims examiner made after receiving the *Morabito* complaint. Pfizer Br.1, 17. Pfizer overstates the note, which reflects an initial read of *Morabito* as compared to "*Alaska Electrical Pension Fund*", B0947—*i.e.*, the *Garber* Consolidated Complaint. This off-the-cuff read does not reflect *any* analysis of the original *Garber* and *Jewell* complaints, and in any event is not binding on U.S. Specialty. *Premcor Refining Grp., Inc. v. Matrix Serv. Indus. Contractors, Inc.*, 2008 WL 2232641, at *4, *8 (Del. Super. Ct. May 7, 2008).

Because *Morabito* ***at least in part*** arose out of or in any manner related to the circumstances noticed to the 2002-2003 Program and related Wrongful Acts alleged

in *Garber*, the Exclusions, when applied according to their plain language, bar coverage.

D. The Positions Taken By Underlying Insurers—Or The Undisclosed Savings They Leveraged—Are Irrelevant

In a final attempt to undercut U.S. Specialty's exclusionary defenses, Pfizer complains that all other carriers in the 2004-2005 Program have already paid their full limits or otherwise settled with Pfizer. Pfizer Br.3, 18. However, U.S. Specialty is not bound by other insurers' coverage positions. *See, e.g.*, *Shy v. Ins. Co. of the Pa.*, 528 F. App'x 752, 754 (9th Cir. 2013) (follow-form excess insurers are not bound by underlying insurers' coverage positions); *Cristal USA Inc. v. XL Specialty Ins. Co.*, 2017 WL 727795, at *3 (Md. Ct. Spec. App. 2017) (same). Moreover, the first seven carriers in the program did not have the benefit of the Prior Notice Exclusion, which was contained in the seventh layer Twin City excess policy immediately underlying the U.S. Specialty Policy.[3] A179; A158. Finally, there is nothing in the record to reflect whether certain of the underlying insurers may have had other, business-related reasons for tendering limits or for settling with Pfizer for less than full limits—for savings that Pfizer refused to disclose below. A822.

[3] U.S. Specialty's then co-defendant, Arch, did not follow form to Twin City's exclusion. For that reason and because the Prior Notice Exclusion applies based on evidence outside the pleadings, U.S. Specialty could not seek relief under that exclusion when jointly moving to dismiss with Arch. The Prior Notice Exclusion was not a "last ditch" defense, as Pfizer falsely portrays it. Pfizer Br.37-38.

II. PFIZER'S PROPOSED "ONE SIZE FITS ALL" APPROACH TO CHOICE OF LAW DEFIES THE RESTATEMENT ANALYSIS.

If this Court concludes there is a conflict between Delaware and New York law, then the Court should reject Pfizer's argument that Delaware law applies to all D&O policies issued to Delaware corporations. New York law should apply here because the Policy was negotiated in New York with assistance from a New York broker, formed in New York, written on a New York form and expressly governed by New York insurance regulations, and covered a multi-national company based in New York (where Pfizer is listed on the NYSE) for nationwide risks. The overwhelming quantity and quality of the contacts between New York and the Policy require application of New York law.

A. Pfizer Incorrectly Focuses Solely on Delaware as the Principal Location of the Insured Risk

This Court's decision in *Certain Underwriters at Lloyds, London v. Chemtura Corporation* provides the framework for resolving any conflict of laws. 160 A.3d 457, 466 (Del. 2017). Second Restatement §193 employs a "presumption" that insurance policies will be governed by the law of the state that is the "principal location of the insured risk." *Id.* at 465. If, however, "§193's presumption does not provide a state law to use, §188's factors are the most appropriate way to determine the appropriate law." *Id.* at 467. "Regardless, courts use the general policy

considerations for choice of law articulated in §6 to guide the overall analysis." *Id.* at 465.

Pfizer seeks to jettison the *Chemtura* standard in favor of another "one size fits all" test, asserting that Delaware law should apply to any D&O insurance policy issued to Delaware corporations on the premise that Delaware is the ***only*** location of the insured risk, triggering the §193 presumption. This premise is false. As U.S. Specialty previously noted, D&O policies cover far more than the "honesty and fidelity" of D&Os. They insure claims against the corporation (*e.g.*, securities litigation), claims against employees who may be neither directors nor officers, and a broad variety of claims against D&Os that are not dependent on the law of the place of incorporation. Br.40. In any given case, the adjudication of "wrongful acts" of Pfizer or its directors, officers and employees may be determined based on an amalgam of federal and state statutes, regulations and common law governing a pharmaceutical corporation like Pfizer operating nationally (and globally). Only in a narrow slice of possible risks, such as claims for breach of fiduciary duty, will Delaware law govern the conduct of Pfizer or D&Os.

Moreover, applying New York law to resolve a dispute between Pfizer and U.S. Specialty concerning a contract negotiated and formed in New York does not contravene any Delaware statute or public policy. The fact that Delaware permits companies incorporated in the State to indemnify D&Os (as well as employees and

agents) and to purchase insurance policies protecting those persons is of no moment. *See* 8 *Del*. *C*. §145. The statute is not specific to claims implicating "honesty and fidelity" to the corporation but broadly protects directors, officers, employees and others who face potential personal liability in third-party lawsuits.

Where, as here, the location of the "insured risk" cannot be fixed to anything "singular and tangible, an 'immovable object' or 'particular' building,' for example," the state of incorporation is but one factor to be measured in conjunction with other contacts. *See Chemtura*, 160 A.3d at 466. Remarkably, Pfizer lambasts U.S. Specialty for noting the location of Pfizer's insurance broker as one such contact. In *Chemtura*, this Court held that §193 was not dispositive and moved on to consider the §188 factors. In this context, the Court considered the insured's New York-based headquarters during the relevant time period, *id.* at 460 (here, Pfizer is based in New York). The Court considered that ***the insured's broker*** was based in New York, *id*. at 461 (so too here). The Court considered that Chemtura's primary insurer was a New York-based insurer, *id.* (as here with Pfizer's primary D&O insurer, National Union). The Court further based its decision "on the sensible understanding that a company's headquarters staff is usually heavily involved in managing insurance programs that cover the entire company." *Id*. at 470. In these circumstances, with New York contacts dominating the §188 analysis, this Court

concluded that the justified expectations of the parties at the time of contracting were met by applying New York law to the parties' coverage dispute. *Id.* at 466-68.

B. Pfizer's "One Size Fits All" Approach Does Not Comport with Any Part of the Restatement

Pfizer's erroneous choice of law analysis does not end with §193 and §188. Pfizer also asserts that Restatement §6 demands application of Delaware law—because applying a unitary rule for all D&O insurance policies issued to Delaware-incorporated entities is predictable. However, the ease of applying an arbitrary rule exalting incorporation over all other relevant Restatement factors does not make it either correct or desirable. As one court explained, analyzing contacts on a case-by-case basis "may, perhaps, afford less certainty and predictability than the rigid general rules," ***but***:

> the merit of its approach is that it gives to the place 'having the most interest in the problem' paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction 'most intimately concerned with the outcome of [the] particular litigation'. Moreover, by stressing the significant contacts, it enables the court not only to reflect the relative interests of the several jurisdictions involved, but also to give effect to the probable intention of the parties…

Auten v. Auten, 124 N.E.2d 99, 102 (N.Y. 1954) (citations omitted).

Pfizer's proposed rule, embraced below, clearly defies the parties' *ex ante* expectations when they entered into the contract. *See Travelers Indem. Co. v. CNH Indus. Am., LLC,* 191 A.3d 288 ¶¶15-16 (Del. 2018). This is particularly true here,

where the policies prominently displayed both stamps and endorsements confirming compliance with New York law (as Pfizer grudgingly admits). Pfizer complains about having one law receive "due consideration" in private pre-suit ADR and a different law apply if ADR fails, resulting in litigation. But that provision is not a choice of law provision, Br.43 (citing cases), and does not require binding application of Delaware law in even an ADR proceeding. Moreover, it makes no sense to have one law (New York) govern formation of the Policy and another (Delaware) govern disputes over policy language, which ***is*** the result Pfizer urges and the result truly contrary to *Chemtura*.

In short, the Superior Court below erred when it departed from this Court's multi-step analysis and instead adopted as mantra the notion that D&O policies exclusively cover directors' and officers' "honesty and fidelity to the corporation." Although this notion first surfaced in *Mills Limited Partnership v. Liberty Mutual Insurance Co.*, 2010 WL 8250837 (Del. Super. Ct. Nov. 5, 2010), the Superior Court breathed life into what had been an obscure holding starting with *Arch Insurance Co. v. Murdock*, 2018 WL 1129110, at *8-11 (Del. Super. Ct. Mar. 1, 2018), a case pending before this Court. Since *Murdock* (which, like *Mills*, was decided before *Chemtura*), a line of cases emerged, which Pfizer wants this Court to enshrine as Delaware law. Rather than produce sensible results, however, these cases have produced a "race to the courthouse" mindset, as policyholders flock to Delaware

courts seeking perceived favorable "Delaware law" (like the supposed "fundamentally identical" standard) and insurers file elsewhere, as occurred in this case and others. *See, e.g., Calamos Asset Mgmt., Inc. v. Travelers Cas. & Sur. Co. of Am.*, 2019 WL 2117647, at *6 (D. Del. May 15, 2019). This Court has the opportunity to re-set the appropriate choice of law analysis for D&O policies, as it has done for general liability and other policies, by reversing the Court below and applying New York law to this dispute.

CONCLUSION

The judgment of the Superior Court should be reversed and judgment should be entered for U.S. Specialty on all of Pfizer's claims.

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COOCH AND TAYLOR, P.A.

/s/ Carmella P. Keener

Carmella P. Keener (#2810)
1007 N. Orange Street, Suite 1120
P.O. Box 1680
Wilmington, DE 19899-1680
ckeener@coochtaylor.com
(302) 984-3816

OF COUNSEL:

CLYDE & CO US LLP
Douglas M. Mangel
Joseph A. Bailey III
Gabriela Richeimer
1775 Pennsylvania Avenue NW
Suite 400
Washington, DC 20006
(202) 747-5100

Attorneys for Defendant-Appellant U.S. Specialty Insurance Company