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IN THE SUPREME COURT OF THE STATE OF DELAWARE

FIRST SOLAR, INC., *Plaintiff Below, Appellant,* v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA and XL SPECIALTY INSURANCE COMPANY, *Defendants Below, Appellees.*	)	No. 217, 2021 On Appeal from the Superior Court of the State of Delaware, C.A. No. N20C-10-156 MMJ CCLD (Johnston, J.)

OPENING BRIEF OF APPELLANT FIRST SOLAR, INC.

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NATURE OF THE PROCEEDINGS

This insurance coverage dispute arises out of First Solar's request for coverage for the *Maverick* Action, a 2015 securities lawsuit in which seven hedge funds alleged that this solar energy company made misrepresentations in 2011 with respect to its integrated systems business segment (the "Systems Business"). Filed in 2015, the *Maverick* Action alleged forward-looking misrepresentations concerning First Solar's Systems Business's progress towards achieving the future goal of "grid parity"—the "Holy Grail" for the solar electricity industry. The *Maverick* Action was filed during First Solar's 2014–15 D&O insurance policy period, and alleged covered Wrongful Acts, which triggered First Solar's D&O insurers' duty to defend.

However, Appellees, First Solar's D&O insurers for the 2014–15 policy period ("Insurers") denied coverage for the *Maverick* Action, relying on the fact that in 2012, three years prior to the filing of the *Maverick* Action, First Solar was sued in the *Smilovits* class action lawsuit (the "Class Action"). In evaluating Insurers' defense predicated on the policies' related-claims exclusions, the Superior Court acknowledged Delaware's well-settled "fundamentally identical" standard,[1] but

[1] *See, e.g.*, *United Westlabs, Inc. v. Greenwich Ins. Co.*, 2011 WL 2623932 (Del. Super. June 13, 2011), *aff'd*, 38 A.3d 1255 (Del. 2012); *RSUI Indem. Co. v. Sempris, LLC*, 2014 WL 4407717 (Del. Super. Sept. 3, 2014); *Med. Depot, Inc. v. RSUI Indem. Co.*, 2016 WL 5539879 (Del. Super. Sept. 29, 2016); *Providence Serv. Corp.*

(Continued . . .)

incorrectly applied it. The Superior Court ruled that two fundamentally different lawsuits—the *Maverick* Action and the Class Action, which concerned different First Solar business segments and sought different relief—were "related," based on "substantial similarities." *See* Memorandum Opinion and Order, attached hereto as Exhibit 1. The Superior Court ignored that the two underlying actions involve different business units, different time periods, different alleged wrongful conduct, different causes of action, and different damages. As a result, they are not "fundamentally identical," and the Insurers cannot meet their high burden to show that the policies' related-claims exclusions preclude coverage.

There can be little doubt that the Class Action was fundamentally different from *Maverick*, because it did not address the Systems Business or grid parity, the focus of the *Maverick* Action. Instead, the Class Action alleged misrepresentations during *previous* reporting periods (2008–2012) concerning the cost of individual solar modules produced by First Solar's component, or module manufacturing, business segment (the "Components Business"). Specifically, the Class Action's allegations centered on two alleged manufacturing defects ("LPM," or low power

v. Illinois Union Ins. Co., 2019 WL 3854261 (Del. Super. July 9, 2019); *Pfizer Inc. v. Arch Ins. Co.*, 2019 WL 3306043 (Del. Super. July 23, 2019); *Northrop Grumman Innovation Sys., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 347015 (Del. Super. Feb. 2, 2021).

modules produced as the result of a discrete manufacturing issue; and "heat degradation," a rapid degradation of module performance in hot climates), and historical issues with First Solar's warranty reserves and cost-per-watt, a manufacturing metric akin to cost of goods sold.

Insurers seized on the superficial fact that the Maverick plaintiffs' election to opt out of the Class Action somehow rendered the two actions fundamentally identical. To justify their position, Insurers ignored fundamental differences: *Maverick*'s claims related to Systems Business predictions of grid parity—which can only constitute forward-looking statements—and the Class Action's claims related to the Component Business's quarterly and annual reports of its cost-per-watt—which, by definition can only reflect historical performance. They ignored the fact that the claims of past performance of the Components Business are fundamentally different from the predictions of future performance of the Systems Business.

As the *Maverick* complaint alleged, grid parity is the ability of a Systems Business-developed and constructed utility-scale solar power plant system comprising of solar modules, mounting structures, inverters, transformers, interconnection substations and other equipment and facilities, all threaded together with miles of electrical cables, among other system project-related assets, to profitably sell electricity at a cost equal to the traditional electricity generation

methods of coal, oil and gas power plant systems projects. *Maverick*'s alleged misrepresentations regarding the System Business' future prospects of achieving grid parity included that the Systems Business purportedly failed to disclose that a flood of cheap imported modules into the United States would compel it to reduce its prices, and thus overstated its projected earnings.

In contrast to *Maverick*, the Class Action alleged misrepresentations about historical manufacturing data and resulting costs-per-watt related to the Components Business. Cost-per-watt is a measure of First Solar's costs to manufacture individual modules, an issue entirely distinct from the Systems Business' future prospects of system-wide grid parity. This distinction was confirmed by the *Maverick* plaintiffs themselves, who insisted that the Class Action did not include their grid parity allegations.

This dispositive distinction, however, was disregarded by the Superior Court, which erred in focusing on the thematic similarities between the two cases. The Superior Court ignored the fundamental differences between the alleged Wrongful Acts of the Components Business in the Class Action and those alleged against the Systems Business in the Maverick Action, including the fact that the majority of the communications alleged to contain misrepresentations (*i.e.* each press release or SEC filing) were unique to each lawsuit, and that, without exception, the substance of every one of the allegedly misleading statements was unique to each suit's focus.

Because *Maverick* and the Class Action are not fundamentally identical, no related-claims exclusion in the policies bars coverage. This Court should reverse and enter judgment that the *Maverick* Action is not fundamentally identical to the Class Action, is not excluded by any related claims provisions, and is a claim first made during the 2014–2015 policy period, the period in which it was filed.

SUMMARY OF ARGUMENT

1. The Superior Court erred in holding that *Maverick* and the Class Action are "fundamentally identical" and that the *Maverick* Action was a claim first made at the time of the Class Action in 2012, before the policy period at issue. A comparison of the Wrongful Acts—the alleged misstatements—in the *Maverick* and Class Actions demonstrate that they are not fundamentally identical. Despite identifying the proper standard, the Superior Court erred in applying it. In granting Insurers' motions to dismiss and denying First Solar's motion for summary judgment, the Superior Court looked only at what it believed were "substantial similarities" between the matters, while disregarding the core differences. The Superior Court incorrectly applied the fundamentally identical test, and its judgment should be reversed.

STATEMENT OF FACTS

A. First Solar's Insurance Policies

First Solar is a leading supplier of solar energy solutions and is incorporated in Delaware. A021 ¶ 9. At all times relevant to the underlying actions, First Solar operated its business in two segments: the Systems Business (the focus of the *Maverick* Action) and the Components Business (the focus of the Class Action), as explained in one of First Solar's SEC filings:

> We operate our business in two segments. Our **components segment** is our principal business and involves the design, manufacture, and sale of solar modules which convert sunlight into electricity.… Our other segment is our fully integrated **systems business**, through which we provide a complete PV solar power system, which includes project development, EPC [Engineering, Procurement and Construction] services, O&M [Operations and Maintenance] services, when applicable, and project finance, when required.[2]

For the policy period of November 16, 2014 to November 16, 2015, First Solar purchased primary and excess directors' and officers' ("D&O") coverage, including from Appellees National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union") and XL Specialty Insurance Company ("XL," and collectively, Insurers"). A023–24 ¶¶ 23–24. The Primary Policy, issued by National

[2] *See* Form 10-K for fiscal year ended December 31, 2010 (available at https://d18rn0p25nwr6d.cloudfront.net/CIK-0001274494/68fde2f3-347a-4775-be18-299d39d113f8.pdf) (emphasis added). The Court may judicially notice a fact, at any stage of a proceeding, that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. D.R.E. 201(b)(1), 201(d).

Union, has a limit of liability of $10 million over a $5 million deductible. A040 §§ 4–5. The first-excess policy, issued by XL, has a limit of liability of $10 million and applies after National Union's policy limits have been exhausted. A147 §§3–4. With certain exceptions, the XL Policy "follows form" to the Primary Policy, meaning the XL Policy incorporates and adopts the terms, conditions, definitions, and exclusions of the Primary Policy (collectively, the "Policies").

The Policies generally provide coverage for Loss arising from any Claim made against an Insured Person for any Wrongful Act of such Insured Person, provided First Solar has indemnified such Loss, or arising from any Securities Claim made against First Solar for any Wrongful Act. A044 § 1(A)(1). "Wrongful Act" is defined as "any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission, or other act…" by an Executive or Employee of an Organization in his or her capacity as such, or by an Organization in regard to a Securities Claim. A069. The *Maverick* Action involves both a Securities Claim and a Claim against Insured Persons whom First Solar has indemnified.

To deny coverage, the Insurers relied on a provision in the Policies' "Notice and Reporting Section." A049 § 7. There, the Policies note that if a Claim is first made and reported during the Policy Period, any Related Claim that is subsequently made and reported shall be "deemed to have been first made at the time that such previously reported Claim was first made… Claims actually first made or deemed

first made prior to the inception date of this policy…are not covered under this policy." A050 §7(b)(1). "Related Claim" is defined as "a Claim alleging, arising out of, based upon or attributable to any facts or Wrongful Acts that are the same as or related to those that were… alleged in a Claim made against an Insured." A067.

The Primary Policy also contains a "Specific Investigation/Claim/Litigation/ Event or Act Exclusion" (the "Specific Matter Exclusion," and together with the Notice and Reporting language above, the "Related Claims Exclusions"). A082. The Specific Matter Exclusion provides, in relevant part, that:

> Insurer shall not be liable to make any payment for Loss in connection with:
>
> (i) any of the Claim(s), notices, events, investigations or actions listed under EVENT(S) below;
>
> (ii) the prosecution, adjudication, settlement, disposition, resolution or defense of: (a) any Event(s); or (b) any Claim(s) or Pre-Claim Inquiry(ies) arising from any Event(s); or
>
> (iii) any Wrongful Act, underlying facts, circumstances, acts or omissions in any way relating to any Event(s).

It further provides that:

> Insurer shall not be liable for any Loss in connection with: … any Claim or Pre-Claim inquiry alleging, arising out of, based upon, attributable to or in any way related directly or indirectly, in part or in whole, to an Interrelated Wrongful Act (as that term is defined below), regardless of whether or not such Claim or Pre-Claim Inquiry involved the same or different Insureds, the same or different legal causes of action or the same or different claimants or is brought in the same or different venue or resolved in the same or different forum.

The list of "Event(s)" includes the Class Action. A082–83. The Specific Matter Exclusion defines "Interrelated Wrongful Act" as "(i) any fact, circumstance, act or omission alleged in any Event(s) and/or (ii) any Wrongful Act which is the same as, similar or related to or a repetition of any Wrongful Act alleged in any Event(s)." A083.

B. The Class Action

On March 15, 2012, Mark Smilovits filed the Class Action on behalf of himself and others similarly situated, as a putative class action in the U.S. District Court for the District of Arizona.[3] A422; A028 ¶ 39. The Class Action named as defendants First Solar and seven individual directors or officers. The Class Action complaint alleged securities violations under Sections 10b-5 and 20 of the Securities Exchange Act of 1934. A556 ¶¶ 253–256. The court certified a class of all persons who purchased or otherwise acquired First Solar's publicly traded securities during a roughly four-year period – from April 30, 2008 and February 28, 2012. A425 ¶ 1; A028 ¶ 39.

Generally, the plaintiffs in the Class Action alleged that First Solar made misrepresentations about the Components Business. Specifically, the Class Plaintiffs alleged that defendants "conceal[ed] and misrepresent[ed] the nature and

[3] *Smilovits, et al. v. First Solar, et al.*, Case No. 2:12-cv-00555-DGC (D. Ariz.).

extent of major manufacturing and design defects in their modules"—a manufacturing "excursion" that produced "low power modules," and a "heat degradation defect" that allegedly affected module performance in hot climates—and "manipulated" the "cost-per-watt" metric. A425, 428–29 ¶¶ 2–3, 21. The Class Action complaint contains allegations of 35 specific "false and misleading statements" made between April 30, 2008 and August 2, 2010 (each of which occurred before the initial stock purchase date cited in the *Maverick* complaint). A457–478 ¶¶ 65–108.

The Class Action plaintiffs sought actual damages and attorneys' fees and costs based on alleged corrective disclosures on seven dates (7/29/2010, 10/28/2010, 2/24/2011, 5/3/2011, 10/25/2011, 12/14/2011 and 2/28/2012). A545–553 ¶¶ 220–242.[4] On January 5, 2020, First Solar and the Class Action plaintiffs reached a settlement, which was approved on June 30, 2020.[5]

C. The *Maverick* Action

The *Maverick* Action plaintiffs, seven related hedge funds that purchased First Solar stock, had a different focus from that in the Class Action. Relying on their unique allegations of grid-parity misrepresentations in connection with First Solar's Systems Business, they advanced an individualized damages theory. The *Maverick*

[4] *See also* Class Action, Dkt. No. 401 at 22–31.

[5] *See* Class Action, Dkt. No. 730.

plaintiffs opted out of the certified class in the Class Action, and on June 3, 2015, during First Solar's 2014–15 D&O policy period, filed the *Maverick* Action against First Solar and certain individual defendants.[6] A029 ¶ 42; A176. *Maverick's* claims are fundamentally different and far broader than the module manufacturing allegations in the Class Action: Maverick took aim at the Systems Business's forward-looking roadmap to achieve grid parity in its utility-scale solar facility system projects, which *Maverick* described as the "Holy Grail" of solar electricity production. A179 ¶ 2. Grid parity is impacted by a variety of factors, including land acquisition or use rights, project finance costs, construction labor, other equipment beyond merely the module necessary for facility construction and operation (mounting structures, inverters, transformers, transmission interconnection stations), operations and maintenance obligations over the life of the project, and end user power purchase agreements. A204; A223; A610–611.

The plaintiffs in the *Maverick* Action alleged that the Systems Business (i) falsely described itself as close to reaching grid parity in the future; (ii) misrepresented the value of its project pipeline and ability to convert the pipeline to earnings; and (iii) refused to adjust its earnings forecasts to reflect anticipated market conditions. A029; A201–210. As part of its focus on grid parity at its utility-scale

[6] *Maverick Fund, L.D.C., et al. v. First Solar, Inc., et al.*, Case No. 2:15-cv-01156-DGC (D. Ariz.).

solar facilities, the *Maverick* Action included other allegations that are both unrelated to the Components Business and absent from the Class Action, including that defendants allegedly concealed (i) cost overruns at First Solar's utility-scale electricity generation facilities (A201–203 ¶¶ 90–100); (ii) the allegedly known impact of a global oversupply of solar modules on First Solar's earnings (A208–210 ¶¶ 120–27); (iii) the reasons for First Solar's inability to obtain federal loan guarantees (A236 ¶ 225); and (iv) delays incurred while procuring necessary permits at First Solar's Antelope Valley systems project (A247 ¶ 264). Also, unlike any of the Class Action plaintiffs, the *Maverick* plaintiffs claimed that First Solar officers and employees made alleged misrepresentations directly to Maverick personnel in "numerous (tens, if not a hundred) direct communications during the relevant period, including direct phone calls, meetings at brokerage houses and hotels for conferences in New York City, and meetings at [the Maverick] Plaintiffs' office in New York." A240 ¶ 239. Indeed, the *Maverick* complaint contains allegations of misstatements on four separate dates that are not even referenced in the Class Action, including alleged misrepresentations made personally to the Maverick plaintiffs—not to any members of the Class Action class. A227, A232–233, A237–238 ¶¶ 195, 212, 215, 229.

The *Maverick* plaintiffs owned First Solar stock during only a small portion of the class period from the Class Action, purchasing it between May 2011 and

December 2011, and selling it between December 14, 2011 and February 28, 2012. A214 ¶ 145. Within its far narrower window of trading, *Maverick* alleged six separate corrective disclosure dates not specifically alleged in the Class Action (8/17/2011, 9/16/2011, 9/21/2011, 9/22/2011, 9/28/2011, and 2/10/2012). A243–248 ¶¶ 251–267. And *Maverick* brought claims not only under the federal securities laws, but also alleged common law fraud, negligent misrepresentation, and violations of Arizona securities statutes. A250–258. First Solar incurred approximately $2.5 million in the defense of the *Maverick* Action, and in June 2020, the parties to the *Maverick* Action reached a settlement in principle in which First Solar agreed to pay $19 million in exchange for dismissal of the *Maverick* Action. A030 ¶ 45.

In August 2020, the Class Counsel in the Class Action filed an Application for Set-Aside Funds from the *Maverick* Action. A564. The *Maverick* plaintiffs opposed the Application, arguing that they pursued an entirely different legal theory than that pursued in the Class Action. A572. The *Maverick* plaintiffs argued: "Maverick pursued a novel theory of the fraud perpetrated by First Solar that Class Counsel did not pursue… Class Counsel did not pursue the grid parity fraud." A567. The *Maverick* plaintiffs further argued that Class Counsel "hurt, rather than helped" Maverick's case, and that the *Maverick* plaintiffs pursued allegations "ignored by Class Counsel," such that the *Maverick* Action was based on allegations and

documents that Class Counsel "never found" and "never presented…to the Court." A569–570, A576.

D. Insurers Deny Coverage for the *Maverick* Action

First Solar promptly gave notice of the *Maverick* Action to certain of its insurers, including Defendant/Appellee National Union, during the 2014–15 policy period. A587. In response, First Solar's second-layer excess carrier Chubb responded to First Solar and the other insurers that it would treat the *Maverick* Action as a related claim to the Class Action, the result being that First Solar could not access additional limits of insurance for the *Maverick* Action. *Id.* National Union did not respond.

On June 1, 2020, First Solar provided an update to all Insurers advising of a mediator's proposal that could lead to a potential settlement for which First Solar was seeking coverage. A590–592. On June 17, First Solar provided the Insurers another update, advising that a settlement agreement in principle had been reached that would impact the Insurers' layers of coverage. A595. Appellee XL responded on June 29, 2020, denying coverage for the *Maverick* Action, in part based on the assertion that the *Maverick* Action is a Related Claim to the Class Action, and as such is a Claim first made during the 2011–12 policy period and is further excluded by the Primary Policy's Specific Matter Exclusion for the Class Action. A031 ¶ 53. National Union followed suit, sending a letter on August 17, 2020, denying coverage

for the *Maverick* Action on similar grounds. A032 ¶ 55. Neither National Union nor XL have contributed any amount to the settlement of the *Maverick* Action.

E. The Procedural History of This Action

Pursuant to the Primary Policy's ADR Provision, the parties unsuccessfully engaged in a mediation in 2020, and First Solar filed suit thereafter. A033. Insurers moved to dismiss, arguing that the *Maverick* Action is not covered by the Policies because it relates back to the Class Action and is a Claim first made in 2012, when the Class Action was filed. A003. Insurers further argued that the Policies' Specific Matter Exclusion for the Class Action barred coverage for *Maverick.*[7] First Solar simultaneously moved for summary judgment, arguing that *Maverick* and the Class Action are not fundamentally identical, because the cases involved different plaintiffs, different alleged harms to different shareholders at different time periods, and were based on different alleged Wrongful Acts.

Although the Superior Court correctly noted that under Delaware law, coverage for purportedly related claims is "precluded only where the two underlying claims are 'fundamentally identical,'" it appeared to apply a balancing test instead, and ultimately concluded that because, in its opinion, the similarities between

[7] The Superior Court did not rule on the application of the Specific Litigation Exclusion or any of the Insurers' alternative arguments against coverage. Ex. 1 at 17.

Maverick and the Class Action outweighed their differences, the two cases are fundamentally identical. Ex. 1 at 13 (citing *Pfizer*, 2019 WL 3306043, at *9). The Superior Court made this determination despite its express recognition that Delaware courts "look to the 'subject' of the claims to see if they are 'the exact same' and do not merely share 'thematic similarities.'" *Id*. at 14 (citing *Northrop Grumman*, 2021 WL 347015, at *11). However, while the Superior Court acknowledged that the *Maverick* and Class Actions involve different time periods, different legal bases for claims, a different number of disclosures, and sought different types of damages, it incorrectly noted that *Maverick* and the Class Action "have substantial similarities," concluding in error that these differences are "not enough to separate the underlying actions." Ex. 1 at 15–16. In ruling on Insurers' motion to dismiss, the Court also improperly based its decision on findings of fact that are inconsistent with the allegations in *Maverick* and the Class Action, including the erroneous finding that "both actions allege that First Solar misrepresented its ability to achieve grid parity." Ex. 1 at 16. As a result, the Superior Court granted Insurers' motions to dismiss and denied First Solar's motion for summary judgment. Ex. 1 at 18. This appeal followed.

ARGUMENT

I. THE SUPERIOR COURT ERRED WHEN IT HELD THAT THE *MAVERICK* ACTION IS FUNDAMENTALLY IDENTICAL TO THE CLASS ACTION SIMPLY BECAUSE THE MATTERS SHARE CERTAIN SIMILARITIES

A. Question Presented

Whether the *Maverick* allegations, related to the future prospects of the Systems Business, and the Class Action allegations, related to past conduct reported by the Components Business, are fundamentally identical and implicate either of the Policies' Related Claims Exclusions. A406; A608; A616; A658.

B. Scope Of Review and Legal Standards

The meaning and application of insurance policy language, including on relatedness, is a question of law, reviewed *de novo*. *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 72 (Del. 2011). This Court reviews motions to dismiss and for summary judgment *de novo*. *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 535 (Del. 2011); *Pavik v. George & Lynch, Inc.*, 183 A.3d 1258, 1265 (Del. 2018).

This Court reviews the Superior Court's decision to grant a motion to dismiss under Rule 12(b)(6) "to determine whether the judge erred as a matter of law in formulating or applying legal precepts." *Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 238 A.3d 863, 871 (Del. 2020). This Court will "view the complaint in the light most favorable to the nonmoving party, accepting as true its well-pled

allegations and drawing all reasonable inferences that logically flow from those allegations." *Id.*

An insurance contract must be read as a whole, and policy language must be evaluated as it would be viewed by an average reasonable insured, consistent with an insured's reasonable expectation of coverage. *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006); *Med. Depot*, 2016 WL 5539879, at *7, 11.

This reasonable reading of the plain language requires a different lens depending on whether the provision provides or excludes coverage. *Med. Depot*, 2016 WL 5539879, at *7 (internal quotations omitted). Insurance contracts should be interpreted as providing broad coverage to align with the insured's reasonable expectations. *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 906 (Del. 2021). Courts will interpret exclusionary clauses with "a strict and narrow construction ... [and] give effect to such exclusionary language [only] where it is found to be 'specific,' 'clear,' 'plain,' conspicuous,' and 'not contrary to public policy.'" *Id.* (internal quotations omitted). The burden "falls on the insurer to prove the elements of a policy exclusion." *E.I. DuPont de Nemours & Co. v. Admiral Ins. Co.*, 711 A.2d 45, 53 (Del. Super. 1995). "[A]n exclusion clause in an insurance contract is construed strictly to give the interpretation most beneficial to the insured." *Sun-Times Media*

Grp., Inc. v. Royal & Sunalliance Ins. Co. of Can., 2007 WL 1811265, at *11 (Del. Super. June 20, 2007).

C. Merits of the Argument

1. Under Delaware Law, The Related Claims Exclusions Do Not Apply Unless The Actions Are Fundamentally Identical

The Superior Court correctly recognized that the *Maverick* Action must be "fundamentally identical" to the Class Action for coverage to be barred by either of the Related Claims Exclusions in the Policies. A688 at 24:3–4 (noting "there's a big difference between 'many similar legal issues' and fundamental identity"). To apply any other standard would be inconsistent with Delaware law and the Policies' language and purpose, and would unreasonably expand the Policies' Related Claims Exclusions well beyond their intended scope.[8]

[8] The Notice and Reporting provision does not purport to exclude coverage for "Related Claims." Rather, for it to apply, there must be a Claim first made and reported in the 2014–15 policy period—which the Class Action was not. Where this provision is triggered, any claim "subsequently" made will be deemed made when the first reported claim was made and would be covered under the 2014–15 Policy. Because *Maverick* is the only claim made and reported under the Policies, the Notice and Reporting provision does not bar coverage. The Superior Court based its ruling on the Notice and Reporting provision rather than the Specific Matter Exclusion, but the outcome should be the same under either provision as under Delaware law, the Specific Matter Exclusion asks whether the *Maverick* and the Class Action are fundamentally identical. Thus, the Superior Court's error in applying the wrong policy provision to exclude coverage is of no consequence here; under the correct application of the standard, neither operates to exclude *Maverick* from coverage.

In accordance with Delaware's principles of insurance contract interpretation, when an insurer attempts to avoid coverage based on the purported "relatedness" of Wrongful Acts, Delaware courts have held that "coverage for the purportedly-excluded Act will be precluded only where the two underlying claims are fundamentally identical."[9] *Northrop Grumman*, 2021 WL 347015, at *11 (internal quotations omitted). This standard has long been applied by Delaware courts addressing similar "arising out of" language in "related" or "interrelated" wrongful acts provisions like the Policies' Related Claims Provisions. *See, e.g.*, *Pfizer*, 2019 WL 3306043 at *10 (citing *Med. Depot*, 2016 WL 5539879, at *14) (holding that the two actions "are not fundamentally identical" and thus, not related, even though both concerned the same medical device manufactured by the insured because the actions alleged different harms to different plaintiffs); *RSUI Indem. Co. v. Sempris, LLC*, 2014 WL 4407717, at *6–7 (Del. Super. Sept. 3, 2014) (claims not related where prior lawsuits alleged fraud claims and a later lawsuit alleged TCPA claims).

[9] The Superior Court did not conduct a choice of law analysis and Insurers did not meaningfully dispute the application of Delaware law. Because First Solar is a Delaware corporation, its D&O policies must be interpreted under Delaware law. *See Pfizer*, 2019 WL 3306043, at *8 ("Where D&O coverage is at issue … the state of incorporation has the most significant relationship" with respect to choice of law) (quoting *Murdock*, 2018 WL 1129110, at *9)).

The "fundamentally identical" standard was most recently applied in *Northrop Grumman*, where the Superior Court noted that the "fundamentally identical" test is settled law on relatedness, and held:

> [I]n Delaware, when an insurer invokes an exclusion resting on the "relatedness" of Wrongful Acts, coverage for the purportedly-excluded Act will be "precluded only where the two underlying claims are fundamentally identical." To determine whether two claims are fundamentally identical, Delaware courts look to the "subject" of the claims to see if they are "***the exact same***" and do not merely share "thematic similarities." When doing so, the underlying claimant's "unilateral characterizations" of the claims need not be credited. Instead, the Court will draw reasonable inferences from the complaint as a whole.

2021 WL 347015, at *8, *11 (emphasis added), *cert. denied*, 2021 WL 772312 (Del. Super. Mar. 1, 2021). Similar to the Policies' provision that "a Claim alleging, arising out of, based upon or attributable to any facts or Wrongful Acts that are the ***same or related*** to [an earlier Claim]" shall be "deemed to have been first made at the time that such previously reported Claim was first made," the policy at issue in *Northrop* provided that "Loss arising out of the ***same or related*** Wrongful Act shall be deemed to arise from the first such same or related Wrongful Act." *Id.* at *2. There, the Superior Court held that two underlying claims were not fundamentally identical because they alleged different types of wrongdoing in different time periods. *Id.* at *11.

The Superior Court also analyzed a specific litigation exclusion similar to that in the Policies in *Pfizer Inc. v. Arch Ins. Co*. In *Pfizer*, the policy at issue excluded claims "***alleging, arising out of, based upon or attributable to*** the facts alleged or contained in any Claim which has been reported…" and further excluded "Loss in connection with any Claim(s) ***alleging, arising out of, based upon, attributable to or in any way related directly or indirectly*** ... to a related Breach of Fiduciary Duty or a related Wrongful Action alleged" in a specified prior lawsuit. 2019 WL 3306043, at *2 (emphasis added where language mirrors the Policies).[10] The Court evaluated the language and applied the fundamentally identical standard to hold that that two lawsuits, both securities fraud class actions involving alleged misrepresentations about health risks of one drug—Celebrex—were not fundamentally identical and as such, the later claim was not barred by the specific litigation exclusion. *Id.* at *10.

[10] Any differences in the Policies' language here does not change the fundamental identity standard that should apply. The "burden of proving the applicability of any exclusions or limitations on insurance coverage lies with the insurer, as those are affirmative defenses." *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376, 388 (D. Del. 2002). And in determining whether the Insurers have met this burden, the Court is guided by "a reasonable reading of the plain language of the polic[ies]." *Id.* at 389; *see also Penn. Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1149 (Del. Super. 1997) (noting that insurance policies "must be interpreted in a common sense manner" as they would be understood by "a reasonable policyholder").

Under Insurers' proposed interpretation of the Policies, *Maverick* is excluded because both it and the Class Action involved First Solar's general business prospects and securities claims alleging fraudulent misrepresentations about them. That is not the appropriate standard. Delaware courts have specifically rejected Insurers' unduly broad interpretation, stating that "merely sharing common facts and events does not necessarily mean that actions are 'related' for purposes of allowing or denying coverage." *Providence Serv. Corp.*, 2019 WL 3854261, at *2 (applying the fundamentally identical standard).

In *Providence*, the insurer sought a broad application of a prior notice exclusion, claiming two lawsuits against the insured filed years apart were "related" based on general overlapping facts, such as both involving the insured's "assessment of unauthorized fees accompanied by threats," while ignoring the different claims, plaintiffs, time periods and Wrongful Acts. *Id.* at *3. The court rejected this reading, in favor of a fundamentally identical standard (*Id.* at *4):

> As a general matter, any challenges to the provision of probationary services can be "related," but the analysis cannot stop there. To accept Defendant's broad definition of "related" would render all claims involving PCC professional services "related." Coverage would be illusory. It would be difficult, if not impossible, to find unrelated incidents in the context of providing probationary services.

Similarly, any claim against First Solar that triggers its D&O coverage will have some portion of facts in common, starting with the same defendant company, and

possibly including its module technology, executives or securities violations. Having *any* fact in common cannot be the test for "related" claims or it would render First Solar's D&O coverage illusory. Thus, the "fundamentally identical" standard is appropriate and consistent with Delaware law.

2. The *Maverick* Action Is Not Fundamentally Identical to the Class Action

"When determining whether actions are 'related,' courts compare the allegations in the complaints to determine their similarities and differences." *Providence*, 2019 WL 3854261, at *3. The Superior Court purported to do so here, but failed to note the distinctions between the allegations concerning First Solar's Components Business in the Class Action and the Systems Business in *Maverick*. Instead, the Court sought out the lowest common thematic denominator between the Wrongful Acts in *Maverick* and the Class Action, broadly (and incorrectly) describing both suits as redress for "artificially raising stock prices by misrepresenting First Solar's ability to produce solar electricity at costs comparable to the costs of conventional energy production." Ex. 1 at 16. As shown in the chart below, *Maverick* and the Class Action involve different operative facts: different shareholder plaintiffs, different First Solar business segments, different alleged wrongful conduct, different causes of action, and different alleged harm occurring in different time periods:

Claim Distinction	*Class Action*	*Maverick* Action
Date Filed	March 15, 2012	June 3, 2015
Time Period at Issue	Class Period: April 30, 2008–February 28, 2012	May 2011–December 2011
Alleged Wrongful Conduct	Concealed and misrepresented *historical* manufacturing and designdefects impacting First Solar's Components Business	Misrepresented *future-looking* progress toward reaching grid parity, impacting First Solar's Systems Business
Business Unit Involved	Components Business	Systems Business
Plaintiffs	Class of all persons who purchased or otherwise acquired First Solar's publicly traded securities from April 30, 2008 to February 28, 2012	Individual Plaintiffs Maverick Fund, L.D.C.; Maverick Fund USA, Ltd.; Maverick Fund II, Ltd.; Maverick Neutral Fund, Ltd.; Maverick Neutral Levered Fund, Ltd.; Maverick Long Fund, Ltd.; and Maverick Long Enhanced Fund, Ltd.
Causes of Action	Federal securities claims	Federal securities claims, Arizona securities laws Common-law fraud Negligent misrepresentation
Alleged "Target" for Misrepresentations	All persons who purchased or acquired securities from April 30 2008, to February 28, 2012	Maverick personnel

Dates of Alleged Corrective Disclosures (Non-Overlapping Dates Italicized)	*7/29/2010*, *10/28/2010*, *2/24/2011*, *5/3/2011*, 10/25/2011, 12/14/2011, 2/28/2012	*8/17/2011*, *9/16/2011*, *9/21/2011*, *9/22/2011*, *9/28/2011*, 10/25/2011, 12/14/2011, *2/10/2012*, and 2/28/2012
Relief Sought	Class certification; actual damages and attorneys' fees	Rescission or rescissionary damages; actual damages; punitive damages for common lawfraud; pre- and post-judgment interest and attorneys' fees

The Superior Court's focus on the thematic overlaps between the two matters, rather than the significant, fundamental differences, led to its rejection of First Solar's claim.

a. The Substantive and Fundamental Differences Between the *Maverick* Action and the Class Action Are Dispositive

In applying the fundamentally identical test, the Superior Court failed to consider the distinct alleged Wrongful Acts central to each action. The Superior Court erroneously adopted Insurers' false assertion that *Maverick* and the Class Action allege the "same fraudulent scheme." Ex. 1 at 16; Trans ID 66372210 (National Union's Opp. to First Solar's Motion) at 1, 2, 29. They do not. At their core, the Class Action and *Maverick* are not fundamentally identical because they involve different groups of plaintiffs, alleging different misrepresentations made on different dates, relating to different business segments, and concerning different

subject matter. While the Class Action concerns misrepresentations regarding the historical cost of individual solar modules manufactured by the Components Business, the *Maverick* Action focuses on the Systems Business's objective to achieve grid parity with respect to utility-scale solar power plant facilities in the future.

(i) The *Maverick* and Class Actions Concern Fundamentally Different Concepts of Grid Parity and Cost-Per-Watt

Revealing its core theme, the *Maverick* Action complaint asserts that "[i]t is hard to overstate the significance of reaching grid parity." A205 ¶ 105. In stark contrast to the *Maverick* complaint, which uses the term "grid parity" 154 times, the term "grid parity" appears only once in the Class Action complaint's 258 paragraphs. Further confirmation of the focus of the *Maverick* Action is seen in the sole exhibit to the *Maverick* Action complaint, a 117-page presentation from June 2009 about the Systems Business's plan to reach grid parity profitably in the future. A204 ¶ 103 ("[A]t First Solar's Annual Analyst/Investor Meeting on June 24, 2009, Ahearn, Sohn, Eaglesham, Meyerhoff, and Polizzotto, ***using over 117 slides***, detailed the Company's roadmap to grid parity"). The *Maverick* complaint focused heavily on that meeting, alleging that the Systems Business's "solar farms would be able to produce electricity at $0.10-$0.15 kWh. Ex. A at slide 81.… By reaching grid parity, First Solar would enjoy the benefits of massive demand for its product but yet still

maintain very healthy 35-40% gross margins and operating margins of 20-25%." A204–205 ¶ 103. This "Grid Parity Roadmap" is not attached to or cited in the Class Action complaint, and was not even one of the 1,277 documents on the Class Action Plaintiffs' list of trial exhibits.[11]

Grid parity and cost-per-watt are not interchangeable terms or concepts. As the Grid Parity Roadmap demonstrates, "grid parity" is a distinct and much broader metric than module "cost-per-watt." As stated in the *Maverick* complaint, "First Solar had a grand plan to produce electricity from the sun at costs comparable to conventional electricity production methods—otherwise known as grid parity." A179 ¶ 2. Grid parity includes not just the economic aspects of the modules, but many other economic aspects of a utility-scale solar *facility* (or as Maverick referred to it, "solar farm"), including balance of systems costs and project development costs, including operations, maintenance, financing, etc. *See* A219 ¶ 162 ("Our module, balance of systems, and project development cost reduction road maps remain on track to achieve our goal to reach . . . parity with fossil fuel"). Indeed, solar modules are no more the singular factor of achieving grid parity than uranium is the singular factor used to determine the viability of a proposed nuclear energy facility.

[11] *See* Class Action, Dkt. No. 667-1 (Class Action Pretrial Order Ex. A).

Cost-per-watt is a crucial metric of the Components Business, namely the cost to manufacture a given module; but that cannot mean that every allegation that refers to cost-per-watt is automatically a "Related Claim."[12] Indeed, the Wrongful Acts alleged in the *Maverick* Action relate to the larger "fraudulent scheme" to mislead investors about the Systems Business progress to achieving grid parity in the future and statements (or Wrongful Acts) allegedly made in furtherance of that goal. A182–183 ¶ 16. In contrast, the Class Action involves alleged misrepresentations about the Components Business' previously reported manufacturing metrics for a single type of equipment, namely, the modules it produced.

(ii) The *Maverick* Action Sought Unique Damages Based On Unique Alleged Misrepresentations

Because of the *Maverick* Action's different core focus, its complaint contains numerous alleged misrepresentations that are not found in the Class Action. *See, e.g.*, A204 ¶ 102 ("[I]n May 2009, First Solar's Walter A. Wohlmuth published and presented a paper detailing the Company's plan to reach grid parity"); A205 ¶ 108 ("[A]t JPMorgan's Technology, Media and Telecom Conference on May 17, 2011, First Solar's Vice President, Investor Relations Larry Polizzotto, told investors that First Solar was close to achieving the goals set forth in the Grid Parity Roadmap…

[12] *See, e.g., Providence Serv. Corp.*, 2019 WL 3854261, at *3 (noting that to deem all allegations of misrepresentations about an insured's business model as "related" would be to render coverage illusory).

Polizzotto would conclude by saying: I think at this point we're doing better than that roadmap…"); A206 ¶ 109 ("[O]n August 4, 2011, Defendant Gillette said: 'Our LCOE is approaching grid parity, which should drive elasticity and demand and a growth of sustainable markets.'"); A206 ¶ 112 ("As CW7 summed it up: 'The CEO was telling us we were getting to grid parity, we weren't telling him.'"). The *Maverick* Action further alleges misrepresentations made at a May 17, 2011 conference, in which First Solar's then-Vice President of Investor Relations told investors that the Systems Business was close to achieving grid parity and was ahead of schedule to meet its grid parity targets. A227–228 ¶¶ 195–96. As another example, the *Maverick* Action complaint alleges that on September 13, 2011, the *Maverick* Action plaintiffs met privately with First Solar's then-CEO, who made further representations to them that First Solar was on track to achieve grid parity. A233–234 ¶¶ 215–17.

None of these alleged misrepresentations—the Wrongful Acts at the heart of the *Maverick* Action—are mentioned in the Class Action complaint. Where the same communications are referenced in both Actions, only *Maverick* alleges misrepresentations concerning grid parity; the Class Action focuses on cost-per-watt, warranty reserves, and historical performance.

In addition to alleging distinct misrepresentations arising from distinct business segments, the *Maverick* plaintiffs also sought to recover distinct and greater

damages. In fact, the Superior Court observed that "the most apparent striking difference between the underlying actions is the type of damages sought by the *Maverick* plaintiffs," but inexplicably attributed that difference to the *Maverick* plaintiffs' "apparent intent of garnering greater recovery." Ex. 1 at 16. The Superior Court failed to recognize that Maverick's claimed damages correspond directly to the different alleged misrepresentations and different corrective disclosures at issue in the *Maverick* Action. Maverick sought to recover for price declines on September 21 and 22, 2011, based on an announcement that First Solar's Topaz utility-scale solar power plant project would not receive federal loan guarantees, which Maverick claimed raised questions about "First Solar's business model" and "the strength of First Solar's utility-scale business"—but nothing about the Component Business. *Id*. ¶ 255. The same is true for an alleged stock price drop on September 28, 2011, when Maverick claimed that news about a "worldwide oversupply of panels" cast doubt on First Solar's overall business model. *Id*. ¶ 26. And Maverick claimed an alleged corrective disclosure on February 10, 2012, about permit delays on a specific utility-scale solar power plant installation, Antelope Valley Solar Ranch One, about which the Class Plaintiffs alleged nothing whatsoever. *Id*. ¶¶ 73–74. These additional allegations form the core of the *Maverick* Action and do not exist in the Class Action.

(iii) The *Maverick* and Class Actions Are Fundamentally Different as That Test Is Applied by Delaware Courts

Because of the different core concepts, alleged misrepresentations, and damages theories, the claims in both actions are not "fundamentally identical." The alleged wrongful acts at issue here are even more different than the purported overlap of claims that were found ***not*** to be fundamentally identical in *Pfizer*, where the Superior Court analyzed two cases involving the same drug: one claimed alleged false representations regarding the *cardiovascular risks* associated with Celebrex and the other alleged false and misleading statements regarding the *gastrointestinal health risks* of Celebrex. 2019 WL 3306043, at *3. They are likewise more different than in *Medical Depot*, where the court found that two cases (one for wrongful death, and one brought under California's Business and Professions Code, both asserting flaws in the manufacture and design of the same medical device), lacked fundamental identity. 2016 WL 5539879, at *6. The *Pfizer* court held that claims of different side effects of the exact same medication were not sufficient to meet the fundamentally identical standard. *Medical Depot* held that unrelated causes of action stemming from the same defective product were not sufficient to meet the fundamentally identical standard. Here, the gulf between the two underlying matters—the past performance of the Components Business and the future

aspirations of the Systems Business—is vast by comparison. Under Delaware law, the two matters cannot be deemed fundamentally identical.

b. Superficial Thematic Similarities Do Not Establish Fundamental Identity

(i) Overlap of Basic Facts Does Not Make the Two Cases Fundamentally Identical

The Superior Court erred in elevating superficial thematic similarities between the Actions—as will always exist where a less diversified company is sued in multiple securities actions—over the fundamental differences illustrated above. *Medical Depot* is instructive in this regard. In that case, the Superior Court held that two lawsuits involving the identical product manufactured by the same manufacturer were not related under similar policy language (relating claims that are based upon, arise from or "in any way involv[e]" the "same or related facts, circumstances, situations, transactions or events[.]") *Id*. at 5, 13–14. Instead, the Court held that coverage for a later class action lawsuit, which asserted misrepresentation claims under California's Business and Professions Code regarding the quality of the insured's full-body sling, was not precluded by an earlier wrongful death, products liability and negligence suit involving personal injury from the failure of the same sling, even though both alleged overlapping misrepresentations about the slings' defective straps and capabilities. *Id.* at 7, 14.

Similarly, in *Providence*, the Superior Court analyzed broad relatedness language including the connection of "any common fact, circumstance, situation…" *Providence Serv. Corp.*, 2019 WL 3854261, at *3. Comparing two actions against Providence, the Court held that though the two actions were brought by similarly situated plaintiffs, alleged similar wrongful conduct, and sought relief under the same statute, the differences outweighed the similarities such that the cases were not related. Differences included that one action was broad, while one was narrow; the actions sought different forms of relief; and one action asserted multiple causes of action that the other did not. *Id.* at *3–4. Each of these differences is present—and even more pronounced—here.

(ii) That The *Maverick* Plaintiffs Opted Out of the Class Action Does Not Mean That The *Maverick* Action Arose Out Of The Class Action

The Wrongful Acts alleged in the Class Action and in *Maverick* involve different plaintiffs, different alleged fraudulent schemes, and different causes of action. Further, there is no allegation that the alleged wrongful conduct in the Class Action caused the separate wrongful conduct in the *Maverick* Action. As such, the two matters did not "arise out of" the same facts or Wrongful Acts, and should not be treated as "Related Claims."

The Superior Court and Insurers relied heavily on the fact that the *Maverick* Action was filed by plaintiffs who opted-out of the Class Action. But courts have

recognized that opt-out actions are not necessarily related to the class action from which they originated. *See, e.g.*, *Am. Gen. Life Ins. Co. v. Ace Ins. Co.*, 131 Fed. Appx. 217, 221 (11th Cir. 2005) (analyzing "related claims" provision and noting that not all opt-out complaints at issue contained allegations relating them to an earlier class action). Indeed, the *Maverick* plaintiffs opted out of the Class Action to preserve their unique rights, and pursued a separate litigation with a "novel grid parity theory of the fraud." A569. The *Maverick* Action was deliberately initiated and maintained separately from the Class Action, and the *Maverick* plaintiffs admittedly pursued differing theories and allegations that were either ignored or "never presented" by Class plaintiffs. A576.

In contrast, an action might "arise out of" an earlier action where it results directly from that earlier action. For instance, a securities fraud litigation instigated by facts revealed in a class action (but not previously disclosed to shareholders) could be deemed to have arisen out of the class action litigation. Here, on the other hand, where the two actions were initiated and maintained separately and sought separate relief for separate misrepresentations, *Maverick* did not arise out of the Class Action.

3. Even if There Exists an Instance Of Fundamental Identity, Distinct Wrongful Acts Alleged in Each Action Can Constitute Separate Claims That Are Not Excluded

Finally, even if certain alleged Wrongful Acts in the *Maverick* Action were related to the Class Action, only the "related" portion of *Maverick* would be excluded—not the entire action. All remaining non-overlapping alleged misrepresentations and corrective disclosures must still be deemed as independent claims, unrelated and not "arising out of" the Class Action. *See AT&T Corp. v. Faraday Capital Ltd.*, 918 A.2d 1104, 1108–09 (Del. 2007) (holding each cause of action in two underlying lawsuits may constitute a separate "Claim" under identical policy language). Following this Court's authority, the Superior Court in *Northrop Grumman* held that "[a] single litigation can involve multiple Claims potentially-covered even where the Claims grow from a common nucleus of misconduct." 2021 WL 347015, at *11. As a result, the court held that one class action lawsuit, containing both 14(a) and 10(b) claims, constituted two "Claims" rather than one. *Id.* The court went on to hold that the two claims asserted in the class action were not fundamentally identical. Notably, the court distinguished the claims because one alleged "wrongdoing pertaining to pre-merger proxy solicitation misstatements," while the other alleged "wrongdoing in connection with…post-merger financial reporting." *Id.* Thus, despite thematic similarities (the alleged wrongdoers, financial reporting misconduct about the same general topic, and the same transaction), the

court held the two claims were not fundamentally identical, and as such, were not related. *Id.* Under both *AT&T* and *Northrop,* the unique Wrongful Acts alleged in *Maverick* can be deemed a separate Claim, even if the overlapping allegations were found to be fundamentally identical. If the Court recognizes multiple Claims in the *Maverick* Action, this matter should be remanded for determination of the total number of Claims asserted in *Maverick*, whether any are "fundamentally identical" to those asserted in the Class Action, and if so, how to properly allocate between Loss precluded by the Related Claims Exclusions and Loss covered by the Policies.[13]

[13] In the event of both covered and uncovered matters, the Policies anticipate determination of a "fair and proper allocation of the amounts to be covered as Loss." A123.

CONCLUSION

First Solar respectfully requests that this Court reverse the trial court's judgment in its entirety and direct that judgment be entered for First Solar that the Policies' Related Claims Exclusions do not exclude coverage for the defense and settlement of the *Maverick* Action, and that the *Maverick* Action is a claim first made during the 2014–2015 policy period.

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