EFiled: Jun 06 2022 04:14PM EDT
Filing ID 67696520
Case Number 24,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STILLWATER MINING COMPANY, Plaintiff-Below, Appellant, v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSURGH, PA, ACE AMERICAN INSURANCE COMPANY, and QBE INSURANCE CORPORATION, Defendants-Below, Appellees.	: : : : : : : : : : : : :	 No. 24,2022 On Appeal from the Superior Court of the State of Delaware Consol. C.A. No. N20C-04-190 AML CCLD

APPELLEES NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA. AND QBE INSURANCE CORPORATION'S ANSWERING BRIEF

OF COUNSEL:

ARNOLD & PORTER KAYE SCHOLER LLP
Scott B. Schreiber
William C. Perdue
Andrew T. Tutt
Samuel I. Ferenc
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001-3743

HEYMAN ENERIO GATTUSO & HIRZEL LLP
Kurt M. Heyman (# 3054)
Aaron M. Nelson (# 5941)
300 Delaware Avenue, Suite 200
Wilmington, DE 19801
(302) 472-7300
Attorneys for Defendant-Below/Appellee National Union Fire Insurance Company of Pittsburgh, Pa.

OF COUNSEL:

ROPERS MAJESKI, PC
Geoffrey W. Heineman
Jung H. Park
John J. Iacobucci Jr.
750 Third Avenue, 25th Floor
New York, New York 10017
(212) 668-5927

PHILLIPS, MCLAUGHLIN
& HALL, P.A.
John C. Phillips Jr. (# 110)
David A. Bilson (# 4986)
1200 North Broom Street
Wilmington, Delaware 19806
(302) 655-4200
Attorneys for Defendant-Below/Appellee QBE Insurance Corporation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

NATURE OF PROCEEDINGS

This is the latest in a series of appeals involving efforts by insureds to expand the scope of directors-and-officers ("D&O") insurance policies to cover Delaware appraisal actions. First, in *In re Solera Insurance Coverage Appeals*, 240 A.3d 1121 (Del. 2020) (*"Solera II*"), this Court held that an appraisal action is not "for a *violation* of law," and therefore was not a "Securities Claim" as defined in the relevant policy. *Id.* at 1131. Then, in *Jarden LLC v. ACE American Insurance Co.*, 2022 WL 618962 (Del.) (order), this Court summarily affirmed a decision holding that an appraisal action was not covered under another policy because it was not "for any Wrongful Act[]." *See Jarden, LLC v. ACE Am. Ins. Co.*, 2021 WL 3280495, at *1, *5-6 (Del. Super.). Now, Appellant Stillwater Mining Co. ("Stillwater") again seeks Securities Claim coverage for a Delaware appraisal action—even though Stillwater acknowledges that, under *Solera II*, such an action is ***not*** a Securities Claim under the governing policy because it does not involve any violation of law. Indeed, the complex procedural history of this simple dispute reflects Stillwater's dogged attempts to evade *Solera II*. Under *Solera II* and this Court's recent choice-of-law decision in *RSUI Indemnity Co. v. Murdock*, 248 A.3d 887 (Del. 2021), this Court should again refuse to expand D&O coverage for Delaware appraisal actions beyond what the plain policy language requires.

The genesis of this case is the Superior Court's since-reversed decision in *Solera Holdings, Inc. v. XL Specialty Insurance Co.*, 213 A.3d 1249 (Del. Super. 2019) ("*Solera I*"), which held that an appraisal action was a Securities Claim. *Id.* at 1254-56. While the appeal of *Solera I* was pending, the parties here filed two lawsuits days apart in the Delaware Superior Court. The first was brought against Stillwater by Stillwater's primary D&O insurer, Appellee National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"), seeking a declaration of no coverage for an underlying Delaware appraisal action against Stillwater (the "Delaware Appraisal Action"). The second was brought by Stillwater against National Union and excess insurers Appellees ACE American Insurance Co. ("ACE") and QBE Insurance Corp. ("QBE," and together with ACE and National Union, the "Insurers"), seeking coverage for defense costs and interest payments from the Delaware Appraisal Action.

Attempting to take advantage of *Solera I*, Stillwater expressly alleged in its complaint that "Delaware law applies" and that "Delaware has a strong state interest in the application of its principles of corporate law and governance … in this matter." B275. Stillwater then immediately filed a motion for judgment on the pleadings arguing that, "because this claim involves D&O insurance coverage for a Delaware corporation, Delaware law applies." B343. The Superior Court consolidated the two actions and stayed them pending resolution of the appeal of *Solera I*.

After *Solera II* held that Delaware appraisal actions are ***not*** Securities Claims, Stillwater abruptly changed course. Rather than acknowledge that binding precedent now foreclosed its coverage demand, Stillwater filed a third lawsuit regarding the Delaware Appraisal Action, this time in Montana court under Montana law (the "Montana Action"). Simultaneously, Stillwater moved to voluntarily dismiss the Delaware case without prejudice. The Superior Court denied voluntary dismissal because it reflected improper forum shopping and would have resulted in piecemeal litigation.

Stillwater then filed an Amended Complaint in Delaware seeking coverage for the Delaware Appraisal Action under Montana law, and the Insurers moved to dismiss with prejudice. After the parties fully briefed and argued that motion to dismiss, Stillwater belatedly moved to stay the Delaware case pending resolution of the Montana Action. The Superior Court denied the requested stay because (1) Stillwater's motion effectively sought to reargue the earlier denial of voluntary dismissal, (2) the stay motion was untimely, and (3) the relevant factors weighed against a stay. Thereafter, the Montana court stayed the Montana Action pending resolution of the Delaware case. Finally, the Superior Court granted the Insurers' motion to dismiss Stillwater's Amended Complaint because, under *Murdock*, Delaware law applies and, under *Solera II*, Stillwater has no viable cause of action under Delaware law.

Stillwater now appeals the denial of its motion for voluntary dismissal, the denial of its motion to stay, and the grant of the Insurers' motion to dismiss. Fundamentally, this appeal is about a litigant that initially chose to sue in Delaware court under Delaware law, but then after an adverse decision sought relentlessly to avoid this state's law and this Court's precedent. The Superior Court correctly rejected those efforts. This Court should affirm.

SUMMARY OF ARGUMENT

1. DENIED. The Superior Court correctly held that Delaware law, not Montana law, applies to Stillwater's entire Amended Complaint. Under *Murdock*, "the state of incorporation is the center of gravity of the typical D&O policy," and thus Delaware law applies unless "the [Montana] contacts in this particular instance are sufficient to tip the balance." 248 A.3d at 901. Here, as the Superior Court explained, "Stillwater's various alleged contacts with Montana neither distinguish the current litigation from existing Delaware precedent nor warrant a departure from applying the law of Stillwater's state of incorporation to the D&O policies." Ex. A at 24 (footnote omitted). Indeed, before *Solera II*, Stillwater itself argued that Delaware law applies. The Superior Court also correctly rejected Stillwater's invitation to apply the disfavored doctrine of "*dépeçage*" such that Delaware law would govern some of Stillwater's causes of action and Montana law would govern others.

2. DENIED. The Superior Court correctly dismissed Stillwater's Amended Complaint in its entirety. Stillwater concedes that it has no viable cause of action under Delaware law, so if Delaware law applies across the board, the Amended Complaint undisputedly must be dismissed. Even if Montana law applied, moreover, Stillwater still has no viable cause of action. Stillwater concedes that, under *Solera II*, it has no contractual cause of action, and therefore counts 1 and 2

undisputedly fail. While Stillwater asserts that count 3 for breach of the Insurers' supposed "duty to defend" remains viable, that duty still would be contractual in nature, and Montana law does not require insurers to advance defense costs for an underlying lawsuit that as a matter of law is not covered. Count 4 for violations of Montana's Unfair Trade Practices Act ("UTPA") likewise fails because the Insurers had a reasonable basis to deny Stillwater's claim for coverage and Stillwater suffered no injury.

3. DENIED. The Superior Court did not abuse its discretion in denying Stillwater's motion for voluntary dismissal. Delaware courts consistently deny voluntary dismissal where dismissal would reward forum shopping or result in piecemeal litigation. Here, the Superior Court correctly concluded that allowing voluntary dismissal after *Solera II* would "take on a flavor of forum shopping" A0154. The court also correctly concluded that, even if it were to dismiss Stillwater's causes of action, National Union's declaratory action would remain, necessitating piecemeal litigation in Delaware and Montana.

4. DENIED. The Superior Court did not abuse its discretion in denying Stillwater's eleventh-hour motion to stay this case pending resolution of the Montana Action. The Superior Court correctly held that Stillwater's motion effectively sought reargument of the court's prior denial of voluntary dismissal and

was grossly untimely. The court also reasonably balanced the relevant factors under *General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681 (Del. 1964).

STATEMENT OF FACTS

A. The Insurance Policies and the Delaware Appraisal Action

Stillwater seeks coverage under a primary D&O policy issued by National Union (the "Primary Policy" or "Policy") and two excess policies issued by ACE and QBE. Specifically, Stillwater seeks coverage under Insuring Agreement C of the Primary Policy, which provides that the Policy "shall pay the **Loss** of any **Organization** … arising from any **Securities Claim**." A0205. "**Organization**" includes Stillwater, *see* A0201, A0226, and "**Loss**" includes defense costs and "pre/post-judgment interest on a covered judgment," A0225. "**Securities Claim**" is defined in relevant part as "a **Claim** … alleging a violation of any law, rule or regulation, whether statutory or common law." A0247. The Policy expressly provides that National Union "does not assume any duty to defend." A0213. Instead, the Policy provides that National Union "shall advance, excess of any applicable Retention, covered Defense Costs." A0265. The ACE and QBE policies are follow-form excess policies that incorporate the terms and conditions of the Primary Policy unless otherwise stated. A0181.

As noted, Stillwater seeks coverage for Loss stemming from the Delaware Appraisal Action. That proceeding arose out of a merger transaction in which Stillwater, a Delaware corporation, was acquired by and merged into a South African mining company at a price of $18.00 per share. *See In re Stillwater Mining Co.*,

2019 WL 3943851, at *1 (Del. Ch.), *aff'd sub nom. Brigade Leveraged Cap. Structures Fund Ltd. v. Stillwater Mining Co.*, 240 A.3d 3 (Del. 2020). In the Delaware Appraisal Action, the Court of Chancery concluded that the fair value of Stillwater's stock was $18.00 per share—equal to the deal price. *Id.* at *61. This Court affirmed. *Brigade Leveraged Cap. Structures*, 240 A.3d at 4.

B. Procedural History

On April 13, 2020, National Union commenced a declaratory action against Stillwater in the Delaware Superior Court, seeking a declaration that the Primary Policy "does not provide insurance coverage for defense expenses and statutory interest resulting from an 'appraisal' suit." B002. Nine days later, on April 22, 2020, Stillwater commenced its own action in the same Delaware court against the Insurers (as well as certain other excess insurers), seeking coverage under the National Union, ACE, and QBE policies (and other excess policies) for defense costs and interest payments from the Delaware Appraisal Action. B269; B292-96. Stillwater expressly alleged that "Delaware law applies to the principles of contract interpretation at issue in this proceeding." B275. Stillwater further alleged that "Delaware has a strong state interest in the application of its principles of corporate law and governance in construing the directors' and officers' liability insurance policies at issue in this matter." *Id.*

On June 12, 2020, Stillwater answered National Union's complaint and, on the same day, filed a motion for judgment on the pleadings ("MJOP"). B300; B315. Stillwater expressly argued that "because this claim involves D&O insurance coverage for a Delaware corporation, Delaware law applies." B343 n. 54; *see* B335, 352-53 (repeatedly referencing "Delaware law"). On June 25, 2020, the Superior Court stayed further briefing on Stillwater's MJOP until after this Court resolved the then-pending appeal of *Solera I*. B355.

On August 6, 2020, the Superior Court consolidated the two related actions and realigned the parties with Stillwater as plaintiff. B357. On August 17 and 19, 2020, the Insurers answered Stillwater's complaint, with ACE and QBE asserting counterclaims seeking declarations that their policies afford no coverage for the Delaware Appraisal Action. B363; B398; B440.

On October 23, 2020, this Court decided *Solera II*, holding that a Delaware appraisal action is not a claim "for a *violation* of law" and thus was not a Securities Claim under the relevant policy. 240 A.3d at 1131. The relevant portions of the Securities Claim definitions in *Solera II* and here are materially identical:

Solera II Policy	Primary Policy
• defining a Securities Claim as a Claim "for any actual or alleged violation of any federal, state or local statute, regulation, or rule or common law"	• defining a Securities Claim as a Claim "alleging a violation of any law, rule or regulation, whether statutory or common law"

Solera II, 240 A.3d at 1125; A0247.

Nevertheless, on December 21, 2020, Stillwater filed a motion to voluntarily dismiss without prejudice or, in the alternative, for leave to file an amended complaint. A0044. The same day, Stillwater commenced the Montana Action in Montana state court. Despite Stillwater's repeated prior statements to the Superior Court alleging and arguing that Delaware law governs its demand for payment of its defense costs and interest payments in the Delaware Appraisal Action, Stillwater's complaint in the Montana Action and its proposed Amended Complaint in Delaware both sought payment for those same defense costs and interest payments solely under ***Montana*** law. *See* B482; B484; B487; B494-95; B510-11; B513-15. The sole substantive difference between Stillwater's complaint in the Montana Action and its proposed Amended Complaint in the Delaware case was that the Montana complaint also sued AIG Claims, Inc. ("AIG Claims"), a claims administrator that Stillwater did not sue in Delaware. *Compare* B473 *with* B496-97.

On April 26, 2021, after oral argument, the Superior Court denied Stillwater's request for voluntary dismissal from the bench. The court explained that the Insurers had met their burden of "demonstrat[ing] plain legal prejudice" because there was not "a sufficient explanation here for a need to dismiss or to pursue this action in Montana as opposed to in Delaware." A0152-53. Stillwater had "maintained … until very recently … that Delaware law governed," and thus allowing Stillwater to

take a voluntary dismissal in favor of the Montana Action after *Solera II* would "take on a flavor of forum shopping." A0153-54. Regardless, even if Stillwater could voluntarily dismiss its own suit, "the declaratory judgment action that originally was filed by National Union in the counterclaims would remain," resulting in "potentially competing causes of action" in Delaware and Montana. A0155.

The Superior Court granted Stillwater's request for leave to amend, which the Insurers had not opposed. *Id.* On May 11, 2021, Stillwater filed its Amended Complaint, asserting four causes of action under Montana law: breach of contract against National Union, breach of contract against ACE and QBE, declaratory judgment for breach of a supposed duty to defend against all Insurers, and violations of the UTPA against all Insurers. A0187-93. On May 25, 2021, the Insurers moved to dismiss Stillwater's Amended Complaint with prejudice. A0309.

Meanwhile, in the Montana Action, on January 11, 2021, the Insurers had removed to federal court, and on January 29, Stillwater had moved to remand back to Montana state court. B520; B528. On July 22, 2021, the federal court granted Stillwater's motion to remand. B557. However, the court denied Stillwater's request for an award of attorneys' fees because the Insurers had an objectively reasonable basis for removal. B555; B558.

On August 19, 2021, back in Montana state court, the Insurers and AIG Claims filed motions (1) to dismiss the Montana Action without prejudice in favor

of the Delaware case under *forum non conveniens*, (2) to stay the Montana Action pending resolution of the Delaware case, or (3) to dismiss the Montana Action with prejudice on the merits. B559; B563. On September 28, 2021, Stillwater cross-moved for partial summary judgment on its non-UTPA causes of action. B590. On October 8, 2021, the Insurers and AIG Claims moved to stay briefing on Stillwater's motion for partial summary judgment pending resolution of the Insurers' and AIG Claims's motions to dismiss or stay proceedings in the Montana Action. B613. On November 24, 2021, the Montana court granted the Insurers' and AIG Claims's motion to stay the Montana Action pending resolution of the Delaware case. B637. Accordingly, all proceedings in the Montana Action currently are stayed pending resolution of this case, including this appeal.

Meanwhile, in the Delaware case, on September 1, 2021, the Superior Court heard oral argument on the Insurers' motion to dismiss Stillwater's Amended Complaint. A0434. Six weeks later, on October 15, 2021, Stillwater moved to stay the Delaware case pending resolution of the Montana Action. A0502. On November 8, 2021, the Superior Court denied Stillwater's motion to stay. The court explained that Stillwater's motion "effectively s[ought] reargument of th[e] Court's April 2021 decision denying [Stillwater]'s motion for voluntary dismissal." A0602. Furthermore, Stillwater "waited too long" because it "did not pursue a stay until months after the parties fully briefed and argued [the Insurers]' motion to dismiss

this action with prejudice," and "staying the action at th[at] late stage would be inequitable and a gross waste of party and judicial resources." *Id.* In any event, "the Cryo-Maid factors d[id] not favor a stay." *Id.*

On December 22, 2021, the Superior Court granted the Insurers' motion to dismiss Stillwater's Amended Complaint. The court first held that "Delaware law governs the policies at issue." Ex. A at 1. To begin with, the court "assume[d] a conflict exists between Montana and Delaware law" because Stillwater "advanced at least a plausible argument that Montana law imposes on an insurer a higher burden (and more significant consequences) for refusing to defend." *Id.* at 19 (footnote omitted).

The court therefore went "on to consider which state has the 'most significant relationship' to the current litigation." *Id.* Following *Murdock*, the court determined that, because Stillwater is incorporated in Delaware, "Delaware law … governs the policy unless the contacts with another forum are sufficient to tip the presumption away from Delaware." *Id.* at 23-24. Here, while "Stillwater's principal place of business is Montana," "nothing else in the record weighs in favor of applying Montana law." *Id.* at 24. Although the Primary Policy "contains 'Montana Amendatory Endorsements,' … those provisions are neither unusual nor sufficiently strong … to tip the scale." *Id.* Furthermore, this case "involves a Delaware appraisal action against Stillwater that arose out of a merger pursuant to Delaware law,

litigated in the Delaware Court of Chancery," and Stillwater itself previously "state[d] that Delaware law applied." *Id.* at 25-26.

The Superior Court also rejected Stillwater's "alternative theory that even if Delaware law applies to the D&O Policies' interpretation, Montana law should apply to the claims handling." *Id.* at 26. That theory, "known as depecage, is disfavored generally, including in Delaware." *Id.* Here, applying "different states' laws to different aspects of a contractual relationship reduces both certainty and efficiency … and contravenes the pronouncement in *Murdock* that emphasized the importance of having a 'single body of law' to govern insurance programs applicable to 'operations around the world.'" *Id.* at 26-27 (quoting *Murdock*, 248 A.3d at 899).

Finally, the Superior Court held that Stillwater's Amended Complaint contains no viable cause of action under Delaware law. *Id.* at 27-28. Indeed, Stillwater had "conceded in oral argument" that "*Solera II* bars Stillwater's coverage claim under Delaware law." *Id.* at 15. Stillwater accordingly could not carry its "burden of proving that its insuring agreements afford it coverage for the alleged loss at issue." *Id.* at 27-28.

ARGUMENT

I. The Superior Court Correctly Held That Delaware Law Applies

A. Question Presented

Whether Delaware law governs the dispute in this case. Yes. (Preserved at A0309-45.)

B. Scope of Review

Choice of law is a question of law reviewed *de novo*. *See Murdock*, 248 A.3d at 896.

C. Merits of Argument

This case should begin and end with choice of law. Stillwater conceded below and does not dispute on appeal that it has no viable cause of action under Delaware law, so if Delaware law applies, it is undisputed that the Superior Court correctly dismissed Stillwater's Amended Complaint. Under a straightforward application of *Murdock*, moreover, the Superior Court correctly held that Delaware law applies. The Superior Court also correctly rejected *dépeçage* because Stillwater articulated no sound basis to apply Delaware law to the interpretation of the Primary Policy but Montana law to the handling of Stillwater's claims for coverage under that same policy. Stillwater's contrary arguments do not withstand scrutiny.

1. Delaware Has the Most Significant Relationship

Stillwater does not challenge the Superior Court's determination that "the parties have *not* included an effective choice of law provision in their insurance

coverage contracts." Ex. A at 19. Accordingly, assuming a conflict between Delaware and Montana law,[1] the choice-of-law analysis is governed by sections 188 and 193 of the Restatement (Second) of Conflicts of Law ("Restatement"). *See Murdock*, 248 A.3d at 896.

In section 193, the Restatement "provides a presumption for insurance contracts," *id.* (citation omitted), whereby courts generally apply "the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy," Restatement § 193. But if "some other state has a more significant relationship … to the transaction and the parties, … the local law of the other state will be applied." *Id.* Thus, "if the facts of a case don't fit the *Second Restatement*'s presumption[]—such as when the insurance contract is part of a comprehensive program insuring risks that are not confined to a single jurisdiction—[courts] must look at broader subject-matter-specific factors" under section 188. *Murdock*, 248 A.3d at 896 (citation and quotation marks omitted).

Under section 188, "which addresses contract disputes more broadly," courts determine the state with the most significant relationship by considering five factors: "the place of contracting; the place of negotiation of the contract; the place of

[1] As explained below, while the Superior Court "assume[d] a conflict exists between Montana and Delaware law," Ex. A at 19, this Court can affirm on the alternative ground that there is no such conflict because Stillwater's causes of action fail even under Montana law. *Infra*, § II.C.2.

performance; the location of the subject matter of the contract; and the domicile, residence, nationality, place of incorporation and place of business of the parties." *Id.* at 896-97. Courts "weigh the relative importance of these contacts in light of the overarching choice-of-law considerations set forth in section 6 of the *Second Restatement*," *id.* at 897—in particular:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Restatement § 6.

In *Murdock*, this Court applied these principles to a dispute concerning D&O insurance coverage. *Id.* at 895. *Murdock* involved a corporation incorporated in Delaware and headquartered in California, and the Court held that "[w]hen the insured risk is the directors' and officers' honesty and fidelity to the corporation—[or] to its stockholders and investors—and the choice of law is between headquarters or the state of incorporation, the state of incorporation has the most significant interest." *Id.* at 900 (citation and quotation marks omitted). That insured risk was part of the "subject matter" of the D&O policy at issue, and "Delaware has specific policies that affect this subject matter." *Id.* "Indeed, it [wa]s by virtue of [8 *Del. C.* § 145], which permits Delaware corporations … to purchase D&O policies …, that

[the corporation] was authorized to purchase the Policy." *Id.* Furthermore, where Delaware law governs the underlying legal relationships among the corporation, its directors and officers, and its stockholders, "corporations must assess their need for D&O coverage with reference to Delaware law." *Id.* at 900-01. As Stillwater itself previously stated, "Delaware has a strong state interest in the application of its principles of corporate law and governance" to cases "involv[ing] D&O insurance coverage for a Delaware corporation." B275; B343 n. 54.

Having concluded that "the state of incorporation is the center of gravity of the typical D&O policy" with regard to risks implicating Delaware corporate and fiduciary law, the Court in *Murdock* "consider[ed]" and rejected an argument that "the California contacts in th[at] particular instance [we]re sufficient to tip the balance toward California." 248 A.3d at 901. The insurer, which advocated applying California law, "stresse[d] that [the corporation]'s headquarters [wa]s in Westlake Village, California, where [its] directors and officers also live and work." *Id.* In this Court's view, however, "this emphasis on physical location underrate[d] the significance of [the insured]'s status as a Delaware corporation." *Id.* The Court also rejected other California contacts—including that the policy was negotiated and issued in California, was handled through the insurer's west-coast regional office, and contained California amendatory endorsements—as insufficient. *Id.* at 897-98, 901. Those contacts were not "as legally significant or as laden with policy

considerations as [the corporation]'s status as a Delaware corporation and the individual insureds' status as directors and officers, all operating under the authority and guidance of Delaware law." *Id.* at 901.

Here, the Superior Court correctly held that, under *Murdock*, the relevant factors in this case decisively favor Delaware law. As the court explained: "Stillwater's principal place of business is Montana," "[b]ut nothing else in the record weighs in favor of applying Montana law," and Stillwater's "principal place of business" is insufficient to "outweigh its state of incorporation in determining coverage" for the Delaware Appraisal Action. Ex. A at 24. "Stillwater's various alleged contacts with Montana neither distinguish the current litigation from existing Delaware precedent nor warrant a departure from applying the law of Stillwater's state of incorporation." *Id.* (footnote omitted).

On appeal, Stillwater stresses that Stillwater is headquartered in Montana, and thus it procured the Primary Policy from Montana, the Policy was delivered to Stillwater there, and any payments to which Stillwater was entitled would be received there. Opening Br. of Plaintiff-Below/Appellant Stillwater ("Br.") at 19, 22-23. Those contacts, however, do not distinguish *Murdock*. There, too, the policy was procured from and issued to the insured's non-Delaware headquarters, yet Delaware law still governed the determination of coverage for the stockholder litigation at issue. *Murdock*, 248 A.3d at 890.

Stillwater also notes that the Primary Policy contains Montana amendatory endorsements, Br. 23-24, but again, the policy in *Murdock* also contained non-Delaware amendatory endorsements, *Murdock*, 248 A.3d at 897-98. As the Superior Court explained, these types of endorsements "are neither unusual nor sufficiently strong … to tip the scale in favor of applying Montana law." Ex. A at 24. Stillwater places particular emphasis on one endorsement providing that the Primary Policy "conform[s] to the minimum requirements of Montana law," suggesting that this endorsement incorporates Montana's choice-of-law statute. A0236; *see* Br. 7, 24. "[M]ost courts to consider the issue," however, "have held that a conformity clause does not determine the applicable law." *AEI Life LLC v. Lincoln Benefit Life Co.*, 892 F.3d 126, 134 (2d Cir. 2018). Such clauses instead "merely indicate[] an intent to avoid inconsistencies between the statutory laws of the state in which the policy was issued and the terms of the policy" and do not act "as the source of law for interpreting the terms of the policy." *Id.* (emphasis and citation omitted); *see id.* (citing, *inter alia*, *Nat'l Sur. Corp. v. Mack*, 2015 WL 8779995, at *2 (D. Mont.)).

Stillwater also asserts that "the Insurers … conceded in Montana courts that a Montana statute controlled the choice-of-law analysis." Br. 23. In fact, the Montana statute supplies the rules for determining choice of law in ***Montana*** courts, but Delaware courts apply their own ***Delaware*** choice-of-law principles. Regardless, the Montana statute still points to Delaware law. That statute provides that a contract

is governed by "the law and the usage of the place where it is to be performed." Mont. Code Ann. § 28-3-102. Here, the Primary Policy affords coverage "anywhere in the world," A0206, and thus "designates the place of performance to be any state where a claim arises," *Mitchell v. State Farm Ins. Co.*, 68 P.3d 703, 709 (Mont. 2003). The Delaware Appraisal Action arose in Delaware, so even under the Montana choice-of-law statute, Delaware law applies.

Stillwater also notes that the Delaware Appraisal Action was brought "against Stillwater, *not* … directors and officers." Br. 19. But the Delaware Appraisal Action arose out of a merger conducted under the DGCL, was litigated in the Delaware Court of Chancery, and arose under the Delaware appraisal statute, which governs internal corporate relationships between Delaware corporations and their stockholders. For these reasons, Delaware appraisal actions centrally implicate "specific policies" of Delaware corporate law, *Murdock*, 248 A.3d at 900.

Stillwater also contends that Montana law should apply because, as relevant here, it supposedly affords greater protection to insureds than Delaware law. Br. 18-20. But even assuming *arguendo* that the relevant aspects of Montana law are more favorable to insureds, that does not mean that Montana has a greater interest in this case. While Montana may have an interest in regulating relationships with insureds that are headquartered in Montana, Delaware has an interest in regulating relationships with insureds that are incorporated in Delaware—as well as broader

interests related to Delaware's integrated body of corporate law. Under *Murdock*, courts do not simply apply the law most favorable to the insured. Rather, the law of the state of incorporation generally governs coverage disputes implicating Delaware corporate and fiduciary law unless the "contacts in th[e] particular instance are sufficient to tip the balance toward [another state]." 248 A.3d at 901. Stillwater's self-interested preference for Montana law in this case is not a "contact[]" between this case and Montana.

Even if the content of Montana's law were relevant here, it cannot displace Delaware law because the applicable law in Montana and Delaware is the same. While portions of Montana's UTPA are enforceable through a private right of action and Delaware's statute is not, the substantive provisions of the two statutes are materially identical. *Compare* Mont. Code Ann. § 33-18-201 *with* 18 *Del. C.* § 2304. Similarly, as explained below, Montana's standard for a duty to defend is not materially different from Delaware's. *Infra*, § II.C.2.

Finally, any Montana contacts here are counterbalanced by other contacts with Delaware. As the Superior Court explained, this case "involves a Delaware appraisal action against Stillwater that arose out of a merger pursuant to Delaware law, litigated in the Delaware Court of Chancery. Stillwater's own previous statements that Delaware law applied to the D&O Policies and Stillwater's coverage claims underscore this conclusion." Ex. A at 25-26. Stillwater attempts to explain away its

prior statements on the theory that, before *Solera II*, there was no conflict between Montana and Delaware law, "so Delaware law *perforce* would apply." Br. 28. But that is not what Stillwater said at the time. It stated that "***Delaware has a strong state interest*** … in this matter" and that, "***because this claim involves D&O insurance coverage for a Delaware corporation***, Delaware law applies." B275; B343 n. 54 (emphases added). Stillwater was right to argue for Delaware law initially and is wrong to argue against it now.

2. The Superior Court Correctly Rejected *Dépeçage*

The Superior Court also correctly rejected Stillwater's invitation to apply Delaware law to questions of "coverage" and Montana law to questions of the Insurers' "defense or claims-handling practices" under the doctrine of *dépeçage*. Br. 26. *Dépeçage* is inappropriate here for three reasons.

First, the Superior Court correctly recognized that *dépeçage* is a "sparingly used doctrine" that "is disfavored generally, including in Delaware." Ex. A at 26-27 (quotation marks omitted). In *Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045 (Del. 2015), this Court stated that *dépeçage* "generally makes no logical sense." *Id.* at 1052 n.28. At least one subsequent Delaware decision rejected the doctrine all but categorically. *See Jackson v. Bridgestone Ams. Tire Operations, LLC*, 2015 WL 13697682, at *5 n.30 (Del. Super.) (discussing *Bell Helicopter* and concluding that it "looks like *bon voyage* to *depecage*"). As this Court has

explained, applying different laws to different parts of the same case "risks subjecting litigants to a law of the case that is not the law of any jurisdiction, but is instead an eclectic blend of various sovereigns' laws crafted by a judge into a bespoke tort law fitted for a particular case." *Bell*, 113 A.3d at 1052 n.28. Stillwater itself acknowledges that *dépeçage* is a departure from the "general rule." Br. 25. While Stillwater cites older decisions applying different states' laws to different issues in the same dispute, those cases all precede *Bell Helicopter* and involved issues that were completely separate, such as distinct causes of action or distinct contract and tort questions—not "coverage" and "defense or claims-handling practices" under the ***same*** insurance policy. *See id.* at 25-26 (citing cases).

Second, *Murdock* counsels against applying *dépeçage* in the D&O context. As this Court explained, determining the law applicable to a "comprehensive insurance program" requires evaluating "what state has the most significant interest in applying its law to the interpretation of the insurance scheme and its terms ***as a whole in a consistent and durable manner that the parties can rely on***." 248 A.3d at 899 (emphasis added) (citation omitted). The Superior Court faithfully followed that teaching here, observing that "[t]he application of different states' laws to different aspects of a contractual relationship reduces both certainty and efficiency for insureds and insurers alike." Ex. A at 26-27.

Third, there is no room for *dépeçage* here because there is only one relevant "issue"—whether Stillwater is entitled to payment of its defense costs and interest payments under the terms of the Primary Policy. That is a single, indivisible issue of contract interpretation that cannot be governed by more than one state's law. The distinction Stillwater attempts to draw between "coverage" and the Insurers' "defense or claims-handling practices" is illusory. Stillwater never explains how the Insurers could have "defense or claims-handling" obligations except because of a contractual duty to provide "coverage." Stillwater cites no decision—from Delaware, Montana, or elsewhere—applying different states' laws to "coverage" and "defense or claims-handling" issues in the same case.

Moreover, even if Montana recognized extracontractual defense duties separate from coverage, that would be a reason to ***reject*** *dépeçage*. Engrafting Montana's supposedly idiosyncratic defense and claims-handling law onto Delaware's integrated body of corporate and insurance law is the antithesis of the consistency and stability this Court called for in *Murdock*. As the Superior Court explained, "[o]ther than an apparent belief that applying Montana law in this case would rescue its coverage claims from inevitable dismissal under *Solera II*, Stillwater has not articulated any compelling basis to apply this 'sparingly used' doctrine. This results-based reasoning is the precise result the Restatement seeks to

avoid." Ex. A at 27. Because Stillwater still offers no sound basis to apply Montana law to any issue in this case, Delaware law applies.

II. The Superior Court Correctly Dismissed Stillwater's Amended Complaint

A. Question Presented

Whether the Superior Court correctly dismissed Stillwater's Amended Complaint in its entirety with prejudice. Yes. (Preserved at A0309-45.)

B. Scope of Review

The grant of a motion to dismiss for failure to state a claim is reviewed *de novo*. *See City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 235 A.3d 702, 716 (Del. 2020). Dismissal is warranted "if the plaintiff fails to plead specific allegations supporting each element of a claim or if no reasonable interpretation of the alleged facts reveals a remediable injury." *Buck v. Viking Holding Mgmt. Co. LLC*, 2021 WL 673459, at *3 (Del. Super.).

C. Merits of Argument

The Superior Court correctly dismissed Stillwater's Amended Complaint for two reasons. *First*, if Delaware law applies, then Stillwater's Amended Complaint concededly has not stated a claim upon which relief can be granted. *Second*, in any event, Stillwater has not stated a viable cause of action under Montana law either.

1. Stillwater's Causes of Action Fail Under Delaware Law

The Superior Court correctly held that Stillwater has no viable cause of action under Delaware law. As the court explained, the Primary Policy "afford[s] Stillwater coverage only for a Securities Claim"—that is, "a Claim 'alleging [a] violation' of a

law." Ex. A at 27. "Under *Solera II*," however, "an appraisal action is not a claim 'for a violation of law,' and therefore not a Securities Claim." *Id.* at 27-28. "Stillwater has the burden of proving that its insuring agreements afford it coverage for the alleged loss at issue, which includes proving that the Delaware Appraisal Action was a Securities Claim. Stillwater has not met that burden …." *Id.* at 28. Indeed, Stillwater "conceded in oral argument" that "*Solera II* bars Stillwater's coverage claim under Delaware law." *Id.* at 15.

Stillwater asserts that the Superior Court "did not resolve choice of law for all three [of Stillwater's] claims" and therefore "failed to identify any legal basis to dismiss Stillwater's claims for breach of the duty to defend and violation of the UTPA." Br. 30-31. That assertion is wrong. The court held that Delaware law applies across the board and rejected Stillwater's invitation to apply Delaware law to some causes of action and Montana law to others. Ex. A at 19-27. To the extent Stillwater asserted causes of action exclusively under Montana law, they fail because Stillwater did not bring them under Delaware law.

2. Stillwater's Causes of Action Fail Under Montana Law

Even if Montana law applied, Stillwater still has no viable cause of action. On appeal, Stillwater does not dispute that Counts 1 and 2—which assert "[b]reach[es] of [c]ontract" against National Union and against ACE and QBE, respectively, A0187, A0189—cannot proceed. This point bears emphasis: Stillwater

concedes that, even under Montana law, the Insurers did ***not*** breach the terms of their policies. For that same reason, Count 3 (seeking a "[d]eclaratory [j]udgment" regarding the Insurers' supposed duty to advance defense costs) and Count 4 (alleging violations of Montana's UTPA) fail as well. A0191-92.

a. The Insurers Did Not Breach Any Duty To Advance Defense Costs

Under Montana law, Stillwater bears "[t]he initial burden … to establish that the claim falls within the basic scope of coverage." *ALPS Prop. & Cas. Ins. Co. v. Keller, Reynolds, Drake, Johnson & Gillespie, P.C.*, 482 P.3d 638, 644 (Mont. 2021). Assuming *arguendo* that the Insurers' duty to advance defense costs here is coextensive with a duty to defend, an insurer owes a duty to defend under Montana law only "when a complaint against an insured alleges facts, which if proven, would result in coverage." *State Farm Mut. Auto. Ins. Co. v. Freyer*, 312 P.3d 403, 410 (Mont. 2013) (quotation marks, citation, and emphasis omitted). "[I]f there is any dispute as to the facts relevant to coverage, those factual disputes must be resolved in favor of coverage." *Farmers Union Mut. Ins. Co. v. Staples*, 90 P.3d 381, 386 (Mont. 2004). But "[i]f there is no coverage under the terms of the policy based on the facts contained in the complaint, there is no duty to defend." *Fire Ins. Exch. v. Weitzel*, 371 P.3d 457, 461 (Mont. 2016) (citation omitted); *accord Landa v. Assurance Co. of Am.*, 307 P.3d 284, 289 (Mont. 2013); *Steadele v. Colony Ins. Co.*, 260 P.3d 145, 150 (Mont. 2011); *Grimsrud v. Hagel*, 119 P.3d 47, 53 (Mont. 2005).

Here, no facts relevant to coverage were ever in dispute, and Stillwater ***concedes*** that, in light of *Solera II*, there is no coverage under the terms of the Primary Policy as a matter of law. That should end the matter. "The duty to defend arises from the language of the policy," so "[w]ithout coverage under the policy terms, no duty exists." *Banjosa Hosp., LLC v. Hiscox, Inc.*, 2018 WL 4621747, at *3 (D. Mont.), *aff'd*, 788 F. App'x 531 (9th Cir. 2019); *see RQR Dev., LLC v. Atl. Cas. Ins. Co.*, 2014 WL 6997935, at *2 (D. Mont.) (similar).

Stillwater argues that Montana defense rights arise whenever coverage is "potentially implicated," Br. 32 (citation omitted), and attempts to convert that phrase into a duty to defend that extends beyond the coverage the policy language actually affords. In Stillwater's view, coverage is "potentially implicated" whenever the insured's reading of the policy language is not foreclosed by precedent, even if the insured's reading ultimately is incorrect as a matter of law. However, the case Stillwater cites—*Tidyman's Management Services, Inc. v. Davis*, 330 P.3d 1139 (Mont. 2014)—does not create an extracontractual duty to defend where the facts relevant to coverage are undisputed. In fact, *Tidyman's* states that defense rights "arise[] when a complaint against an insured alleges facts which, if proved, would result in coverage." *Id.* at 1149. Stillwater is able to suggest that "potentially implicated" encompasses cases involving no factual uncertainty only by wrenching those words from context. Here is the relevant passage:

> Our case law … makes clear that the threshold question … is whether the complaint against the insured alleges facts that, if proven, would trigger policy coverage. If there is any dispute as to the facts relevant to coverage, those factual disputes must be resolved in favor of coverage.
>
> In effect, … all that matters is whether [the insurer] was on notice that the Policy was potentially implicated.

Id. at 1150 (cleaned up). After *Tidyman's*, the Montana Supreme Court has repeatedly stated that defense rights arise "when a complaint against an insured alleges facts, which if proven, would result in coverage," without using the phrase "potentially implicated." *Draggin' Y Cattle Co., Inc. v. Junkermier, Clark, Campanella, Stevens, P.C.*, 439 P.3d 935, 941 (Mont. 2019); *see Emps. Mut. Cas. Co. v. Est. of Buckles*, 443 P.3d 534, 538 (Mont. 2019); *J&C Moodie Props., LLC v. Deck*, 384 P.3d 466, 472 (Mont. 2016). The duty to defend in Montana is defined by the actual scope of coverage under the policy; it is ***not*** extracontractual.[2]

Stillwater also asserts that Montana law requires an insurer denying advancement to make an "unequivocal demonstration" that there is no coverage. Br. 32-33. But that phrase, too, just means that factual disputes are resolved in the insured's favor. As the Montana Supreme Court has explained: "Unless there exists

---

[2] At oral argument below, Stillwater suggested that the duty to defend under Montana law is defined not by contract or common law but by statute. *See* A0476. Stillwater does not mention that statute on appeal, but regardless, the statute still ties defense rights to the contract. An insurer must defend only "in respect to the matters embraced by the indemnity," Mont. Code Ann. § 28-11-316, *i.e.*, the coverage afforded by the policy language.

an unequivocal demonstration that the claim against the insured does not fall within the policy coverage, the insurer has a duty to defend. ***In other words***, if there is any dispute as to the facts relevant to coverage, those factual disputes must be resolved in favor of coverage." *Staples*, 90 P.3d at 386 (emphasis added) (citations omitted).

Accordingly, contrary to Stillwater's suggestion, Br. 33, an insurer need not demonstrate that precedent forecloses the insured's coverage theory. Rather, the insurer must demonstrate only that the underlying complaint does not "allege[] ***facts***, which if proven, would result in coverage." *Staples*, 90 P.3d at 385 (emphasis added). In *Staples*, for example, coverage hinged on who owned a horse, and thus there was a duty to defend notwithstanding evidence from outside the underlying complaint that the horse was not owned by the insured. *Id.* Here, there has never been any dispute about any ***fact*** relevant to coverage. Because *Solera II* conclusively establishes that there is no coverage as a matter of law, there is no duty to defend.

The language of the Primary Policy reinforces this conclusion. The Policy provides that "advance payments by the Insurer shall be repaid to the Insurer … in the event and to the extent that any … Insured Person or Organization shall not be entitled under this policy to payment of such Loss." A0213. Accordingly, even if the Insurers had advanced Stillwater's defense costs as Stillwater alleges they should have under Montana law, and *Solera II* later made clear that those costs are not covered, the Policy would have required Stillwater to pay the Insurers back. The

Montana Supreme Court has expressly upheld an insurer's right to recoup "expenses that the insurer incurred in defending a claim *outside of the insured's policy coverage*." *Nat'l Indem. Co. v. State*, 499 P.3d 516, 533 (Mont. 2021) (emphasis original, citation omitted).

Stillwater also contends that, if an insurer breaches a duty to defend, then the insurer "loses its right to invoke insurance contract defenses and is estopped from denying coverage." Br. 33. In fact, an insurer is estopped only if it "refuses to defend a claim ***and does so unjustifiably***," *Tidyman's*, 330 P.3d at 1149 (emphasis added), either because the insurer "acknowledges potential coverage" or because ultimately "coverage is found," *Banjosa*, 2018 WL 4621747, at *3. Here, the Insurers have never acknowledged potential coverage, and it is undisputed that in fact there is no coverage as a matter of law. The Insurers thus denied Stillwater's advancement request ***correctly***, not unjustifiably.

Finally, Stillwater suggests that Montana law bars an insurer from denying advancement unless the insurer files a declaratory action contesting coverage while advancing defense costs in the interim under a reservation of rights. Br. 34. In fact, Montana law is clear that filing a declaratory judgment action is optional. *See Tidyman's*, 330 P.3d at 1149, 1151 (explaining "where an insurer refuses to defend its insured, it does so at its peril" and "t[akes] its chances"). Moreover, National Union ***did*** file a declaratory action on "the first day" the Primary Policy permitted.

Br. 10, 40; *see* A0219 (barring commencement of judicial proceedings until 90 days after mediation terminates). While the Insurers did not advance Stillwater's defense costs under a reservation of rights in the meantime, that is of no moment because, again, Stillwater concedes that those costs are not covered.

b. The Insurers Did Not Violate the UTPA

Stillwater's UTPA cause of action likewise fails, for two reasons. *First*, "[a]n insurer may not be held liable" under the UTPA "if the insurer had a reasonable basis in law or in fact for contesting the claim." Mont. Code Ann. § 33-18-242(5). Under that provision, "reasonableness is a question of law for the court to determine when it depends entirely on interpreting relevant legal precedents and evaluating the insurer's proffered defense under those precedents." *Redies v. Att'ys Liab. Prot. Soc'y*, 150 P.3d 930, 938 (Mont. 2007). Furthermore, where an insurer "properly denied coverage," it necessarily follows that the insurer "had a reasonable basis in law for denying coverage" under the UTPA. *Landa*, 307 P.3d at 291. Here, *Solera II* conclusively establishes that the Insurers' denial of Stillwater's claim for coverage was not just "reasonable," but correct as a matter of law.

Stillwater asserts that "UTPA claims can go forward even if the insurer did not breach the insurance contract," Br. 36, but its only supporting citation—*Graf v. Continental Western Insurance Co.*, 89 P.3d 22 (Mont. 2004)—is completely inapposite. The UTPA suit in *Graf* was not even brought by the insured. *Graf*

concerned the circumstances in which a third-party claimant can sue an insurer under the UTPA for failing to engage in good-faith settlement negotiations under Mont. Code Ann. §§ 33-18-242(6)(b) and 201(6). *See id.* at 25-28. This case does not involve those provisions or any settlement negotiations between the Insurers and a third-party claimant. *Graf* does not remotely suggest that Montana law imposes an extracontractual duty to pay defense costs that are not covered as a matter of law.

Second, even if the Insurers somehow "mishandled" Stillwater's coverage request—and Stillwater has not made any "specific allegations" showing that they did—doing so did not cause Stillwater any "remediable injury." *Buck*, 2021 WL 673459, at *3. That is because, under the terms of the Primary Policy, Stillwater was never entitled to any payments from the Insurers in the first place. While Stillwater alleges that the Insurers violated the UTPA by failing to adequately investigate Stillwater's coverage request and failing to respond appropriately, the only UTPA damages Stillwater seeks (beyond attorneys' fees and punitive damages) are for payment of its defense costs and interest payments. A0192-95. But even taking Stillwater's allegations as true, the manner in which the Insurers investigated and responded to Stillwater's request did not result in Stillwater paying anything that it would not have had to pay anyway. Regardless of whether the Insurers handled Stillwater's claim properly or improperly, Stillwater still was responsible for its own defense costs and interest payments—because the plain terms of the Primary Policy

do not require the Insurers to pay those costs and payments. Stillwater's UTPA count ultimately is duplicative of its other counts, and accordingly fails for all the same reasons.

III. The Superior Court Properly Denied Voluntary Dismissal

A. Question Presented

Whether the Superior Court abused its discretion in denying Stillwater's motion for voluntary dismissal. No. (Preserved at A0052-77.)

B. Scope of Review

The denial of a motion for voluntary dismissal is reviewed for abuse of discretion. "An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice to produce injustice." *Harper v. State*, 970 A.2d 199, 201 (Del. 2009).

C. Merits of Argument

The Superior Court properly denied Stillwater's motion for voluntary dismissal. Under Delaware Superior Court Rule 41(a), after "service by the adverse party of an answer or of a motion for summary judgment," "an action shall not be dismissed at the plaintiff's instance save upon order of the Court and upon such terms and conditions as the Court deems proper." The same Rule also provides that "[i]f a counterclaim has been pleaded by a defendant prior to the service upon defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the Court."

"To defeat [a] Rule 41(a)(2) motion" filed after service of an answer, "a defendant is required to satisfy the burden of demonstrating 'plain legal prejudice.'"

AT&T Wireless Servs., Inc. v. Fed. Ins. Co., 2005 WL 2155695, at *3 (Del. Super.) (quoting *Draper v. Paul N. Gardner Defined Plan Tr.*, 625 A.2d 859, 863 (Del. 1993)). In determining whether that burden is met, courts consider the following factors:

> (1) the defendants' effort and expense in preparation for trial;
>
> (2) excessive delay and lack of diligence on the part of plaintiff in prosecuting the action;
>
> (3) insufficient explanation for the need to take a dismissal; and
>
> (4) the fact that a motion for summary judgment has been filed by the defendant.

Id. This list, however, is not "a mandate that each and every factor be resolved in favor of the moving party before dismissal is appropriate. It is rather simply a guide for the trial judge, in whom the discretion ultimately rests." *United States v. Outboard Marine Corp.*, 789 F.2d 497, 502 (7th Cir. 1986) (cited approvingly in *Draper*, 625 A.2d at 864) (quotation marks omitted)).

In exercising their discretion, Delaware courts consistently deny voluntary dismissal where it reflects "mere forum shopping to obtain a litigation advantage," *AT&T Wireless*, 2005 WL 2155695, at *5, where moving "the dispute elsewhere would carry the taste of rewarding forum shopping," *Rhodes v. Silkroad Equity, LLC*, 2007 WL 441940, at *1 (Del. Ch.), and where the reason for the motion is "to avoid an adverse result," *In re Walt Disney Co. Derivative Litig.*, 1997 WL 118402,

at *4 (Del. Ch.); *see also* 9 Wright & Miller, *Fed. Prac. & Proc.* § 2364 (4th ed.) ("[A] voluntary dismissal to reinstate the action in a forum that will apply a different body of substantive law clearly is disfavored."). Delaware courts also deny voluntary dismissal where "the unacceptable and unproductive possibility of piecemeal litigation … would occur" because the parties would have to litigate multiple related lawsuits in parallel. *AT&T Wireless*, 2005 WL 2155695, at *5; *see Rhodes*, 2007 WL 441940, at *1.

Here, "focus[ing]" on "the sufficiency of the explanation for the need to take dismissal," the Superior Court was unpersuaded "that there is a sufficient explanation here for a need to dismiss or to pursue this action in Montana as opposed to in Delaware." A0152-53. "The plaintiff is a Delaware corporation. It voluntarily filed this action in Delaware. It maintained for all the time until very recently that this action was pending, that Delaware law governed the dispute. There'[d] really been no argument to [the court] that this is an inconvenient place for plaintiff to litigate this case." A0153. "And, frankly, the decision to dismiss now after an adverse ruling stemming from the Delaware Supreme Court in *Solera* does take on a flavor of forum shopping. That's not something that th[e] Court typically allows, certainly tries to avoid, and we don't allow the use of Rule 41(a) to promote forum shopping." A0154. The court also noted the danger of piecemeal litigation because "the declaratory judgment action that originally was filed by National Union in the

counterclaims would remain," resulting in "potentially competing causes of action." A0155.

That cogent reasoning refutes Stillwater's assertion that "the Superior Court failed to provide reasons for the judicial determination denying voluntary dismissal." Br. 39. Stillwater may disagree with the Superior Court's reasoning, but that does not mean that the court "did not state any reason or conclusion as to the ultimate question" of "whether the Insurers would suffer plain legal prejudice." Br. 39-40.

Stillwater also asserts that the Superior Court relieved the Insurers of their "burden" because the court noted the absence of any argument that Delaware would be inconvenient or any explanation for the need for voluntary dismissal except avoiding *Solera II*. Br. 39. The burden of proof, however, was irrelevant because the pertinent facts are undisputed—Stillwater in fact did not argue that Delaware is inconvenient, nor did it deny that the reason for its voluntary dismissal motion stemmed from *Solera II*. Stillwater also ignores that the Insurers separately met their "burden" by persuading the Superior Court that voluntary dismissal would result in piecemeal litigation.

Stillwater's assertion that forum shopping "is not a *Draper* factor" and would not prejudice the Insurers, Br. 40, also misses the mark. To begin with, Stillwater again ignores that the Superior Court denied voluntary dismissal based on concerns about not just forum shopping but also piecemeal litigation. Regardless, even

focusing narrowly on forum shopping, the *Draper* factors include whether there is "insufficient explanation for the need to take a dismissal," 625 A.2d at 864, and Delaware courts consistently hold that forum shopping is an "insufficient explanation." Furthermore, the *Draper* factors are not exclusive and do not preclude denying voluntary dismissal based on other considerations, including the "general rule" that "litigation should be confined to the forum in which it is first commenced." *Rhodes*, 2007 WL 441940, at *1 (citation omitted). As the Court of Chancery has explained, "defendants will suffer prejudice if plaintiffs may dash in and out of a forum based on tactical considerations and an assessment that their case looks weak in light of the governing law in a particular jurisdiction." *Walt Disney*, 1997 WL 118402, at *4.

Finally, Stillwater's suggestion that the Insurers somehow strong-armed Stillwater into litigating in Delaware and that "[i]t was, in fact, [National Union] that forum shopped," Br. 41, is false. There was nothing improper about National Union filing a declaratory action in Delaware in a case governed by Delaware law. Regardless, no legal or practical impediment prevented Stillwater from filing its own initial complaint in Montana rather than in Delaware. Instead, in an effort to capitalize on *Solera I*, Stillwater made a strategic choice and "voluntarily filed this action in Delaware." A0153. In that context, the Superior Court's denial of voluntary dismissal was not an abuse of discretion.

IV. The Superior Court Properly Denied a Stay

A. Question Presented

Whether the Superior Court abused its discretion in denying Stillwater's motion to stay this action pending resolution of the Montana Action. No. (Preserved at A0570-97.)

B. Scope of Review

The denial of a motion to stay is reviewed for abuse of discretion, as described in § III.B, *supra*.

C. Merits of Argument

The Superior Court properly denied Stillwater's eleventh-hour motion to stay this case pending resolution of the later-filed Montana Action. That ruling was well within the Superior Court's broad discretion for three independent reasons.

First, the Superior Court reasonably denied Stillwater's stay motion as an improper motion for reargument. The court explained that Stillwater's October 2021 stay motion "effectively s[ought] reargument of th[e] Court's April 2021 decision denying [Stillwater]'s motion for voluntary dismissal." A0602. Under Superior Court Rule 59(e), "[a] motion for reargument shall be served and filed within 5 days after the filing of the Court's opinion or decision," and thus Stillwater's motion came nearly six months too late. In any event, the court explained that "[t]he 'updated facts' [Stillwater] offer[ed] in support of revisiting this decision do not materially change the landscape on which the Court based its previous ruling." A0602. On

appeal, Stillwater does not even mention this determination by the Superior Court, let alone offer a convincing reason why it reflects an abuse of discretion.

Second, the Superior Court reasonably denied Stillwater's stay motion as untimely. Stillwater does not dispute that Delaware courts may deny stay requests based on the movant's unreasonable delay—nor could it. *E.g.*, *Carlton Inv. v. TLC Beatrice Int'l Holdings, Inc.*, 1996 WL 33167168, at *9-10 (Del. Ch.). Here, Stillwater's delay was clearly unreasonable. As the Superior Court explained, Stillwater "did not pursue a stay until months after the parties fully briefed and argued [the Insurers]' motion to dismiss this action with prejudice." A0602. The court also "anticipat[ed] issuing a ruling on that motion to dismiss" within a few weeks (as it later in fact did). *Id.* The court thus concluded that "staying the action at this late stage would be inequitable and a gross waste of party and judicial resources." *Id.*

Stillwater's only challenge to the Superior Court's timeliness rationale mischaracterizes the record. Stillwater asserts that the Superior Court's determination that Stillwater "waited too long" was "clearly erroneous" because Stillwater "requested a stay in conjunction with its months-earlier motion to voluntarily dismiss." Br. 43. In fact, Stillwater's voluntary dismissal motion and associated reply made no mention of requesting a "stay." A0044-51; A0078-100. Instead, Stillwater cites a comment from the voluntary-dismissal oral argument, in

which Stillwater suggested that, "if [the court] did not feel like [it] wanted to dismiss the declaratory judgment counts that are pending by the insurers, there is also an option to stay those as well." A0151-52. Stillwater's later stay motion never referenced that comment.

Third, the Superior Court reasonably determined that the balance of the *Cryo-Maid* factors did not favor a stay. Those factors are:

> (1) the relative ease of access to proof; (2) the availability of a compulsory process for witnesses; (3) the possibility to view the premises, if appropriate; (4) all other practical problems that would make the trial easy, expeditious, and inexpensive; (5) whether the controversy is dependent upon Delaware law …; and (6) the pendency or non-pendency of a similar action in another jurisdiction.

GXP Cap., LLC v. Argonaut Mfg. Servs., Inc., 253 A.3d 93, 101 (Del. 2021) (citation omitted). As the Superior Court explained, here these factors "either are neutral (access to proof, availability of compulsory process, view of the premises, dependence on Delaware law) or weigh in favor of proceeding in this Court." A0602. "Specifically, from a practical perspective, the parties ha[d] expended substantial resources briefing the [Insurers]' motion to dismiss, and allowing this Court to resolve that motion w[as] expeditious and efficient." *Id*. "Moreover, this action is the first-filed action. [Stillwater] voluntarily filed its claim in th[e Superior] Court and repeatedly argued Delaware law applied to the dispute." *Id.*

Stillwater's arguments to the contrary, *see* Br. 44, all fail. Stillwater reiterates its contention that Montana law applies, but in actuality, as explained, Delaware law

applies. *Supra*, § I. Stillwater also asserts that the location of witnesses and documents favors Montana, but modern transportation methods "render concerns about transmission of documents virtually irrelevant" and "lessen … concern about the travel of witnesses." *Rapoport v. Litig. Tr. of MDIP Inc.*, 2005 WL 3277911, at *5-6 (Del. Ch.) (quotation marks omitted). As for Stillwater's assertions about "the efficient administration of justice," Br. 44, they ignore the "practical" point that the Superior Court was mere weeks away from resolving this case in its entirety. A0602.

Perhaps most fundamentally, Stillwater ignores that a stay would have rewarded Stillwater's brazen efforts to avoid Delaware courts and Delaware law. Granting Stillwater's stay motion thus would have contravened the principles underlying *Cryo-Maid*, which aim "to discourage forum shopping and promote the orderly administration of justice by recognizing the value of confining litigation to one jurisdiction." *Gramercy Emerging Mkts. Fund v. Allied Irish Banks, P.L.C.*, 173 A.3d 1033, 1041 (Del. 2017) (citation omitted). If Stillwater truly believed that this dispute implicated unique Montana-law concerns, it should have sued in Montana court from the outset. Instead, Stillwater made a strategic decision to litigate in Delaware and to invoke Delaware law. In that context, the Superior Court's denial of Stillwater's stay motion was not an abuse of discretion.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

OF COUNSEL:

ARNOLD & PORTER KAYE SCHOLER LLP
Scott B. Schreiber
William C. Perdue
Andrew T. Tutt
Samuel I. Ferenc
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001-3743

HEYMAN ENERIO GATTUSO & HIRZEL LLP

/s/ Kurt M. Heyman
Kurt M. Heyman (# 3054)
Aaron M. Nelson (# 5941)
300 Delaware Avenue, Suite 200
Wilmington, DE 19801
(302) 472-7300
Attorneys for Defendant-Below/Appellee National Union Fire Insurance Company of Pittsburgh, Pa.

OF COUNSEL:

ROPERS MAJESKI, PC
Geoffrey W. Heineman
Jung H. Park
John J. Iacobucci Jr.
750 Third Avenue, 25th Floor
New York, New York 10017
(212) 668-5927

PHILLIPS, MCLAUGHLIN & HALL, P.A.

/s/ John C. Phillips Jr.
John C. Phillips Jr. (# 110)
David A. Bilson (# 4986)
1200 North Broom Street
Wilmington, Delaware 19806
(302) 655-4200
Attorneys for Defendant-Below/Appellee /QBE Insurance Corporation

Dated: June 6, 2022

CERTIFICATE OF SERVICE

Aaron M. Nelson, Esquire, hereby certifies that, on June 6, 2022, the foregoing Appellees National Union Fire Insurance Company of Pittsburgh, PA and QBE Insurance Corporation's Answering Brief was served electronically upon the following:

David J. Baldwin, Esquire
Peter C. McGivney, Esquire
BERGER HARRIS LLP
1105 North Market Street, 11th Floor
Wilmington, DE 19801

John C. Phillips, Jr., Esquire
David A. Bilson, Esquire
PHILLIPS MCLAUGHLIN & HALL P.A.
1200 North Broom Street
Wilmington, DE 19806

John L. Reed, Esquire
DLA PIPER LLP (US)
1201 N. Market Street, Suite 2100
Wilmington, DE 19801

Gregory F. Fischer
COZEN O'CONNNOR
1201 N. Market Street, Suite 1001
Wilmington, Delaware 19801

/s/ Aaron M. Nelson
Aaron M. Nelson (# 5941)