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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.)

REPLY BRIEF OF APPELLANT FIRST SOLAR, INC.

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INTRODUCTION[1]

The key issue on appeal is whether two actions—the Class Action, which alleges that First Solar made misrepresentations about the historical performance of its Components Business in manufacturing individual solar modules, and the *Maverick* Action, which alleges that First Solar made misrepresentations about the likelihood that its Systems Business, in designing, developing and constructing solar-power system facilities, would be able to produce energy at a price comparable to conventional energy generation facilities—are sufficiently "related" such that the Policies will exclude coverage for the *Maverick* Action.

To exclude *Maverick* as related to the Class Action, Insurers insist they are relying on the Policies' "plain language"—but they blatantly ignore the Policies' plain language in three ways. First, Insurers' proposed "meaningful linkage" standard (articulated in the *Sycamore* case they favorably cite), is definitely not in the Policy's plain language—neither word is found in any Exclusion. Second, Insurers do not even argue for the broadest standard that the plain language would support—that cases should be deemed related if they share "any fact" in common.

[1] Capitalized terms are defined in First Solar's Opening Brief ("Br."), XL Specialty's Brief ("XL Br."), and National Union's Brief ("NU Br.").

Insurers ignore this "any fact" clause because they know that this particular plain-language approach would render coverage illusory. Third, Insurers gloss over the plain language of the Policies' Notice and Reporting Provision (under which the Superior Court dismissed First Solar's claim), which says nothing about excluding claims and expressly limits its purpose to broadening coverage to claims filed after the Policy Period. Plain language confirms that the only potentially applicable exclusion is the Specific Matter Exclusion.

Insurers talk a good "plain language" game but fail to walk the walk. They use a variety of extraneous terms and phrases to interpret their Policies' supposedly plain language, and completely ignore the broadest "any fact" clause. As not even Insurers are actually arguing for the Policies' plain language to apply, the Court must interpret the Policies' Exclusion(s) narrowly to meet the parties' intent without rendering coverage illusory – in this case, through use of the "fundamentally identical" standard.

That said, under either the meaningful linkage standard or the fundamentally identical standard, the Policies do not exclude coverage for the *Maverick* Action, which shares no meaningful linkage with, and is not fundamentally identical to, the Class Action. The *Maverick* Action took aim at First Solar's Systems Business's forward-looking roadmap for its design and construction of solar power system

facilities to achieve "grid parity," which *Maverick* described as the "Holy Grail" of solar electricity production—the goal of generating utility-scale solar energy at costs comparable to conventional methods. The Class Action, on the other hand, focused on First Solar's alleged reporting irregularities in connection with the then-recent performance of its Components Business—its manufacturing lines. Even Insurers, in their descriptions of the crux of each case, acknowledged these fundamental differences:

> First Solar and its officers and directors defrauded investors by misrepresenting … that it "had a winning formula for ***reducing manufacturing costs*** … ."

NU Br. 13; XL Br. 8 (quoting Class Action complaint, A425 ¶ 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***.

NU Br. 14; XL Br. 9 (quoting *Maverick* complaint, A181 ¶¶ 7-8) (all emphases added). Insurers' own selection of these quotes from the underlying complaints at issue illustrates that the Class Action involved only one concentrated piece of First Solar's business—module manufacturing—while *Maverick* concerned the comprehensive business goals effectuated by the development and construction of vast solar power utilities. These are two distinct business units, and the challenges, strategies and issues First Solar faced with respect to each were quite different.

Insurers' effort to paint both Actions with the same brush by alleging a single fraud falls apart simply by examining the very excerpts from the underlying complaints Insurers themselves quote—manufacturing costs' impact on module manufacturing (cost-per-watt) v. myriad different issues that impacted solar power system facilities design, development and construction (grid parity).

The two Actions' focus on two independent business sectors resulted in different alleged misrepresentations giving rise to two fundamentally different lawsuits. The differences between the Wrongful Acts alleged in the Class Action (the Components Business concealing module manufacturing defects' impact on First Solar's cost-per-watt) and those alleged in the *Maverick* Action (the Systems Business misrepresenting its future ability to competitively develop and construct solar power system facilities and thus achieve grid parity), reveal that the two litigations allege materially and fundamentally different Wrongful Acts. The Court should reverse and hold that the Policies do not exclude coverage for the *Maverick* Action.

ARGUMENT

I. THE POLICIES' SPECIFIC MATTER EXCLUSION DOES NOT BAR COVERAGE FOR THE *MAVERICK* ACTION

Because neither Insurer provides a standard based on the plain language of the Specific Matter Exclusion, an interpretive standard is required. The most tested standard in Delaware, which is also consistent with this Court's guidance on insurance policy construction, is the fundamentally identical test. However, even under *Sycamore*'s meaningful linkage standard proffered by Insurers, the Specific Matter Exclusion does not apply to bar coverage for *Maverick*.[2]

A. Because The Policies' Plain Language Renders Coverage Illusory, Rules Of Construction Compel Adoption Of The Narrow Fundamentally Identical Standard

This Court has instructed that insurance policy interpretation should reflect the reasonable expectations of insureds, and that insurers are obligated to make exclusionary language "specific," "clear," "plain," and "conspicuous." *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 906 (Del. 2021); *see also Rhone-Poulenc Basic Chemicals Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

[2] As explained in Point II, *infra*., the other provision relied on by Insurers (and applied by the court below), the Notice and Reporting Provision, does not exclude claims under the Policy, but would be subject to the same standards and analysis set forth in this Point I.

Exclusions are to be construed narrowly, against the insurer and in favor of coverage. *See, e.g.*, *id.* And, "that a grant of coverage should not be rendered illusory protects the reasonable expectations of the purchaser" of insurance coverage. *First Bank of Delaware, Inc. v. Fidelity and Deposit Co. of Maryland.*, 2013 WL 5858794, at *9 (Del. Super. Oct. 30, 2013); *see also Providence Service v. Illinois Union Insurance Co.*, 2019 WL 3854261, at *4 (Del. Super. July 9, 2019) (rejecting the insurer's policy interpretation because "[c]overage would be illusory"); *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376, 397-98 (D. Del. 2002) ("The fact that some limited amount of coverage might survive the intentional act exclusion is not sufficient grounds to apply an exclusion that is irreconcilable with the coverage grant itself …. [if it] would eviscerate coverage for the majority of [covered] claims.").

Insurers repeat the mantra of "plain language" over and over but are quick to abandon the approach where resort to plain language renders their coverage illusory. They implicitly recognize that the Policy's "any fact" phrase goes too far, instead arguing for the meaningful linkage standard that does not appear in the Policy's plain language. In ignoring the plain language, what Insurers are actually asking this Court to do is interpret the Exclusion, and to do so in a way that ignores the established rules of construction that Delaware courts have adhered to in an effort to strike the proper balance between the unclear, sweeping, language used in Related

Claims Provisions and this Court's instructions concerning interpretation of exclusions. The fundamentally identical standard best reflects the parties' intent as expressed through the Policies' plain language, while avoiding illusory coverage.

1. The Lower Courts Have Required That Cases Be Fundamentally Identical Before A Successive Claim Will Be Excluded

In their attempt to undermine the fundamentally identical standard, Insurers argue that the standard was merely a description of what would constitute relatedness that accidentally morphed into a requirement. But review of the case law demonstrates they are wrong.

The fundamentally identical standard originated in *United Westlabs, Inc. v. Greenwich Ins. Co.*, which held (under language nearly identical to that here) that two claims were fundamentally identical and implicated a policy exclusion because they involved "the same subject, as well as common facts, circumstances, transactions, events and decisions." 2011 WL 2623932, at *4 (Del. Super. June 13, 2011), *aff'd on other grounds*, 38 A.3d 1255 (Del. 2012). Thereafter, the court in *RSUI Indemnity Co. v. Sempris, LLC*, 2014 WL 4407717, at *6-7 (Del. Super. June 23, 2014) found the cases to be unrelated, and in doing so distinguished *United Westlabs*'s fundamental identity finding.

Insurers' argument that under *United Westlabs* and *Sempris*, Wrongful Acts that are fundamentally identical are sufficient—but not necessary—to trigger interrelated wrongful acts provisions (*see* NU. Br. at 38-40) ignores that the same trial court here (Br. Ex. 1 at 13-14) as well as in *Providence* , 2019 WL 3854261, at *2, made clear that the fundamentally identical standard is a requirement of the exclusion.[3] Indeed, Delaware courts have routinely applied the standard as a requirement in the years since *United Westlabs*. *See Med. Depot, Inc. v. RSUI Indem. Co*., 2016 WL 5539879, at *14 (Del. Super. Sept. 29, 2016); *Pfizer Inc. v. Arch Ins. Co*., 2019 WL 3306043, at *9 (Del. Super. July 23, 2019) ("[T]his Court has found coverage to be precluded only where the two underlying claims are 'fundamentally identical.'"); *Northrop Grumman Innovation v. Zurich American Insurance Company*, 2021 WL 347015, at *11 (Del. Super. Feb. 2, 2021). Notably, Insurers fail to cite any case in which a Delaware court found two alleged wrongful acts to be related without being fundamentally identical.

[3] In *Ferrellgas Partners L.P. v. Zurich American Insurance Co.*, 2020 WL 363677, at *10 (Del Super. Jan 21, 2020) (Johnston, J.), the court never reached application of the exclusion, which contained the clause "common nexus" not appearing in the Policy here or in the preceding cases.

2. The Fundamentally Identical Standard Strikes The Proper Balance Between The Parties' Intent As Expressed Through The Plain Language Of Related Claims Exclusions, And The Risk Of Illusory Coverage For Successive Claims

To avoid the fundamentally identical standard established and observed by the Delaware courts, Insurers argue it is inconsistent with a plain-language analysis. They favorably cite *Sycamore Partners Management, L.P. v. Endurance American Insurance Company*, 2021 WL 4130631, at *11 (Del. Super. Sept. 10, 2021) to support that contention. The interrelated claims provision in *Sycamore* extended to Wrongful Acts "which are based on, arise out of, directly or indirectly result from, are in consequence of or ***in any way involve any of the same*** or related or series of related ***facts***…" *Id.* at *3 (emphasis added). Similarly, *Sycamore*'s prior notice exclusion captured claims "based upon, arising out of, directly or indirectly resulting from, in consequence of, or ***in any way involving any fact***, circumstance, situation, transaction, event…" previously noticed. *Id.* (emphasis added).

While the *Sycamore* court departed from the fundamentally identical standard, it did not, as Insurers argue, "confine [its] analysis to the Policies' plain language." NU Br. at 4; XL Br. at 15 (citing *Sycamore*, 2021 WL 4130631, at *11). The court did not look to determine if the two claims "in any way involve" "any of the same or related" "facts," *Sycamore*, 2021 WL 4130631, at *10-15—because every successive claim against the same policyholder will in any way involve the same

fact.[4] Instead, the court omitted the phrase "any fact" from its quote of the policies' language, presumably as it rendered coverage illusory. *Id.* at *12.[5] The court then stated that "the Policies' plain language requires a meaningful link that connects the factual circumstances underpinning the alleged Wrongful Acts challenged in each litigation." *Id.* at *14. But because the phrase "meaningful linkage" is not found in the exclusions, it must reflect an attempt to interpret unclear policy language. *Id.* at *12, 14.

The *Sycamore* court borrowed the meaningful linkage standard from this Court's interpretation of the lone phrase "arising out of." *Id*. at *12 (citing *Pacific Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1257 (Del. 2008)). However, not only does this address just one phrase in the Exclusion, but also, the "arising out of" phrase in *Pacific* appeared in the context of a policy provision expanding coverage,

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[4] Likewise, Insurers, while arguing for a "plain language" approach do not even attempt to argue for the application of the phrase "any facts … that are the same as" when interpreting the Policies' definition of Related Claim. Neither Insurer provides any construction of the Related Claim definition that gives meaning to the clause "any facts." NU Br. 22; XL Br. 15-16.

[5] The *Providence* court used the fundamentally identical standard to mitigate against the risk that these exclusions could be used to bar all coverage for any successive claim against the same policyholder. 2019 WL 3854261, at *4 ("Coverage would be illusory. It would be difficult, if not impossible, to find unrelated incidents in the context of [the policyholder's core business].").

not excluding coverage, and was therefore construed broadly. 956 A.2d at 1257. Where, as here, the Related Claims Exclusions are being used to avoid coverage, they must be interpreted narrowly so long as they give effect to the intent of the parties. *Rhone-Poulnec*, 616 A.2d at 1196.

The fundamentally identical standard comports with that guidance without going too far as it does not restrict the Exclusions to only apply to two lawsuits that are "identical." *See*, *contra* XL Br. 33. Fundamental means "serving as a basis supporting existence or determining essential structure or function;"[6] it means basic or "core."[7] In other words, at their core, does the "essential structure" of each lawsuit hinge on the same Wrongful Acts such that they should be considered a single Claim? Delaware courts recognize that a reasonable reading of these exclusions entails looking beyond superficial facts; the proper inquiry concerns whether the alleged, actionable wrongful acts are the same. *Sempris*, 2014 WL 4407717, at *5-6 (distinguishing *Westlabs* where claims were related, despite their differences,

[6] *See* https://www.merriam-webster.com/dictionary/fundamental (last visited Oct. 9, 2021)

[7] *See* https://www.merriam-webster.com/thesaurus/fundamental (last visited Oct. 9, 2021).

because "the wrongful acts giving rise to the 2007 and 2009 Counterclaims" were the same).

To the extent the Insurers'/*Sycamore* meaningful linkage standard is interpreted as having a broader scope than the established fundamentally identical standard, the latter more effectively applies canons of interpretation: the Court should construe exclusionary language narrowly, against the insurer and in favor of coverage. *See, e.g.*, *Murdock*, 248 A.3d at 906; *Northrop Grumman*, 2021 WL 347015, at *9 (noting that exclusionary language is applied narrowly and strictly even when unambiguous).[8] This guidance exists because an insurer has the "opportunity and responsibility to state the terms of its coverage and exclusions in clear and understandable language." *Phillips Home Builders, Inc. v. Travelers Ins.*

[8] While the parties and the courts that have evaluated the myriad language in these relatedness exclusions have all agreed that it is unambiguous, they argue for different interpretations. "[A] contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *Rhone-Poulenc*, 616 A.2d at 1195-96. If the Court concludes that the language of the Exclusions is ambiguous, "the doctrine of *contra proferentum* requires that language of an insurance contract be construed most strongly against the insurance company that drafted it." *Id.*; *see also Twin City Fire Ins. Co. v. Delaware Racing Ass'n*, 840 A.2d 624, 630 (Del. 2003). As explained above, Insurers' arguments belie their "plain language" assertions. If Insurers are correct that the meaningful linkage standard is a reasonable interpretation that is broader than the fundamentally identical standard, and if the lower court decisions requiring fundamental identity were not unreasonable, then the Exclusions must be construed against Insurers.

Co., 700 A.2d 127, 130 (Del. 1997). If Insurers wanted there to be a meaningful linkage between Claims for the Exclusions to apply, they had the opportunity to make that clear, but they did not. Insurers should not be permitted to do so now.

B. Under Either Standard, The Specific Matter Exclusion Does Not Apply To The *Maverick* Action

Because at their core the *Maverick* and Class Actions are predicated on different misrepresentations concerning different First Solar business units, they are neither fundamentally identical nor meaningfully linked, and coverage for *Maverick* is not barred by the Specific Matter Exclusion.

Even the Superior Court below acknowledged several key differences between the Class Action and the *Maverick* Action, noting both actions involve different time periods, separate legal bases for claims, a different number of disclosures, and different types of damages. Br. Ex. 1 at 15. However, the Superior Court, like Insurers, failed to appreciate the material distinctions between the two:

> Class Action: Components Business's manufacturing of individual solar modules and alleged misrepresentations concerning the historical cost of manufacturing individual solar modules (cost-per-watt);
>
> *Maverick* Action: Systems Business's development, design and construction of solar power system facilities and alleged misrepresentations concerning future prospects of utility scale electricity generation at costs

> equal to or lower than conventional energy sources (grid parity).[9]

Insurers repeatedly claim that the Class Action and *Maverick* involve the "same fraudulent scheme." NU Br. 1, 3, 14, 23, 31, 34, 42, 45; XL Br. 1, 2, 3, 5, 12, 14, 16, 34. But this unsupported broad declaration cannot blur the material distinctions between the Wrongful Acts alleged in the two Actions.

1. The Conduct At Issue In The Class Action Concerned Module Manufacturing, Not The Design And Construction Of Solar Power System Facilities To Achieve Grid Parity

National Union's acknowledgement that "the *Smilovits* complaint did not repeat the term 'grid parity' as many times as the *Maverick* complaint" is a massive understatement. NU Br. 25. While the *Maverick* complaint referenced the grid parity objective 154 times and attached First Solar's achieving "Grid Parity Roadmap" to its complaint as its sole exhibit, the Class Action complaint used the term ***only once***. Br. 28. This is not a mere difference in nomenclature; as *Maverick*'s counsel asserted, "Class Counsel did not pursue the grid parity fraud." (A567.) This is because the focus of the Class Action was on the business of manufacturing solar

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[9] The distinction between First Solar's businesses is not a new argument not raised below (*see, e.g.*, Br. 7 n.2; A391; A400; A409). Insurers' objection to First Solar's enhanced explanation of its business segments is unfounded. *See General Refractories Co. v. First State Ins. Co.*, 855 F.3d 152, 162 (3d Cir. 2017) (noting that "[t]he parties may even 'reframe' their argument…" on appeal).

modules (an individual component in a solar power system), *not* the multi-faceted operation of First Solar's provision of a complete "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." *See* Form 10-K for fiscal year ended December 31, 2010 (available at https://d18rn0p25nwr6d.cloudfront.net/CIK-0001274494/68fde2f3-347a-775be18-299d39d113f8.pdf).

2. The Conduct At Issue In *Maverick* Concerned Utility Scale Solar-Powered Electrical Generation, Not Module Manufacturing

Insurers mischaracterize *Maverick* by asserting that the "fraudulent scheme" in both Actions "alleged that First Solar manipulated the cost-per-watt metric." NU Br. at 26; *see also* XL Br. at 25-26. To the extent the *Maverick* Action discussed the cost-per-watt metric it did so because "[r]educing 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[.]" A199 ¶ 83. Module cost-per-watt is one sliver of one of many factors contributing to the design, construction and operation of utility scale solar-power system facilities at grid parity, which was the focus of *Maverick's* alleged misrepresentations.

3. *Maverick* Concerned Future-Looking Statements; The Class Action Concerned The Company's Past Performance

While the *Maverick* Action concerned representations about the ability of First Solar's utility scale facilities to achieve grid parity in the future, the Class Action concerned representations about First Solar's historical module manufacturing issues and resulting profitability in prior periods. This temporal distinction—between one case involving allegedly misleading statements about *past* performance, and one involving allegedly misleading statements about the likelihood of reaching *future* goals—is remarkably close to the distinction in *Northrop Grumman*. There, the earlier claim's wrongful acts concerned pre-merger acts designed to convince shareholders to approve the merger, while the latter claim's wrongful acts concerned post-merger actions designed to mislead shareholders of the successor company about the value of their investments. *Northrop Grumman*, 2021 WL 347015, at *11.

4. The Alleged Misrepresentations—The Wrongful Acts—Were Different, Even If Made In Common Communications

Because of the core difference in alleged fraudulent schemes, the alleged Wrongful Acts—the misrepresentations that allegedly impacted the respective plaintiff groups—had different focuses as well. (*See* AR003–005 (Ex. A to Ltr.

From J. Wasson Regarding Apr. 15, 2021 Oral Argument (Trans. ID 66523302)).[10] Insurers argue that "[t]he two complaints alleged that the company's officers made repeated misrepresentations on investor calls, in press releases, in SEC reports, and in presentations." NU Br. 11. However, even where the same communications are alleged to contain misrepresentations in both Actions, *Maverick* sought to connect those alleged misrepresentations to grid parity and the Systems Business predictions, whereas the Class Action used them to establish their allegations of previously reported module manufacturing cost-per-watt misrepresentations. These means to very different ends are critical here, where the test for relatedness concerns the alleged Wrongful Acts that actually trigger the Policies' coverage.[11] [12]

One example of the two Actions alleging different misrepresentations within those communications is the February 24, 2011, press release announcing 4Q10

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[10] Insurers submitted a response to First Solar's letter. Trans. ID 66543688.

[11] This is reflected in the "fundamental" and "material" components of each alternative test.

[12] Further, Insurers' alternative focus on First Solar's underlying litigation positions and bookkeeping (NU Br. 14) cannot substitute for an analysis of the Wrongful Acts at issue in each Action. That First Solar sought to achieve efficiencies in its defense of those Actions does not contradict First Solar's current argument that *Maverick* is not barred by the Policies' Related Claims Exclusions. Nor can defense counsel's billing practices push a claim into a different policy period, as Insurers suggest. *See* A661-663.

financial results. The Class Action only referenced the past "fiscal year-end 2010 financial results," while the *Maverick* Action again focused on the future, quoting First Solar CEO Rob Gillette as saying, "[w]e have good demand visibility in 2011, which gives us confidence in our ability to sell the 2 GW that we plan to produce." (*Compare* A484 ¶118 *with* A220 ¶168; *see also* AR004, at line 42.)

As another example, XL compares ¶ 126 of the Class Complaint with ¶¶ 203-204 of the *Maverick* Complaint citing an August 4, 2011 conference call. XL Br. 28. But while the Class Action's alleged Wrongful Act is Gillette's statement regarding the "[m]odule manufacturing cost per watt…," the *Maverick* Complaint's is Gillette's statement that: "[s]o what it means for our roadmap, is we're committed to delivering on the [Grid Parity] [R]oadmap…" (*Compare* A489 ¶126 *with* A230 ¶204; *see also* AR004, at line 49).

In short, these fundamental differences—different business segments, different time periods, and different alleged misrepresentations—render the two actions unrelated. Indeed, even *Sycamore* found the underlying claims "involved different allegations and different Wrongful Acts," for similar reasons present here. 2021 WL 4130631, at *13. The *Sycamore* insurers seized upon the existence of merger agreement carve-outs that were common to both underlying actions. *Id.* at *8. In the first action (*Jones*), the stockholders alleged that the value of the carve-

outs had been understated. *Id.* at *5. In the second action (*Nine West*), the plaintiffs alleged that the carve-outs constituted evidence of a fraudulent conveyance. *Id.* at *6. The *Sycamore* court rejected the insurers' contention that the commonality of the carve outs was sufficient to make the two actions related (like the arguments advanced by Insurers here), stating:

> it is not sufficient for two Claims to mention some of the same facts. That [two underlying transactions] were noted in each litigation might, at a high level of abstraction, illustrate a "link." But that link is not meaningful enough to trigger the Interrelated Claims Provision. Two Claims do not "involve" and are not "consequence[s] of" the same Wrongful Acts merely because the underlying claimants, to aid readers in understanding and situating their allegations, recounted the history of two temporally related but substantively unassociated transactions. The fact that the Merger was a precursor to the Carve-Out Transactions, or that the Carve-Out Transactions were cited in the Jones [Action], is not dispositive because the Carve-Out Transactions did not form "the basis" of the Wrongful Acts alleged in the Jones [Action], just as the Merger did not form "the basis" of the Wrongful Acts alleged in the Nine West Claims.

Id. at *14. Similarly, here, allegedly defective First Solar modules are mentioned in the *Maverick* complaint, but that reference alone does not establish that *Maverick* is fundamentally identical to, or meaningfully linked with the Class Action. Module manufacturing did not form the basis of the Wrongful Acts alleged in the *Maverick* Action; representations about the ability of First Solar's Systems Business to achieve grid parity did. Mere overlapping facts concerning the same company history are

simply insufficient to deem the two actions related and trigger the Specific Matter Exclusion under any standard.

II. THE POLICIES' NOTICE AND REPORTING PROVISION 7(B) DOES NOT EXCLUDE COVERAGE

Insurers' argument that the Policies' Notice and Reporting provision 7(b) excludes the *Maverick* Action ignores the provision's express limitation which appears at its start:

> Solely for the purpose of establishing whether any subsequent **Related Claim** was first made or a **Related Pre-Claim Inquiry** was first received during the **Policy Period** or **Discovery Period** (if applicable) …

A050. Insurers' efforts to convert this provision—meant "[s]olely" for the limited purpose of bringing future claims into the Policies' coverage—into an exclusion, contradicts this Court's mandate that exclusionary language must be "specific," "clear," "plain," and "conspicuous." *Murdock*, 248 A.3d at 906.[13]

The remainder of the provision reinforces that it is not an exclusion. It states that if a "Claim [is] first made and reported in accordance with 7(a) above" (during the 2014–15 Policy Period), then a subsequent "Related Claim" may be "deemed to have been first made at the time that such previously reported Claim was first made."

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[13] The limited purpose also dooms Insurers' reliance on the clause in the provision which contemplates that some Claims may be deemed first made prior to the inception date of this policy, and would not be covered. NU Br. 8 (quoting A129). So too does the absence of any Policy provision that operates to deem the *Maverick* Action first made in a past policy period.

(A129.) Because the Class Action was not made or reported during the 2014–15 Policy Period, the prerequisite does not exist. National Union cites no authority for the remarkable proposition that the three-year-old 2011–12 policy could serve to exclude a Claim otherwise covered under the 2014–15 Policy (First Solar is not seeking coverage under the 2011–12 Policy). Nor would such a proposition ever comport with the reasonable expectation of a policyholder: no reasonable policyholder would expect to look to its past, expired policies to identify excluded claims, especially absent a clear and specific instruction to do so.

Had Insurers wanted to exclude Claims that were "related" to Claims made prior to the Policy Period they could have expressly said so. *See cf. Pfizer*, 2019 WL 3306043, at *2 (discussing policy's "Related Wrongful Acts Exclusion"); *Sycamore*, 2021 WL 4130631, at *3 (discussing policy's "Prior Notice Exclusion"). But they didn't. No definition of Related Claims could by implication turn the Notice and Reporting Provision, intended to benefit the insured, into a claim-barring exclusion.

III. DISTINCT WRONGFUL ACTS ALLEGED IN EACH ACTION SHOULD CONSTITUTE SEPARATE CLAIMS THAT ARE NOT EXCLUDED

Insurers seem to dispute two Delaware cases that expressly hold that a single complaint can consist of more than one "Claim" for insurance purposes. *See* NU Br. at 35; XL Br. at 33-34. But the Court's guidance was clear. In *AT & T Corp. v. Faraday Capital Ltd.*, 918 A.2d 1104 (Del. 2007), this Court unequivocally held that a single lawsuit may contain multiple claims, and remanded *AT&T* to properly identify the "Claims," since the precise question had not been addressed at the trial court. *Id.* at 1109; *see also Northrop*, 2021 WL 347015, at *11 ("[a] single litigation can involve multiple Claims potentially-covered").

Under this jurisprudence, every Wrongful Act alleged in *Maverick* must be fundamentally identical to (or materially linked with) a Wrongful Act alleged in the Class Action. But this is not the case. Even if Insurers' erroneous combination of First Solar's discrete business units was taken as true, *Maverick*'s grid parity claims were not made by the Class Action plaintiffs—they are distinct and unrelated. XL contends that "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." XL Br. 34. But even allegations of a "common nucleus of misconduct" are insufficient to bar

coverage for the entire action. *Northrop*, 2021 WL 347015, at *11. Thus, First Solar properly requested in its Opening Brief that even if the Court finds that some of the alleged Wrongful Acts in *Maverick* are excluded, the grid parity allegations are not, constitute distinct Claims, and the Court should remand this matter to the trial court to determine how to properly allocate between Loss excluded and Loss covered under the Policies. Br. 38.

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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