IN THE SUPREME COURT OF THE STATE OF DELAWARE

PVP ASTON, LLC, *et al*., Appellants, Plaintiffs Below, v. US BANK NATIONAL ASSOCIATION, *et al*., Appellees, Defendants Below.	C.A. No. 67,2023

APPELLANTS' OPENING BRIEF

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NATURE OF THE PROCEEDINGS

This appeal concerns the Superior Court's construction of loan agreements and financial insurance policies issued to the borrowers and lenders in a series of realty sale-leaseback transactions. Each individual transaction was financed with a loan that matured during the COVID-19 pandemic and could not be refinanced. Plaintiffs alleged that Defendants breached the loan agreements and the insurance policies when they failed to retire Plaintiffs' loans with the policy proceeds.

The insurance contract itself consisted of several documents, two of which are relevant to this appeal: (i) a form policy ("Base Policy") that, by its terms, bound the insurer, the borrower and the "additional named insured" lender; and (ii) an "additional named insured endorsement" (the "ANIE") that, by its terms, bound only the lender and insurer. Nothing in the transaction documents, including the text of the ANIE itself, provided that the insured was bound by the ANIE.

The Base Policy provided only two options for the insurer to fulfill its insurance commitment upon receipt of a claim under the policy. Option A was to pay off the insured balloon amount directly to the lender and treat the payment as a routine insured loss, in the same manner as a casualty insurer might regard a claim payment for a house fire. Option B was to pay the identical claim amount but to treat that same claim payment as the "purchase price" of the insured loan. The primary conditions to exercise Option B were i) the insurer must give notice to the insured and lender of its decision to elect Option B, and ii) the insurer must pay the "purchase price" within a three-day window. Failure to satisfy these conditions made Option B unavailable. If timely elected, Option B would have required the same expenditure of claim dollars as Option A but would provide the insurer with the significant benefit of receiving an assignment of the loan documents, which could be sold or enforced by it to generate recoupment of part or all or possibly even more than all the claim dollars paid.

Dovetailing with the Option provisions described above are provisions of the loan agreements that unambiguously require that any insurance proceeds that a lender received following a default must be applied to the outstanding balance of the insured loans.

In this case, the insurer did not elect Option B, meaning that it elected Option A for more than 35 Loan defaults. Even though it made this admission and funded more than $40 million in loan payoffs under Option A, the insurer demanded and received from Defendants *the very same assignments and other documents and benefits that were only available under the Base Policy if the insurer had exercised Option B.* Defendants' delivery of these documents was a breach of Defendants' obligations to Plaintiffs under both the loan agreements and the insurance policies.

In the Superior Court, Defendants claimed that they were obligated to deliver those same documents to the insurer based on a single ambiguous sentence in the

ANIE that provided the Defendants must deliver a loan assignment in connection with the payment of any claim paid by the insurer. This result makes perfect sense if the insurer elected Option B. But, if the insurer elected Option A, under the terms of the Base Policy and the loan agreements, the loans must be retired by the lenders as soon as the claim proceeds are received. This means that, to comply with the lenders' assignment obligation to the insurer under the ANIE, the only assignment that can be delivered is one that transfers only those rights under the loan documents that remain extant after payment in full of the loans.

Defendants could have fulfilled their obligation under the ANIE by delivering assignments reflecting zero loan balances, while at the same time fulfilling their loan agreement and policy obligations to Plaintiffs to pay off the loans. Instead, they "read into" the ANIE an "alternative assignment right" – a conveniently invented but non-existent "Option C" – that required assignment of full balance loan documents to the insurer, even in the absence of an Option B election. If there really were an Option C in the documents (and there is not), its existence would nullify Option B completely because no insurer would ever select Option B, and comply with its rigorous notice, financial and timing conditions, if it could obtain the exact same benefits under the ANIE without having so to comply.

On March 11, 2022, Plaintiffs commenced this action. The complaint, as amended, alleged that the insurer elected Option A, sought a declaration that the loans had been satisfied and sought damages for breach of the loan agreements and insurance contracts.

On January 24, 2023, the Superior Court granted Defendants' motion to dismiss, rejecting Plaintiffs' interpretation of the contractual documents as "commercially unreasonable," and ruling that Defendants' construction of the applicable provisions was the only reasonable one urged in the case. Based on its erroneous belief that Plaintiffs' construction of the documents was "commercially unreasonable," the Superior Court summarily rejected Plaintiffs' remaining arguments, declining also to find any ambiguity in the contract documents.

Plaintiffs appealed to this Court on February 22, 2023. This is Plaintiff-Appellants' Opening Brief on appeal.

SUMMARY OF ARGUMENT

1. The Superior Court committed reversible error by not giving effect to the plain language of the loan agreements that, under the facts of this case, required Defendants to apply the claim proceeds they received to satisfy Plaintiff's loans.

2. The Superior Court committed reversible error in its interpretation of the insurance policies by:

   a. Concluding that the policies unambiguously required Defendants, in all cases, to assign loan documents with their full outstanding balances upon payment of a claim, regardless of whether Option B was elected by the insurer;

   b. Concluding that Plaintiffs' interpretation of the policies was commercially unreasonable; and

   c. Alternatively, by failing to find that the contract language is ambiguous and, accordingly, declining to dismiss the amended complaint.

3. The Superior Court committed reversible error by ruling that Defendants' unauthorized and undisclosed amendment to the policies without notice and written consent of Plaintiffs was not a breach of that agreement and that Plaintiffs lacked standing to assert that breach.

STATEMENT OF FACTS[1]

In the late 1990s, Rite Aid Corporation implemented a program of sale-leaseback transactions. Those transactions involved i) Rite Aid, as seller and tenant under a long-term lease, ii) a buyer/borrower (Plaintiffs here) that owned the store premises, iii) a lender (Defendants here), and iv) a residual value insurer, Financial Structures, Ltd. ("FSL").

At the heart of each transaction was a 22-year loan from a lender to a borrower. Each loan transaction was structured so that a balloon payment was due to the lender at maturity. FSL insured the timely payment of that balloon.

Each transaction was evidenced by multiple contracts by and among the individual parties and subsets of the parties involved. The loan documents were bi-lateral contracts between only the applicable lender and borrower. The Base Policy was a three-party contract among each applicable borrower, the lender and FSL. In addition to the Base Policy, there was the ANIE, a bi-lateral contract between only FSL and the lender (and not the borrower).

I. <u>The Loans and Policies</u>

Each Plaintiff owns or owned an interest in a parcel of improved realty (a "Property"). (A33, ¶18). The acquisition of each Property was financed with a loan

[1] The Statement of Facts is drawn from the Amended Complaint and incorporated documents. Citations to documents contained in the Appellants' Appendix are cited herein as "A___".

(each, a "Loan") borrowed from a Defendant or its predecessor in interest (each, a "Defendant" or "Lender"). Each Loan was evidenced by a note and loan agreement and secured by a mortgage and related instruments (collectively, "Loan Documents"). (A33, ¶19).

The final "balloon" installment of each Loan was "insured" for full payment by FSL. The insurance was documented, in each case, by a policy of financial guaranty insurance that FSL issued (each, a "Policy") and which was purchased by the Plaintiff that was the "borrower" under the applicable Loan Documents. Each Plaintiff/borrower was the named "insured" under the applicable Policy. (A34, ¶22). Each Lender was also a party to the Policy relating to each Loan held by that Lender. (A34, ¶23).

Each Policy provided for payment directly to the Lender in the event a "claim" was made thereunder. The Loan Documents required, following any Loan default, that any payment that Defendants received from any source, including the proceeds of insurance from FSL, was to be applied to the outstanding balance of the Loan. (A37, ¶39).

II. Contractual Provisions in the Loan Documents

The Loan Documents fall into two subsets, with the Loan Documents in each subset being substantively identical for current purposes to the others within the set. The subsets are referred to herein as the RA2 Set[2] and the WEC Set.[3]

The loan agreements contained in the RA2 Set specifically require that, following a payment default, all funds that the Lender receives from any source shall be applied to the unpaid principal of the Loan (after reimbursement of the Lender's expenses). Section 6.05 of the loan agreement in the RA2 Set provides as follows:

> *Payments after Event of Default.* The Lender shall apply (a) **all moneys received and amounts realized by it** (including any amounts realized by the Lender pursuant to the exercise of remedies pursuant to this Agreement, the Mortgage, the Lease Assignment, Paragraph 19 of the Lease or any other Operative Document) after …..the principal of the Loan then Outstanding shall have been declared to be due and payable immediately pursuant to Section 7.01, and (b) all moneys then held or thereafter received by it under this Agreement or under any other Operative Document as part of the Mortgaged Property, as follows:

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[2] The RA2 Set includes all of the Loans on Exhibit A to the Amended Complaint for which Defendant U.S. Bank National Association is the Lender. A copy of the RA2 Set may be found at A466.

[3] The WEC Set includes all of the Loans on Exhibit A to the Amended Complaint for which US Bank is not the Lender. Specifically, the Loans held by Defendants Sutherland Commercial Mortgage Trust 2018-SBC7, Sutherland Grantor Trust, WF RR3-CMFUN, LLC and Wells Fargo Trust Company, N.A. A copy of the WEC Set may be found at A511.

> (i) to reimburse the Lender for any unpaid expense (including any reasonable legal and other professional fees or expenses) or other costs incurred or paid or advances made by it with its own funds;
>
> (ii) **to pay in full the aggregate unpaid principal amount of the Loan then Outstanding,** plus any due but unpaid interest thereon to the date of application ….

(A495) (emphasis added).

The WEC Set contains similar language that requires the Lender to apply post default proceeds to the borrower's outstanding indebtedness. Paragraph 25 of the Mortgage and Security Agreement provides as follows:

> <u>Prepayment After Event of Default</u>. If following the occurrence of any Event of Default, Borrower shall tender payment of an amount sufficient to satisfy the Debt at any time prior to a sale of the Mortgaged Property either through foreclosure or the exercise of other remedies available to Lender under this Indenture, such tender by Borrower shall be deemed to be a voluntary prepayment under the Note and this Indenture in the amounts tendered.

(A538-39).

The plain language of these provisions required Defendants to apply any insurance proceeds received from FSL to the borrowers' outstanding Loan indebtedness. This obligation was unconditional in all cases except where the FSL "claim" payments were not insurance proceeds at all but rather "purchase price" payments under the Loan Purchase Option (as defined below) that was timely exercised by FSL. In other words, the only way FSL could have avoided the payoff obligations quoted above was to exercise the Loan Purchase Option, which had the effect of converting the dollars paid by FSL from "insurance proceeds" to the "purchase price" of the applicable Loan within the meaning of Article V(d) of the Policies. In each instance here, Defendants never received any "purchase price" and only received "insurance proceeds" from FSL. Yet, Defendants chose not to abide by their contractual obligations to Plaintiffs in the Loan Documents.

III. Contractual Provisions in the Policies

The FSL documents relevant to this appeal are (i) a Base Policy, and (ii) the ANIE.

(i) The Base Policy. The text of the Base Policy that is relevant to the issues on appeal follows:

> In consideration of the payment of premium, [FSL] agrees with the Insured and the [Lender] as follows:
>
> **I. AGREEMENT OF INSURANCE**
>
> In the event of receipt of Notice of Claim from the [Lender], subject to the terms and conditions hereof, [FSL] shall pay to the [Lender] the amount of the Insured Value, subject to the terms and the conditions, exclusions and limitations of this Policy….
>
> **II. DEFINITIONS**
>
> **20. Insured Value:** with respect to the Property, the amount identified in Item 8 of the Declarations, not to exceed all amounts due and payable on the Loan.
>
> **V. PAYMENT OF INSURED VALUE**

(a) [FSL] will pay to the [Lender] an amount equal to the Insured Value, if:

(i) A valid Notice of Claim has been given;

(ii) The [Lender] shall not have received payment in full of all amounts owing under the Loan; and

(iii) All the terms and conditions of this Policy have been satisfied.

[FSL]'s obligations hereunder are limited to *making payment* to the [Lender] in accordance with the terms hereof and the Additional Named Insured Endorsement, or, at [FSL]'s option, in accordance with paragraph V(d) below, and *[FSL] shall have no liability to the Insured except to make payments to the [Lender] in accordance with this Policy*. .....

* * *

(c) [FSL] shall endeavor to make any payment payable under Article V(a) or V(d) hereof on the same day a valid Notice of Claim is received by [FSL]. In all events if a Notice of Claim is received by [FSL] not less than three (3) Business Days prior to the Termination Date, [FSL] will make payment hereunder on the Termination Date, and if a Notice of Claim is received by [FSL] less than three (3) Business Days prior to the Termination Date payment shall be made within three (3) Business Days after receipt of the Notice of Claim.

(d) In the event that [FSL] is obligated in accordance with the terms and conditions of the Policy to make payment to the [Lender], on the Termination Date (and at any time thereafter) [FSL] shall have the option in its sole discretion, *in lieu of the complying with Article I and Article V of the Policy*, to purchase the Loan from the [Lender] for a purchase price equal to all amounts payable under the Loan, but in no event greater than the Insured Value. [FSL] may exercise such option by giving written notice to the Insured and the [Lender] and making payment of the purchase price to the [Lender] within the time provided in Article

> V(c) hereof. *If [FSL] exercises such option, the [Lender] will assign the Loan and all documents evidencing or securing the Loan to [FSL], without recourse, in accordance with the provisions of Section 8 of the Additional Named Insured Endorsement. …..*

(A421-31).

Each Base Policy required FSL to pay the Lender the "Insured Value" upon presentation of a valid claim. Each Policy also contained an option allowing FSL to elect to "purchase" a Loan instead of paying it off (the "Loan Purchase Option"). The "purchase price" of a Loan in the event that FSL exercised the Loan Purchase Option was the Insured Value – the same amount that would have been owed to the Lenders and applied to the Loans if FSL did not elect the Loan Purchase Option. The required process to exercise each Loan Purchase Option was explicitly and unambiguously detailed in the language of each Policy. (A42, ¶60). Each Base Policy provided that exercise of the Loan Purchase Option was the sole contractually permitted mechanism by which FSL could acquire a Loan with any outstanding balance greater than zero. (A42, ¶61).[4]

[4] If FSL purported to purchase a Loan through some other mechanism or agreement outside of the Policy, that purchase would be a breach of the Base Policy by FSL because the purchase would not have satisfied FSL's obligations to make all payments to Lenders "in accordance with this Policy." It would have been an independent investment transaction entered into by FSL, which could not serve to satisfy FSL's obligations under the Base Policy. The same analysis applies to any transaction whereby the Lenders decided to sell Loans outside of the Policy. That action would have rendered the Lenders unable to perform their obligations to

(ii) **The ANIE.** The provision of each ANIE relevant to this appeal is the following:

> 8. **Assignment of Loan Documents in Accordance with Requirements of Policy**. Upon the payment by [FSL] of the Insured Value pursuant hereto, the [Lender] agrees to promptly assign to [FSL] (or its designee), without recourse, the Note, the Mortgage and all other documents relating to the Loan….

(A451-63).

Under the express terms of the Policies, FSL had the unconditional obligation to pay the balloon amount insured by it to each Lender if the Borrower defaulted.

FSL did not exercise any Loan Purchase Option. (A43, ¶64). Rather than satisfy the conditions to exercise the Loan Purchase Options, one of which was to pay claims within three days, FSL simply paid the Lenders an additional fee and then finally paid the balloon amounts several weeks after all Loan Purchase Options expired. Thus, the dollars paid by FSL never became "purchase price" consideration as contemplated in Article V(d) of the Base Policy; instead, they retained their character as "insurance proceeds" that were required under the terms of the Loan Documents to be applied to the payment of the Loans. Despite the obligations of FSL and the Lenders to recognize that the Loans were paid off in these

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Plaintiffs under the Base Policy and would create actionable claims against the Lenders for damages or other remedies for having made their performance under the Policies impossible.

circumstances, the Lenders and FSL acted as though the Loan Purchase Options had been exercised and treated all the Loans as having been "purchased" by FSL and therefore still valid after the FSL payoff.

The Lenders accepted the late FSL payments, reflected in their own business records that the Loans were paid in full and then assigned the Loan Documents (with no representations as to the amount evidenced by or the validity of the documents) to FSL. In direct contravention of the Loan Document and Base Policy language referred to above and their own business records, the Lenders claimed that those assignments were transfers of Loan Documents evidencing Loans that *were not paid in full*.

Thus, even though FSL had not exercised the Loan Purchase Options in the Policies, the Lenders delivered to FSL precisely the same assignments of fully unsatisfied loans that FSL would have been entitled to if it had timely exercised the Loan Purchase Options.

IV. Claims Made on the Policies and Defendants' Failure to Satisfy the Loans

Upon receipt of a Lender's claim under a Policy, FSL was required to make payment to the Lender of the "Insured Value" set forth in the Base Policy. Upon payment of the "Insured Value" set forth in the applicable Base Policy, where there was no exercise of the Loan Purchase Option and under the terms of the Loan Documents, each Lender should have realized a zero balance on the applicable Loan and characterized the Loan as fully satisfied on behalf of the Insured. (A37, ¶39). In addition, Defendants should have indicated a zero balance in any assignment that they delivered to FSL pursuant to the ANIE. (A37, ¶40). But they did not, even though, by reason of FSL's failure to exercise the Loan Purchase Options, the Loan Documents required the Loans to be satisfied by the insurance payments, and there can be no other result after payment to Defendants of claim dollars not constituting "purchase price" as contemplated in the Base Policies. In fact, Defendants assigned each of the Loans pursuant to instruments that purposefully omitted the actual balance of the Loan, thereby further breaching the Loan Documents and the obligations of the Lender to the insured pursuant to the applicable Base Policy. (A38, ¶41).

V. Defendants' Wrongful Actions

The Complaint alleged that, by reason of FSL's failure to exercise the Loan Purchase Options, the Loan Documents required that any moneys that Defendants received following a payment default be credited to the unpaid balances of the Loans. (A37, ¶39.). Plaintiffs contended that Defendants wrongfully breached that obligation.

Defendants knew that FSL did not exercise the Loan Purchase Options and thus was not entitled to assignments of unsatisfied Loans under the Policies. Regardless, they assigned the Loan Documents anyway, asserting that the Loans remained unpaid and knowing that FSL would use the Loan Documents to seek recourse against the Insureds or the Properties. Defendants should have refused to deliver the assignment documents that FSL demanded or should have caused those documents to evidence that, at the time of assignment of each Loan, the outstanding Loan balance was zero. (A44-45, ¶72).

Defendants knew that enforcing the Loan Documents against borrowers and Properties where the balance outstanding under the Loan Documents was zero was a violation of the Loan Documents, the Policies, and state laws where the Properties are located. (A45, ¶73). Assigning the Loan Documents, or failing to cause those documents to evidence that, at the time of assignment, the outstanding Loan balance was zero, was a material breach by each Defendant of its obligations under the Loan Documents. (A45, ¶74).

Defendants knew that the express provisions of each Base Policy required that FSL pay each claim to the applicable Defendant within three business days. Rather than follow the terms of the documents, each Lender entered into a secret agreement with FSL to receive an impermissible fee ("Extension Fee") in excess of the "Insured Value" set forth in the applicable Policy. The agreements relating to Extension Fees were unauthorized attempts at amendment of the Policies. Neither FSL nor any Defendant (i) gave notice of the purported amendment to any Insured or (ii) obtained the consent of any Insured, despite each having the legal obligation and duty to do so under the Policies. (A46, ¶77). Instead, FSL and each Defendant actively concealed that information from Plaintiffs. (A46, ¶78). Each purported modification was void under the express provisions of each Base Policy because, among other reasons, the insured did not consent in writing as required by Article VIII of each Policy. (A46, ¶79). Each Lender's agreement to accept an Extension Fee was a breach of its Loan Documents and its obligations to Plaintiff under the Policies.

The delivery by each Defendant to FSL of assignment instruments that purported to give FSL documentation of a Loan balance in excess of zero exposed each Plaintiff to severe harm deriving from efforts by successors to FSL to enforce the Loan Documents against the Properties and Plaintiffs. (A46-47, ¶82).

ARGUMENT

I. THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR BY FAILING TO GIVE EFFECT TO THE PLAIN LANGUAGE OF THE LOAN AGREEMENTS.

A. Question Presented

In ruling that the Defendants had no obligation to apply the insurance proceeds that they received to reduce the balances of the Loans, did the Superior Court err by failing to give effect to the plain language of the Loan Documents? This argument was preserved for appeal. (A304; A312-14; A318-19; A325-26).

B. Scope of Review

This Court reviews *de novo* a trial court decision to grant a motion to dismiss. *Olenik v. Lodzinski*, 208 A.3d 704, 714 (Del. 2019). This Court also reviews *de novo* a trial court's "interpretation of written agreements." *Cent. Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings, LLC*, 27 A.3d 531, 353 (Del. 2011). When reviewing a judgment that grants a motion to dismiss, this Court will: "(1) accept all well pleaded factual allegations as true, (2) accept even vague allegations as 'well pleaded' if they give the opposing party notice of the claim, (3) draw all reasonable inferences in favor of the non-moving party, and (4) [ ] not affirm a dismissal unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances." *Id.*

Dismissal of a contract dispute under Rule 12(b)(6) is only proper "'if the defendants' interpretation is the only reasonable construction as a matter of law.'" *IMO Ronald J. Mount 2012 Irrevocable Dynasty Tr. U/A/D December 5, 2012*, 2017 WL 4082886, at *3 (Del. Ch. 2017). "If the plaintiff has offered a reasonable construction of the contract, and that construction supports the claims asserted in the complaint, then the Court must deny the motion to dismiss even if the defendant's construction is also reasonable." *Id*. "On a motion to dismiss for failure to state a claim, a trial court cannot choose between two differing reasonable interpretations of ambiguous documents." *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996).

C. Merits of Argument

The Superior Court began its analysis with its interpretation of the language of the Policies. (Op. at 19-23). The Court's interpretation of the Policy language was in error, as discussed below, but that erroneous interpretation led the Court to give short shrift to and erroneously interpret the express terms of the primary contract between Plaintiffs and Defendants in this case: the Loan Documents.

The plain language of the RA2 Set of Loan Documents required that, following a default, each Defendant apply "all moneys received and amounts realized by it" to the outstanding principal and interest of the applicable Loan (after payment of any of the Lender's expenses). (A495). The Defendant holding all Loan

Documents in the RA2 Set (U.S. Bank) breached this obligation. It never applied the "insurance proceeds" that it received to the borrowers' outstanding obligations as it was obligated to do. Instead, it wrongly treated the FSL payments as Loan "purchase price" payments as that term is used in Policy Article V(d).

The language of the WEC Set of Loan Documents imposed a similar obligation on the Lenders. If, following a default, the borrower tendered a payment, then the Lender was required to treat that payment as a "voluntary prepayment under the Note and this Indenture in the amounts tendered."[5] (A538-39). Defendants holding Loan Documents in the WEC Set (the Defendants other than U.S. Bank) breached this obligation. Those Defendants never treated the "insurance proceeds" that they received as a "voluntary prepayment" of the amounts owed. Instead, they wrongly treated the FSL payments as Loan "purchase price" payments as that term is used in Policy Article V(d).

The Superior Court admittedly gave this argument "little further analysis." (Op. at 24). The Court conflated its interpretation of the Base Policies with the

[5] Before the Superior Court, Defendants argued that insurance proceeds from FSL did not constitute "a tender by the Borrower" within the meaning of this provision. (A353-54; A381). Plaintiffs argued that payment of insurance proceeds arising from a Policy that the borrower procured and purchased was a "tender by the Borrower." In any event, at the motion to dismiss stage, Plaintiffs are entitled to the inference that the insurance proceeds constituted a "tender by the Borrower" within the meaning of the WEC Set of Loan Documents.

independent obligations that Defendants had to apply claim proceeds (as opposed to "purchase price" payments) that they received in accordance with the terms of the Loan Documents. The Court held:

> Plaintiffs' argument [that the Defendants had an obligation to apply proceeds to the outstanding Loans] is premised on their contention that the Lenders only could assign the Loans if FSL exercised the Loan Purchase Option.

(Op. at 25).

Plaintiffs respectfully contend that the premise of their argument lies in the plain language of the Loan Documents, not the Superior Court's interpretation of the language of the Policies. Under the Loan Documents, Defendants were required to apply all moneys that they received from FSL that were not "purchase price" payments under Article V(d) of a Base Policy to the outstanding Loan amounts. Defendants accepted claim payments from FSL that were not "purchase price" payments, retired the Loan balances on their books, but then assigned the Loan Documents and insisted the assignments evidenced outstanding Loan balances, thereby breaching those obligations and causing damage to Plaintiffs.

The Superior Court's interpretation of these Loan provisions is incorrect. The Loan Documents contain very specific terms on this very point regarding the Defendants' duties when they received funds after a default, which is the exact circumstance that this case presents. In that event, where the dollars received were not "purchase price" as that term is used in Policy Article V(d), the Defendants had the duty and the obligation to apply those dollars to satisfaction of the borrowers' outstanding debt obligations.

At the very least, the Superior Court should have allowed Plaintiffs to establish at trial that Defendants applied the FSL claim payments to satisfy the Loans on their books, or that Defendants received Extension Fee (as defined below) payments from FSL that were not loan repayment funds, but rather income of a different sort. For those reasons, among others, the Superior Court's decision to dismiss this case was in error.

II. THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR IN ITS INTERPRETATION OF THE POLICIES

A. Question Presented

In its interpretation of the language of the Policies, did the Superior Court commit reversible error by concluding that the Policies unambiguously required Defendants, in all cases, to assign the Loan Documents with a full unsatisfied balance to FSL upon payment of a claim and that Plaintiffs' interpretation of the Policies was commercially unreasonable? In the alternative, did the Superior Court commit reversible error by failing to find that the Policy language is ambiguous and accordingly, declining to dismiss the amended complaint. This argument was preserved for appeal. (A309-10; A314-18; A328-332).

B. Scope of Review

This Court reviews *de novo* a trial court decision to grant a motion to dismiss. *Olenik v. Lodzinski*, 208 A.3d 704, 714 (Del. 2019). This Court also reviews *de novo* a trial court's "interpretation of written agreements." *Cent. Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings, LLC*, 27 A.3d 531, 353 (Del. 2011). When reviewing a judgment that grants a motion to dismiss, this Court will: "(1) accept all well pleaded factual allegations as true, (2) accept even vague allegations as 'well pleaded' if they give the opposing party notice of the claim, (3) draw all reasonable inferences in favor of the non-moving party, and (4) [ ] not affirm a dismissal unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances." *Id.*

Dismissal of a contract dispute under Rule 12(b)(6) is only proper "'if the defendants' interpretation is the only reasonable construction as a matter of law.'" *IMO Ronald J. Mount 2012 Irrevocable Dynasty Tr. U/A/D December 5, 2012*, 2017 WL 4082886, at *3 (Del. Ch. 2017). "If the plaintiff has offered a reasonable construction of the contract, and that construction supports the claims asserted in the complaint, then the Court must deny the motion to dismiss even if the defendant's construction is also reasonable." *Id.* "On a motion to dismiss for failure to state a claim, a trial court cannot choose between two differing reasonable interpretations of ambiguous documents." *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996).

C. Merits of Argument

1. The Superior Court's Conclusion That the Policies Unambiguously Required the Defendants, in all Cases, to Assign the Loan Documents to FSL with a Full Balance Was Erroneous

As noted above, the Superior Court's ruling is based exclusively on its flawed interpretation of the Policies. "The Motions [to Dismiss] must be granted because the contractual language is clear that the assignments by Defendants to FSL were valid and in fact required under the RVI Policies." (Op. at 17). "The plain language of Article V of the RVI Policy and Section 8 of the ANIE permits only one reasonable interpretation: FSL was entitled to assignment of the Loans upon tendering payments under either Article V(a) or V(d)." (Op. at 19). Since claim proceeds can only be tendered under Article V(a) or V(d), the Superior Court, in effect, ruled that FSL is always entitled to a full balance assignment of every Loan as to which any claim is made, and that there really is no Option A or B to be elected by anyone and no difference between "insurance proceeds" and "purchase price."

Plaintiffs respectfully submit that a careful reading of the terms of the Policies actually yields a contrary conclusion.

Article V(a) of the Policies required FSL to pay the Lender the "Insured Value" upon FSL's receipt of a valid claim. "Insured Value" is defined in the Policies to mean, "the amount identified in Item 8 of the Declarations, **not to exceed all amounts due and payable on the Loan**." (A425, emphasis added). Article V(d) contains the Loan Purchase Option. It gave FSL the option to purchase the Loan from the Lender "in lieu of complying with Article I and Article V of the Policy," by paying "all amounts payable under the Loan, but in no event greater than the Insured Value." (A426).

Here is where the analysis of the Superior Court went astray. The Superior Court misconstrued this provision to allow FSL to exercise the Loan Purchase Option for "less than the Insured Value if the amount payable under a given Loan is less than that value." (Op. at 20). But that reading ignores the definition of "Insured

Value." The amount due and payable on the Loan can never be less than the Insured Value by definition: if the amount due on the Loan is reduced, the Insured Value is also reduced. Rather than giving FSL an opportunity to purchase a Loan for less than the Insured Value, this term actually caps the amount that FSL would pay in order to exercise the Loan Purchase Option if the amount of the outstanding Loan **exceeded** the Insured Value. In other words, the Superior Court erroneously concluded that the "price" for an assignment to be delivered could be different under the Base Policy than the "price" that might apply under Section 8 of the ANIE. This erroneous reading of the defined terms led the Superior Court to the further erroneous conclusion that FSL had its choice to select from one assignment provision or another. This was also error—there is only one assignment provision that could be elected by FSL and only one "price" or claim payment amount in all cases where a claim is made by a Lender.

In the absence of this erroneous reading, the Superior Court's interpretation of the Base Policies makes Article V(d) mere surplusage. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage. We will not read a contract to render a provision or term 'meaningless or illusory.'") (citations omitted). If FSL were entitled to an assignment under both Article V(a) and Article V(d), Article V(d) is meaningless.

It is only the Superior Court's erroneous conclusion that Article V(d) permitted FSL to obtain an assignment of the Loan Documents for "less than the Insured Value" that gives independent meaning to Article V(d) when compared to Article V(a).

This fundamental error permeated the rest of the Superior Court's contractual analysis. First, the Superior Court cited Section 8 of the ANIE in support of its interpretation of the Policies. Again, however, a careful reading of that provision counsels the opposite conclusion.

The Superior Court concluded that, due to the ANIE, Defendants had a contractual obligation to make full balance assignments to FSL regardless of whether FSL exercised the Loan Purchase Option. (Op. at 19-21). But, as is made clear below, the ANIE was drafted not to bind or benefit the insureds in any way and therefore cannot be asserted to diminish their rights under the Base Policies or the Loan Documents. Moreover, even if the ANIE were binding on the insureds, by its own terms it does not apply to the situation where the Loan Purchase Options are not exercised or, if it does apply, any assignment delivered thereunder must reflect a Loan balance of zero.

The Superior Court reached its conclusion that the ANIE controlled the outcome below notwithstanding the bold language in Section 8 of the ANIE that says it only applies to the "**Assignment of Loan Documents in Accordance with Requirements of Policy.**" In other words, Section 8 of the ANIE is only triggered when the Base Policy[6] requires an assignment of the Loan Documents, and an assignment **in accordance with the Policy** only occurs if FSL exercises the Loan Purchase Option. The only place in the Base Policies that "requires" an assignment is Article V(d). Plaintiffs' reading of the ANIE is bolstered by the language in Article V(d):

> If [FSL] exercises such option, the [Lender] will assign the Loan and all documents evidencing or securing the Loan to [FSL], without recourse, **in accordance with the provisions of Section 8 of the Additional Insured Endorsement**.

(A426, emphasis added). In other words, Article V(d) and Section 8 of the ANIE are a closed loop that solely refer to each other.

The Superior Court rejected Plaintiffs' argument that the specific reference to Section 8 of the ANIE in Article V(d) and the absence of such a reference in Article V(a) supports the conclusion that Section 8 refers only to assignments required by Article V(d). In the rejecting that argument, however, the Superior noted: "A cross reference [in Article V(a)] would be redundant, so its absence is not significant. In contrast, Article V(d) refers to occasions when FSL pays less than the Insured Value." (Op. at 22). As already discussed, by definition, there is no circumstance where FSL would pay less than Insured Value and therefore the comment of the Superior Court was based on a defective reading of the Policy language.

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[6] The ANIE specifically provides that, as used in the ANIE, "Policy" means only the "Base Policy." (A452).

The Lenders also claimed – and the Superior Court accepted without analysis – that they *were required t*o make full balance assignments under the ANIE, even though the Loan Purchase Options were never exercised and doing so violated the insured's rights under the Base Policy and Loan Documents.

In fact, as demonstrated below, the provisions of the ANIE bound only the Lender and FSL. Nowhere does the ANIE purport to override the *rights of the insureds* under the Base Policy and nowhere does it purport to nullify or amend Plaintiffs' rights *against the Lenders* under the Loan Documents. Regardless of what it says in respect of obligations that exist only between the Lenders and FSL, it cannot diminish Plaintiffs rights under the Base Policy or the Loan Documents because it is not binding on Plaintiffs

Moreover, even if the ANIE were binding on Plaintiffs, the Lenders could have complied with their obligations under both the Base Policy and the ANIE by simply following the plain language of the agreements and not "reading into" the language of the ANIE meaning that was not there. Read strictly and without invented embellishment, the ANIE says only that, after a claim is paid, the *Loan Documents* must be assigned to FSL. That is all it says. It does not say that the proceeds of the claim cannot first be applied to reduce or pay off Loans as contemplated in the Loan Documents. It does not say that the assignment to which FSL is entitled shall be identical to the one contemplated under the Loan Purchase

Option. It does not specify the amount of the Loan, if any, that must be reflected in the assignments. Put differently, to comply with the ANIE, the Lenders were not required to assign **unpaid loans**—they were required only to assign the *Loan Documents evidencing whatever rights existed thereunder at the time of delivery of the assignment.* In this case, because the Loan Purchase Options were not exercised and no "purchase price" was ever paid, the only rights that remained available for assignment were those that survived **after** the FSL proceeds were applied to the Loans, as the Lenders were unconditionally required to do under the Loan Documents.[7]

The Superior Court also supported its interpretation by incorrectly noting that the Insured Covenants Agreement (A433), a third agreement binding, if at all, only between FSL and each insured and which is not material to the issues in this case, required the **Defendant-Lenders** to deliver deeds to the Property upon FSL's

[7] Regardless of the provisions of the ANIE, which are themselves vague and ambiguous, the Lenders owed the unqualified obligation to Plaintiffs to apply the FSL payments to the satisfaction of the Loans under the Loan Documents. The Lenders may have obligations to FSL under the ANIE that may conflict with or seem inconsistent with the Loan Documents, but the Loan Documents are binding on the Lenders in accordance with their terms. The Lenders owed strict performance to Plaintiffs under the Loan Documents even if they are also bound to render conflicting obligations to the Lenders under the ANIE. Nowhere is there any document that says ANIE obligations somehow relieved the Lenders from complying with the Loan Documents that unconditionally required them to apply the FSL proceeds to satisfy the Loans.

payment of a claim under the Policy. In quoting the Insured Covenants Agreement, the Superior Court incorrectly redefined the term "Owner" as "Lender-Defendants." (Op. at 21) ("the Owner [*i.e.*, Lender-Defendants] shall cause the deed to the Property to be immediately delivered to FSL."). But the Insured Covenants Agreements were strictly between FSL and the Owners of the Properties. The Lender-Defendants were not parties to the Insured Covenants Agreements and had no contractual rights or obligations thereunder.[8] Again, it appears that the court below has misconstrued the meaning and effect of the transaction documents.

Finally, the Superior Court "supported" its contract interpretation by the erroneous assertion that Plaintiffs' interpretation of the language of the Policies is "commercially and economically unreasonable." (Op. at 24). The Court noted:

> Plaintiffs' reading of the relevant agreements would mean that for payment of each insurance premium, Plaintiffs absolved themselves of responsibility for the balloon payment. In other words, Plaintiffs would have no incentive to make their respective balloon payments, but nevertheless would obtain each Property free and clear of all obligations unless FSL exercised the Loan Purchase Option by paying less than the Insured Value. No commercially reasonable party would agree to that.

(Op. at 24). First, as noted, the Court's observation relies on the misreading of Article V(d) and the definition of Insured Value. But more fundamentally, this observation ignores the fact that Plaintiffs fully expected that FSL would and did

[8] In separate litigation against FSL, Plaintiffs have asserted that the Insured Covenants Agreements are unenforceable as forfeitures.

exercise the Loan Purchase Option. (A42-43). Plaintiffs had no way to know before initiating litigation that FSL had actually failed to exercise the Loan Purchase Options. Without that knowledge, Plaintiffs, in fact, had every "incentive to make their respective balloon payments." Had FSL validly exercised the Loan Purchase Options, and paid the applicable "purchase prices," as Plaintiffs believed it had, then Defendants would have been obligated to assign the Loan Documents to FSL with full unsatisfied balances. Plaintiffs would then be in the position where they essentially switched lenders from Defendants to FSL or its designee and would not have received the windfall benefit that the Superior Court believes rendered Plaintiffs' construction of the documents "commercially unreasonable."

In other words, Plaintiffs never had an incentive to default as the Superior Court surmised. In no way does Plaintiffs' construction of the documents lead to them being "absolved" of their obligations. If there was any "absolution" in this case, it was granted by FSL when it knowingly made the economically unreasonable, unpredictable and ill-advised decision *not to exercise* the Loan Purchase Options. The choice was FSL's alone. Had it exercised the Loan Purchase Options, there would have been no argument for and no possibility of "absolution" under Plaintiffs' construction of the agreements, and this case would not have existed.

The Superior Court's misunderstanding of the Policy language is demonstrated even further by taking the Court's above observation to its logical conclusion. Taken to its logical conclusion, the Court's comment that no "commercially reasonable party would agree to" the transaction as Plaintiffs have interpreted it means that no party **would agree to pay less** when there is an option **to pay more**. One does not have to be familiar with any details of the underlying transactions to realize that this comment does not make sense. If FSL could have satisfied its insurance obligations for less than Insured Value, *i.e.,* at a discount to a Loan's face value, by exercising the Loan Purchase Options, why would it ever not exercise them and pay more for the same Loan under the fictional Option C in the ANIE? In fact, if the Superior Court's reading of the applicable provisions were correct, the only commercially reasonable course would be to do the opposite of what the Superior Court suggested: to exercise the Loan Purchase Options every time and thereby acquire the valuable Loan assignments at a discount.

Finally, Plaintiffs submit that it is not commercially and economically unreasonable for an insured under a policy of insurance to expect that the insurer would pay a valid claim. In an insurance contract, the insured pays a premium in order to pass a risk to the insurer. The insurer agrees to accept that risk because it can spread the risk of loss over a large volume of risks and earn income from the invested premiums until a risk matures – in this case over more than 20 years.

2. The Superior Court Erred by Construing the ANIE As a Modification of the Insureds' Rights under the Policies and Loan Documents

The Superior Court essentially ruled that Section 8 of the ANIE amends each Base Policy *with respect to the rights and obligations of Plaintiffs* thereunder and is binding on them, even though Plaintiffs never signed it or any other agreement that says they are bound by it. Plaintiffs acknowledge that the ANIE is included within the definition of the "Policy" as set forth in the Base Policy, but not all parts of the Policy are binding on – or benefit – all three parties. By way of one example, only the borrower had the obligation to pay the premiums for the Policy. There are many similar bi-lateral rights and obligations imbedded in the Policies that do not bind all parties to the Policy. In other words, rights and obligations within the Policies are specific to the particular party addressed in certain provisions. While the ANIE is part of the overall transaction, none of its provisions was addressed to the insured, and its terms were not binding on the insured. Had the parties intended otherwise, the borrowers would have undoubtedly been made signatories to the ANIE.

There are many other indications that the ANIE was not intended to bind the insureds or confer any benefit on them.[9] Certainly, if the ANIE was intended by

[9] The ANIE by its terms is a "personal" contract between only FSL and the Lender, binding on the "successors and assigns" of only FSL and the Lender. It contains a notice provision but does not include the insured as a notice party or require that it give or receive any notices thereunder. It contains an assignment provision but

FSL to entirely nullify the rights of the insureds under the Loan Purchase Options, there is no clear provision in the ANIE that would accomplish that result.

In addition to erroneously deciding that Section 8 is binding on the Plaintiffs, the Superior Court found that Section 8 of the ANIE somehow modifies the provisions of the Loan Documents and obligates the Lenders to assign the Loan Documents to FSL even if FSL never exercised the Loan Purchase Option in the Base Policy and never paid a "purchase price" for the applicable Loan as contemplated in Article V(d) of the Policy. The result of the Superior Court's ruling allowed FSL to obtain automatic assignments of the Loans with their full unsatisfied balances, in contradiction to the provisions of the Loan Documents, regardless of FSL's compliance with its obligations under Article V(c) and Article V(d) of the Base Policies, and regardless of whether FSL is or was in default under the Policies for having failed to make its claim payments on time or otherwise.

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neither permits nor prohibits any assignments under the ANIE by the insured, obviously because, as a non-party to the ANIE, the insured had no rights to assign. It provides for delivery of a release upon payment of a claim to a Lender but not any release from the insured. It provides for amendments to the ANIE to be signed by the "parties hereto," which does not include the insured. It requires each of FSL and the Lender to cooperate with the other and deliver instruments of further assurance, but there is no such provision that purports to bind the insured. The Base Policy language is consistent with the foregoing. Section II.2. of each Base Policy defines "Additional Named Insured Endorsement" as that "Endorsement of even date herewith, between [FSL] and [Lender]." The ANIE specifically states it is, for consideration, an agreement between the "parties." Those parties are only FSL and the Lender.

Under the Superior Court's erroneous interpretation, FSL would never exercise a Loan Purchase Option under Article V(d) because FSL would receive the exact same assignment under Section 8 of the ANIE without complying with the onerous, notice, financial and other conditions of Article V(d), thus rendering the Loan Purchase Option meaningless.

The Superior Court erred in concluding that the ANIE completely eliminated the Lenders' obligations to Plaintiffs under the Loan Purchase Options and the Loan Documents' payment application provisions and allowed FSL to escape its obligations to satisfy the Loans in the case where it does not – or cannot – exercise the Loan Purchase Option. There is no document anywhere that requires such a result.

3. In the Alternative, the Superior Court Erred in Finding the Language of the Policies Unambiguous

Plaintiffs contend that the only reasonable interpretation of the Policies that gives effect to all of their provisions is as they have argued. Article V(a) provides for payment of an insurance claim. Article V(d) provides that FSL has the option to purchase a loan in lieu of paying the claim. Section 8 of the ANIE requires the Lender to assign the Loan Documents if FSL exercises the Loan Purchase Option and to note a zero loan balance in any such assignment delivered in circumstances where the Loan Purchase option was not exercised. Under the Loan Documents, if the Lenders received payments on the Loans, as opposed to "purchase price" for the sale of the Loans, they were required to apply those payments to the borrowers' outstanding indebtedness.

Plaintiffs believe that the foregoing is the only interpretation of the Loan Documents and Policies that gives effect to all the contractual terms and does not, for instance, make the Loan Purchase Option mere surplusage. Nevertheless, it is at minimum **one** reasonable interpretation. "If the plaintiff has offered a reasonable construction of the contract, and that construction supports the claims asserted in the complaint, then the Court must deny the motion to dismiss even if the defendant's construction is also reasonable." *IMO Ronald J. Mount 2012 Irrevocable Dynasty Tr. U/A/D December 5, 2012*, 2017 WL 4082886, at *3 (Del. Ch. 2017). "On a motion to dismiss for failure to state a claim, a trial court cannot choose between two differing reasonable interpretations of ambiguous documents." *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996).

If this Court were to conclude that the Loan Documents and the Policies are ambiguous, the Superior Court dismissal should be reversed.

4. The Superior Court Erred by Disregarding the Insureds' Rights Under the Policies

In support of its interpretation of the Policies, the Superior Court erroneously relied on the provision in the Policies that provides that the Insureds had "no ownership interest" in the proceeds of the Policies. (Op. at 21). The Court seemed to conclude that, because the Insured had no interest in the **proceeds** of the Policies, the Insured had no right to enforce any rights under the Policies. This conclusion is incorrect.

Plaintiffs had the unrestricted and absolute right to enforce FSL's obligations to pay the Lenders "in accordance with this Policy." To protect and preserve that right of Plaintiffs, among other rights, any amendments or waivers to a Policy required the written consent of the applicable Plaintiff and would not be effective without such consent. Thus, Plaintiffs had substantial rights under the Policies against FSL. As co-parties to the Policy, Plaintiffs also had all available rights of a party in privity with another against the Lenders.

The sole exception to FSL's obligations to pay off any Loan in the event of a Borrower default was if FSL timely elected the Loan Purchase Option under the applicable Policy. The Loan Purchase Option provision in each Policy was a contractual agreement among the three parties to the Policy setting forth the limited circumstances in which a claim payment by FSL could be treated as a purchase of the Loan. Plaintiffs had the contractual right to enforce performance by both FSL and the Lenders of their respective obligations under the Loan Purchase Option provisions, all of which related to the payment obligations of FSL under the Policies which FSL was bound to perform "in accordance with this Policy." That right of enforcement meant that, if FSL failed to pay the Lenders on-time or never paid them, Plaintiffs had the right to bring actions against FSL to force it to pay the Lenders or to pay Plaintiffs' damages. Similarly, if FSL failed to exercise the Loan Purchase Option but nevertheless characterized its "claim" payment as Loan "purchase price," that payment by FSL is not "in accordance with [the terms of the] … Policy" and FSL has liability to Plaintiffs for their loss.

The Policy language contained certain limitations on Plaintiffs' remedies against FSL, but no such limitations appear in respect of the claims that may be made by Plaintiffs against Lenders that did not comply with their Policy obligations. Here, the Lenders' agreement to accept payments from FSL as "purchase price" and not "insurance proceeds" creates an actionable claim in favor of Plaintiffs against the Lenders for the same reasons that it has a claim against FSL.

III. THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR BY RULING THAT THE DEFENDANTS' UNAUTHORIZED AMENDMENT TO THE POLICIES WAS NOT A BREACH AND THAT PLAINTIFFS LACKED STANDING TO ASSERT THAT BREACH.

A. Question Presented

Did the Superior Court commit reversible error by concluding that the Extension Fees and related agreements to which the Defendants agreed with FSL were not breaches of the Policies and that Plaintiffs lack standing to assert those breaches. This argument was preserved for appeal. (A307-08; A310; A319-20; A325-26).

B. Scope of Review

This Court reviews *de novo* a trial court decision to grant a motion to dismiss. *Olenik v. Lodzinski*, 208 A.3d 704, 714 (Del. 2019). This Court also reviews *de novo* a trial court's "interpretation of written agreements." *Cent. Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings, LLC*, 27 A.3d 531, 353 (Del. 2011). When reviewing a judgment that grants a motion to dismiss, this Court will: "(1) accept all well pleaded factual allegations as true, (2) accept even vague allegations as 'well pleaded' if they give the opposing party notice of the claim, (3) draw all reasonable inferences in favor of the non-moving party, and (4) [ ] not affirm a dismissal unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances." *Id.*

C. Merits of Argument

Plaintiffs alleged that when the time came for FSL to begin paying claims, FSL and Defendants entered agreements in exchange for Extension Fees above and beyond the Insured Value of the claims. (A45-46). The extension agreements purportedly modified the terms of the Policies by extending the time by which FSL was required to pay claims and by increasing the amount that FSL paid on each claim. The Extension Fees damaged Plaintiffs because both Defendants and FSL treated the fees as default interest that accrued as a lien on the Properties.

Defendants and FSL entered the extension agreements that were intended to amend the terms of the Policies without the consent of or notice to Plaintiffs. These agreements were made in the face of Article VIII(e) of the Policies that provides:

> This Policy (including all endorsements hereto) may not be amended, changed or modified after the date hereof, or any provision thereof waived or discharged, except by a written endorsement issued by the Company [FSL] and consented to by the Insured and the Additional Named Insured, attached hereto and made a part hereof.

(A429). By agreeing to the Extension Fees and agreements governing them, Defendants breached the Policies by attempting to make unauthorized amendments to the Policies.

The Superior Court seemed confused by this argument and suggested that Plaintiffs were arguing that the extension agreements voided the assignments from the Defendants to FSL. While it is true that Article V(c) required payment within 3 days of a claim payment pursuant to either Article V(a) or Article V(d) and FSL never met that obligation due to the extension agreements, that was not the gist of Plaintiffs' argument. Rather, adoption the extension agreements and payment of the Extension Fees were independent breaches of the Policies that damaged Plaintiffs. As Plaintiffs argued in their Answering Brief in the Superior Court with respect to the Extension Fees: "The making of and performance under the purported agreements described above by each Defendant constituted a breach by such Defendant of its explicit obligations to the Insured set forth in each applicable Policy and each applicable Loan Document." (A320).

The Superior Court went on to rule conclude: "If Defendants chose to waive the three-day requirement, Plaintiffs have no standing to challenge that waiver." (Op. at 23). If the only agreement that FSL and Defendants reached was a waiver of the 3-day payoff period, the Superior Court's comment on Plaintiffs' standing might have some force. But when that extension comes with a fee to be borne by Plaintiffs and is in breach of their rights under the Policies, it is beyond reasonable dispute that the Plaintiffs have standing to complain. *Dover Historical Soc. v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110 (Del. 2003) ("At the pleading stage, general allegations of injury are sufficient to withstand a motion to dismiss.")

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that the Court reverse the judgment of the Superior Court.

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CERTIFICATE OF SERVICE

I, Michael L. Vild, hereby certify that on this 11th day of April, 2023, I caused a true and correct copy of *Appellants' Opening Brief* to be served on the persons listed below via File & ServeXpress.

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