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Case Number 21,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HERTZ GLOBAL HOLDINGS, INC.,	)	
	)	
Appellant,	)	
	)	C.A. No. 21, 2024
v.	)	
	)	Court Below – Superior Court
	)	of the State of Delaware,
	)	C.A. No. N22C-01-153
ALTERRA AMERICA INSURANCE	)	
COMPANY N/K/A PINNACLE	)	
NATIONAL INSURANCE COMPANY,	)	
	)	
Defendant.	)	

APPELLANT'S OPENING BRIEF

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Dated: March 5, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

NATURE OF THE PROCEEDINGS

Hertz seeks insurance coverage for more than $27 million in fees and expenses incurred to defend two class actions and a related yearslong SEC proceeding against the company and its directors and officers. Coverage exists on two grounds. First, the SEC proceeding was a Claim against Insured Persons—the directors, officers, and employees of Hertz. Second, even if the SEC proceeding is not a Claim, at least a portion of the fees at issue are covered because they were equally attributable to the defense of two class actions that Alterra admitted were both covered and related to the SEC proceeding.

The Superior Court denied Alterra's motion to dismiss. The parties then filed cross-motions for summary judgment. The court granted Alterra's motion and denied Hertz's. *See* Memorandum Opinion and Order dated December 18, 2023 (Trans. ID 71645804), attached as Exhibit A hereto. Hertz timely appealed that summary judgment order to this Court.

Only two documents are necessary to determine there is defense-costs coverage for a Claim against Insured Persons: the policy and the SEC's formal order of investigation. The policy provides that a formal order of investigation is a Claim if it directs an investigation into Insured Persons. And the SEC order on its face directs an investigation into Insured Persons for violations of securities laws.

Alterra has contested this straightforward conclusion on the ground that the order did not direct an investigation into Insured Persons, but the order instead directed only an investigation into Hertz the organization. Alterra argues this is the case because the order does not contain the names of any Insured Person and the order is captioned "In the matter of *Hertz Global Holdings, Inc*."

That argument has no merit. The order directs an investigation into potential violations by natural "persons." Some of the potential violations ordered to be investigated *can only be violated by the directors, officers, or employees* of a corporation; the corporation itself is incapable of violating these rules. And the order specifies numerous times that it is directed at individuals who are Insured Persons.

One simple example illustrates the point. The order directs an investigation into "the . . . principal executive officer or . . . principal financial officer" of Hertz for potential violations of Rule 13a-14, which can only be violated by the CEO or CFO of a corporation. The order on its face thus initiates an investigation into Insured Persons for violations only such persons could commit. The fact that the SEC issued its order captioned under the name of the corporation—its normal practice—does not in any way detract from the order's direct targeting of the directors, officers, and employees of Hertz. Moreover, there is no requirement in the policy that the order specifically identify the name of the Insured Persons subject to investigation.

The Superior Court did not address any of this in its one-paragraph analysis. The court instead explained that the order "fail[ed] to establish an *actual* Claim against an Insured Person" because "there is nothing in the record evidencing that the SEC ever served any subpoena or other written request for documents or information on any Insured Person." The policy's text forecloses this reasoning. The policy requires only the entry of a formal order, not that a subpoena or other document be served on Insured Persons under that order. That is because the policy defines a "Claim" to be made "after the service of a subpoena, *entry* of a formal order of investigation, or Wells Notice . . . ." The service of a subpoena is itself a "Claim" just like the entry of a formal order is a "Claim" by itself.

The Court should also reverse because at least a portion of the defense costs are attributable to the defense of admittedly covered and related claims. Hertz defended itself and its directors and officers against a sprawling SEC proceeding and class actions that alleged the same wrongful acts relating to the same financial statements. The defense of these claims was coordinated and overlapping. Delaware law provides that when defense costs are attributable to a covered claim, the insurer cannot avoid covering those costs just because the costs were also relevant to uncovered matters. The Superior Court held otherwise when it accepted Alterra's theory that the word "solely" in the definition of Defense Costs negates coverage

anytime there is a common defense of a covered and uncovered matter. This holding also conflicts with the allocation provision in the policy.

Even if the SEC order is not a Claim, Alterra owes Hertz any defense costs that would have solely resulted from the admittedly covered class actions in absence of the SEC proceeding. This creates a fact question about what defense costs at issue here would have been spent defending the admittedly covered class actions if the SEC proceeding had never happened. This Court should reverse and remand for determination of that fact question to protect the coverage that Hertz sought and bought for covered claims even if the SEC proceeding is not a Claim.

SUMMARY OF THE ARGUMENT

1. The Court should reverse the summary judgment ruling because the SEC proceeding was a Claim against Hertz's directors and officers and thus triggered a duty for Alterra to reimburse Hertz for expenses incurred to defend these Insured Persons.

(a). To begin, under Alterra's policy, the SEC proceeding is a "Claim" against an "Insured Person" if the SEC entered a "formal order of investigation" that directed an investigation of an Insured Person. A105–06, §§ 1(B)(ii), 2(b)(6)(ii). The SEC did precisely that. A189. The SEC entered a formal order of investigation that "order[ed]" an "investigation be made to determine whether any *persons* or entities have engaged in . . . any of the" violations of statutes and rules referenced in the order. A192 (emphasis added and all-caps removed). The order unmistakably directed a formal investigation "be made" against Hertz's directors and senior officers—Insured Persons under the policy. The order targeted Hertz directors and officers eight separate times, asserting that the SEC "has information that tends to show" that Hertz "officers, directors, [or] employees" potentially violated federal securities statutes and rules. A189–92, § II.B-H, M.

(b). An example proves the point. The SEC ordered an investigation "be made" into a potential violation of Rule 13a-14. A191; 17 C.F.R. § 240.13a–14. That rule provides that the Chief Executive Officer and Chief Financial Officer of

an issuing corporation must personally certify that—to their knowledge—10-K disclosures contain no misstatements or omissions. 17 C.F.R. § 240.13a–14. Hertz the organization *cannot* violate Rule 13a-14. An order directing that an investigation be made into a violation of Rule 13a-14 *necessarily* means that an investigation is to be made into Hertz's now-former CEO and CFO, Insured Persons under the policy.

(c). The policy defines the "entry" of a formal order to be a "Claim" by itself. The Superior Court thus erred in requiring that a subpoena or other document be served on an Insured Person in addition to the entry of the order. A106, § 2(b)(6). The relevant subsection makes clear that an "investigation by the SEC" becomes a "Claim" upon any of three events: "the service of a subpoena, entry of a formal order of investigation, or Wells Notice." *Id.* The service of a subpoena and the entry of a formal order are each "Claims" independently from one another. And, in any event, reliance on post-order facts is irrelevant to the determination of whether the order triggered defense costs obligations. The defense-costs determination must be made based on facts available at the outset of the case, so the issue is whether the contents of the order "fall within the scope of coverage," construed "broadly in favor of the policyholder." *Legion Partners Asset Mgmt., LLC v. Underwriters at Lloyds London*, 2020 WL 5757341, at *6 (Del. Super. Ct. Sept. 25, 2020) (cleaned up).

(d). Contrary to Alterra's position, is not necessary for the order to contain the specific names of Insured Persons, and the consequences of a contrary rule would

be substantial for the State. If there is only coverage for directors and officers targeted by a formal order of investigation when the order specifically names those officers, there will almost never be insurance coverage for directors and officers being investigated under a formal order of investigation. Alterra's cramped reading of the SEC's order and the policy threatens the availability of that coverage—and in turn, a key tool in the recruitment and retention of talented corporate directors and officers.

2. The Superior Court incorrectly ruled that *no portion* of the Defense Costs sought in this action can be covered. This violates Delaware's larger settlement rule and contravenes the policy's text. The fees incurred to defend against the SEC proceeding were necessary to the defense of two indisputably related *and* covered class actions regarding the same issues, coverage should extend to those expenses as well.

(a). Delaware's larger settlement rule provides that when there is a covered and related uncovered matter, an insurer must fully pay the covered matter except to the extent that the cost was increased by the uncovered matter. *See RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 908 (Del. 2021); *Clover Health Invs. Corp. v. Berkley Ins. Co.*, 2023 WL 1978227, at *12 (Del. Super. Ct. Feb. 6, 2023). Alterra argued and the Superior Court held that Hertz is not entitled to coverage for any of the fees if the fees did not "result[] *solely* from the investigation, adjustment, defense and/or

appeal of a Claim against an Insured." Ex. A at 26 (quoting policy). This ruling endangers the larger settlement rule and Delaware law's focus on "protect[ing] the economic expectations of the insured." *Clover Health*, 2023 WL 1978227, at *10 (internal quotation marks omitted); *see also Murdock*, 248 A.3d at 906. "Solely" should rather be understood in the broader context of the policy and reasonable expectations to mean what the larger settlement rule holds: Hertz is entitled to full coverage for any covered claim. And if an uncovered matter increased the costs to defend a covered claim, Alterra does not have to reimburse Hertz for that increase because that increase did not result "solely" from a covered claim. *See Murdock*, 248 A.3d at 908–09. That means there is an unresolved fact question about the amount of defense costs that would have solely been spent on the covered claims if the SEC proceeding had never occurred. That amount "solely" resulted from covered claims, and Hertz bought insurance coverage for that amount.

(b). The Superior Court's holding that defense costs must "solely" result from a covered claim also renders part of the policy illusory or in conflict. The policy contains an allocation provision for defense costs in Section 8, which would be useless if the insurer can deny coverage anytime defense costs are spent in a situation that the cost arises out of both covered and uncovered matters.

STATEMENT OF FACTS

Hertz purchased a $200 million tower of directors and officers liability insurance for the period between November 16, 2013 and November 16, 2014. A96. The primary layer of this tower was issued by National Union. *Id.* U.S. Specialty issued the first-excess policy, and Alterra American issued the second-excess layer that is the subject of this action. *Id.* The excess policies adopt and incorporate the terms of the primary policy.

During the policy period, Hertz and its executives faced extraordinary legal problems related to allegations about the company's financial statements that led to Hertz issuing restatements for multiple years. *See, e.g.*, A195–98. Those allegations resulted in securities class actions and a sweeping SEC inquiry, and Hertz ultimately spent over $27 million defending itself and its directors and officers. *See* A200. Hertz filed this action to recover those fees and expenses.

A. The SEC launched a formal proceeding against Hertz's directors and officers.

On June 11, 2014, the SEC informed Hertz by letter that it was "conducting an inquiry . . . to determine whether there have been any violations of any federal securities laws." A179. This initial letter required substantial cooperation by Hertz and its directors, officers, and employees. The SEC demanded a "chronology" for Hertz's financial statements from 2011-2013, and that "chronology" needed to include: 1) "the nature, scope, and duration of . . . errors" in those statements; 2) how

and "by whom" those errors were discovered; 3) how and when the errors "were reported to or otherwise became known to senior management [and] the audit committee of Hertz's board of directors"; 4) the board of directors and senior management's "understandings . . . regarding the cause, scope and materiality of" the errors and any "assessments made by such persons concerning whether to revise or restate any of Hertz's financial statements" regarding the need "to declare that any such financial statements should no longer be relied on"; and whether they understood "any material weaknesses [to] exist[] in Hertz's internal controls." *Id.*

In addition to the demand for significant information about the mental state and conduct of Hertz's directors and officers, the letter also ordered that a mountain of documents with any relevance to years of financial statements be preserved under the threat of "civil and criminal liability." A179–86. The letter acknowledges that these documents may be in the possession of "employees or custodians," extending the threat of civil and criminal liability to Hertz's directors and officers. A479.

The SEC's inquiry did not end there. On September 8, 2014, the SEC, believing that "it appear[ed] there may be violation[s]" of securities law, 17 C.F.R. § 202.5(a), issued a formal order that made several specific allegations and empowered the agency to use its authority to investigate the alleged wrongdoing. The order specifically alleged that the SEC "has information that tends to show" that Hertz and its directors and officers potentially violated statutes including Section

17(a) of the Securities Act of 1933 and Sections 10(b), 13(a), 13(b)(2)(A), 13(b)(2)(B), 13(B)(5), 14(a), and 14(e) of the Securities Exchange Act of 1934. A189–92. And the order alleged that there were potential violations of SEC Rules 10b-5, 12b-20, 13a-1, 13a-13, 12a-14, 13a-15, 13b2-1, 13b2-2(a), 13b2-2(b), and 14a-9. *Id.*

The order did not equivocate about the action it required: "a private investigation [is] to be made to determine whether any persons or entities have engaged in, or are about to engage in, any of the reported acts or practices or any acts or practices of similar purport or object." A192. And it authorized individuals at the SEC to "administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records deemed relevant or material to the inquiry." A193.

The order made no secret that the SEC was investigating Hertz's directors and officers. It targeted those Insured Persons eight separate times, asserting that the SEC "has information that tends to show" that Hertz's "officers, directors, [and] employees" potentially violated federal securities statutes and rules. A189–92, § II.B-H, M. And the order specifically identified Hertz's "principal executive officer . . . and principal financial officer" as having potentially violated securities law in two instances. A191, § II.I-J.

This Court does not need to wade into each of the nearly twenty securities-law violations alleged; there are three allegations in the order that are particularly relevant: the violations of Rules 13a-14, 13b2-2(a) and 13b2-1. None of these rules could be violated by Hertz the organization. Rather, these three rules could only be violated by Hertz's directors and officers.

For example, the allegation of a violation of Rule 13a-14 is necessarily directed at the former Chief Executive Officer and Chief Financial Officer of Hertz. Rule 13a-14 requires those officers to individually certify that, to their personal knowledge, Hertz's 10-K disclosures contain no errors, omissions, or misleading statements. *See* 17 C.F.R. § 240.13a–14. The SEC directed this allegation specifically at these two officers:

> [T]he respective principal executive officer . . . and principal financial officers . . . of Hertz . . . may have falsely signed . . . personal certifications under Rule 13a-14 . . . indicating . . . that they reviewed [the] . . . periodic reports filed with the Commission and that, based on their knowledge, these reports did not contain any untrue statement of material fact or omit to state a material fact necessary to make the statements made . . . not misleading . . . .

A191, § II.I.

Likewise with violations of 13b2-2(a) and 13b2-1. The latter regulation provides that "[n]o person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to 13(b)(2)(A) of the Securities Exchange Act." 17 C.F.R. § 240.13b2–1. The text of the order also acknowledges that this rule was

potentially violated by "officers, directors, [or] employees." A190, § II.G. And 13b2-2(a) with greater specificity provides that "[n]o *director* or *officer* of an issuer shall, directly or indirectly" make or cause to be made false or misleading statements or omissions in connection with "any document or report" filed with the SEC or the "review or examination of financial statements." 17 C.F.R. § 240.13b2–2 (emphasis added). The order similarly acknowledges that its allegation of potentially violating that rule and the related investigation of the same is directed at "officers and/or directors of Hertz." A191–92, § II.K–L.

After a yearslong proceeding, Hertz consented to another SEC order that required Hertz to pay a $16 million penalty on December 31, 2018. A278. Hertz collectively paid in excess of $27 million in defense fees for the coordinated defense of the corporation, its directors, and its officers against the SEC proceeding and the associated class actions that dealt with the same issues in Hertz's financial statements.

B. Alterra promised to pay Hertz's defense costs for Claims against Insured Persons (i.e., directors and officers).

Hertz purchased a $200 million D&O insurance tower for precisely this situation. Alterra's policy "provide[s] the Insureds with insurance in accordance with terms, conditions, and exclusions set forth in the" National Union policy. A171. The policy provides coverage for both Hertz the organization and Insured Persons. A104. The coverage includes Indemnifiable Loss Coverage that covers

"the Loss of [Hertz] arising from a Claim made against an Insured Person . . . for any Wrongful Act, but only to the extent that [Hertz] has indemnified such Insured Person." *Id.*

As relevant here, a "Claim" includes:

> (1) a written demand for monetary, non-monetary, or injunctive relief;
>
> * * *
>
> (6) a civil, criminal, or administrative or regulatory investigation (including, but not limited to, an SEC, DOJ, state attorney general, Equal Employment Opportunity Commission ("EEOC"), grand jury investigation or any self-regulatory organization) of an Insured Person:
>
> * * *
>
> (ii) in the case of an investigation by the SEC or a similar federal, state, or foreign government authority, after the service of a subpoena, entry of formal order of investigation, or Wells Notice or with regard to a foreign proceeding, any foreign equivalent document, upon such Insured Person; or
>
> * * *

A105–06, § 2(b).

A "Claim" must be for a "Wrongful Act" under the policy, and "Wrongful Acts" include:

> (1) any actual or alleged breach of duty, neglect, error, statement, misstatement, misleading statement, omission, or act of any actual or alleged Employment Practices Violation:
>
> (i) with respect to any Executive of an Organization, committed or attempted or

> allegedly committed or attempted by such Executive in his or her capacity as such or any matter claimed against such Executive solely by reason of his or her status as such; or
>
> (ii) with respect to any Employee of an Organization, committed or attempted or allegedly committed or attempted by such Employee in his or her capacity as such, but solely with respect to any: (a) Securities Claim; or (b) other Claim so long as such Claim is also maintained against an Executive of an Organization.

A117, § 2(dd); A108, § 2(i)(5).

An "Insured Person" includes "any Executive of [Hertz]." A111, § 2(q). And the policy defines "Executive" to include "past, present and future duly elected or appointed director, officer, trustee or governor, management committee member, member of management board, supervisory board, advisory board or any other executive committee of a corporation." A109, § 2(j). For example, the former CEO and CFO of Hertz are "Insured Persons." Employees of Hertz are also Insured Persons. A111, § 2(q).

In sum, coverage exists when there is a Claim against an Insured Person for a Wrongful Act, and that coverage includes Defense Costs. *Id.* § 2(s). Defense Costs are "reasonable fees . . . , costs and expenses consented to by the Insurer such consent not to be unreasonably withheld, . . . resulting solely from the investigation, adjustment, defense and/or appeal of a Claim against an Insured. . . ." A107, § 2(e).

Section 8 of the policy also provides for allocation of non-securities-claim Defense Costs "jointly incurred by . . . any Organization and any Insured Person in connection with any Claim other than a Securities Claim, any such Organization and any such Insured Person and the Insurer agree to use their best efforts to determine fair and proper allocation of the amounts" of Defense Costs between the Insurer, Organization, and the Insured Person. A126.

C. Alterra denied coverage and refused to pay Hertz's defense costs.

Hertz notified its insurers of both the class actions and the SEC proceeding. A175. The insurers informed Hertz that the first class action, known as the *Ramirez* litigation, was covered under its insurance tower. A433; A482. And the second class action, known as the *Ansfield* litigation, was also tendered to the insurers in 2014. A484–86. When noticing the SEC proceeding, Hertz explained that it related "to the same facts/circumstances addressed in the *Ramirez* and *Ansfield* lawsuits . . . (i.e., alleged errors in Hertz's previously filed consolidated financial statements for 2011, 2012, and/or 2013)." A491. The primary carrier acknowledged coverage for the Ansfield Claim but denied coverage for the SEC proceeding. A196.

Alterra finally formally denied coverage for the SEC proceeding by letter on February 4, 2019. A501–04. This denial made a critical admission: the SEC proceeding against Hertz and its directors and officers was related to the *Ansfield* and *Ramirez* litigation because the proceeding "arises out of, is based upon,

attributable to and relates, in part and/or in whole, to facts, circumstances, acts and omissions" at issue in the *Ramirez* and *Ansfield* cases. A503; *see also* A439–79. Alterra denied coverage on this basis and cited an exclusion that purported to exclude all claims related to *Ramirez* and *Ansfield* – but that exclusion could of course not exist in the policy at issue here, which was issued before those claims existed. Alterra reiterated this inapplicable rationale for denial of coverage in its next letter on February 9, 2019. A507. And this rationale was again reiterated in the final, formal denial of coverage for the defense costs on October 18, 2021. A200 (explaining the denial "incorporate[s] by reference" the earlier letter denying on the basis the proceeding was related to the *Ansfield* and *Ramirez* claims). So, Alterra admitted—three separate times—that the SEC proceeding is related to the *Ansfield* and *Ramirez* class actions, which no one has disputed are covered under the policy.

D. The Superior Court's order.

The Superior Court granted Alterra's motion for summary judgment. *See* Ex. A. First, the court held that Hertz was precluded by earlier litigation from arguing that it is entitled to organizational insurance because the SEC proceeding was a Securities Claim. *Id*. at 2, 20.[1] Second, it held that the SEC proceeding was not a Claim against Insured Persons because the "target of the [initial] SEC Letter was Hertz," *id.* at 22–23, and because the SEC order represented a "mere potentiality of

[1] Hertz does not challenge this holding.

an investigation or claim targeting an Insured Person," as "there is nothing in the record evidencing that the SEC ever served any subpoena or other written request for documents" to an Insured Person, *id.* at 25. Third, the court held that there was no coverage for any of the fees arising from the covered *Ramirez* and *Ansfield* class actions because the policy precludes coverage unless "th[e] costs . . . resulted solely from the investigation, adjustment, defense and/or appeal" of those actions. *Id.* at 27.

ARGUMENT

I. THE SUPERIOR COURT ERRED BY RULING THAT THE SEC MATTER WAS NOT A CLAIM AGAINST INSURED PERSONS.

A. Question Presented.

Did the Superior Court err by ruling that the SEC proceeding was not a Claim against Insured Persons? A85–93; Ex. A at 22–25.

B. Standard of Review.

A court's summary judgment decision interpreting a contract is reviewed *de novo*. *City of Newark v. Donald M. Durkin Contracting, Inc.*, 305 A.3d 674, 679 (Del. 2023).

C. Merits of Argument.

Delaware has well-established rules for interpreting insurance contracts that are relevant to both questions presented. Insurance contracts are interpreted according to their plain meaning when that meaning is "clear and unequivocal." *Monzo v. Nationwide Prop. & Cas. Ins. Co.*, 249 A.3d 106, 118 (Del. 2021) (internal quotation marks omitted). That interpretation "should" account for an understanding of "broad coverage to align with the insured's reasonable expectations." *Murdock*, 248 A.3d at 906. This is particularly true of "the duty to pay defense costs," which "should be construed broadly . . . in favor of coverage whenever factual allegations raise the possibility of liability covered by the policy." *Conduent State Healthcare, LLC v. AIG Specialty Ins. Co.*, 2019 WL 2612829, at *6 (Del. Super. Ct. June 24,

2019). To that end, "exclusionary clauses" are given a "strict and narrow construction," and such clauses only exclude coverage if they are "specific, clear, plain, conspicuous, and not contrary to public policy." *Murdock*, 248 A.3d at 906 (cleaned up). In a situation where "there is more than one reasonable interpretation of an insurance policy, Delaware courts apply the interpretation that favors coverage." *Monzo*, 249 A.3d at 118. And "conceivably conflicting terms, which cannot be indisputably reconciled on the face of the contract," render a contractual ambiguity. *See Sunline Com. Carriers, Inc. v. CITGO Petro. Corp.*, 206 A.3d 836, 839–40 (Del. 2019).

1. <u>The SEC's formal order of investigation unmistakably directed an investigation into Insured Persons, so it is a Claim under the policy.</u>

This Court should reverse the summary judgment granted to Alterra because the SEC order is a Claim against Insured Persons for a Wrongful Act. This is the only proper conclusion because: (1) The SEC's order was a "formal order of investigation" and therefore a Claim under the policy's plain language; (2) that order directed an investigation of an Insured Person (*i.e.*, Hertz directors and officers); and (3) the investigation was for a Wrongful Act (*i.e.*, numerous violations of federal securities laws). A106, § 2(b)(6).

a. The SEC's formal order of investigation is a Claim.

The SEC's order is a formal order of investigation. This is not in dispute. Alterra explained below that the "SEC Investigation Order" was "a formal order of investigation." A252. Alterra only disputed that the order directed an investigation into Insured Persons, arguing that it only directed an investigation of the "company." *Id.* An SEC investigation into Insured Persons is a "Claim" under the policy after "entry of a formal order of investigation." A106, § 2(b)(6).

b. The SEC ordered an investigation of Insured Persons (i.e., Hertz directors and officers).

To begin, there is no question that Hertz's former CEO and CFO, along with other executives, employees, directors, and officers, are Insured Persons under the policy. "Insured Person" includes "any Executive" of Hertz. A111, § 2(q). And an "Executive" includes any "past, present and future . . . officer" of Hertz. A109, § 2(j). The former CEO, CFO, and directors of Hertz are clearly "Insured Persons" under the policy, and Alterra does not contest this fact.

The order directed an investigation of Insured Persons. This is true for two reasons. First, the text of the order plainly shows that an investigation was ordered into all the potential violations of statutes and rules cited in the order, including violations by persons. Second, the text confirms that some of the alleged securities-law violations could only be committed by Hertz's senior executives or directors, and the order directs those allegations at those individuals.

The SEC ordered an investigation into natural persons.

In its order, the SEC specifically ordered "a private investigation be made to determine whether any *persons* or entities have engaged in, or are about to engage in, any of the reported acts or practices" alleged in the order. A192 (emphasis added); *see Nat'l Stock Exch. v. Fed. Ins. Co.*, 2007 WL 1030293, at *4 (N.D. Ill. Mar. 30, 2007) (explaining that a formal order of investigation that named a company only was still directed against insured persons because it directed an investigation "to determine whether [the company] 'or any other persons' [had] engaged in the alleged securities violations").[2] The "reported acts or practices" are listed in paragraphs A through N in section II of the order, and each of those paragraphs has as its subject a rule or statute that the SEC alleges the acts or practices violate. A189–92. A basic reading of the order thus makes clear that the SEC ordered that an investigation take place into whether "any persons" engaged in the alleged activity that violated the statutes or rules cited in the order.

[2] The text of the order encompasses both "entities" and "persons." In such context, "persons" plainly means *natural* persons because otherwise there would be no need for the word, as entities naturally includes artificial persons such as corporations. *See Entity*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An organization (such as a business or governmental unit) that has a legal identity apart from its members or owners.").

The SEC order was directed at Hertz directors and officers.

The investigation of some of the potential rule violations was an investigation of Hertz's directors and officers, as the text of the order makes clear. It targeted these individuals eight separate times, asserting that the SEC "has information that tends to show" that Hertz "officers, directors, employees" potentially violated federal securities statutes and rules. *Id.*, § II.B-M.[3] And the order specifically identified Hertz's "principal executive officer . . . and principal financial officer" as having potentially violated securities law in two specific instances: paragraphs I and J. A191, § II.I-J.

But that is not all. The alleged violations in the SEC order necessarily required an investigation of Hertz's directors and officers. The clearest such example is Rule 13a-14, invoked in Paragraph I of the order. 17 C.F.R. § 240.13a–14. That rule could only have been violated by Hertz's former CEO or CFO. In other words, it is not possible for Hertz the corporation to violate the rule, and any investigation of a violation of that rule was an investigation of Hertz's former CEO and/or CFO.

[3] The order mentions "officers, directors, [and] employees" or the "principal executive officer . . . and principal financial officer" in reference to the alleged potential violations of section 17(a) of the Securities Act, sections 10(b), 14(a), 13(a), 13(b)(2)(A), 13(b)(2)(B), 13(b)(5), and 14(e) of the Exchange Act, and rules 10b-5, 14a-9, 12b-20, 13a-1, 13a-11, 13a-13, 13b2-1, 13a-14, 13a-15, 13b2-2(a), and 13b2-2(b). A189–92.

The reason for this is straightforward. This rule requires that the CEO and CFO of a corporation sign a certification of the accuracy of financial statements filed with the SEC, like a 10-K. *Id.* And the rule imposes a certification obligation on the CEO and CFO as *individuals*. Many authorities prove what a quick read of the regulation makes plain: the regulation can only be violated by the CEO or CFO. *See SEC v. Jensen*, 835 F.3d 1100, 1112–13 (9th Cir. 2016) (explaining the rule and that it creates a cause of action against the CEO and CFO); *SEC v. Das*, 723 F.3d 943, 952 (8th Cir. 2013) (explaining that "[t]he requirement of [Rule 13a-14] that the principal executive and principal financial officer certify a Form 10-K quite clearly imposes a requirement on those *individuals*" (emphasis added and internal quotations omitted)); *cf. SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 773 (5th Cir. 2017) (explaining that in an action brought against a company and its officers, the SEC brought a claim of violating Rule 13a-14 "as to [the officer] only" and *not* against the company); *see also SEC v. Johnston*, 986 F.3d 63, 76 n.8 (1st Cir. 2021) (affirming a jury verdict on a Rule 13a-14 cause of action against a CFO).

In short, a "possible violation of Rule 13a-14" can only be a violation of law committed by the CEO or CFO as individuals. A191, § II.I. And, of course, the face of the SEC's order acknowledges this by directing the allegation at those two individuals: the "principal executive officer . . . and principal financial officer . . . of Hertz . . . at the time of filing their respective Form 10-K or Form 10-Q, may have

falsely signed . . . certifications under Rule 13a-14." *Id.* This potential violation was one of the "acts or practices" of "any person" that the SEC ordered an "investigation be made" to determine if violations had occurred. A192.

At least two other rules mandate the same result. Rule 13b2-1 provides that "[n]o *person* shall directly or indirectly falsify or cause to be falsified, any book, record or account subject to 13(b)(2)(A) of the Securities Exchange Act." 17 C.F.R. § 240.13b2–1. The SEC ordered an investigation "be made" into whether any "persons" violated this rule. *Id.* In describing the acts to be investigated, the SEC again directed its charge at Insured Persons: "[i]n possible violation of Rule 13b2-1 . . ., *officers, directors, employees* or partners of [Hertz] . . . may have been or may be" committing acts that violate Rule 13b2-1. A190–91, § II.G.[4] This is of course the case because an investigation of potential violations of 13b2-1 is an investigation into *individuals* and not the corporation. *Cf., e.g., SEC v. Monterosso*, 746 F. Supp. 2d 1253, 1257 (S.D. Fla. 2010) (recounting all the allegations of violations of rules and statutes by a corporation and its officers and noting that the SEC only brought a claim of violations of 13b2-1 and 13b2-2 against the individuals).

[4] "Insured Person" also includes "Employee," which the policy defines as "any past, present or future employee, other than an Executive of [Hertz], whether such employee is in a supervisory, co-worker or subordinate position or otherwise . . . ." A107–11, § 2(f), 2(q).

The same is true with Rule 13b2-2. *Cf., e.g., id.* That rule provides that "[n]o *director* or *officer* of an issuer shall, directly or indirectly" make or cause to be made false or misleading statements or omissions in financial statements. 17 C.F.R. § 240.13b2–2 (emphasis added). And because that rule could only be violated by Insured Persons—the directors and officers of Hertz—the SEC's order reflects that in its allegation: "[i]n possible violation of Rule 13b2-2(a) . . . officers and/or directors of Hertz . . . may have made or caused to be made" statements or omissions that would violate the rule. A191–92, § II.K–L.

The policy and order are clear, but if there is any doubt, "the duty to pay defense costs should be construed broadly, and in favor of coverage whenever factual allegations raise the possibility of liability covered by the policy." *Conduent*, 2019 WL 2612829, at *6. And any interpretation of the policy "should" account for an understanding of "broad coverage to align with the insured's reasonable expectations." *Murdock*, 248 A.3d at 906. Indeed, it speaks for itself that an insured would reasonably understand and expect coverage for defense costs promised under the insurance policy for an "investigation . . . of an Insured Person" when there has been an "entry of a formal order of investigation" that directs an investigation into rules that could only be violated by an "Insured Person." A106, § 2(b)(6).

Because Hertz's former CEO, CFO, and directors are "Insured Persons," the SEC's order that directed an investigation into violations that could only be

committed by such Insured Persons was a formal order of investigation that directed an investigation of Insured Persons. It is therefore a "Claim" under the plain terms of the policy. *Id.*

c. The SEC Order alleged "Wrongful Act[s]," thus triggering coverage.

The SEC's alleged rule violations by Insured Persons were for Wrongful Acts. "Wrongful Acts" include "any actual or alleged" statements, misstatements, or omissions by an Executive or Employee. A117, § 2(dd); *see also* A108, § 2(i)(5). Such conduct is directly at issue in the investigations of potential violations of Rules 13b2-2, 13b2-1, and 13a-14.

In the Superior Court, Alterra disputed whether the "Wrongful Acts" requirement was met as to the organizational Securities Claim that the Superior Court ruled was precluded, but Alterra did not dispute that the Claim was for a Wrongful Act if the SEC order or letter was a Claim against Insured Persons. *Compare* A91–93 (Hertz arguing that the order and letter were Claims against Insured Persons for Wrongful Acts), *with* A245–46 (Alterra arguing regarding the Securities Claim/organization issue without mentioning Insured Persons), *and* A246–53 (Alterra failing to mention Wrongful Acts in discussing Insured Persons). So, the argument was arguably forfeited by Alterra.

Regardless, Delaware law resolves the issue in Hertz's favor. Under Delaware law it is not a convincing argument that "investigating an alleged unlawful

act by the insured . . . is different from actually alleging an unlawful act." *Conduent*, 2019 WL 2612829, at *5. And Delaware courts have observed for the purposes of coverage, the difference between investigating an unlawful act and alleging one "is a distinction without a difference." *Id.*; *Guaranteed Rate, Inc. v. ACE Am. Ins. Co.*, 2021 WL 3662269, at *2 (Del. Super. Ct. Aug. 18, 2021). As already explained, the SEC ordered an investigation into Insured Persons for potential violations of law, which are Wrongful Acts under the policy.[5] Under Delaware law, that is enough.

2. The Superior Court's no-coverage ruling was wrong, as were Alterra's arguments presented in the Superior Court.

The Superior Court held that the SEC's order is not a Claim against Insured Persons because, under the order, "the SEC [never] served any subpoena or other written request for documents or information on any Insured Person." Ex. A at 25. In other words, the formal order of investigation cannot itself constitute a Claim; the

[5] Alterra's reading of what constitutes an allegation is in significant tension with the policy's overall structure. *See O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 287 (Del. 2001) (explaining that "a court's interpretation of an insurance contract must rely on a reading of all of the pertinent provisions of the policy as a whole, and not on any single passage in isolation"). The policy provides coverage for formal orders of *investigation*. The SEC is authorized to enter such orders when "it appears there may be violation[s]" of securities laws or rules. *See* 17 C.F.R. § 202.5(a). It is of course an alleged Wrongful Act when the SEC suggests there "may be violations" of securities laws, and that is exactly what the SEC order does. *See also* A191 (explaining the SEC "has information that tends to show that . . . [i]n possible violations of Rule 13a-14 . . . the . . . principal executive officer . . . of Hertz . . . may have falsely signed . . . certifications under Rule 13a-14").

SEC must issue to an Insured Person a subpoena or other documentary request to transform the order into a Claim. This reasoning is wrong.

The Superior Court mistakenly conflated two arguments presented by Hertz. Hertz argued the SEC order was a Claim under two *separate* subsections of the Claim definition. First, Hertz argued that the order was "a written demand or notice for monetary, non-monetary or injunctive relief" under section 2(b)(1) of the policy. A105; A85–86. Second, Hertz argued, and continues to argue here, that the order was a Claim under section 2(b)(2) because it was a "formal order of investigation" that directed an investigation into Insured Persons. A106, § 2(b)(2)(6); A87–91. The Superior Court's rationale might address the first argument, but it has no relevance to the second argument.

The policy does not require subpoenas or other documents to transform a "formal investigative order" into a Claim. The policy defines the "entry of a formal investigative order" to be a Claim by itself. A106, § 2(b)(2)(6). Indeed, Alterra never argued that a formal order of investigation that directed an investigation into Insured Persons would be insufficient to constitute a Claim without additional subpoenas or other documents. *See* A251–53; A532–33. That is because the policy plainly does not require additional documents. Again, the *entry* of a formal order alone is a "Claim" under the policy, and the context confirms this. The relevant subsection explains that an investigation by the SEC becomes a claim upon any of

three events: "after the service of a subpoena, entry of a formal order of investigation, *or* Wells Notice . . . ." A106, § 2(b)(2) (emphasis added). And here the summary judgment record established that the SEC order was directed at Hertz's directors and officers. *Supra*, § I.C.1.b.

Moreover, evidence of post-order documents served on an Insured Person is irrelevant to the determination of whether the order is a Claim. It is irrelevant under the policy because the policy defines the order to be a Claim by itself. It is also irrelevant under Delaware law. The defense costs determination must be made based on the facts available at the outset of the case, so the issue is whether the contents of the order "fall within the scope of coverage," construed "broadly in favor of the policyholder." *Legion Partners*, 2020 WL 5757341, at *6 (cleaned up). Even though such evidence is irrelevant on every conceivable level, there was evidence in the record that "Hertz provided indemnification and/or the advancement of legal fees to" at least twenty-five directors, officers, and employees, and this indemnification included "[the Insured Persons'] legal representation in responding to the SEC's inquiries and providing testimony to the SEC . . . ." A313–14.

Alterra argued that the order "launched a formal investigation into Hertz and did not name any specific [Insured Person] as the target of the investigation." A251. To support this argument Alterra merely pointed to the title of the formal order—In the Matter of *Hertz Global Holdings, Inc.*—and the fact that the order did not

specifically contain the name of any Insured Person. A251–53. This argument lacks merit.

As already explained, a basic reading of an order that both directs an investigation into "persons" for violations of securities laws that include rules that *only Insured Persons could violate* and refers to positions at Hertz, like the CEO or CFO, that could only be held by an Insured Person cannot lead to any other conclusion than the order directed an investigation into Insured Persons. *Cf. Nat'l Stock Exch.*, 2007 WL 1030293, at *4–5 (rejecting an argument that an order did not specifically name Insured Persons and explaining both that "the policy does not require the SEC to name specific individuals" in an order to be against Insured Persons and that a "formal investigative order" that stated it was directing an investigation to determine whether "'any other persons' have engaged in the alleged securities violations" was against Insured Persons).

Alterra's position underscores the paramount importance of this issue for Delaware directors and officers. This Court should firmly reject this "the-order-says-Hertz" argument. A contrary holding would leave Delaware directors and officers without D&O insurance in many cases of extremely invasive, aggressive, and expensive formal investigations by the SEC. It is entirely normal for the SEC to enter a formal order of investigation that names the corporation in the caption but obviously directs an investigation into the corporation's directors and officers, and

the SEC indeed does investigate those officers and directors under such orders—as it did here.

Delaware law has long placed a strong emphasis on protecting the directors and officers of Delaware corporations, which "enhance[s] the ability of Delaware corporations to attract talented people to fill those roles." *See Murdock*, 248 A.3d at 900. This Court should accordingly send a clear message: if a corporation buys coverage for formal orders of investigation against its directors and officers, there will be coverage in Delaware for formal orders of investigation that order an investigation into securities law violations that can only be committed by the corporation's directors and officers. Alterra's cramped reading of the SEC's order and the policy language threatens the availability of that coverage—and in turn, a key tool in the recruitment and retention of talented corporate directors and officers.

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In sum, the SEC order is a Claim against Insured Persons for Wrongful Acts, so the defense costs Hertz paid on behalf of its directors and officers for the defense of the proceeding are covered under Alterra's policy. Summary judgment should have been granted for Hertz on this issue, and Alterra's corresponding motion for summary judgment should have been denied. This Court should reverse the Superior Court's contrary ruling.

II. THE SUPERIOR COURT ERRED BY GRANTING SUMMARY JUDGMENT TO ALTERRA BECAUSE A FACT ISSUE EXISTS UNDER DELAWARE'S LARGER SETTLEMENT RULE.

A. Question Presented.

Did the Superior Court err in granting summary judgment in Alterra's favor because there is a question of fact regarding how much of the more than $27 million in Defense Costs in this action should be allocated to the admittedly covered and related *Ramirez* and *Ansfield* claims under Delaware's larger settlement rule? A424–25; A554–56; Ex. A at 25–27.

B. Standard of Review.

"A trial court's decision on a motion for summary judgment is subject to *de novo*" review, and the same standard applies to whether a genuine dispute of material fact exists to preclude the entry of summary judgment. *AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 443 (Del. 2005).

C. Merits of Argument.

1. The larger settlement rule should apply as a matter of Delaware law, common sense, and the policy's text.

Delaware has adopted the larger settlement rule. *E.g., Murdock*, 248 A.3d at 909 (affirming application of the rule). The express purpose of the rule is to "protect the economic expectations of the insured by preventing deprivation of insurance coverage that was sought and bought." *Clover Health*, 2023 WL 1978227, at *10 (cleaned up). The rule provides that "the insurer pay all the costs associated with a

settlement or defense, without allocating any costs to the uninsured parties or matters if:" (1) the defense resolved in part insured claims, (2) the parties cannot agree as to allocation between the covered and uncovered claims, (3) the policy's allocation provision does not provide a specific method. *Id.* If the defense costs were higher because of the uncovered claim, the rule mandates that allocation is appropriate only to the extent that defense costs "were, by virtue of the wrongful acts of the uninsured parties, higher than they would have been had only the insured parties been defended." *Arch Ins. Co. v. Murdock*, 2020 WL 1865752, at *7 (Del. Super. Ct. Jan 17, 2020), *aff'd* 248 A.3d 887. Each element is met in this case.

First, there was a common defense of the SEC proceeding and the two class actions, *Ramirez* and *Ansfield*, regarding the same alleged wrongful acts. The same documents had to be preserved and reviewed, and the substantive defenses to the alleged wrongful conduct were of course jointly formulated and coordinated. No one contested coverage for the class actions, including Alterra. Indeed, Alterra admitted no less than three times that the SEC proceeding and the class actions related to the same alleged wrongdoing. *Supra* Statement of Facts § C. So, even if Alterra's position concerning coverage for the SEC investigation is correct, the common defense resolved covered and uncovered claims.

Second, the parties cannot agree to an allocation because Alterra has flatly refused to cover any of the fees Hertz argues are common to the covered class actions.

Third, the policy's allocation provision does not provide a method to allocate between the claims. It is undisputed that the two class actions were securities claims, and the policy *does not contain* an allocation provision for a situation where the covered claim is a Securities Claim. Indeed, Securities Claims are expressly carved out of the allocation provision. A126 ("With respect to . . . Defense Costs jointly incurred by . . . [Hertz] and any Insured Person in connection with any Claim *other than a Securities Claim* . . . [the parties] agree to use their best efforts to determine a fair and proper allocation of the amounts" between them. (emphasis added)).

Although directly presented below, the Superior Court did not address the larger settlement rule. A424–25 (raised); A554–56 (raised); Ex. A at 25–27 (not addressed). It instead rejected the possibility that any of the defense costs at issue here could be covered as a part of the common class action defense. It explained that because the policy defined Defense Costs as "reasonable fees . . . resulting *solely* from the investigation, adjustment, defense and/or appeal of a Claim against Insured," the Defense Costs for the SEC proceeding would have to "solely" result from the *Ramirez* or *Ansfield* class actions. Ex. A at 26–27. The result of the

Superior Court's interpretation and apparent refusal to apply the larger settlement rule is untenable and negates the larger settlement rule.

Reviewing the history here is instructive. In 2014, Hertz received multiple class action complaints and concerning communications from the SEC, all of which relate to the same financial statements and conduct. These matters required Hertz to preserve huge amounts of information relevant to the same series of financial statements and retain lawyers to review those documents and defend against the allegations that Hertz and its directors and officers committed misconduct. Hertz learned from its insurance companies that the class action defense would be covered, but the insurers denied coverage for the SEC proceeding.

Under the Superior Court's reasoning, Hertz and its directors and officers should have retained two sets of lawyers. One set to preserve documents, review those documents, and defend the class actions, and another set to do the same with the SEC proceeding. If there was only one set of lawyers, Hertz would constantly be at risk of denials by the insurance companies based on the theory that some of the bills were not "solely" resulting from the class actions.

That makes no sense. The common-sense result should be that Hertz and its directors and officers have a coordinated, efficient approach to their defense of the class actions and the SEC proceeding. That is what happened, and that rational course of conduct is what Delaware law protects with the larger settlement rule. *See*

Clover Health, 2023 WL 1978227, at *10 (explaining the purpose of the rule is to "protect the economic expectations of the insured by preventing deprivation of insurance coverage that was sought and bought"); *cf. also High Point Design, LLC v. LM Ins. Co.*, 2016 WL 426594, at *3–4 (S.D.N.Y. 2016) (explaining that the "better-reasoned case law" in a situation involving the common defense of a covered and uncovered defendant results in any defense costs that "redounded to the benefit of both" the covered and uncovered defendants "are entirely recoverable" but if the fees were increased by the uncovered defendant, the insurer did not have to pay that amount if it could prove the increase). This Court should protect the application of the larger settlement rule and refuse to read an expansive exclusion into the definition of Defense Costs on the basis of the word "solely."

This Court has explained that exclusionary language should be construed narrowly and has no effect when it is "contrary to public policy." *Murdock*, 248 A.3d at 906 (internal quotation marks omitted). An expansive reading of "solely" in the definition of Defense Costs would frustrate the expectations of insureds and invite unjustified denials of D&O coverage. Insureds "have an economic expectation" of coverage when there is Loss that constitutes a Claim, but the expansive reading of "solely" would lead to denials in many such scenarios. *See Arch Ins.*, 2020 WL 1865752, at *8, *aff'd* 248 A.3d 887. In the situation laid out above, the insurer could always deny any bill submitted in the class action defenses

on the basis that it did not "solely" result from the class action. Likewise in every situation where there are two closely related claims, one with coverage and one without. This frustration of the expectations of insureds is against the public policy of Delaware and contravenes how this Court has instructed Delaware courts to interpret insurance policies. *Murdock*, 248 A.3d at 906 (explaining insurance policies should be interpreted in the light of reasonable expectations of the insured).[6]

And this commonsense position is not at odds with "solely." Hertz's position is that, even if the SEC proceeding is not covered, Alterra owes Hertz for the full amount of Defense Costs that "solely" resulted from the admittedly covered class actions, consistent with the larger settlement rule. The proper way to determine this amount is to calculate how much Hertz would have spent defending the class actions assuming the SEC proceeding had never happened. The amount resulting from that calculation would "solely" arise from covered Claims, and Hertz plainly purchased insurance coverage for those amounts. *Cf. Murdock*, 248 A.3d at 908. Alterra and the Superior Court's rationale cannot be squared with that commonsense result

[6] Delaware decisions understand the defense costs obligation broadly in a way contrary to the Superior Court's reasoning. Delaware courts have explained that Defense Costs include "all expenses reasonably necessary to conduct the defense . . . whether or not they have an ancillary benefit to the insured." *Northrup Grumman Innovation Sys., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 347015, at *12 (Del. Super. Ct. Feb. 2, 2021). Such a broad conception of defense costs has been held to include pre-claim investigatory expenses that benefit the insured and "may have been incurred during discovery anyway." *Id.*; *see also Legion Partners*, 2020 WL 5757341, at *11.

required by the policy and Delaware law. This Court should hold that the larger settlement rule applies and reverse.

2. Alterra's interpretation conflicts with other provisions in the policy and should be rejected on that ground too.

This Court should also reverse because the expansive reading of "solely" would either render part of the policy illusory or two provisions of the policy to be in conflict. Either result demands reversal. Rendering a portion of a contract illusory violates a cardinal rule of contract interpretation in Delaware: that a contract must be read to give every clause effect. *O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 287 (Del. 2001). And when a contract's terms create a conflict, the contract is ambiguous, which, in the insurance context, means that the court should adopt the meaning resulting in coverage. *See, e.g.*, *Monzo*, 249 A.3d at 118.

As already mentioned, the policy has an allocation clause. It provides:

> Defense Costs jointly incurred by . . . [Hertz] and any Insured Person in connection with any Claim other than a Securities Claim, [Hertz] and any such Insured Person and the Insurer agree to use their best efforts to determine a fair and proper allocation of the amounts as between [Hertz], any such Insured Person and the Insurer, taking into account the relative legal and financial exposures, and the relative benefits obtained by any such Insured Person and [Hertz]. In the event that a determination as to the amount of Defense Costs to be advanced under the policy cannot be agreed to, then the Insurer shall advance Defense Costs excess of any applicable retention amounts which are not in dispute until a different amount shall be agreed upon or determined pursuant to the provisions of this policy and applicable law.

A126.

Although the allocation provision is not directly at issue here because the related class actions were Securities Claims, the provision shows that part of the policy contemplates that the insurers cannot flatly deny Defense Costs arising out of a situation that involves coverage for some matters but no coverage for other matters. In other words, if "solely" can be used by Alterra to deny Defense Costs that arise out of *both* a covered and uncovered matter, then the allocation clause would have no effect. There would never be a need to allocate anything if Alterra can deny based on "solely" in that situation.

"Proper interpretation of an insurance contract will not render any provision illusory or meaningless." *Murdock*, 248 A.3d at 905 (internal quotation marks omitted). Alterra and the Superior Court's interpretation of "solely" to exclude coverage whenever Defense Costs arise out of both covered and uncovered matters would entirely negate the allocation provision, so the interpretation cannot be correct under Delaware law. Rather, this Court should apply the larger settlement rule to enforce Hertz and its directors and officers' reasonable expectation that in a common defense of covered and uncovered matters, the insurers would cover the admittedly covered Defense Costs, and, if the ultimate costs were not increased by the uncovered matter, the insurers would cover the entire amount of Defense Costs.

Alternatively, if the Superior Court is correct about what "solely" means, then it renders a conflict between the terms of the policy for the same reasons. If "solely"

means what the Superior Court held it to mean, then the allocation provision conflicts with the definition of Defense Costs, as both cannot be applied together. Under Delaware law, a contract that "contain[s] conceivably conflicting terms, which cannot be indisputably reconciled on the face of the contract . . . is ambiguous." *Sunline Com. Carriers*, 206 A.3d at 839–40. And it is well-established that when an ambiguity exists in an insurance contract "Delaware courts apply the interpretation that favors coverage." *E.g.*, *Monzo*, 249 A.3d at 118. That interpretation here results in the application of the larger settlement rule by declining to read the word "solely" in the definition of Defense Costs as a sweeping exclusion.

Remand for further proceedings is appropriate if the larger settlement rule applies. Application of the larger settlement rule would result in fact questions that must be resolved on remand. Those questions include whether the amount of defense costs increased as the result of any uncovered portion of the SEC proceeding and, if the costs did increase, to what extent can Alterra prove that increase. And, of course, such materially disputed facts would preclude summary judgment from being entered against Hertz on its claim for coverage. *E.g.*, *AeroGlobal Cap. Mgmt.*, 871 A.2d at 443.

CONCLUSION

Hertz respectfully requests that this Court reverse and remand to the Superior Court for further proceedings.

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