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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 Court Below – Superior Court of the State of Delaware C.A. No. N20C-10-156 MMJ CCLD (Johnston, J.)

ANSWERING BRIEF ON APPEAL OF APPELLEE XL SPECIALTY INSURANCE COMPANY

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NATURE OF THE PROCEEDINGS

This coverage litigation arises out of two securities lawsuits, one filed as an opt-out from the other, in which some of the same plaintiffs sued the same eight defendants and alleged the same fraudulent scheme involving many of the same misrepresentations and disclosures. Plaintiff-Appellant, First Solar, Inc. ("First Solar") seeks coverage for *Maverick Fund, L.D.C., et al. v. First Solar, Inc., et al.*, No. 2:15-cv-01156, 2018 WL 6181241 (D. Ariz. Nov. 27, 2018) (the "Maverick Action"), a securities lawsuit filed in 2015 against First Solar and seven of its directors and officers as an opt-out from a securities class action filed against the same defendants in 2012, *Smilovits, et al. v. First Solar, et al.*, No. 2:12-cv-00555, 2012 WL 6574410 (D. Ariz. Dec. 17, 2012) (the "Smilovits Action"). Five years after the complaint in the Maverick Action was filed, apparently having exhausted the coverage available for the 2011-12 policy period, First Solar sought coverage for the Maverick Action under XL Specialty Policy No. ELU136925-14 (the "XL Specialty Policy"), which is excess of and follows form to the primary policy (the "Primary Policy") issued by Defendant-Appellee National Union Fire Insurance Company of Pittsburgh, PA ("AIG"). Defendant-Appellee XL Specialty Insurance Company ("XL Specialty") denied coverage for the Maverick Action because it is a Claim deemed first made when the Smilovits Action was first made, prior to the XL Specialty Policy's inception.

In its June 23, 2021 Memorandum Opinion and Order, the Superior Court agreed with XL Specialty and held that the Maverick Action and the Smilovits Action are "Related Claims" deemed first made when the Smilovits Action was first reported in 2012, prior to the inception of the XL Specialty Policy. The Superior Court correctly determined that the Maverick Action relates back to the Smilovits Action because "both cases involve the *same fraudulent scheme*—artificially raising stock prices by misrepresenting First Solar's ability to produce solar electricity at costs comparable to the costs of conventional energy production" – "[i]n other words, both actions allege that First Solar misrepresented its ability to achieve grid parity."

On appeal, First Solar tries to differentiate the Maverick Action and the Smilovits Action by arguing that "*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 Components Business's quarterly and annual reports of its cost-per-watt—which, by definition can only reflect historical performance." But this distinction is contrived and flies in the face of the allegations in the complaints. As the Superior Court correctly found, both the Maverick Action and the Smilovits Action focus on First Solar's *past* misrepresentations—including its misrepresentations about defective solar panels, manufacturing processes, panel degradation rates, and cost-per-watt metrics—as

well as First Solar's overall scheme to mislead investors about its ability to be price-competitive with fossil fuels – or, stated differently, to achieve grid parity – in the *future*.

Specifically, the Maverick Action and the Smilovits Action both allege that First Solar's past misrepresentations were part of the *same* fraudulent scheme to convince the *same* investors that First Solar could reduce costs and thereby produce solar power at prices comparable to power produced with fossil fuels. *See* Maverick Compl., A179 ¶ 2 ("Since its inception as a public company, 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."); *see* Smilovits Am. Compl., A425-26 ¶¶ 2-4 ("As multi-billion-dollar fraud schemes go, defendants' was fairly simple . . . defendants spent years convincing investors that First Solar had a winning formula for reducing manufacturing costs so rapidly and dramatically as to make solar power competitive with fossil fuels.").[1]

The Superior Court thus correctly held that the Maverick Action is not covered under the XL Specialty Policy because it relates back to and is deemed first made when the Smilovits Action was first made, prior to the XL Specialty

[1] Citations to "A___" in this brief are references to the Appendix to Appellant's Opening Brief. Citations to "B___" in this brief are references to the Appendix to Appellees' Answering Briefs.

Policy's inception. This Court therefore should affirm the Superior Court's decision granting XL Specialty's motion to dismiss and denying First Solar's motion for summary judgment.

SUMMARY OF THE ARGUMENTS

1. *Denied*. The Superior Court correctly held that the Maverick Action is not covered under the XL Specialty Policy because the Maverick Action is a Claim that relates back to and is deemed first made when the Smilovits Action was first made, prior to the XL Specialty Policy's inception. The Primary Policy defines "Related Claim" to mean, in relevant part, "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 provides that "Claims actually first made or deemed first made prior to the inception date of this policy . . . are not covered under this policy[.]" A129. The Maverick Action is "a Claim alleging, arising out of, based upon or attributable to any facts or Wrongful Acts" alleged in the Smilovits Action because it is an opt-out case brought by some of the *same* plaintiffs alleging that the *same* defendants engaged in the *same* fraudulent scheme to convince the *same* investors that First Solar could reduce costs and produce solar energy at prices comparable to fossil fuels – in other words, that it could achieve grid parity.

The Maverick Action thus is a Claim deemed first made when the Smilovits Action was first made in 2012, prior to the inception date of the XL Specialty Policy. The Superior Court correctly applied the relevant policy language and its judgment should be affirmed.

STATEMENT OF THE FACTS

A. The XL Specialty Policy

XL Specialty issued the XL Specialty Policy for the Policy Period[2] from November 16, 2014 to November 16, 2015.[3] A145-74. The XL Specialty Policy includes a $10 million aggregate limit of liability excess of $10 million provided by the Primary Policy, which was issued by AIG and a $5 million self-insured retention. *See* A147; A040.

The XL Specialty Policy's Insuring Agreement states as follows:

> The Insurer will provide the Insured with insurance coverage for Claims, as such term is defined in the Primary Policy, first made against the Insured during the Policy Period excess of the Underlying Insurance stated in ITEM 4 of the Declarations. Coverage hereunder will apply in conformance with the terms, conditions, endorsements and warranties of the Primary Policy. The coverage hereunder will attach only after all Underlying Insurance has been exhausted by the actual payment of loss by the applicable insurer or insurers thereunder, by the Insured and/or by any other person or entity, and in no event will the coverage under this Policy be broader than the coverage under the Primary Policy.

A172, as amended by A164.

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[2] Terms that are capitalized or appear in bold but are not defined in this brief are defined in the XL Specialty Policy or the Primary Policy and carry the same meaning here.

[3] First Solar also sued for coverage under Policy No. ELU132247-13, which XL Specialty issued for the Policy Period from November 16, 2013 to November 16, 2014, but it has never attempted to articulate a theory of coverage under that policy. *See* A024 ¶ 24. Regardless, all of the arguments asserted here equally would preclude any possibility of coverage under Policy No. ELU132247-13.

The Primary Policy defines "Claim" in relevant part to mean "a civil, criminal, administrative, regulatory or arbitration proceeding for monetary, non-monetary or injunctive relief which is commenced by: (i) service of a complaint or similar pleading . . . ." A060. The Primary Policy defines "Related Claim" to mean "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 either: (i) alleged in a **Claim** made against an **Insured**; or (ii) the subject of another **Pre-Claim Inquiry** received by an **Insured Person**." A067.

The Primary Policy's relation back provision, which is incorporated in the XL Specialty Policy by the Insuring Agreement, provides in relevant part:

> (b) *Relation Back to the First Reported Claim or Pre-Claim Inquiry*: Solely for the purpose of establishing whether any subsequent **Related Claim** was first made . . . during the **Policy Period** or **Discovery Period** (if applicable), if during any such period:
>
> (1) A **Claim** was first made and reported in accordance with Clause 7(a) above, then any **Related Claim** that is subsequently made against an **Insured** and that is reported to the **Insurer** 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, as amended by A103, A129-130 (the "Relation Back Provision").

B. The Underlying Litigation

The Smilovits Action is a shareholder class action lawsuit that was filed in the U.S. District Court for the District of Arizona on March 15, 2012. A020 ¶¶ 5-

6; A425 ¶ 1. The Smilovits Action alleges that First Solar and the individual defendants, between April 30, 2008 and February 28, 2012, violated the federal securities laws by engaging in a fraudulent scheme to convince investors and the public that the cost of solar power was moving toward parity with fossil fuels and that they "had a winning formula for reducing manufacturing costs so rapidly and dramatically as to make solar power competitive with fossil fuels." A425 ¶¶ 1-2. First Solar and the individual defendants allegedly "perpetuated their fraudulent self-portrayal by concealing and misrepresenting the nature and extent of major manufacturing and design defects in their solar modules." A425 ¶ 2. Specifically, First Solar and the individual defendants allegedly made false and misleading statements about a manufacturing deviation and a heat degradation problem with First Solar's solar modules, as well as the effect these issues had on First Solar's earnings and business prospects. A425 ¶ 3; A432-35 ¶¶ 29-34. First Solar and the individual defendants allegedly perpetuated this fraudulent scheme by knowingly misrepresenting and manipulating "cost-per-watt" metrics, including First Solar's module and balance of system costs. *See* A484-86 ¶ 120; A487 ¶ 122; A492 ¶¶ 131-32; A529 ¶ 196; A533-34 ¶ 204(d); A537-38 ¶ 206(a); A539-40 ¶ 209(a); A542-43 ¶ 217.

A number of shareholders opted out of the Smilovits Action and filed the Maverick Action in the same court on June 3, 2015. A028 ¶ 41. First Solar seeks

coverage in connection with the defense and settlement of the Maverick Action. *See* A019 ¶ 2; *see also* A179. Typical of an opt-out action, the Maverick Action is like the Smilovits Action in several critical aspects:

- As noted, the plaintiffs in the Maverick Action are class members who opted out of the Smilovits Action.
- All of the defendants named in the Smilovits Action are also named as defendants in the Maverick Action.
- Like the Smilovits Action, the Maverick Action alleges that First Solar and the same current and former officers and directors of 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.
- Like the Smilovits Action, the Maverick Action alleges that First Solar and the individual defendants engaged in a fraudulent scheme to conceal manufacturing and design defects and to manipulate First Solar's cost-per-watt metrics, including its module and balance of system costs, in order to oversell its ability to achieve grid parity or cost competitiveness. A180 ¶ 5; A212 ¶ 136.
- Like the Smilovits Action, the Maverick Action alleges that the defendants concealed massive cost overruns at First Solar's utility projects and overstated the value and projected earnings of the projects, and thereby issued false financial reports in violation of GAAP. A201-03; A210-11.
- Like the Smilovits Action, the Maverick Action alleges that the truth was revealed on February 28, 2012. A247 ¶¶ 265-66.
- The plaintiffs in the Maverick Action specifically identify the filings in the Smilovits Action as a source of their allegations against the defendants in the Maverick Action. A179.

First Solar repeatedly touted the similarities between the two lawsuits in motions it filed in the Maverick Action, and the U.S. District Court for the District

of Arizona repeatedly acknowledged those similarities in granting the relief that First Solar sought. For example, First Solar successfully moved to transfer the Maverick Action to the same judge presiding over the Smilovits Action based on the "substantial overlap in legal and factual issues and the substantial overlap in parties" between the two lawsuits, and its motion set forth the overlapping parties, facts, and allegations in detail. B078. First Solar also filed a stipulation extending its time to respond to the Maverick Action complaint so it could coordinate its progress with "the related securities class action," B132, and moved to dismiss the Maverick complaint as the "latest in a series of securities fraud actions" making "nearly identical allegations" as the Smilovits Action, B141.

The judge presiding over both lawsuits cited the overlap between the two matters in multiple rulings in which the court denied a motion in the Maverick Action based on its prior rulings in the Smilovits Action, and took judicial notice in the Maverick Action of facts established in the Smilovits Action. B182-183. The judge further ordered the defendants in the Maverick Action to produce expert reports from the Smilovits Action due to "the degree of overlap in facts, parties, and issues between this case and the Smilovits class action." B194.

C. First Solar's Belated Claim for Coverage

Consistent with its repeated representations to the U.S. District Court for the District of Arizona that the Maverick Action was inextricably interrelated with the

Smilovits Action, First Solar acknowledges that it failed to provide notice of the Maverick Action to XL Specialty – or to any insurer on the 2014-15 tower – when the lawsuit was filed on June 1, 2015. *See* A030 ¶ 48. Rather, First Solar initially provided notice of the Maverick Action "as follow-up correspondence" on the Smilovits Action to the insurers on the 2011-12 tower that were funding First Solar's defense in that lawsuit. *Id.* XL Specialty first learned of the Maverick Action by letter dated June 1, 2020, after the 2011-12 insurance tower had been exhausted, in which First Solar advised XL Specialty and the other 2014-15 insurers (AIG and Chubb) that a mediator had recently made a mediator's proposal to resolve the Maverick Action and demanded that the insurers provide coverage for the defense and settlement of the Maverick Action. *See* A031 ¶ 51; *see also* B338 ¶ 3; B341-43.

D. Coverage Litigation

The parties engaged in an unsuccessful coverage mediation, following which First Solar filed this coverage suit in the Superior Court of Delaware. *See* A033 ¶ 61. XL Specialty moved to dismiss First Solar's coverage suit because the Maverick Action and the Smilovits Action constitute "Related Claims," and the Maverick Action is deemed a Claim first made when the Smilovits Action was first made, prior to the XL Specialty Policy's inception. *See* B322-29. XL Specialty further argued that, even if the Maverick Action were not a Claim first made prior

to the XL Specialty Policy's inception (which it is), coverage would be barred under the applicable Specific Matter Exclusion, notice provisions, and consent-to-settle provision.[4] *See* B329-33. First Solar simultaneously moved for partial summary judgment. A385-417.

On June 23, 2021, the Superior Court granted XL Specialty's motion to dismiss and denied First Solar's motion for partial summary judgment. *See* Memorandum Opinion and Order, attached to Appellant's Op. Br. as Exhibit 1 ("Ex. 1"). The Superior Court correctly concluded that:

> [B]oth cases involve the same fraudulent scheme—artificially raising stock prices by misrepresenting First Solar's ability to produce solar electricity at costs comparable to the costs of conventional energy production. In other words, both actions allege that First Solar misrepresented its ability to achieve grid parity.

Ex. 1, Opinion at 16. The Superior Court further concluded that the Maverick Action and the Smilovits Action have "substantial similarities" including allegations that First Solar (i) "concealed defects in the design and manufacturing of modules and panels;" (ii) "manipulated its costs, including cost-per-watt

[4] In addition to the reasons set forth in this answering brief, the Superior Court's decision may be affirmed for the other reasons set forth in XL Specialty's briefing at the trial level, including its briefing on the Specific Matter Exclusion, notice provisions, and consent-to-settle provision. *See* B307-36; B355-93; B459-82. Because the Superior Court did not address those other arguments, XL Specialty will not do so here, but it is prepared to do so if this Court so desires. In addition, because the XL Specialty Policy follows form to the Primary Policy, the arguments made in National Union's Answering Brief regarding the Specific Matter Exclusion apply with equal force to the XL Specialty Policy.

metrics;" and (iii) "issued false financial reports in violation of GAAP." *Id.* The Superior Court determined that "the similarities between the *Smilovits* and *Maverick* cases outweigh any differences" and "the Court need not accept First Solar's 'unilateral characterizations' of the claims." *Id.* at 15-16.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY HELD THAT THE MAVERICK ACTION RELATES BACK TO AND IS DEEMED A CLAIM FIRST MADE WHEN THE SMILOVITS ACTION WAS FILED, PRIOR TO THE XL SPECIALTY POLICY'S INCEPTION.

A. Question Presented

The Maverick Action and the Smilovits Action involve many of the same plaintiffs suing the same defendants regarding the same fraudulent scheme and allege many of the same misrepresentations regarding First Solar's ability to become cost-competitive with energy produced with fossil fuels. Did the Superior Court correctly hold that the Maverick Action is a Claim that relates back to and is deemed first made when the Smilovits Action was first made, prior to the XL Specialty Policy's inception? B322-30; B375-91; B465-73.

B. Scope of Review

The Superior Court's decision granting XL Specialty's motion to dismiss is subject to a *de novo* standard of review. *Martin v. Nat'l Gen. Assurance Co.*, 2019 WL 2402927, at *2 (Del. Supr. June 5, 2019), *cert. denied,* 140 S. Ct. 957 (2020). In this context, this Court "must determine whether the trial judge erred as a matter of law in formulating or applying legal precepts." *Hart v. Parker*, 236 A.3d 307, 309–10 (Del. 2020).

C. Merits of the Argument

1. The Maverick Action is a Claim that relates back to and is deemed first made when the Smilovits Action was first made, prior to the XL Specialty Policy's inception.

a. The Superior Court correctly applied the plain meaning of the applicable policy language in holding that the two claims are related.

The Superior Court correctly held that the XL Specialty Policy does not provide coverage for the Maverick Action because the Maverick Action is a Claim that relates back to and is deemed first made when the Smilovits Action was first made, prior to the XL Specialty Policy's inception. The Superior Court correctly determined that "[t]he issues of relatedness and relating back turn on whether or not the Maverick Action is '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'" the Smilovits Action. *See* Ex. 1, Opinion at 12 (italics omitted). In other words, these issues "turn on" the plain language of the Related Claim definition in the Primary Policy. *See Sycamore Partners Mgmt., L.P. v. Endurance Am. Ins. Co.*, 2021 WL 4130631, at *10 (Del. Super. Sept. 10, 2021) (holding that the policies' plain language controlled question of interrelatedness); *Northrop Grumman Innovation Sys., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 347015, at *9 (Del. Super. Feb. 2, 2021) (citing *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012)) (providing that courts must conduct a "plain meaning"

analysis pursuant to which "all contract terms – including those in insurance policies – are accorded their plain, ordinary meaning"). As the Superior Court held, under a "plain meaning" analysis, the Maverick Action is "a Claim alleging, arising out of, based upon or attributable" to the Smilovits Action because it is an opt-out from the Smilovits Action alleging the *same* fraudulent scheme by the *same* defendants making the *same* misrepresentations to convince the *same* investors that First Solar could reduce costs and compete with fossil fuels.

First Solar urges this Court to ignore the plain language of the Primary Policy, however, and to hold that the Maverick Action and the Smilovits Action are not Related Claims because they are not "fundamentally identical." First Solar relies largely upon the opinion in *Pfizer Inc. v. Arch Insurance Co.*, in which the Superior Court found that two claims were not interrelated because they involved different plaintiffs suing different defendants alleging "entirely distinct misrepresentations of very different health risks" arising from the use of different drugs. 2019 WL 3306043, at *9-10 (Del. Super. July 23, 2019). While the *Pfizer* opinion did state that "this Court has found coverage to be precluded only where the two underlying claims are 'fundamentally identical,'" it relied largely on an opinion in which the court found that two claims were related because they were fundamentally identical, without explaining how that opinion supported its holding that interrelatedness *requires* a finding that two claims are "fundamentally

identical." *Id.* at *10 (citing *United Westlabs, Inc. v. Greenwich Ins. Co.*, 2011 WL 2623932, at *1 (Del. Super. June 13, 2011)).

First Solar recites the phrase "fundamentally identical" no fewer than 45 times in its opening brief on appeal, arguing that "[t]his standard has long been applied by Delaware courts" and that the trial court acknowledged this "standard" but "incorrectly applied it." Appellant Op. Br. at 1-2, 21. But "fundamentally identical" is not a standard of any kind – the phrase provides no benchmarks for determining when the similarity between two claims reaches the level of "fundamentally identical" or any guidance on how parties to insurance policies can avoid litigation by resolving that issue for themselves. The trial court did not "incorrectly apply" the "standard" – there was no standard for it to apply other than the plain meaning of the applicable policy language.

Consistent with the ruling on appeal, the Superior Court has made clear that the *Pfizer* opinion was not based on some overly-narrow application of a "fundamentally identical" standard, but rather on a straightforward application of the policy language for related claims. *See Ferrellgas Partners L.P. v. Zurich Am. Ins. Co.*, 2020 WL 363677, at *7 (Del. Super. Jan. 21, 2020) ("The issue before the Court [in *Pfizer*] was whether the *Morabito* Action shared 'as a common nexus of any fact, circumstance, situation, event, transaction [or] cause' with the *Garber* Action."). And in numerous other opinions reciting the phrase "fundamentally

identical," the Superior Court has stated that it in fact conducted a "plain meaning" analysis pursuant to which "all contract terms – including those in insurance policies – are accorded their plain, ordinary meaning." *Northrop Grumman Innovation Sys., Inc.*, 2021 WL 347015, at *9 (citing *Alta Berkeley VI C.V. v. Omneon, Inc.,* 41 A.3d 381, 385 (Del. 2012)).

For example, in *United Westlabs, Inc. v. Greenwich Insurance Co.*, the Superior Court applied the "related claims" policy language as written in holding that two claims were "fundamentally identical" where they involved "the same subject, as well as common facts, circumstances, transactions, events and decisions." 2011 WL 2623932, at *11 (Del. Super. June 13, 2011), *aff'd,* 38 A.3d 1255 (Del. 2012). Likewise, the court in *Providence Service v. Illinois Union Insurance Co.* looked to the "ordinary meaning" of the policy's related claim language and further explained that, "[w]hen determining whether actions are 'related,' courts compare the allegations in the complaints to determine their similarities and differences." 2019 WL 3854261, at *2-3 (Del. Super. July 9, 2019). In that case, the court held that two underlying actions were not related where one action alleged breach of contract, and the other alleged constitutional challenges and, ultimately, "[t]he similarities between the two Actions [we]re **outweighed** by their differences." *Id.* at *4 (emphasis added). Similarly, in *Medical Depot, Inc. v. RSUI Indemnity Co.*, the court "read the Policy's relevant

provisions as a whole" and held that two underlying actions were not related where one action alleged wrongful death, the other alleged violations of California's Business & Professions Code, and the only thing in common was that both involved a medical sling. 2016 WL 5539879, at *12 (Del. Super. Sept. 29, 2016). And in *Northrop Grumman*, the court stated that it applied the "plain, ordinary meaning" of the relevant policy language and held that two claims were not related where they involved policies issued to and lawsuits filed against "legally distinct entit[ies]," with pre-merger wrongdoing in one and post-merger in the other, and "[v]ariations in timing, breed of securities violation, *mens rea*, motive, and burdens of proof . . . ." 2021 WL 347015, at *9-11.

Nevertheless, the purported "fundamentally identical" standard undoubtedly has influenced some of the Superior Court's decisions in a way that runs afoul of the principle that insurance policy provisions must be interpreted in accordance with their plain language. The court's ruling in *Northrop Grumman*, for example, is difficult to square with the language of the policy provision at issue – while the court recognized that it must apply the policy language as written, it went on to state that interrelatedness must be measured by the "fundamentally identical" standard, which it interpreted to mean that the two claims must be the "exact same," notwithstanding that neither phrase existed in the applicable policies. And only an "exact same" analysis could account for the ruling that the Section 10(b)

claim and the Section 14(a) claim in the same complaint were not, at the very least, interrelated claims.

At best, "fundamentally identical" has become a phrase the Superior Court recites in the process of analyzing the applicable policy language; at worst, it has fostered confusion and inconsistent application of the "plain meaning" standard that indisputably governs policy interpretation. Earlier this month, the Superior Court addressed the confusion and inconsistency surrounding the court's use of "fundamentally identical" and concluded that "[t]o apply indiscriminately that type of gloss to otherwise unambiguous policy language arguably could contravene Delaware law requiring this Court to interpret insurance policies according to their plain language . . . ." *Sycamore Partners*, 2021 WL 4130631 at *11. The court noted that "this thorny question likely will be resolved by the Delaware Supreme Court" and then properly applied the policies' plain language to the interrelatedness analysis. *Id.* XL Specialty respectfully submits that this Court should provide the clarity sought by the Superior Court and reaffirm that the plain language of the policy controls, not the "gloss" of "fundamentally identical." *Id.* Regardless, as explained below, the Smilovits Action and the Maverick Action are interrelated by any reasonable measure.

b. The Maverick Action is related to the Smilovits Action because they involve the same parties, the same alleged fraud, and the same alleged misrepresentations.

On the merits, the situation here is nearly the mirror image of the one in *Pfizer* and plainly calls for a different outcome. In finding the claims before it to be unrelated, the *Pfizer* opinion relied on "the myriad of differences between the Morabito and Garber Action" including that "[*d*]*ifferent* plaintiffs brought *separate* actions against *different* defendants regarding *different* misrepresentations about *different* products and associated health risks." *Ferrellgas Partners*, 2020 WL 363677, at *8 (emphasis in original) (distinguishing *Pfizer* and holding that two claims were interrelated). By contrast, the Maverick Action overlaps with the Smilovits Action in "myriad" ways, including that some of the *same* plaintiffs sued the *same* defendants regarding the *same* alleged misrepresentations and other actions regarding the *same* grid parity goals, cost-per-watt metrics, manufacturing processes, and design defects, and the *same* alleged corrective disclosures. *See* Maverick Compl., A180 ¶ 5; Smilovits Am. Compl., A425-26 ¶¶ 2-4. The similarities between the Maverick Action and the Smilovits Action are not "outweighed by their differences," like in *Providence Service Corp.*, and the Maverick Action and Smilovits Action are not merely tangentially related, like the Superior Court found to be the case in *Medical Depot* and *Northrop Grumman*. *See* Ex. 1, Opinion at 16 ("The Court finds that the similarities between the

Smilovits and *Maverick* cases outweigh any differences and go beyond mere 'thematic similarities.'").

The Maverick Action and the Smilovits Action both focus extensively on First Solar's alleged misrepresentations that it could compete with fossil fuels, which both complaints refer to as "grid parity." Maverick Compl., A179 ¶ 2; Smilovits Am. Compl., A535 ¶ 205(a). That shared focus is made clear from the first page of the two operative complaints, where the plaintiffs summarized the crux of their respective complaints. The amended complaint in the Smilovits Action summarized its allegations as follows:

> As multi-billion-dollar fraud schemes go, defendants' was fairly simple. Seizing on the opportunity presented by government subsidies and public enthusiasm for alternative energy, defendants spent years convincing investors that First Solar had a winning formula for reducing manufacturing costs so rapidly and dramatically as to make solar power competitive with fossil fuels.

Smilovits Am. Compl., A425 ¶ 2.

Likewise, the complaint in the Maverick Action summarized its allegations in substantively identical terms:

> Since its inception as a public company, 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.

Maverick Compl., A179 ¶ 2. Both complaints focused on the same alleged fraudulent scheme by the same defendants to convince investors that First Solar could produce solar energy at costs comparable to fossil fuels, or grid parity.

The crux of First Solar's effort to distinguish the two matters boils down to its contention that the term "grid parity" appears in the Maverick Action complaint 154 times but only once in the Smilovits Action complaint. That contention is profoundly misleading because of what First Solar omits – the Maverick Action complaint expressly stated that it used the term "grid parity" as a defined term to mean "produc[ing] electricity from the sun at costs comparable to conventional electricity production methods – otherwise known as grid parity." Maverick Compl., A179 ¶ 2. Likewise, the Smilovits Action focused extensively on First Solar's misrepresentations about its ability to produce solar energy at costs comparable to conventional methods in the future, but it referred to this concept by various terms including "grid parity," as First Solar concedes, as well as "cost competitiveness," "competitive," "cost parity," "compete with," "comparative," and the like. *See, e.g.,* Smilovits Am. Compl., A425 ¶ 2; A529 ¶ 198; A531 ¶ 202(d); A534 ¶ 204(f); A534-35 ¶ 205(a). The Maverick Action complaint makes clear that all of these terms refer to the same thing: the key issue in both complaints, First Solar's alleged misrepresentations about its future ability to produce solar electricity at costs comparable to conventional electricity production. The terms in the two complaints could be interchanged without altering the meaning of either one – they are both talking about the same thing.

With that understanding, the Maverick Action and the Smilovits Action both

hinge on allegations that First Solar concealed and misrepresented to investors and the public the existence of manufacturing and design defects that would prevent it from reaching "grid parity," or cost-competitiveness with fossil fuels. *See* Maverick Compl., A180 ¶ 6 ("As a result of the undisclosed problems then-existing at First Solar, the Company was nowhere near achieving grid parity or the goals set forth in the 'roadmap.'"); Smilovits Am. Compl., A425 ¶ 2 ("[First Solar] perpetuated their fraudulent self-portrayal by concealing and misrepresenting the nature and extent of major manufacturing and design defects in their solar modules."). These manufacturing and design defects allegedly included a "manufacturing excursion" that could result in premature power loss in affected modules, *see* Maverick Compl., A185-91 ¶¶ 29-51, A241 ¶ 242 *compared with* Smilovits Am. Compl., A431-32 ¶¶ 28-29, A441-47 ¶ 50, A545-46 ¶ 220, as well as panel degradation and heat-related problems with First Solar's modules and systems, *see* Maverick Compl., A191-99 ¶¶ 53-82, A241 ¶ 242 *compared with* Smilovits Am. Compl., A434-36 ¶¶ 34-36, A441-48 ¶ 50-51, A545-46 ¶ 220. Both actions allege that First Solar issued false financials and violated GAAP by improperly accounting for and failing to disclose the true costs associated with the modules that failed to meet specifications, and made false and misleading statements regarding its revenues and the successful installation of the modules sold in hot climates. *See, e.g.,* Maverick Compl., A210 ¶ 129 *compared with*

Smilovits Am. Compl., A497-99 ¶ 139; *see also* Ex. 1, Opinion at 15 (finding actions have "substantial similarities" including identical defendants and overlapping class periods, disclosures, and alleged violations of SEC Rules 10b-5 and 20).

Both the Maverick Action and the Smilovits Action further allege that First Solar made misleading and false statements regarding its ability to achieve "grid parity" by knowingly manipulating its cost-per-watt metrics. In fact, both actions allege that misrepresenting the cost-per-watt metrics was key to First Solar perpetuating its fraudulent scheme. *See* Maverick Compl., A199 ¶¶ 83-84 ("Throughout its existence, First Solar has repeatedly emphasized the importance of its cost per watt metric. Reducing the Company's cost per watt lowered overall costs of producing electricity from solar energy and brought the Company closer to being able to create electricity at 'grid parity'. . . . However, Defendants manipulated First Solar's publicly reported cost per watt figure."); *id.*, A216 ¶ 153 ("Defendants falsely reassured investors the Company was successfully reducing its cost per watt manufacturing costs as set forth in the Grid Parity Roadmap."); *id.*, A220 ¶ 170 ("Defendant Gillette falsely reassured investors that First Solar had substantially reduced its costs of producing electricity and accomplished substantial progress towards achieving grid parity."); Smilovits Am. Compl., A429 ¶ 21 ("[T]he cost-per-watt metric was the key gauge for investors in assessing First

Solar's viability as an unsubsidized business …. Unable to achieve the required cost savings and efficiency, defendants engaged in a scheme to defraud investors by knowingly manipulating the cost-per-watt metric."); *id.*, A429 ¶ 22 ("Furthermore, a 'failure to reduce cost per watt' would impair First Solar's ability to enter into and compete in new markets . . . . The math was simple – either First Solar lowered its costs to produce modules faster than it reduced its selling prices or the Company's margins would erode, profitability would decline and the Company would 'default under certain of [its] Long Term Supply Contracts."); *id.*, A528 ¶ 195 ("The significance of the cost-per-watt metric to First Solar's operations cannot be overstated. Defendants regularly acknowledged that First Solar's viability as an unsubsidized business depended on their ability to reduce significantly their cost-per-watt."); *id.*, A528 ¶ 198 ("Because First Solar's cost-per-watt was far from the level necessary to compete with conventional sources of electricity without the benefit of subsidies, defendants and analysts were keenly aware of the need for First Solar to maintain a constant and rapid trend toward reducing their cost-per-watt."); *id.*, A529 ¶ 199 ("Defendants knew if they failed to maintain that constant and rapid trend toward reducing their cost-per-watt, their failure would not go unnoticed by analysts[.]").

c. First Solar's arguments regarding "grid parity" and purported "different business segments" are post-litigation inventions that fly in the face of the facts and First Solar's prior representations to the courts.

First Solar's arguments that the Maverick Action and the Smilovits Action are not related clearly were contrived after the resolution of the underlying lawsuits to support a post-merits money grab. First Solar filched its "grid parity" argument from the *Maverick* plaintiffs' counsel, who first asserted this "novel theory" after both lawsuits resolved and they filed an opposition to a motion by counsel for the *Smilovits* plaintiffs seeking a share of the attorneys' fees generated by the $19 million settlement in the Maverick Action. A564-84. Similarly, here, First Solar espoused its "grid parity" theory only after the lawsuits resolved and it exhausted coverage under its previous policy. Tellingly, when the merits mattered, and its previous policy had not yet exhausted, First Solar insisted that the Smilovits Action *was* related to the Maverick Action and argued, among other things:

- "*Like the [Smilovits] Action*, the Maverick Fund Action alleges that the Company and the *same* current and former officers and directors of Company issued or caused to be issued many of the *same* misleading statements as alleged in the [Smilovits] Action.";

- "*Like the [Smilovits] Action,* the Maverick Fund Action alleges 'undisclosed problems' and inadequate remediation reserves relating to module defects caused by the manufacturing excursion (*See, e.g.,* [Maverick Compl.,] §IV.B) and undisclosed module performance issues in hot climates (*See, e.g.,* [*id*.,] § IV.C)).";

- "Further, the Maverick Fund Action presents many *similar legal*

> *issues* as the [Smilovits] Action, including whether certain alleged corrective disclosures, several of which overlap with those alleged in the [Smilovits] Action, meet the test for loss causation in the Ninth Circuit – the same issue this Court certified for interlocutory appeal in the [Smilovits] Action."

B077-78. (emphasis added). First Solar's initial position was correct – both actions rely on largely the same evidence to support the same allegations that First Solar fraudulently misrepresented its ability to achieve "grid parity," or a competitive level of costs with fossil fuels. *See* Maverick Compl., A179 ¶ 2 ("First Solar had a grand plan to produce electricity from the sun at costs comparable to conventional electricity production methods."); Smilovits Am. Compl., A425 ¶ 2 ("[D]efendants spent years convincing investors that First Solar had a winning formula for reducing manufacturing costs so rapidly and dramatically as to make solar power competitive with fossil fuels."); *see also* Maverick Compl., A216 ¶ 153 *compared with* Smilovits Am. Compl., A481-82 ¶ 114 (Nov. 1, 2010 10-Q); Maverick Compl., A221 ¶ 172 *compared with* Smilovits Am. Compl., A484 ¶ 119 (Feb. 24, 2011 call); Maverick Compl., A225-26 ¶ 190 *compared with* Smilovits Am. Compl., A487 ¶ 122 (May 3, 2011 1Q call); Maverick Compl., A230 ¶¶ 203-04 *compared with* Smilovits Am. Compl., A489 ¶ 126 (Aug. 4, 2011 call); Maverick Compl., A245 ¶¶ 257-58 *compared with* Smilovits Am. Compl., A549-50 ¶¶ 230-31 (Oct. 25, 2011 disclosures); Maverick Compl., A246 ¶ 260 *compared with* Smilovits Am. Compl., A550-51 ¶¶ 233-34 (Dec. 14, 2011 disclosures);

Maverick Compl., A247 ¶¶ 265-66 *compared with* Smilovits Am. Compl., A551-52 ¶¶ 235-36 (Feb. 28, 2012 disclosures).

Now, in a desperate, last-ditch effort to find a plausible argument for this Court, First Solar has asserted for the first time that "*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 Components Business's quarterly and annual reports of its cost-per-watt—which, by definition can only reflect historical performance." Appellant Op. Br. at 3. This purported "business segment" distinction was never raised in the underlying litigation *or* before the trial court in this coverage litigation – it was raised for the first time in First Solar's opening brief on appeal. This Court should reject First Solar's untimely argument on this basis alone. *See Riedel v. ICI Americas Inc.*, 968 A.2d 17, 25 (Del. 2009) ("We 'adhere to the well settled rule which precludes a party from attacking a judgment on a theory which was not advanced in the court below.'") (footnotes omitted) (overruled on other grounds).

Moreover, First Solar's argument is entirely without merit – both the Maverick Action and the Smilovits Action focus on First Solar's *past* misrepresentations, including its misrepresentations about defective solar panels, manufacturing processes, panel degradation rates, and cost-per-watt metrics, as well as First Solar's overall scheme to mislead investors about its ability to

compete with fossil fuels in the *future*. The Maverick Action explicitly includes allegations regarding First Solar's historical performance. *See, e.g.,* Maverick Compl., A241 ¶ 242 ("Defendants engaged in a scheme to mislead investors with respect to, among other things: (i) known defects in First Solar's panels and manufacturing processes; (ii) panel degradation rates, including heat degradation; (iii) First Solar panels' cost per watt to generate electricity; (iv) massive cost overruns at First Solar's utility scale projects, and the profitability of such projects in First Solar's pipeline . . . ."). The Smilovits Action explicitly includes allegations regarding forward-looking statements. *See, e.g.,* Smilovits Am. Compl., A471 ¶ 99 ("Although defendants had identified a manufacturing problem, they falsely touted their module manufacturing capability as 'reliable' and directly linked their manufacturing capabilities with their *future success*.") (emphasis added). First Solar's new "business segment" argument is nothing more than a recent invention that flies in the face of the facts and the allegations in both underlying lawsuits.

First Solar further argues in a footnote that the Relation Back Provision does not bar coverage because the Smilovits Action was a Claim first made under a prior Policy Period. Appellant's Op. Br. at 20, n.8. Consistent with its placement in a footnote, this argument is meritless. The Relation Back Provision provides that where two matters are Related Claims as defined in the Primary Policy, the

later-noticed matter will be deemed a Claim first made at the time the previously reported Claim was first made. It goes on to state that "Claims actually first made or deemed first made prior to the inception date of this policy . . . are not covered under this policy." A050, as amended by A103, A129-130; Ex. 1, Opinion at 10-11. The latter statement makes clear that the provision applies to situations like this one. In other words, where a claim is made during the 14-15 Policy Period that is a Related Claim with one made in an earlier Policy Period, that Claim is deemed first made at the time of the earlier Claim, and if that time is prior to the 14-15 Policy Period, then there will be no coverage for the Claim under the 14-15 policies. Additionally, First Solar incorrectly asserts that "the Specific Matter Exclusion asks whether the *Maverick* and the Class Action are fundamentally identical." Appellant's Op. Br. at 20, n.8. The Specific Matter Exclusion makes no reference to whether Claims are "fundamentally identical," and, in any event, the Superior Court expressly declined to rule on XL Specialty's arguments regarding that provision. XL Specialty reserves all rights regarding the Specific Matter Exclusion, including as set forth in its briefing before the Superior Court. *See* B329-30; B383-84; B472-73.

Ultimately, the Smilovits Action and the Maverick Action involve many of the same plaintiffs suing the same eight defendants and alleging many of the same misrepresentations of past performance as part of the same alleged fraudulent

scheme to convince investors that First Solar could ultimately "produce electricity from the sun at costs comparable to conventional electricity production methods – otherwise known as grid parity." The two lawsuits are interrelated under the plain language of the applicable policy or any other reasonable standard, and this Court should affirm the Superior Court's decision and hold that the XL Specialty Policy provides no coverage for the Maverick Action because the Maverick Action is a Related Claim deemed first made at the time of the Smilovits Action in 2012, before the inception of the XL Specialty Policy.

2. The Maverick Action is one "Claim" that relates back to is deemed first made at the time of the Smilovits Action.

The Primary Policy defines "Claim" in relevant part to mean "a civil … proceeding for monetary, non-monetary or injunctive relief which is commenced by: (i) service of a complaint or similar pleading . . . ." A060. The proper unit of comparison here is to compare the Maverick Action as a whole to the Smilovits Action as a whole, and there can be no doubt that the relationship between the two is more than sufficient to deem them Related Claims. *See, e.g., SP Syntax LLC v. Federal Ins. Co.*, 2016 WL 831532, at *7 (Ariz. Ct. App. Mar. 3, 2016) (interpreting nearly identical definition of Claim to mean that each lawsuit

constituted a single Claim for purposes of related-claim analysis). [5]

First Solar argues that there may be coverage for some portion of the Maverick Action because it alleges some wrongful acts that are not identical to those in the Smilovits Action. As an initial matter, of course the two lawsuits are not *identical* – if they were, this would be a question of *res judicata* or *stare decisis* rather than of contract interpretation. In addition, neither of the authorities on which First Solar relies supports its contention that "unique Wrongful Acts alleged in *Maverick* can be deemed a separate Claim," even assuming any such acts exist; rather, this Court held in *AT&T Corp. v. Faraday Capital Ltd.*, 918 A.2d 1104 (Del. 2007), that each *cause of action* might constitute a separate Claim after

[5] Cases nationwide reinforce this common-sense reading of a Claim definition. *See, e.g., Market St. Bancshares v. Fed. Ins. Co.*, 962 F.3d 947, 953 (7th Cir. 2020) ("a 'claim' taking the form of 'a civil proceeding commenced by the service of a complaint' spans the entire civil action, not just the legal theories and factual allegations in the complaint that commenced the action"); *UBS Fin. Serv., Inc. v. XL Specialty Ins. Co.*, 929 F.3d 11, 24 (1st Cir. 2019) (rejecting argument that lawsuits should be "divided into multiple fractions" where "Claim" is defined as "civil proceeding"); *Nat'l Union Fire Ins. Co. v. Willis*, 296 F.3d 336, 342 (5th Cir. 2002) (holding that an amended complaint does not constitute a new "Claim" and rejecting proposition that "one lawsuit" can qualify as two "civil proceedings"); *W.C. & A.N. Miller Dev. Co. v. Cont'l Cas. Co.*, 2014 WL 5812316, at *4 (D. Md. Nov. 7, 2014) (holding that a civil proceeding constituted a "Claim"), *aff'd*, 814 F.3d 171 (4th Cir. 2016); *XL Specialty Ins. Co. v. Agoglia*, 2009 WL 1227485, at *8 (S.D.N.Y. Apr. 30, 2009) ("a 'claim' is defined as a legal proceeding and not, as the insureds would have it, as each separate portion of a complaint specifying the legal theories defining a cause of action"), *aff'd sub nom. Murphy v. Allied World Assur. Co.*, 370 Fed. App'x 193 (2d Cir. 2010).

observing that AT&T had first made, and then dropped, an argument like the one First Solar makes here. First Solar cannot point to a single cause of action that it contends should be carved out as a separate Claim, and no legal authority supports carving out specific acts as separate Claims.

Moreover, even if it were possible to split a single civil action into two claims, the broad language of the Related Claim definition easily encompasses the Maverick Action in its entirety – any allegations in the Maverick Action that may differ from those in the Smilovits Action plainly are "incident to" or "have a connection with" the allegations and legal theories that the two matters share in common. *See, e.g., SP Syntax LLC,* 2016 WL 831532, at *5-6 (holding that two claims were related under substantively indistinguishable language notwithstanding many non-overlapping allegations and legal issues); *Biltmore Assocs. v. Twin City Fire Ins. Co.*, 2006 WL 2091667 (D. Ariz. 2006) (applying Arizona law and finding that lawsuit related back to a demand received by the insured prior to the policy period notwithstanding that the wrongful acts were not clearly identified in the demand letter and the policy did not define the term "Interrelated Wrongful Act"), *aff'd,* 572 F.3d 663 (9th Cir. 2009).

Ultimately, any non-overlapping allegations do not change the fact that both the Maverick Action and the Smilovits Action allege the same fraudulent scheme to misrepresent First Solar's ability to compete with fossil fuels, which is the

"dispositive motif" and not just a "thematic similarity" of the complaints. *See Northrop Grumman*, 2021 WL 347015, at *11 & n.127.

CONCLUSION

For the foregoing reasons, XL Specialty respectfully requests that this Court affirm the Superior Court's order granting XL Specialty's motion to dismiss.

Respectfully submitted,

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