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IN THE SUPREME COURT OF THE STATE OF DELAWARE

STILLWATER MINING COMPANY, Plaintiff-Below, Appellant v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, 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 C.A. No.: N20C-04-190 AML CCLD CONSOLIDATED

REPLY BRIEF ON APPEAL OF PLAINTIFF-BELOW/APPELLANT STILLWATER MINING COMPANY

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I. INTRODUCTION

The parties – Stillwater,[1] the primary insurer NUFI,[2] and the Excess Insurers[3] – agree on the issues and applicable standards of review. The crux of the appeal is the Superior Court's erroneous decision to apply Delaware law to unique and discrete Montana-law claims that arise from Stillwater's status as a Montana-based company which purchased its insurance in Montana. Delaware's only connection to this action is Stillwater's incorporation in Delaware. Stillwater has no physical presence in, and does no business in, Delaware. The Insurers took no actions in Delaware other than rushing to first-file a declaratory judgment action here. The conduct at issue – Stillwater's tender of the defense of the Appraisal Action[4] ("the tender"), NUFI's rejection of the tender and, had they been made by the Insurers, payment of defense costs – all took place (or were to take place) in Montana. Stillwater is *not* seeking to enforce or avoid a Delaware judgment; Stillwater *is* seeking enforcement of Montana statutory defense and claims-handling standards. §33-18-201, MCA, *et seq*., §28-11-316, MCA.

Despite the undisputed facts that NUFI: (1) contractually *agreed* to comply

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[1] Plaintiff-Below/Appellant Stillwater Mining Company ("Stillwater").
[2] Defendant-Below/Appellee National Union Fire Insurance Company of Pittsburgh, PA ("NUFI").
[3] Defendants-Below/Appellees ACE American Insurance Company and QBE Insurance Corporation ("Excess Insurers").
[4] *In re Appraisal of Stillwater Mining Company*, C.A. No. 2017-0385-JTL (Del. Ch.) ("Appraisal Action").

with Montana statutes (A0236), and (2) subjected itself to the Montana Insurance Code by issuing the policy in Montana (§33-15-101, MCA), NUFI argues Delaware law applies to all possible legal claims related to the tender. NUFI (and the Excess Insurers) seek application of Delaware law for one reason only: to avoid the different (and stricter) regulation of the pertinent insurance practices at issue, under Montana law. If the Insurers prevail in this case, Delaware's courts will have become a hideout for insurers who sell policies *in all other states* that have regulatory schemes insurers deem less favorable, by allowing such insurers to weaponize the fact of Delaware incorporation against companies – like Stillwater – that reside and do business elsewhere but choose to incorporate here. This is an outcome that would be bad for Delaware, bad for insureds and a disaster for the effective multi-state regulation of insurer practices envisioned by the Restatement (Second) of Conflicts of Law (the "Restatement").

II. ARGUMENT

A. THE SUPERIOR COURT INCORRECTLY APPLIED DELAWARE LAW.

NUFI gives lip service to the proper Restatement tests to determine whether to apply Delaware or Montana law to Stillwater's claims, conceding that choice-of-law analysis is governed by weighing the factors in Sections 188 and 193. (NUFI Br.17). However, like the Superior Court, NUFI then completely ignores the required analysis. NUFI urges this Court to blindly apply the *result* of the weighing in *RSUI Indem. Co. v. Murdock*, 248 A.3d 887 (Del. 2021) ("*Murdock*") to these completely different claims, interests and facts at issue in this case. NUFI has failed to identify a single consideration which weighs in favor of the application of Delaware law to these Montana regulatory claims.

1. A Conflict of Law Exists.

The Superior Courtly correctly determined a conflict existed between Montana and Delaware law after this Court's decision in *In re Solera Ins. Coverage Appeals*, 240 A.3d 1121 (Del. 2020) ("*Solera II*"). (Mem.Op., pp.18-19). Montana law authorizes insureds to assert private causes of action against insurers for violation of the UTPA, while Delaware law does not. §33-18-242(5), MCA; *Thomas v. Harford Mut. Ins. Co*., 2003 WL 220611, *4-5 (Del. Super. 2003). Moreover, "Montana law imposes on an insurer a higher burden (and more significant consequences) for refusing to defend." (Mem.Op., p.19). The

"significant consequences" include coverage-by-estoppel and the forfeiture of the insurer's policy defenses – remedies not provided in Delaware, and which render the existence of a duty to indemnify (aka "coverage") – irrelevant. *National Indemnity Co. v. State*, 499 P.3d 516, 536 (Mont. 2021) (As a result of duty-to-defend breaches, "estoppel is applied without regard to coverage defenses or considerations.") A conflict of laws exists.[5]

2. Section 193 Weighs in Favor of Montana Law.

Section 193 "provides a presumption for insurance contracts" that courts should 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." *Murdock*, 248 A.3d at 896. Importantly, indemnity is not at issue in this case – Stillwater is not seeking to enforce a judgment entered in Delaware. Stillwater is seeking to recover its defense costs in the appraisal action – costs it incurred in Montana. Stillwater procured the policy in Montana; Stillwater demanded from its offices in Montana that NUFI pay defense costs to it in Montana; and NUFI refused to pay from its offices not in Delaware, but in New York, and directed that refusal to Stillwater in Montana. (A0555-556; A0561-565). NUFI presents not a single

[5] ACE joins NUFI (and QBE's) arguments except for one independent theory, *i.e.*, that no conflict of laws exists because *Solera II* resolved coverage. (ACE Br.5-7). As shown below (Section B), *Solera II* does not resolve Stillwater's claims. ACE is, thus, wrong in its separate analysis. On the existence of a conflict, the Superior Court was correct. Hereafter, citations are to NUFI's brief ("Br.__").

contrary legal theory or fact and identifies no insurer practices that occurred in Delaware.

Moreover, the parties' understanding that Montana statutory law applies is memorialized in the insurance contract itself. NUFI contracted to use "Montana" billing and practice rules and to apply Montana law when canceling or renewing the policy. (A0233-0234). Most crucially, NUFI agreed to conform to Montana statutes. (A0236). Those statutes impose a duty to defend immediately (§28-11-316, MCA) and require NUFI to strictly adhere to the Montana Unfair Trade Practices Act ("UTPA") – the very requirements Stillwater seeks to enforce in Counts III and IV. By issuing policies in Montana, the Insurers subjected themselves to the regulation of Montana's UTPA, not Delaware's UTPA. *See* §33-15-101, MCA; A0236; *Peris v. Safeco Ins. Co*., 916 P.2d 780, 784 (Mont. 1996) (enforcing conformance-to-Montana-statutes endorsement by applying Montana's UTPA). NUFI's "contrary" authority (Br.21) actually recognizes the importance of conformance endorsements to a conflict-of-laws analysis when – as here – they identify by name the state to which the policy conforms. *AEI Life LLC v. Lincoln Benefit Life Co.*, 892 F.3d 126, 133 (2d Cir. 2018) ("conclud[ing] only that the provision in the policy at issue here, as written" did not point to application of a particular law because it did not "name the chosen state.")

Section 193's presumption favors application of Montana law because the parties understood, and agreed in writing, that defense and claims-handling obligations were to be performed in conformance with Montana's statutes and regulated by Montana's Insurance Code, including *Montana's* UTPA.

3. Section 188 Favors Application of Montana Law.

Section 188 urges consideration of five factors: the place of contracting; the place of negotiation of the contract; the place of 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. *Murdock*, 248 A.3d at 896-897. Stillwater established through sworn testimony that all of these factors favor application of Montana law. The insurance contract was negotiated, procured, and but for NUFI's violation of applicable Montana regulation, would have been performed in Montana. (A055-0556; AO561-0565). Stillwater is incorporated in Delaware, NUFI is not. No party is domiciled in Delaware. Stillwater's principal place of business is in Montana, where it is domiciled. The Section 188 factors clearly support application of Montana law to these Montana regulatory claims.

4. Section 6 Factors Favor Application of Montana Law.

NUFI completely ignores the Restatement's Section 6 factors (highlighted in Stillwater's briefing), which this Court calls the "overarching choice-of-law considerations" that a Delaware court must consider in applying the most

significant relationship test. *Murdock*, 248 A.3d at 897. The factors include the relevant policies of Delaware; the relevant policies of Montana "in the determination of the particular issue;" and protection of justified expectations. *Id.*

In *Murdock*, this Court enunciated Delaware's interest in "permit[ting] Delaware corporations to provide broad indemnification and advancement rights to their directors and officers to purchase D&O policies to protect them even where indemnification is unavailable." *Id.* at 900. The only issue in *Murdock* was whether California's public policy against the insuring of fraud outweighed this identified Delaware statutory interest. This Court held it did not. *Id.* at 903 (citing 8 *Del. C.* §145(g)).

The facts and claims in this case are not at all analogous to *Murdock*, which the Superior Court applied in a vacuum. In *Murdock*, a non-Delaware insurer sought to void coverage provided to a Delaware-incorporated company for an indemnity obligation which arose in Delaware. Here, Stillwater seeks to enforce the Montana statutory claims-handling standards which, by written endorsement, NUFI agreed to comply with. (A0236). Applying Delaware law in this case would *defeat* Delaware's interest – identified in *Murdock* – of allowing Stillwater to obtain the defense-payment benefits of the D&O policy it purchased from NUFI.

The Section 6 "particular issue" in this case differs greatly from the issue in *Murdock*. All four counts of Stillwater's Amended Complaint involve the

regulation of the Insurers' refusal to defend and their handling of the tender for claims brought by shareholders against *Stillwater*, not its officers or directors. (A0167-0196). NUFI does not question that by issuing the policy in Montana it subjected itself to Montana's Insurance Code, the purpose of which is to "govern and regulate the business of insurance" in Montana. *Shattuck v. Kalispell Regional Medical Center, Inc.*, 261 P.3d 1021, 1026 (Mont. 2011). But NUFI attempts to gloss over the critical difference between Delaware and Montana law. The Montana Legislature, unlike the Delaware Legislature, specifically authorizes Montana insureds to bring independent statutory causes of action based on violations of specific Code provisions. §33-18-242(1), MCA; *Thomas,* 2003 WL 220611, *4-5. Nonetheless, NUFI baldly asserts that "the substantive provisions of the two statutes are materially identical." (NUFI Br.23).

Obviously, the authorization of private statutory causes of action as part of Montana's regulatory scheme *is* materially and crucially different from Delaware law. Just as obviously, Montana's remedy for breach of the duty to *immediately* defend is materially different; unlike Delaware, Montana has long-allowed an insured to invoke coverage-by-estoppel. *National Indemnity*, 499 P.3d at 547 (citing *Farmers Union Mut. Ins. v. Staples*, 90 P.3d 381, 386 (Mont. 2004) (citing *Independent Milk & Cream Co. v. Aetna Life Ins. Co.*, 216 P. 1109, 1111 (Mont. 1923); §28-11-316, MCA, first enacted in 1895)).

NUFI contends that Stillwater's UTPA claims "fail because Stillwater did not bring them under Delaware law." (Br.29). But this is wrong as Delaware's UTPA regulates the trade practices of insurers when conducted in *Delaware*, not Montana. 18 *Del. C.* §2303 ("No person shall engage *in this State* in any trade practice which is . . . an unfair or deceptive act or practice in the business of insurance") and §2301 (Delaware's UTPA "defin[es] or provid[es] for the determination of all such practices *in this State* which constitute . . . unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.") (emphasis added). NUFI has not identified a single action related to Stillwater's tender that NUFI took in Delaware. Instead, as shown above, the undisputed sworn testimony establishes that all NUFI's conduct occurred (or failed to occur) in Montana. Delaware's UTPA cannot govern or regulate NUFI's actions in this matter – Montana's UTPA governs NUFI or no law does.

Properly weighing the relative interests of Delaware and Montana pursuant to Restatement Section 6, any general interest Delaware may have in enforcing D&O policies against Delaware-incorporated companies is outweighed by Montana's century-old and carefully guarded interest in regulating insurers' defense and claims-handling practices, particularly under policies sold in Montana to Montana-domiciled insureds.

Section 6 also requires this Court to weigh the protection of the parties' justified expectations. *Stillwater* justifiably expected NUFI to be regulated by Montana's UTPA and its other statutes because of Stillwater's Montana domicile and NUFI's agreement to conform to those statutes. (A0236). Given NUFI's prior experience in Montana duty-to-defend regulation, *NUFI* also knowingly expected, indeed feared, Montana regulation of its D&O policy-related conduct, hence its rush to the courthouse in Delaware. *See Newman v. Scottsdale Ins. Co. and NUFI*, 301 P.3d 348 (Mont. 2013) ("*Newman*"); *Tidyman's Mgmt. Servs. Inc. v. Davis*, 330 P.3d 1139 (Mont. 2014) ("*Tidyman's I*"); *Tidyman's Mgmt. Servs. Inc. v. NUFI*, 378 P.3d 1182 (Mont. 2016) ("*Tidyman's II*").

Delaware's only connection to any party or issue in this case is Stillwater's Delaware incorporation. NUFI's reliance on *Murdock* makes a mockery of the identified Delaware interest in that case – protection of D&O coverage for Delaware-incorporated companies. *Murdock*, 248 A.3d at 900. Here, NUFI does not seek to further Delaware's interest in the protective nature of D&O coverage. To the contrary, NUFI has weaponized Stillwater's corporate status to barricade itself against regulation of its practices in Montana. Unlike in *Murdock*, Montana law has the most significant relationship to this cause of action because, for a hundred years, Montana statutes and common law have prescribed specific defense and claims-handling duties that NUFI was required to comply with when handling

Stillwater's claim. *National Indemnity*, 499 P.3d at 547. Importantly, Delaware has no countervailing interest in protecting NUFI from these Montana-imposed duties that NUFI contractually agreed to undertake, and which the Montana Supreme Court has twice taken *NUFI itself* to task for violating. *Tidyman's II* at 1185; *Newman* at 359. This Court should reverse the Superior Court's erroneous facilitation of NUFI's flight from justice.

5. At the Least, Montana Law Applies to Stillwater's Claims in Counts III and IV.

In Counts III and IV, Stillwater alleges Montana-law claims for breach of the duty to advance defense costs and for violations of the UTPA. (A0191-A0193). Even if Delaware law does apply to the interpretation of the D&O policies, Montana law must apply to these *claims-handling* causes of action.

The Superior Court dismissed this argument without analysis of the merits. (Mem.Op.26-27). NUFI does not dispute that Delaware courts have allowed application of different states' laws to distinct claims arising from the same circumstances – a concept known as *dépeçage*. (Br.24-25); *see Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Servs., Inc*., 2008 WL 2133417, *2, *5 (Del. Ch. May 21, 2008), *aff'd sub nom.* 962 A.2d 916 (Del. 2008). Specifically, where different states' policies are not in conflict and lead to differences in concluding which state has the "most significant relationship on an

issue," *dépeçage* may be applied to give effect to both states' policies. *Pittman v. Maldania, Inc.*, 2001 WL 1221704, *3-4 (Del. Super. July 31, 2001).

NUFI posits three reasons to reject *dépeçage* here; all three lack merit. *First*, NUFI argues *dépeçage* is disfavored because – according to NUFI – the claims all arise "under the **same** insurance policy." (Br.25, emphasis in original). In actuality, Counts III and IV arise under Montana statutes governing the duty to defend and compliance with Montana's UTPA, not under the policy's language. (A0165).

Second, NUFI argues "consistency" requires application of Delaware law to all claims. (Br.25). NUFI's anti-*dépeçage* position leads not to consistency, but to a pernicious situation allowing the Insurers to escape any and all regulation of their claims-handling practices by winning the race to the courthouse in Delaware, a state which, as shown above, has no regulatory authority over NUFI's entirely out-of-state conduct. While *dépeçage* may in some instances "risk[] subjecting litigants to the law of the case that is not the law of any jurisdiction," *Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1052, n. 28 (Del. 2015), failure to apply *dépeçage* in this case guarantees inconsistent application of claims-handling duties. Montana has consistently enforced defense and claims-handling duties for a century. *See National Indemnity*, 499 P.3d at 547. Delaware's UTPA does not apply to NUFI's conduct in this case because none of NUFI's practices

occurred in this state. *See* 18 *Del. C*. §§2301 and 2303. If Delaware law applies at all then absent *dépeçage,* NUFI will escape all regulation of its claims-handling processes. That is an outcome contrary to *Bell Helicopter*, contrary to the Restatement and contrary to common sense, which will invariably result in foreign insurers flocking to Delaware to first-file declaratory judgment actions against the interests of Delaware-incorporated companies.

Finally, NUFI asserts there is only one relevant issue – coverage under the Policy. (Br.26). NUFI's premise is fallacious. Montana law authorizes separate causes of action based on breach of the duty to defend and violations of the UTPA independent from indemnification under the policy. *See* §33-18-242(5), MCA. Indeed, the private cause of action is part of the regulatory scheme governing insurers that issue policies in Montana. *Id*. Stillwater has established, and NUFI has not refuted, that Montana law requires adjudication of an insurer's duty to defend based not on coverage, but rather upon whether the insurer unequivocally demonstrated that no coverage exists or obtained a judicial determination *prior* to denying the defense. *Newman*, 301 P.3d at 359.

As such, should this Court determine Delaware law applies to the contract claims, *dépeçage* is the only method of assuring that NUFI does not completely escape regulation of its insurance practices. But faithful consideration of the Restatement factors requires application of Montana law to the entire Amended

Complaint. Every set of factors – Sections 193 & 188, Section 6, and *Murdock* – weigh in favor of applying Montana law. The Superior Court erred by blindly applying the *Murdock* result to an entirely different set of facts without weighing Montana's interest "in the determination of the particular issue." *Murdock*, 248 A.3d at 897. Reversal is required.

B. THE SUPERIOR COURT ERRED IN GRANTING THE INSURERS' MOTION TO DISMISS.

As established in Stillwater's opening brief – and uncontested by the Insurers – "[t]he Court will grant a motion to dismiss under Rule 12(b)(6) only if the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings*, *LLC*, 27 A.3d 531, 536 (Del. 2011). The Superior Court failed to properly apply this test and the decision must be reversed on that basis alone.

1. Count III Presents a Viable Coverage-by-Estoppel Claim.

NUFI asserts if coverage is eventually determined not to exist, then NUFI's failure to defend prior to that determination is wiped clean.[6] (Br.30). The opposite is true. As the Montana Supreme Court has long held, and has advised NUFI specifically, "there must exist an unequivocal demonstration that the claim against the insured does not fall within the policy coverage **before** an insurer can refuse to defend; otherwise, the insurer has a duty to defend." *Newman*, 301 P.3d at 359 (emphasis added).

NUFI cannot dispute the facts of its denial in this case. On April 25, 2017, Stillwater notified NUFI and the Excess Insurers of the appraisal action,

[6] Without citation to the record (because there is none), NUFI baldly claims that "Stillwater **concedes** that, even under Montana law, the Insurers did **not** breach the terms of their policies." (Br.30) (emphasis in original). Stillwater does not concede, and viably pleads, breach of contract in Counts I and II.

demanding that NUFI "confirm approval to incur defense costs." (A0184, AO299). At this time, no legal authority precluded coverage for appraisal actions under a D&O policy. Thus, Stillwater's claim potentially implicated coverage in 2017. Nevertheless, NUFI failed to accept Stillwater's tender without explanation or demonstration of the reasons for its denial. On July 31, 2019, the Delaware Superior Court held that D&O insurers were obligated to cover an insured's losses resulting from an appraisal action. *Solera Holdings, Inc. v. XL Specialty Ins. Co.*, 213 A.3d 1249 (Del. Super. 2019) ("*Solera I*"). On November 5, 2019, Stillwater again demanded that NUFI pay defense costs incurred in the Appraisal Action. (A0299). Not until November 12, 2019 – over two and half years after tender – did NUFI disclaim coverage, refusing to pay defense costs despite coverage being implicated by *Solera I*. (A0564).

NUFI's failure to defend immediately, standing alone, provides not just a conceivable circumstance allowing Stillwater to prevail, but a highly probable chance of prevailing. The Montana Supreme Court has repeatedly held that failure to reserve rights and unequivocally demonstrate that coverage is precluded results in coverage-by-estoppel, *regardless* of any policy defenses or coverage considerations. *National Indemnity*, 499 P.3d at 536. Contrary to NUFI's assertion, under Montana law a court does not reach the coverage issue in determining whether the insurer breached the duty to defend. *Tidyman's I*, 330

P.3d at 1151. Rather, the court only considers whether the insurer made an unequivocal demonstration that coverage was not implicated by the complaint in the underlying action. *Id.*

Coverage-by-estoppel, Montana's unique "remedy for an insurer's breach of the duty to defend is long-established in Montana, having been a part of the law, both statutory and common law, for over 100 years." *National Indemnity*, 499 P.3d at 547. "Estoppel is not a retroactive revision of policy terms, but a remedy for contractual, statutory and common law breaches that recognizes the difficult position in which an insurer's breach of the duty to defend places the insured." *Id.*

Stillwater demanded defense and coverage from NUFI in April of 2017 and again on November 5, 2019. (A0184; A0299). NUFI rejected the demands without explanation and without reserving rights for over two and a half years after tender. On these undisputed facts, Montana law required NUFI to "immediately" defend Stillwater unless and until NUFI made an unequivocal demonstration that no coverage existed or until judicial determination. "The 'duty to defend requires an insurer to act **immediately** to defend the insured from a claim,' and it 'must do so on the basis of mere allegations that **could implicate** coverage, if proven.' *National Indemnity.*, 499 P.3d at 531 (*quoting State Farm Mut. Auto. Ins. Co. v.*

Freyer, 312 P.3d 403, 415 (Mont. 2013)) (emphasis added).[7] From April of 2017 until October of 2020, the Appraisal Action complaint required NUFI to provide a defense to Stillwater because the allegations of the claim implicated coverage under existing law -- *Solera I*. At the very least, Montana law required NUFI to defend until October 23, 2020, when this Court decided *Solera II*. Under Montana law, NUFI had solely to pay defense costs as incurred, reserve a right to recoupment, and after October 23, 2020, require repayment of defense costs from Stillwater. *Tidyman's I*, 330 P.3d at 1149. An insurer may recoup defense costs only if it "(1) timely and explicitly reserved the right to recoup the costs; and (2) provided specific and adequate notice to the insured of the possibility of reimbursement." *National Indemnity*, 499 P.3d at 533. That NUFI once again did none of these things seals its fate here, just as NUFI sealed its own fate in *Tidyman's I*.

2. Count IV Presents a Viable Claim of Violation of Montana's Unfair Trade Practices Act.

Stillwater has established a viable claim under Montana's UTPA.

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[7] NUFI asserts that "potentially implicated" is a phrase taken out of context by Stillwater. (Br.32). *National Indemnity's* post-*Tidyman's* quote from *Freyer's* pre-*Tidyman's* holding shows NUFI is wrong. In Montana, the operative question is, and long has been, whether the complaint filed against the insured "could implicate coverage, if proven" under the applicable law. *National Indemnity* at 531. NUFI also inexplicably states that Stillwater did "not mention [28-11-316] on appeal." (Br.32, n.2) Stillwater's Table of Authorities identified that statute on pages 2, 7, 8 and 24, and its brief discussed its import on pages 16-21, 24-25.

Montana's legislature has specifically authorized the exact cause of action pled by Stillwater, and the claim is well-established in Montana. *Redies v. Attorneys Liability Protection Soc.*, 150 P.3d 930, 937 (Mont. 2007). NUFI asserts two theories to preclude Stillwater's UTPA claims, both of which require this Court to analyze and resolve factual issues not before it. *First*, NUFI relies upon a statutory defense to the action, even though NUFI has not yet pled any defenses in response to Stillwater's Amended Complaint. NUFI asserts it had a "reasonable basis in law or in fact for contesting the claim," pursuant to §33-18-242(5), MCA. (Br.35). A question of fact exists as to whether NUFI's actions were reasonable in denying coverage for over three years without any supporting authority – in direct defiance of Montana's requirement of an "immediate" defense. *National Indemnity*, 499 P.3d at 531.

Further, no clear-cut legal precedent establishes that NUFI had a reasonable basis *in law* to reject Stillwater's tender of defense in April of 2017 or November of 2019. Indeed, in 2019, *Solera I* established that coverage was, at the least, implicated for the Appraisal Action and a defense must be provided immediately. NUFI's claim that *Solera II* "conclusively establishes" that the Insurers' denial of Stillwater's claim for coverage was correct based on *Solera II* does not establish a reasonable basis for having rejected the tender for the three years prior. Under Montana law, an insurer's "reasonable basis in law" defense must be determined

based on legal precedents in effect "at the time the dispute arose" – in this case 2017. *Estate of Gleason v. Central United Life Ins. Co.*, 350 P.3d 349, 364 (Mont. 2015). NUFI has neither pled nor established a reasonable basis in law sufficient to allow dismissal of Stillwater's UTPA claims.

Second, NUFI argues its violations of the UTPA did not cause "remedial injury," asserting that "the only UTPA damages Stillwater seeks (beyond attorneys' fees and punitive damages) are for payment of its defense costs and interest payments." (Br.36). This argument again displays NUFI's willful blindness to the requirements of Montana law. The UTPA claim is viable even if the contract damages for breach of the duty to defend are the only basis for the punitive award. Montana law explicitly provides that "when an insurer is found to have violated the UTPA, a jury is not required to find compensatory damages beyond those for breach of the insurance contract before considering malice and punitive damages under the UTPA." *Estate of Gleason*, 350 P.3d at 362. If the court finds coverage-by-estoppel based on breach of the duty to defend, and awards even $1 in damages, the UTPA claim survives to determine whether punitive damages should be assessed under the UTPA. *Id.*

At the motion-to-dismiss stage, a court is required to accept all well-pleaded factual allegations in the Amended Complaint as true and draw all reasonable inferences in favor of the plaintiff. *City of Fort Meyers General Employees'*

Pension Fund v. Haley, 235 A.3d 702, 716 (Del. 2020). Stillwater's UTPA claims are viable and constitute a longstanding component of Montana's regulation of insurers, like NUFI, that issue policies in Montana. Dismissal must be reversed.

C. THE SUPERIOR COURT ABUSED ITS DISCRETION BY DENYING STILLWATER'S MOTION TO VOLUNTARILY DISMISS ITS COMPLAINT.

Under Delaware law, voluntary dismissal without prejudice should be granted unless the defendant would suffer "plain legal prejudice" from such dismissal. *Draper v. Paul N. Gardner Defined Plan Trust*, 625 A.2d 859, 863 (Del. 1993). Here, the Insurers did not establish, and the Superior Court did not find, that the Insurers would suffer any prejudice, much less "plain legal prejudice."

To determine whether plain legal prejudice exists, the Superior Court should have considered the *Draper* factors: (1) the defendants' effort and expense in preparation for trial; (2) excessive delay and lack of diligence on the part of the 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.* at 864. NUFI does not dispute that the Superior court correctly determined three of these four factors favored Stillwater's request for voluntary dismissal, and then mistakenly concluded that *because* of the absence of delay, motions and litigation, there was no sufficient reason to allow dismissal. (A0153).

NUFI argues voluntary dismissal would result in piecemeal litigation, but in fact the refusal to dismiss Stillwater's Complaint *guarantees* piecemeal litigation. Stillwater's claims against NUFI, the Excess Insurers, and NUFI's claims-handler

– a non-party here – are pending in Montana. Regardless of the resolution of this matter, the UTPA and bad faith claims against NUFI's claims-handler will be resolved in Montana. (A0395).

NUFI accuses Stillwater of forum shopping – not a *Draper* factor. In any event, the record is clear that Stillwater is simply seeking regulation of NUFI's claims-handling conduct, either in Montana or Delaware, under the sole applicable regulatory scheme: Montana. NUFI does not dispute that its conduct is governed by the Montana Insurance Code, including the UTPA. Yet NUFI argues Stillwater cannot enforce the UTPA in the manner allowed by Montana law – a private cause of action – in a Delaware court. (Br.23). At the same time, NUFI argues that Stillwater should have brought UTPA claims under Delaware law (Br.29), even though Delaware's UTPA does not govern NUFI's out-of-Delaware conduct. 18 *Del. C*. §§2301-2303.

Plain and simple, NUFI is on the lam in Delaware, evading Montana's regulatory scheme. When it sold the policy in Montana, NUFI subjected itself to Montana's Insurance Code. On the other hand, NUFI's conduct in this case has no connection to Delaware, and Stillwater's only connection is its Delaware incorporation, which NUFI asks this Court to let it weaponize *against* Stillwater.

NUFI would not be prejudiced by dismissal of the Delaware claims. NUFI would simply be subject to the regulation of the only state – Montana – in which it

transacted the business of insurance at issue here. The Superior Court abused its discretion in denying Stillwater the right to litigate its claims in the sole state which has regulatory authority over NUFI's defense and claims-handling conduct and responsibilities under the subject policy – Montana.

D. THE SUPERIOR COURT ABUSED ITS DISCRETION BY REFUSING TO GRANT THE REQUESTED STAY.

The Superior Court abused its discretion when it misapplied *General Foods Corp. v. Cryo-Maid*, *Inc.*, 198 A2d 681 (Del. 1964), *overruled in part by Pepsico, Inc. v. Pepsi-Cola Bottling Co. Of Asbury Park*, 261 A.2d 520 (Del. 1969). NUFI treats *Cryo-Maid* as an afterthought, contrary to this Court's holdings.

First, NUFI argues the Superior Court denied Stillwater's motion to stay "as an improper motion for reargument" regarding voluntary dismissal. (Br.43). But the Superior Court did not reach Stillwater's initial alternative request for a stay (A0151-052) prompting Stillwater to re-assert the request by formal motion based on new occurrences in the Montana litigation.

Second, NUFI argues Stillwater's request for a stay was untimely. (Br.44). The stay, however, was requested immediately (A0151-052) – but not considered. At the time of Stillwater's second motion, the parties had not engaged in discovery, and had only briefed preliminary motions, not summary judgment.

Finally, NUFI addresses the *Cryo-Maid* balancing test factors:

> (1) whether Delaware law governs the case; (2) the relative ease of access to proof; (3) the availability of compulsory process for witnesses; (4) the possibility of a view of the premises; and (6) all other practical considerations that would make the trial easy, expeditious, and inexpensive.

National Union Fire Ins. Co. v. Crosstex Energy Servs., L.P., 2013 WL 6598736, *2 (Del. Super. Dec. 13, 2013) (citing *Cryo-Maid*, 198 A.2d at 684). To prevail,

the movant "need only demonstrate that the preponderance of applicable forum factors 'tips in favor' of litigating in the non-Delaware forum. *Id*.

The sole nexus between the parties in this case and Delaware is Stillwater's incorporation. The contract was not procured or performed in Delaware. The uncontroverted declarations establish that most of the witnesses who will testify regarding the dispute are officed and reside in Montana, and all pertinent original documents are in Montana. (A0554; A0561). No witnesses are located in Delaware and no party is domiciled in Delaware, meaning trial in Delaware would be unnecessarily difficult and expensive for all parties.

At bottom, the issue of the stay depends upon resolution of the conflict-of-laws issue. Montana law should apply because only Montana exercises regulatory authority over NUFI's claims-handling practices at issue, and Delaware does not. §33-18-201, MCA, *et seq.*; 18 *Del. C*. §§2301-2303. It follows that this action should be stayed to allow a Montana court to adjudicate the Insurers' liability under the unique Montana regulatory scheme. Montana's courts are singularly qualified to adjudicate Stillwater's claims because the requirements imposed upon the Insurers "hav[e] been a part of [Montana] law, both statutory and common law, for over 100 years." *National Indemnity*, 499 P.3d at 531. This is a Montana action that should be decided in Montana.

III. CONCLUSION

For the foregoing reasons, the Superior Court erred in keeping this Montana dispute in Delaware and dismissing it with prejudice under Delaware law. Doing so wrongly allowed non-Delaware insurers to weaponize Stillwater's decision to incorporate in Delaware against it, stripping Stillwater of the protections Montana statutes grant to all other Montana-domiciled insureds, statutes that the Insurers contracted to conform to, not run away from. In the undisputed circumstances of this case, reversal with instruction to grant Stillwater's motion to dismiss its complaint without prejudice, and to stay the Insurers' declaratory judgment actions pending decision by the Montana courts, is a fair and proper outcome, and the sole outcome that comports with the Restatement and this Court's holdings in *Murdock*.

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