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IN THE SUPREME COURT OF THE STATE OF DELAWARE

FERRELLGAS PARTNERS L.P., FERRELLGAS, L.P., BRIDGER LOGISTICS, LLC, BRIDGER ADMINISTRATIVE SERVICES II, LLC, BRIDGER LAKE, LLC, BRIDGER LEASING, LLC, BRIDGER MARINE, LLC, BRIDGER RAIL SHIPPING, LLC, BRIDGER REAL PROPERTY, LLC, BRIDGER STORAGE, LLC, BRIDGER TERMINALS, LLC, BRIDGER TRANSPORTATION, LLC, BRIDGER SWAN RANCH, LLC, BRIDGER ENERGY, LLC, J.J. ADDISON PARTNERS, LLC, AND J.J. LIBERTY, LLC, Plaintiffs-Below/ Appellants, v. ZURICH AMERICAN INSURANCE COMPANY, Defendant-Below/ Appellee.	No. 183, 2023 ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE C.A. No. N19C-05-275-MMJ CCLD

PLAINTIFFS-BELOW / APPELLANTS' REPLY BRIEF ON APPEAL AND PLAINTIFFS-BELOW / CROSS APPELLEES' ANSWERING BRIEF ON CROSS-APPEAL

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

CASES

STATUTES

RULES

NATURE OF PROCEEDINGS ON CROSS-APPEAL

On May 9, 2023, the Superior Court granted Plaintiffs'[1] motion to dismiss the remaining claims in this action ("Motion to Dismiss"). Exhibit B.[2] It entered an order dismissing Plaintiffs' Count III against Zurich for breach of contract and also entered final judgment ("Judgment Order"). *Id.* Plaintiffs timely filed a notice of appeal on May 30, 2023, appealing from the Summary Judgment Order. Zurich filed a notice of cross appeal on June 9, 2023, appealing entry of the Judgment Order. A1346-50.

Zurich's sole argument on cross appeal is that Plaintiffs' appeal is untimely. Zurich Opening Brief on Cross-Appeal ("Zurich Opening Br.") at pp. 53-58. Zurich's cross appeal is thus procedurally improper, as filing a cross appeal necessarily concedes that Plaintiffs' notice of appeal is timely. *See* 10 *Del. C.* § 149 (cross appeal is timely only in "any civil action *where a timely notice of appeal* to the Supreme Court is filed by a party….") (emphasis added). Zurich cannot argue this Court has jurisdiction to hear its cross-appeal but *not* Plaintiffs' appeal.

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[1] Capitalized terms not otherwise defined herein have the same meaning as in Plaintiffs' Opening Brief on Appeal ("Plaintiffs' Opening Br.").

[2] Citations herein to "Exhibit A" and "Exhibit B" refer to those exhibits to Plaintiffs' Opening Brief. Citations to the record beginning with "A" refer to Plaintiffs' Appendix, dated October 6, 2023. Citations to the record beginning with "B" refer to Zurich's Appendix, dated November 3, 2023.

Even if this Court hears Zurich's cross appeal, the Superior Court did not err in entering final judgment on May 9, 2023. Zurich asserts that the Summary Judgment Order resolved all claims as between it and Plaintiffs, and that the litigation was "over" once the counts against Beazley were dismissed by the November 2021 Court-approved stipulation ("Beazley Stipulation"). Zurich Opening Br. at pp. 53-56. Despite the fact the Summary Judgment Order as to Zurich expressly dismissed only Count I for declaratory judgment on advancement of defense costs, Zurich improperly argues that the same Order somehow *also* dismissed Count III for breach of contract for failure to indemnify. *Id*. Yet, the underlying Eddystone Litigation remains pending. The Summary Judgment Order cannot be read in Zurich's proposed manner, however, because under this Court's precedent, any determination of indemnification is premature – regardless of whether the Superior Court made an initial interlocutory determination from the pleadings on advancement of defense costs.[3]

Plaintiffs, in fact, sought dismissal of their count for breach of contract for failure to indemnify only *after* they exhausted the Zurich Policy limits, for the

[3] Zurich acknowledges the January 2020 Summary Judgment Order was an interlocutory order from which it never sought entry of a final judgment under Rule 54(b). A1315; Del. Super. Ct. Civ. R. 54(b). Thus, its argument that Plaintiffs waited over "three years" to appeal is misleading at the very least. Zurich Opening Br. at pp. 7, 24, 53, 56.

express purpose of appealing the Summary Judgment Order on advancement of defense costs as to Zurich. A1281-82; A1285-95; A1306-1342. The dismissal of the count for indemnity cannot be implied into that interlocutory order, as Zurich asserts.

An order only embodies a final decision if the Superior Court has "clearly declared [its] intention in this respect in [its] opinion." *Cf. Plummer v. R.T. Vanderbilt Co. Inc.*, 49 A.3d 1163, 1166-67 (Del. 2012). Though Plaintiffs do not believe the Superior Court's prior orders were unclear, that is ultimately inconsequential. Rather, the Superior Court found during oral argument on the Motion to Dismiss that it was unclear from its prior orders whether any were intended to resolve all claims between Plaintiffs and Zurich. A1330-34. Under this Court's precedent, the Superior Court thus properly entered final judgment on May 9, 2023. Plaintiffs timely filed their notice of appeal within 30 days of entry of that final judgment. 10 *Del. C.* § 148; A1343-45.

PLAINTIFFS' RESPONSE TO ZURICH'S SUMMARY OF ARGUMENTS ON CROSS-APPEAL

1. The Superior Court erred when it entertained and then granted a "motion to dismiss" a claim which had already been fully and finally adjudicated by that Court's prior Order declaring there is no coverage for the Eddystone Litig[ati]on under the Zurich Policy. The Superior Court's final act in this case was its approval of the stipulated dismissal of the remaining claims against the only other defendant in this action on November 10, 2021, rendering the instant appeal by Ferrellgas untimely. 10 *Del. C.* § 148.

Plaintiffs' Answer: Denied. The Superior Court's Summary Judgment Order dismissed Count I of Plaintiffs' Complaint for declaratory judgment on advancement of defense costs as to Zurich. The Summary Judgment Order did not address either Plaintiffs' Count III for breach of contract for failure to indemnify or specifically address Zurich's counterclaim for declaratory judgment. In fact, given that Count III sought relief greater than either party could have even requested on summary judgment, or that could even be awarded while the underlying Eddystone Litigation remained pending, this count was beyond the scope of the Summary Judgment Order and could not have been dismissed.

Zurich admits that the Summary Judgment Order remained an interlocutory order subject to revision at any time prior to entry of final judgment, and further does not contest that the Beazley Stipulation by its terms applied specifically and solely

to dismissal of the counts against Beazley. This Court has jurisdiction to hear appeals only from final judgments or interlocutory orders taken and accepted under Rule 42. *Harrison v. Ramunno*, 730 A.2d 653, 653-54 (Del. 1999). To the extent Zurich believed in January 2020 that the Summary Judgment Order constituted a final decision of the claims between Plaintiff and Zurich, Zurich did not seek entry of final judgment under Rule 54(b). *Id.*; A0001-24; Del. Super. Ct. Civ. R. 54(b). To the extent Zurich believed the Court-entered Beazley Stipulation dismissing all claims solely *against Beazley* constituted a final decision *of all claims as to all parties*, Zurich did not seek clarification from the Superior Court. A0001-24.

The ultimate question of whether an opinion embodies a final decision depends on "whether the judge has or has not clearly declared [her] intention in this respect in [her] opinion." *Plummer*, 49 A.3d at 1166-67. In granting the Motion to Dismiss, the Superior Court held that the Summary Judgment Order and Court-entered Beazley Stipulation were at best unclear and confusing as to whether any live claims remained as to Zurich, that the Superior Court had not clearly declared an intent that any prior order was final, that Zurich never sought clarification or entry of a final judgment, and that granting the Motion to Dismiss and entering the Judgment Order was therefore procedurally appropriate. Based on this Court's clear precedent, Plaintiffs' appeal is timely.

COUNTER-STATEMENT OF FACTS ON CROSS-APPEAL

Plaintiffs filed the present action in Delaware Superior Court on May 29, 2019, against their primary level insurers Beazley and Zurich, seeking a declaration of coverage for the Eddystone Litigation. A0025-55.

The operative Coverage Complaint in this action asserts counts against Zurich for (a) declaratory judgment that Zurich is required to reimburse and advance defense costs incurred by Bridger Logistics and the Bridger Subsidiaries in the defense of the Eddystone Litigation (Count I), and (b) breach of contract for failing to indemnify Bridger Logistics and the Bridger Subsidiaries in the Eddystone Litigation (Count III). A0056-86. The Coverage Complaint asserts counts against Beazley for (a) a declaratory judgment that Beazley is required to reimburse and advance defense costs incurred by Plaintiff (and Eddystone defendant) FG in the defense of its former officers and directors Rios and Gamboa (Count II) and (b) breach of contract for failing to indemnify Rios and Gamboa in the Eddystone Litigation (Count IV). *Id.* Zurich asserted a counterclaim for declaratory judgment. A0005; A0324-377.

On July 11, 2019, Plaintiffs filed a motion for partial summary judgment on Counts I and II, seeking declarations that Zurich and Beazley "as a matter of law" had a duty to advance defense costs in the Eddystone Litigation. Exhibit A at p.7; A0583-623. Zurich filed a cross motion for summary judgment on its counterclaim,

which the Superior Court noted asked it to "dismiss Count I on the grounds that Zurich has no duty to advance defense costs covering the Eddystone Litigation." Exhibit A at pp. 7, 11-23; A0590-91; A0863-66. Zurich did not move for summary judgment on Count III, which alleged Zurich was in breach of contract for failing to indemnify Bridger Logistics and the Bridger Subsidiaries in the Eddystone Litigation. A0056-86; A0590-92.

The Court heard argument on November 13, 2019, and subsequently entered the Summary Judgment Order on January 21, 2020. Exhibit A. The Court granted summary judgment in favor of FG as to Beazley on Count II, finding it had a duty to advance defense costs for the defense of FG's former directors and officers Rios and Gamboa in the Eddystone Litigation. *Id.* at pp. 32-35. The Court incorrectly denied Plaintiffs' motion as to Zurich, incorrectly granted Zurich's motion, held Zurich had no duty to advance, and dismissed Count I of the Coverage Complaint. *Id.* at pp. 24-26.

The Summary Judgment Order did not specifically grant any relief on Zurich's counterclaim, which sought a broader declaration as to coverage than Plaintiffs sought in Count I. *Id.* at 34. Rather, the Summary Judgment Order stated that Plaintiffs had brought the Coverage Action against "Zurich and Beazley seeking to enforce its insurance contracts and for advancement of defenses costs in relation to the Eddystone Litigation," that Plaintiffs had filed a motion for partial summary

judgment as to Counts I and II seeking a determination regarding advancement of defense costs, and that Zurich filed a cross motion for summary judgment asking the "Court to dismiss Count I on the grounds that Zurich has no duty to advance defense costs covering the Eddystone Litigation." *Id.* at p.7; A0583-623. The Summary Judgment Order then specifically held:

> The Court finds that the Run-Off Exclusion applies to the Transfer Acts alleged in the Eddystone Litigation. Additionally, the Eddystone Litigation did not pursue a claim for the Inducement Acts. Thus, the Eddystone Litigation is excluded from the Zurich Policy coverage. *Therefore, Zurich's Motion for Summary Judgment is hereby* ***GRANTED****, Count I is dismissed, and Plaintiffs' Motion for Partial Summary Judgment on Count I, duty to advance defense costs, is hereby* ***DENIED***.

Exhibit A at p. 34 (bold emphasis original; italics emphasis added). Though Zurich asserts on cross-appeal that the Summary Judgment Order resolved all claims between it and Plaintiffs, Zurich did not move for clarification of the Summary Judgment Order or seek entry of a final judgment as to it under Rule 54(b). A0001-24.

In February 2020, the Superior Court denied Beazley's application for interlocutory appeal of the Summary Judgment Order and, in September 2020, denied Beazley's application for interlocutory review of a separate order requiring Beazley to advance defense costs for the defense of Plaintiff FG's former directors and officers Rios and Gamboa. A1238-60; A1272-77. FG and Beazley then proceeded to follow the Court's Order setting a *Fitracks*-style protocol of invoice

submission, review, and dispute resolution regarding fees and costs which Beazley was obligated to advance for Rios and Gamboa. A1243-60. This included not only fees and costs incurred prior to the Summary Judgment Order, but also for all ongoing monthly fees and expenses incurred by FG in the defense of Rios and Gamboa in the underlying Eddystone Litigation. A1254-58.

Plaintiffs subsequently settled their dispute with Beazley, and per the Court-approved Beazley Stipulation dated November 10, 2021, between Plaintiffs and Beazley, the litigation was "dismissed as to Beazley only." A1278-79. Zurich received notice of the filed proposed stipulation on October 20, 2021. A0021 (DI # 86); A1319-20. The November 10, 2021, Beazley Stipulation stated that "[f]or avoidance of doubt, this stipulation applies to Beazley only." A1278; A1317. Zurich's counterclaim, and Count III of the Coverage Complaint, which sought a finding that Zurich was in breach for (among other things) failure to indemnify its insureds for the underlying Eddystone Litigation, were not disposed of by any prior order and remained pending. Exhibit A at pp. 24-26; Exhibit B. A bench trial in the underlying Eddystone Litigation concluded on August 9, 2023, and as of the filing date of this brief, no judgment has been entered. *See generally Eddystone Rail Co., LLC v. Bridger Logistics, et al.*, Case No. 2:17-cv-00495 (E.D. Pa.); A1313.

On September 27, 2022, the Prothonotary served a letter on counsel requesting an update on the status of the litigation. A1280. Plaintiffs responded that in late

2021, FG filed a companion lawsuit in this Court against XL Specialty Insurance Company ("XL"), the carrier providing the next layer of coverage above Beazley, seeking a declaration that XL owed a duty to advance defense costs, and that it voluntarily dismissed that litigation on May 6, 2022. *See Ferrellgas, L.P. v. XL Specialty Ins. Co.*, C.A. No.: N21C-12-050 MMJ ("XL Lawsuit");[4] A1281-82. Plaintiffs also advised that they had been in discussion with Zurich about the resolution of Count III (which remained pending), a potential appeal of the Summary Judgment Order, and a possible resolution of claims against Zurich, and that they had been in discussions with insurers excess to Zurich, whose coverage had now been triggered. *Id.* Plaintiffs requested that the Court continue the matter for 45 days. *Id.* Zurich, despite not having previously addressed the Superior Court on this point, responded to the Prothonotary's letter with its position that all claims had been adjudicated or settled, and this action before the Superior Court could be "administratively closed." A1283-84. The Superior Court did not enter any further orders.

On March 2, 2023, Plaintiffs filed the Motion to Dismiss. A1285-91. Plaintiffs noted the Superior Court had entered an interlocutory opinion finding Zurich had no duty to advance defense costs, and that the separate question of breach

[4] This Court may take judicial notice of the XL Lawsuit. *See* D.R.E. 202(d)(1)(C).

of contract for indemnification had not been decided, nor could it be decided while the Eddystone Litigation remained pending. *Id*. Nonetheless, Plaintiffs stated they had now "exhausted the limits under the Zurich Policy and the excess layers ha[d] been triggered" in the Eddystone Litigation, and that they were moving to "voluntarily dismiss Count III for breach of contract as to Zurich" for "failure to indemnify" and for "dismissal of Zurich's counterclaim" so that they "may appeal the [Summary Judgment] Order on the advancement of defense costs as to Zurich." A1290. Plaintiffs did not seek to vacate any prior orders entered by the Superior Court and, despite Zurich's arguments to the contrary, Plaintiffs argued only that the issue of breach of contract for failure to indemnify – not for refusal to advance – remained pending. Zurich Opening Br. at p. 7; A1285-1291; B0838-0845.

Zurich objected to the Motion to Dismiss, arguing the Superior Court had already granted judgment on its counterclaim and dismissed Plaintiffs' Count III in the Summary Judgment Order. A1296-1304. The Court heard oral arguments on May 8, 2023. A0022 (DI # 94); A1306-1342. The Superior Court acknowledged at oral argument that, even if it had been the intent of the Court to dispose of all claims between Plaintiffs and Zurich in the Summary Judgment Order (an issue it did not decide), the Superior Court's orders were at best confusing and unclear as to what claims had been adjudicated and what had not, and that Zurich had never requested clarification or entry of judgment as to it. A1330-34. Zurich's counsel also

conceded that it could identify no prejudice if Plaintiffs' motion were granted other than that "Zurich ha[d] moved on" and that Zurich would "have to deal with an appeal." A1327-1335. Accordingly, on May 9, 2023, the Superior Court entered an order granting the Motion to Dismiss without prejudice and entered final judgment. Exhibit B.

Plaintiffs timely filed a notice of appeal on May 30, 2023. A1343-45. Zurich filed a notice of cross-appeal on June 9, 2023. A1346-50.

REPLY ARGUMENT ON APPEAL

A. The Superior Court Improperly Held That Zurich Does Not Owe a Duty to Advance.

1. The Duty to Advance is Determined Solely by Review of the Zurich Policy and Allegations of the Eddystone FAC.

In determining whether an insurer owes a duty to defend or advance defense costs, Delaware courts look exclusively at the "eight corners of the complaint" – the insurance policy and the allegations of the complaint. *See, e.g., First Am. Title Ins. Co. v. McLaren, LLC*, 2012 WL 769601, at *4-5 (D. Del. Mar. 9, 2012) (quoting *State Farm Fire & Cas. Co. v. Maltman ex rel. Maltman*, 1976 WL 168381, at *2 (Del. Super. June 22, 1976)). Materials outside of the policy and allegations of the complaint are irrelevant to the duty to advance and may not be considered. *Id.*; *see also Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Rhone-Poulenc Basic Chemicals Co.*, 1992 WL 22690, at *7 (Del. Super. Jan. 16, 1992).

Notwithstanding, Zurich cites to two memorandum opinions from the underlying Eddystone Litigation within the Statement of Facts and Argument sections of its appellate brief, improperly injecting the Pennsylvania District Court Judge's interlocutory characterizations of Eddystone's claims into this proceeding. Zurich Opening Br. at pp. 10, 15, 17, 41. These materials should be disregarded by the Court.

In an attempt to nonetheless ask the Court to consider both these materials and the application of Texas law, Zurich summarily alleges that *Texas* (rather than

Delaware) law *may* apply to the Zurich Policy, and that under *Texas* law, analysis of the duty to advance is not necessarily limited to the Zurich Policy and the allegations of the Eddystone FAC. *Id.* at p. 27. But Zurich makes no effort on appeal to explain why Texas law *may* apply here. *Id.* This cursory argument is undeveloped and cannot support either Zurich's inclusion of extrinsic materials or reliance on case law interpreting coverage under Texas law. *Id.*; *see, e.g.*, *Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004) (undeveloped arguments waived on appeal). Zurich thus improperly adds to the record and cites materials that may not be considered here. Its citations to cases interpreting Texas law, which the Superior Court correctly did not rely on or even reference, are not relevant to this appeal.

2. Zurich Relies Upon Inapposite Case Law that Does Not Apply to the Facts Here.

At issue on appeal is whether Zurich owed Plaintiffs a duty to advance their defense costs for the Eddystone Litigation or if, as asserted by Zurich, the Interrelated Wrongful Acts Exclusion from the Run-Off Endorsement purchased by Bridger, LLC, excuses that duty. As recognized by the Superior Court and agreed by both parties on appeal, the duty to advance defense costs is triggered "whenever the underlying complaint alleges facts that fall within the scope of coverage," with the duty "broadly [construed] in favor of [the insured]." Plaintiffs' Opening Br. at

25-26; Zurich Opening Br. at 27 (both quoting *Verizon Commc'ns., Inc. v. Ill. Nat'l Ins. Co.*, 2017 WL 1149118, at *6-7 (Del. Super. Mar. 2, 2017)).

Zurich does not challenge the well established rule under Delaware law that exclusionary clauses are interpreted with a "strict and narrow construction" and are given effect only where they are found to be "specific, clear, plain, conspicuous, and not contrary to public policy." *See generally* Zurich Opening Br.; Plaintiffs' Opening Br. at pp. 28-29 (quoting *Verizon Commc'ns Ins. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2022 WL 14437414, at *6 (Del. Super. Oct. 18, 2022)).

Rather, Zurich analyzes at length a number of inapposite cases – primarily (and tellingly) ones interpreting the law of other states – to support its argument that the Interrelated Wrongful Acts Exclusion applies here. Given the disparate factual presentations of these cases and the warning that "*some* degree of relatedness is going to exist among almost any claims brought against an insured, especially in the field of directors' and officers' liability insurance," these cases provide no support for Zurich's claim that the Inducement Acts are interrelated with subsequent Wrongful Acts. *See Southridge Cap. Mgmt., LLC v. Twin City Fire Ins. Co.*, 2006 WL 2730312, at *9 (Conn. Super. Ct. Sept. 8, 2006) (applying Delaware law).

In *Oceans Healthcare, LLC v. Ill. Union Ins. Co.*, a Fifth Circuit case interpreting *Texas* law, the court found no duty to advance under a run-off exclusion because the insured *itself* asked the court to "construe the [operative pleading] as

alleging False Claims Act ['FCA'] violations potentially taking place at any time" both before and after the run-off date, and conceded that it was "clear from the face of the [operative pleading]" that the government was investigating potential violations of the FCA that occurred both before and after the run-off date. 379 F. Supp. 3d 554, 568-69 (E.D. Tex. 2019). Notably, in *Oceans Healthcare*, the court applied a "broad, general and comprehensive interpretation" to the exclusion, which is contrary to Delaware law, which construes exclusions very narrowly, in favor of the insured. *Compare id.* at 568 *with Med. Depot, Inc. v. RSUI Indemn. Co.*, 2016 WL 5539879, at *7 (Del. Super. Sept. 29, 2016), *abrogated on other grounds by First Solar, Inc. v. Nat'l Union Fire Ins. Co of Pittsburgh, PA*, 274 A.3d 1006 (Del. 2022).

In *HLTH Corp. v. Clarendon Nat'l Ins. Co.*, the insured "stipulated that its claim ar[ose] out of Wrongful Acts committed, attempted, or allegedly committed or attempted, in whole or in part after September 12, 2000," the cut-off date of the policy. 2009 WL 2215126, at *17 (Del. Super. July 15, 2009) (nonetheless recognizing that an "exclusion clause in an insurance contract is construed strictly to give the interpretation most beneficial to the insured").

In *Bainbridge Mgmt., LP v. Travelers Cas. & Sur. Co. of Am.*, a decision applying *Illinois* law, the insured conceded that based on its plea agreement in a separate criminal action, its officer "engaged [in] a continuous" criminal scheme

"over a five year period," and that the "time period of the illegal scheme was from 1995 through December[] 2001." 2006 WL 978880, at *3-4 (N.D. Ind. Apr. 10, 2006). Thus, the court held it was conceded that at least part of the "continuous" "Wrongful Acts" occurred prior to the October 1998 cut-off date in the policy. *Id.*

Finally, in *Champlain Enter., Inc. v. Chubb Custom Ins. Co.*, a decision applying *New York* law, the court held that the "original acquisition of the corporate jet in 1994 was clearly the gravamen of the corporate waste claim," not any subsequent use of the jet, and thus "the fact that the jet was used after the [1999] cut-off date of the prior acts exclusion is irrelevant." 316 F. Supp. 2d 123, 130 (N.D.N.Y. 2003). These cases are all inapposite.

Unlike in *Champlain*, for example, the alleged Wrongful Acts here are discrete and do not arise from a common triggering event, such as the purchase of the corporate jet. Nor do Plaintiffs stipulate that the Wrongful Acts are interrelated as in *HLTH* and *Bainbridge*. Rather, unlike in *Oceans Healthcare* and *Bainbridge*, the Eddystone FAC cannot reasonably be read in a way that establishes that there was a common scheme or plan beginning in 2013 and continuing past June 24, 2015. The claim that Rios, Gamboa, and Bridger Logistics would somehow have schemed to induce Eddystone to enter the RSA with the intent to ultimately breach that agreement is nonsensical. Rather, the Eddystone FAC alleges fundamentally different Wrongful Acts, including the Inducement Acts, which started and stopped

long before the June 24, 2015 date found in the Exclusion to the Run-Off Endorsement. Plaintiffs' Opening Br. at pp. 14-18, 41-45. The Eddystone FAC alleges two distinct schemes.

3. The Exclusion to the Run-Off Endorsement Does Not Bar Zurich's Duty to Advance.

Zurich asserts that there is necessarily only a single "Claim" – the Eddystone Litigation – and that the only question is whether the Exclusion to the Run-Off Endorsement bars Zurich's duty to advance for the "Eddystone Litigation" as a whole. Zurich Opening Br. at 34-35. While Plaintiffs readily admit that the policy definition of "Claim" includes "a civil proceeding against any Insured," and that the Eddystone Litigation is thus a "Claim," the Zurich Policy language specifically provides that both covered and uncovered matters may exist in a single Claim. A0221-22. The Eddystone FAC asserts two discrete sets of Wrongful Acts – the Inducement Acts and the Improper Transfer Acts. Thus, the proper question is whether the Exclusion to the Run-Off Endorsement bars Zurich's duty to advance for the *covered* matters in the Claim – the Inducement Acts. The answer to this question is no. As much as Zurich would like this Court to believe that the Eddystone Litigation is a simple unified action for breach of the RSA, spending multiple pages mischaracterizing the Eddystone FAC to that end, that is simply not the case. Zurich Opening Br. at pp. 35-38.

In fact, there is no claim for breach of contract in the Eddystone FAC. A0275-303. None of the defendants in the Eddystone Litigation could have defaulted under the RSA because none were parties to it. A0280-81, ¶¶13-30; A0283, ¶36. BTS, which Eddystone alleges was sold to Jamex Marketing in January 2016, was the only party to the RSA, is the only party that allegedly breached the RSA, is the only entity that allegedly consented to an arbitration award for alleged breach of the RSA, and is not a defendant in the Eddystone Litigation. A0292-94, ¶¶ 70-75. Zurich's arguments nonetheless confuse the allegations, making such statements as that "*Ferrellgas*" – not non-party BTS – "defaulted under the RSA, leading to the SMA arbitration and an award of damages on account of that breach." Zurich Opening Br. at p. 36 (emphasis added).

Zurich's argument is also based on its subjective characterization of the "causes of action" in the Eddystone FAC as being "exclusively designed to create a fund from which Eddystone can collect the SMA arbitration award or the equivalent consequential damages arising out of the [alleged] February 2016 breach of the RSA," and that the "specific relief" sought in the Eddystone FAC is "limited to damages on account of that [alleged] breach." *Id.* at pp. 36-38 (emphasis removed).

But as the Superior Court correctly found (but ultimately misapplied), it is not bound by either the "causes of action or requests for relief set forth in the [Eddystone] FAC." Exhibit A at p. 23. Rather, it must look "beyond the

characterization of the acts alleged" in the Eddystone FAC and "examine[] those *acts* to determine" if they fall within the scope of coverage. *IDT Corp. v. U.S. Specialty Ins. Co.*, 2019 WL 413692, at *10 (Del. Super Jan. 31, 2019). As the Superior Court even acknowledged, Eddystone alleges that Plaintiffs defrauded it. Exhibit A at p. 23.

There is no doubt that based on a fair and reasonable reading of the allegations in the Eddystone FAC, Eddystone can be said to seek relief based on being fraudulently induced into entering into the RSA. This is especially the case here, since if the allegations are considered ambiguous, coverage under the Zurich Policy is triggered because any doubts concerning coverage owed must be construed against Zurich. *See, e.g.*, *Steadfast Ins. Co. v. DBi Servs., LLC*, 2019 WL 2613195, at *4 (Del. Super. June 24, 2019), *appeal refused*, 2019 WL 3453239 (Del. July 31, 2019) ("When the allegations in the complaint are ambiguous and do not clearly state a claim that is within the coverage of the policy, all doubts are resolved in favor of the insured resulting in the insurer having a duty" to advance.).

This Court's opinion in *In re Solera Insurance Coverage Appeals*, relied upon by Zurich, does not change that conclusion. Zurich Opening Br. at p. 40. In *Solera*, this Court addressed the limited question of whether an "appraisal action" under Section 262 of the Delaware General Corporation Law constitutes a "Securities Claim." 240 A.3d 1121, 1125-27, 1132-33 (Del. 2020). It noted that the policy

definition of "Securities Claim" was a claim made against the insured "for any actual or alleged violation" of a law "regulating securities." *Id.* Because the underlying appraisal actions were not "proceedings that adjudicate" violations of "any law or rule," they did not "fall within the definition" of a "Securities Claim." *Id.* In fact, this Court in *Solera* did not even reach the issue of whether the claim at issue was for a "Wrongful Act," finding it moot since the underlying appraisal actions did not meet the policy definition of a "Securities Claim." *Id.* at 1138-39.

This is not the issue here. There is no dispute in this case that the definition of a "Claim" under the Zurich Policy includes a "civil proceeding against any Insured," such as the Eddystone Litigation. Unlike in *Solera*, the definition of "Claim" does not depend upon any "precipitating wrongful act," as Zurich alleges. Zurich Opening Br. at p. 39.

Zurich also cites two Superior Court cases interpreting *Solera* to support its position. Zurich Opening Br. at p. 40. But like *Solera*, both cases interpreted "appraisal actions" brought under Section 262 of the Delaware General Corporation Law, a "creature of statute" that "imposes limited duties" on a corporation and "does not involve any inquiry into claims of wrongdoing." *See Jarden, LLC v. ACE Am. Ins. Co.*, 2021 WL 3280495, at *4-6 (Del. Super. July 30, 2021), *aff'd*, 273 A.3d 752 (Del. 2022); *MPM Holdings Inc. v. Fed. Ins. Co.*, 2022 WL 811170, at *5 (Del. Super. Mar. 17, 2022), *correcting and superseding* 2022 WL 770563 (Del. Super.

Mar. 15, 2022). These cases are thus limited to Section 262 and do not broadly hold, as Zurich claims, that the Eddystone FAC must seek specific redress for the Inducement Acts.

As set forth in Plaintiffs' initial brief, the Inducement Acts started and stopped prior to June 24, 2015, and constitute Wrongful Acts under the Zurich Policy. Because any doubts and ambiguities in the allegations must be resolved in favor of coverage, the Eddystone FAC can be read as seeking relief based on these alleged Acts, even if not expressly stated by Eddystone in a count or prayer for relief. The Superior Court erred in finding that Zurich did not owe a duty to advance and nothing set forth in Zurich's briefing supports its denial.

B. The Superior Court Improperly Failed to Apply the Reasonable Expectations of the Insured Doctrine.

Zurich argues that the Superior Court properly applied Delaware law and declined to apply the reasonable expectations doctrine. Zurich Opening Br. at pp. 45-49. But Zurich fails to address Plaintiffs' central argument. The Superior Court erred in construing the language in the Exclusion by itself without reference to the coverage grant in the Zurich Policy to determine if the "policy terms are ambiguous or conflicting, contain a hidden trap or pitfall, or if the fine print takes away that which has been provided by the large print." Plaintiffs' Opening Br. at 37-40.

This Court's precedent in *Hallowell v. State Farm Mut. Auto. Ins. Co.* and *Stoms v. Fed. Serv. Ins. Co.*, both cited by Zurich, are consistent with Ferrellgas's central argument. Zurich Opening Br. at 45-46 (citing 443 A.2d 925, 927-28 (Del. 1982) & 125 A.3d 1102, 1108-09 (Del. 2015)). In *Hallowell*, as recognized by Zurich, this Court held that the doctrine applies only if policy terms are "ambiguous *or conflicting, or if the policy contains a hidden trap or pitfall or if the fine print purports to take away what is written in large print*." 443 A.2d at 927-28 (emphasis added). The Court does not look at "ambiguity" alone, as the Superior Court did (and as Zurich suggests). Exhibit A at pp. 11, 24; Zurich Opening Br. at pp. 45-46. In *Stoms*, this Court found the Superior Court analyzed the policy as a whole in finding certain terms unambiguous, and thus declined to apply the doctrine. 125 A.3d at 1107-08. Plaintiffs argue here that the Zurich Policy must be read as a whole

to determine "if policy terms are ambiguous or conflicting, [or] contain a hidden trap or pitfall, or if the fine print takes away that which has been provided by the large print," and that (as the Superior Court correctly noted) the court "must give effect to the parties' mutual intent at the time of contracting." Plaintiffs' Opening Brief at pp. 38-40 (emphasis added); Exhibit A at p. 10 (citing *IDT Corp.*, 2019 WL 413692 at *7).

Here, the Superior Court found that "*the Run-Off Exclusion language* is not fairly or reasonably susceptible to more than one meaning." Exhibit A at p. 24 (emphasis added). This was error, as the Superior Court must "interpret the insurance policy through a reading of all of the relevant provisions of the contract as a whole, and not on any single passage in isolation." *See Med. Depot, Inc.*, 2016 WL 5539879, at *7. This is especially significant here, as policy language "is interpreted broadly to protect the insured's objectively reasonable expectations," while exclusionary clauses – such as the Exclusion to the Run-Off Endorsement – are to be "accorded a strict and narrow construction." *Id.*

In arguing that Plaintiffs do "not point to any ambiguity *in the Run-Off Exclusion*," Zurich makes the same error as the Superior Court did. Zurich Opening Br. at p. 46. Rather, as argued in Plaintiffs' opening brief, when the Zurich Policy *is read properly as a whole*, the Exclusion to the Run-Off Endorsement is inconsistent and conflicts with the coverage grant in the Zurich Policy and cannot

be interpreted – as the Superior Court did – to eliminate existing coverage. Thus, the reasonable expectations doctrine must apply. Plaintiffs' Opening Br. at pp. 38-39.

Zurich's argument that the Run-Off Endorsement, as interpreted by the Superior Court, does not "reduce" coverage is similarly misplaced. Zurich Opening Br. at pp. 46-47. Plaintiffs do not argue on appeal, as Zurich incorrectly suggests, that the Run-Off Endorsement provides illusory coverage, or that the Zurich Policy or the Run-Off Endorsement insures against a Claim arising out of "fresh" Wrongful Acts or Interrelated Wrongful Acts occurring after the Zurich Policy expired on December 17, 2015. *Id*. at pp. 47-48. Rather, Plaintiffs argue that the Exclusion, as interpreted by the Superior Court in isolation and not read together with the Zurich Policy as a whole, would reduce coverage for an otherwise covered Claim for Wrongful Acts or Interrelated Wrongful Acts that started even *prior* to the inception of the Zurich Policy (December 17, 2014) or purchase of the Run-Off Endorsement (June 24, 2015). Plaintiffs' Opening Br. at p. 38. This includes the Inducement Acts, which allegedly began in 2013. Stated another way, the Run-Off Endorsement was purchased to expand coverage and, as interpreted by Zurich and the Superior Court, it has the effect of taking claims outside of coverage.

The cases cited by Zurich for the proposition that the Run-Off Endorsement here affords the same coverage provide no support for Zurich's claims. At issue in

Old Republic Ins. Co. v. Rexene Corp. was whether certain insurance policies should be rescinded based on alleged misrepresentations by the insureds in the insurance applications. 1990 WL 176791, at *1-7 (Del. Ch. Nov. 5, 1990). The court referenced but did not address or analyze the coverage available under policies with run-off endorsements. *Id.* In *EMSI Acquisition, Inc. v. RSUI Indem. Co.*, the insureds purchased an insurance policy in conjunction with a stock purchase agreement that contained an exclusion barring coverage for any "Wrongful Acts" that "first occurred prior to November 3, 2015." 306 F. Supp. 3d 647, 649-50, 658-59 (D. Del. 2018). As "*all of the alleged Wrongful Acts*" in the "Underlying Action occurred" "between May and October 2015" – prior to November 3, 2015, the court held the exclusion applied. *Id.* (emphasis added). That court did not address the situation here, in which the Eddystone FAC alleges Inducement Acts that occurred completely prior to June 24, 2015, as well as Improper Transfer Acts that occurred both before and after that date.

Zurich also misinterprets *Alstrin v. St. Paul Mercury Ins. Co*. Zurich Opening Br. at pp. 47-48 (citing 179 F. Supp. 2d 376 (D. Del. 2002)). The court in *Alstrin* did not "agree," as Zurich contends, that the "run-off endorsement did not include 'going forward coverage….'" Zurich Opening Br. at p. 47 (citing 179 F. Supp. 2d at 393-94). Rather, the insurance policy at issue in *Alstrin* contained both "going forward" coverage as well as separate coverage under a run-off endorsement. 179

F. Supp. 2d at 392-93. The relevant issue in *Alstrin* is whether a certain "intentional acts exclusion" which excluded claims "arising out of, based upon or attributable to the committing in fact of any criminal or deliberate fraud," could be properly construed to exclude coverage for securities fraud claims. *Id.* at 396. The court agreed with the insureds that such a reading would "directly conflict with" and was "irreconcilable with" the "coverage grant of the policy," and could not be interpreted in a way that would leave some "limited amount of coverage" under the coverage grant of the policy. *Id.* at 396-98.

The Superior Court erred when it failed to properly analyze the Exclusion to the Run-Off Endorsement in the context of the entire Zurich Policy. When read as a whole, the Exclusion is irreconcilable and conflicts with the coverage grant in the Zurich Policy, and the reasonable expectations of Plaintiffs must be considered. *Id.* at 398 (holding an exclusion could not be relied upon to defeat coverage because if the "exclusion applied to securities claims, there would be little or nothing left to that coverage").

C. The Inducement Acts Are Not Interrelated to the Later Improper Transfer Acts.

Zurich argues that even if it credits the Inducement Acts as a separate set of "Wrongful Acts," they are necessarily interrelated with the later Improper Transfer Acts that occurred in part after June 24, 2015. Zurich Opening Br. at pp. 50-52. Zurich is incorrect. The Inducement Acts and Improper Transfer Acts cannot be interrelated, as there are no allegations in the Eddystone FAC of a scheme to induce Eddystone to enter into the RSA with BTS and expend $170 million to build the Eddystone Facility, just so that Plaintiffs could later breach the RSA, strip all the assets from BTS, and leave Eddystone with an empty facility.

Thus, there are two unrelated alleged schemes: one to induce Eddystone to build the Eddystone Facility and enter into the RSA with only BTS so the parties could exploit the favorable price of North Dakota crude, and a second to avoid the obligations of the RSA only after the price of North Dakota crude fell. The Eddystone FAC alleges two discrete sets of Wrongful Acts, with the Inducement Acts ending at the latest in April 2014 when the Eddystone Facility was completed.

ANSWERING ARGUMENT ON CROSS-APPEAL

A. The Final Order in This Litigation Was the May 9, 2023, Order Granting Plaintiffs' Motion to Dismiss and Entering Final Judgment.

1. Question Presented

Did Plaintiffs timely appeal when the Superior Court entered final judgment on May 9, 2023, it found on the record that to the extent its earlier orders were intended to adjudicate all remaining counts (an issue it did not decide), any such intentions were not clearly declared in those orders, Plaintiffs appealed within 30 days after entry of final judgment, and Zurich subsequently filed a notice of cross-appeal, thereby conceding Plaintiffs' appeal was timely? Preserved on appeal at A1281-82; A1285-95; A1306-1342.

2. Scope of Review

The Court's "jurisdiction to hear appeals from the Superior Court in civil cases is limited to appeals" from final judgments. *Plummer*, 49 A.3d at 1166-67. The question of "whether an opinion embodies a final decision depends on whether the judge has or has not clearly declared [her] intention in this respect in [the Court's] opinion[s]." *Id.* (internal citations and quotations omitted).

3. Merits of the Argument

a. Zurich's Cross-Appeal is a Procedurally Improper Attempt to Challenge the Clear Jurisdiction of this Court.

Zurich frames its cross-appeal as a standard *de novo* review of the Superior

Court's May 9, 2023, order granting the Motion to Dismiss and entering final judgment. But Zurich's sole argument on cross appeal is that Plaintiffs' May 30, 2023, notice of appeal is untimely because it believes the final order in this action was entered in November 2021 – not May 9, 2023. Zurich Opening Br. at pp. 53-54. Specifically, it asserts that (a) all claims between it and Plaintiffs were fully resolved in the Superior Court's Summary Judgment Order, and that (b) all claims as to all parties were fully and finally disposed of in November 2021 when the Court approved the Beazley Stipulation between Plaintiff and Beazley dismissing all counts as to Beazley only. *Id.* at pp. 54-56.

In other words, Zurich does not argue the Superior Court erred on the legal merits of dismissal of the remaining counts (in which case *de novo* review would be proper), but rather argues that this Court lacks jurisdiction to hear Plaintiffs' appeal based on *timeliness*. *Id.* at pp. 53-58. The "finality of a court's order is not determined" by what the parties believe, but "by the court itself." *Tyson Foods, Inc. v. Aetos Corp.*, 809 A.2d 575, 581 (Del. 2002) (when the court "intends for its order to resolve all outstanding issues, and says so, its order is final"). Here, the Superior Court in no uncertain terms entered final judgment on May 9, 2023. *See* Exhibit B.

Critically, Zurich's very act of filing a notice of cross-appeal concedes Plaintiffs' "timely notice of appeal to [this] Court." *See* 10 *Del. C.* § 149 (notice of cross-appeal timely only if appellant filed a "timely notice of appeal"). Zurich's

cross-appeal is thus procedurally improper and concedes the very fact which it disputes.

This Court's precedent is clear: the question of "whether an opinion embodies a final decision" for purposes of triggering the appellate jurisdiction of this Court "depends on whether the judge has or has not clearly declared [her] intention in this respect in [her] opinion." *Cf. Plummer*, 49 A.3d at 1167 (quoting *J.I.Kislak Mortg. Corp. of Del. v. William Matthews, Builder, Inc.*, 303 A.2d 648, 650 (Del. 1973)); *see also Tyson Foods*, 809 A.2d at 579 (the "test for whether an order is final and therefore ripe for appeal is whether the trial court has clearly declared its intention that the order be the court's 'final act' in a case") (citing *J.I.Kislak Mortg. Corp.* 303 A.2d at 650).

After carefully considering the parties' briefing and oral argument on the Motion to Dismiss, the Superior Court granted the Motion to Dismiss and entered final judgment on May 9, 2023. A1306-42; Exhibit B. This is not a case like *Farmer v. Brosch*, cited by Zurich for the standard of review on cross-appeal, in which the plaintiff argued the Superior Court erred in dismissing her complaint for failure to file within the statute of limitations, and this Court reviewed that decision *de novo*. Zurich Opening Br. at p. 53 (citing 8 A.3d 1139, 1141 (Del. 2010)). Rather, the sole issue on cross-appeal here is not the *merits* of dismissal but the jurisdictional issue of whether Plaintiffs' appeal is timely.

At end, Zurich's alleged cross-appeal is nothing more than an improper attempt to ask this Court to review the Superior Court's decision entering final judgment *de novo* rather than under the proper jurisdictional standard, which undisputedly establishes the time to appeal began on May 9, 2023.

Even if the Superior Court contemplated that the Summary Judgment Order was intended to dispose of all claims between Plaintiffs and Zurich, or whether the Beazley Stipulation was intended to be final as to all parties (which Plaintiffs both dispute and which the Superior Court did not decide), the Superior Court found at oral argument any such intention was not clearly declared in those orders, going so far as to question why "if everybody had intended that [the Beazley Stipulation] be the final order and trigger the appeal date, why didn't it say the whole action is dismissed….?" A1317; A1330-34. That is the end of the inquiry. The May 9, 2023, entry of judgment was therefore procedurally proper, and Plaintiffs' May 30, 2023, notice of appeal was timely. This Court has jurisdiction to hear Plaintiffs' appeal. 10 *Del. C.* § 148.

Further, despite apparently believing the Summary Judgment Order resolved all claims between Plaintiff and Zurich and "left nothing for future determination or consideration" except Plaintiffs' claims against Beazley, Zurich did not move for entry of final judgment as to it and Plaintiffs. Del. Super. Ct. Civ. R. 54(b); Zurich Opening Br. at pp. 55-56; A0001-24. It also did not move for clarification after

admittedly receiving and reviewing the proposed and subsequently entered Stipulation that dismissed all claims as to Beazley only. A0001-24; A1319-20; *Cf. Plummer*, 49 A.3d at 1167 (if there "was any ambiguity as to the [final order]," counsel "could have requested clarification from the Superior Court," but declined to do so). Again, what Zurich "believed" to be the status of the litigation does not control.

The Superior Court already stated during oral argument its belief that it was unclear from the orders on the docket what the status of the litigation was and whether any claims remained pending. A1330-34. While Plaintiffs respectfully disagree that the Summary Judgment Order or the Court-entered Beazley Stipulation were unclear as to what counts those orders were deciding, that does not matter for purposes of this cross-appeal. What matters is when the final order was entered. That is "not determined by" what Zurich believes it to be, but by the "[Superior] Court itself." *Cf. Tyson Foods*, 809 A.2d at 579. Under this Court's clear precedent, that is May 9, 2023, the date that the Superior Court "clearly declared its intention that the order be the [Superior C]ourt's 'final act'" in the case. *Id.*

b. The Summary Judgment Order Did Not Adjudicate the Separate Legal Question of Indemnity under Count III.

Should this Court consider Zurich's arguments further, Zurich incorrectly asserts that the Summary Judgment Order adjudicated all claims between Plaintiffs and Zurich. Zurich Opening Br. at pp. 54-55. Yet it cannot be disputed that the

Summary Judgment Order (a) found that both Plaintiffs and Zurich were only seeking a declaratory judgment on the duty to advance defense costs, (b) held that based solely on the allegations in the Eddystone FAC there was no duty to advance costs, and (c) based on these findings dismissed Count I of the Coverage Complaint. Exhibit A at pp. 7, 34.

In this respect, Zurich's citation to *Harrison v. Ramunno* actually supports Plaintiffs' position here. In *Harrison*, no final order had been entered (and the Court thus lacked jurisdiction over an appeal) when a counterclaim remained undecided. Zurich Opening Br. at p. 56; 730 A.2d 653, 654 (Del. 1999). Despite what Zurich maintains it moved for on summary judgment, it is undisputed that the Summary Judgment Order did not adjudicate or even mention Count III of the Coverage Complaint or Zurich's counterclaim, much less rule on those counts. Exhibit A. It further did not dismiss Zurich from the Litigation, and Zurich never moved for clarification of the order. Exhibit A; A0001-24.

Zurich also argues that the Summary Judgment Order constituted a "final judgment" under the Declaratory Judgment Act. Zurich Opening Br. at pp. 56-58. Yet it concedes that the Summary Judgment Order was interlocutory in nature, and that interlocutory orders are "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Del. Super. Ct. Civ. R. 54(b); Zurich Opening Br. at pp. 56-58; A1318-19.

Zurich also takes issue with the timing of Plaintiffs' Motion to Dismiss. It misleadingly suggests that Plaintiffs waited "three years" after the Summary Judgment Order to file a notice of appeal, despite conceding that even under its own theory, it would not have been possible to appeal the Summary Judgment Order until November 2021 – not January 2020. Zurich Opening Br. at pp. 56-57; A1319. Zurich goes so far as to call Plaintiffs' Motion to Dismiss a "sham" and an attempt to "'re-start' an appeal clock which had long since expired." Zurich Opening Br. at pp. 56-58. This is based on the same flawed argument that the Summary Judgment Order allegedly decided all issues between Plaintiff and Zurich.

This is not the case. The Summary Judgment Order only adjudicated the issue of advancement of defense costs – not the separate legal question of indemnification at issue in Count III of the Coverage Complaint. In fact, that determination was not yet ripe as the Eddystone Litigation remained (and still remains) pending. While the duty to advance is determined solely by review of the allegations in the underlying complaint, any duty to indemnify is not determined until the final conclusion of the underlying litigation. *See, e.g., First Am. Title Ins. Co.*, 2012 WL 769601, at **4-5 (obligation to defend, as "distinguished from [the] obligation to [indemnify]," is to be determined solely "by the allegations of the complaint") (internal citations omitted); *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 198 (Del. 2009)

("indemnification claims do not accrue until the underlying claim is finally decided").

As Plaintiffs argued before the Superior Court, while a bench trial in the underlying Eddystone Litigation had concluded, no finding of liability or judgment has yet been entered and thus any determination as to indemnification is premature. A1289, A1313. This is the case even though the Superior Court entered an interlocutory order finding there was no duty to advance defense costs. *See*, *e.g.*, *Premcor Refining Group, Inc. v. Matrix Serv. Indus. Contractors, Inc.*, 2009 WL 960567, at *12 (Del. Super. Mar. 19, 2009) (as a matter of law, determination of pending question of indemnification on summary judgment is premature when the "underlying suits" are still ongoing, even if there is an interlocutory finding of no duty to defend).

Plaintiffs properly moved to dismiss Count III for breach of contract for Zurich's refusal to indemnify Plaintiffs for the Eddystone Litigation after Plaintiffs had exhausted the Zurich Policy limits and the excess insurance layers were triggered, so that Plaintiffs could appeal the Superior Court's finding on advancement of defense costs. A1289-90. At end, regardless of what the Superior Court intended to do in its prior orders, the Superior Court itself decided that entry of final judgment in May 2023 was proper. Respectfully, this Court should not second-guess that determination.

CONCLUSION

Plaintiffs respectfully request that this Court (a) reverse the Superior Court's order granting Zurich's motion for summary judgment and denying Plaintiffs' motion for partial summary judgment, and remand to the Superior Court with an instruction that it enter judgment in favor of Plaintiff and against Zurich on Count I of the Coverage Complaint, and (b) affirm the Superior Court's May 9, 2023, order granting Plaintiffs' Motion to Dismiss and entering judgment.

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