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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,	)	
	)	
Appellee.	)	

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Alterra's only answer to coverage for Claims against Insured Persons is that the SEC order does not specifically name Insured Persons. But this naming requirement finds no support in the policy's text, which simply requires the SEC to direct an investigation into Insured Persons. The order unambiguously does so. It alleges violations of law and directs an investigation into violations of federal securities laws which, as a matter of law, could only be committed by the former CEO and CFO of Hertz. And the order simultaneously refers to the titles of those two Insured Persons. That is more than sufficient to trigger the coverage for Defense Costs under the policy's plain language. The Court should reverse.

A separate and independent basis for reversal is that the fees at issue here were incurred in defense of the *Ramirez* and *Ansfield* Claims, which Alterra concedes are covered. Alterra points only to the word "solely" in the policy but fails to explain how the word "solely" can be used as a backdoor to defeat coverage for claims that Alterra admits are covered. Hertz offers a straightforward interpretation of "solely": if the covered claim, without the existence of any uncovered claim, would have necessarily resulted in the expenditure of the fee, then that fee arose "solely" from the covered claim. Alterra's competing interpretation would defeat coverage for an admittedly covered claim if any related and uncovered proceeding is brought subsequently. That makes no sense and is not how D&O insurance works.

Alterra raises three alternative grounds for affirmance, but each fails.

First, Alterra argues that Hertz failed to give timely notice of the SEC order. But notice was given under the plain text of the policy. Clause 7(b) deems a later Claim noticed on the date that an earlier Claim was noticed if the later Claim is related to the earlier Claim and Hertz "report[s]" the later Claim to Alterra. Alterra concedes that Hertz reported the SEC order to Alterra *and* does not contest that the SEC order is related to the earlier *Ramirez* and *Ansfield* Claims. Because Hertz first reported the *Ramirez* Claim to Alterra on November 25, 2013—during the policy period, Clause 7(b) deems the SEC order reported on that date.

Second, Alterra argues that its policy requires that the underlying limits of insurance be exhausted by loss "covered" under the underlying policies. This argument is likewise foreclosed by the policy's plain language. Alterra and Hertz agreed to an endorsement (that was not mentioned in Alterra's brief) of Alterra's policy that made only one change: it *deleted* the requirement that the underlying loss had to be "covered." The endorsement is outcome determinative. Alterra does not dispute that the amounts at issue are sufficient to reach its layer or that the amounts are "loss" under the Alterra endorsement; it only argues that the amounts had to be covered under the underlying policies. Alterra's policy defeats its only exhaustion argument.

Finally, Alterra argues that the Superior Court erred by declining to apply collateral estoppel to the Insured Person issue. This argument fails on many levels. First, Alterra should have filed a cross appeal to assert this ground for affirmance because a collateral estoppel holding would diminish Hertz's rights more than the judgment below. Second, the Superior Court acted well within its discretion in declining to apply collateral estoppel. Third, the Superior Court correctly decided the issue on the merits, and Alterra's only argument to the contrary both mangles New York precedent on the application of preclusion when a court issues alterative grounds for its decision and entirely fails to explain what the New York court decided in the prior action.

Under the plain text of the policy and Delaware law, the fees at issue here are covered under Alterra's policy. This Court should reverse.

ARGUMENT

I. THE SEC ORDER IS A CLAIM AGAINST INSURED PERSONS.

As Alterra concedes, a formal order is a Claim under the policy if it orders an investigation of an Insured Person. *E.g.*, Ans. Br. 27 (explaining that "Clause 2(b)(6)" requires a demonstration "that the SEC was investigating an Insured Person" (quotation marks omitted)); *accord* A251–52; A519. Alterra also concedes that Hertz's then-CEO and CFO are Insured Persons, and it fails to contest that the SEC order alleges Wrongful Acts. Ans. Br. 25–32. And, as it must, Alterra concedes that the SEC order is a formal order under the policy. *See id.* at 27. Finally, Alterra does not defend the Superior Court's reasoning that additional documents, like a subpoena, are required to show that the SEC order is a Claim. *See* Opening Br. 29–30 (explaining that additional documents are not required).

These concessions leave only one question on the first issue: Did the SEC order direct an investigation into an Insured Person?

Alterra's only argument is that the order did not direct an investigation into Insured Persons because their names are not specified in the document. But Alterra's insistence that the Insured Persons be identified by name finds no support in the policy's text. Under Alterra's magic-words argument, there is no coverage if the SEC enters a formal order of investigation titled "in the matter of Hertz" that stated only that "the SEC is investigating the CEO of Hertz for securities law violations,"

but there *is coverage* if the order instead stated that "the SEC is investigating Mark Frissora, the CEO of Hertz, for securities law violations." *Cf. Holifield v. XRI Inv. Holdings* LLC, 304 A.3d 896, 934 (Del. 2023) (rejecting a requirement of magic words when what is communicated unambiguously means the same thing as such magic words). This interpretation would defeat coverage for claims at the core of D&O coverage based on a non-existent naming requirement. The policy language in no way mandates this arbitrary result.

The SEC can express that it is investigating an individual Insured Person in multiple clear and unambiguous ways. *Cf. Mallory v. Norfolk Southern Railway Co.*, 600 U.S. 122, 136 & n.5 (2023) (also explaining that a 'magic words' approach is nonsensical). One way would be to use that person's name. Another way would be to use a title that only the person holds. Still another way would be to say that it is investigating a violation of law that could only be violated by an easily identifiable natural person. The SEC chose the latter two paths in the SEC order, and the intended result was unambiguous. The SEC directed an investigation into Insured Persons when it entered the formal order.

A. Neither the policy nor any authority requires the SEC order to use the name of an Insured Person.

Alterra strains both to read into the policy a conspicuously absent requirement of using the Insured Person's name and to read a non-precedential decision to support its naming theory.

On the text, Alterra points to two provisions that it claims supports its naming position. First, it argues the policy requires Insured Persons to be identified specifically by name because it says that a claim exists only "after the . . . entry of a formal order of investigation . . . upon *such* Insured Person." Ans. Br. 28 (quoting A106). Second, Alterra argues the policy requires naming because Insuring Agreement B(ii) applies to Loss "arising from a Claim made against *an* Insured Person . . . to the extent that [Hertz] has indemnified *such* Insured Person." *Id.* (quoting A104).

Alterra fails to explain how either provision mandates the result it seeks. To the contrary, the quotations speak for themselves. Neither provision mentions anything about a requirement that the SEC include the name of the Insured Person for an order to be a Claim. The policy easily could have required that the formal order "name an Insured Person" or the equivalent, but the policy imposes no such requirement. *See, e.g.*, *Nat'l Stock Exch. v. Fed. Ins. Co.*, 2007 WL 1030293, at *5 (N.D. Ill. Mar. 30, 2007) ("Contrary to defendant's assertions, the policy does not require the SEC to name specific individuals as the target of its proceedings.").[1] The Court need go no further.

[1] Hertz does not assert that *National Stock Exchange* dictates the result in this Court under Delaware law. *Contra* Ans. Br. 30. Rather *National Stock Exchange* is a helpful authority in that it explains that the lack of a name in a document targeting an Insured Person does not mean that the document categorically fails to target such an Insured Person.

Alterra's arguments in fact only reinforce the case for coverage.

The policy's inclusion of the word "such" is not a naming requirement. And to the extent "such" suggests that the Insured Person be "specific[ally] identifi[ed]," then the SEC order is still a Claim because it specifically identifies the former CEO and CFO of Hertz: each title was held respectively by two different and identifiable Insured Persons, as explained below and in Hertz's opening brief. *See* Ans. Br. 28; Opening Br. 23–26; *infra* I.B.

Alterra's reliance on the "upon" clause is also misplaced to the extent that Alterra now claims that the clause requires an Insured Person's name to be at the top of the order. *See* Ans. Br. 27.[2] Like the use of "such," the "upon" language imposes no requirement that the document be titled "in the matter of [Insured Person]." As already explained, Alterra's arguments admit that there would be coverage for an order that was titled "in the matter of Hertz," had the text expressly indicated that "the SEC is investigating Mark Frissora, the CEO of Hertz, for securities law violations."

[2] Alterra never made this argument below, and this position on appeal is entirely inconsistent with the arguments it made to the Superior Court. A532–33; A533 ("In short, Clause 2(b)(6) requires an 'SEC investigation *of* an Insured Person" and the SEC Investigation Order does not 'demonstrate that the SEC was investigating an Insured Person.'"); A251–53 (same); *see, e.g.*, *Shawe v. Elting*, 157 A.3d 152, 162–63 (Del. 2017).

Alterra's case authority fares no better. Alterra cites only one case, a Florida district court decision applying Florida law, to buttress its non-existent naming requirement. *Office Depot, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 734 F. Supp. 2d 1304 (S.D. Fla. 2010); Ans. Br. 29. According to Alterra, *Office Depot* held that the Insured Person's name must be included in the formal order of investigation to be a Claim under a D&O policy. Ans. Br. 29. But that characterization of *Office Depot* is wrong.

At the outset, the language and analysis Alterra quotes is in the context of whether the claim at issue was a Securities Claim against the Organization, not a Claim against Insured Persons. The district court, applying Florida law, held that a formal order of investigation did not commence a "proceeding" against either the Organization or any Insured Person, so under the policy at issue there, there was no Securities Claim. *Office Depot*, 734 F. Supp. 2d at 1318–20.

In the relevant section of the opinion that addresses the Claim against Insured Persons, the court explained that the policy at issue required either (1) that "the Insured Person [be] 'identified in writing' by the investigating authority as a person against whom a civil, criminal, administrative or regulatory proceeding 'may be commenced' . . . ***or*** (2) 'in the case of investigation by the SEC . . . after service of a subpoena upon such Insured Person.'" *Id.* at 1320 (quoting the policy text). Put another way, the policy at issue provided no coverage for formal orders of

investigation that directed an investigation into Insured Persons. The relevant part of *Office Depot* could plausibly be read to hold that the policy requirement of "identified in writing" requires identification by name, as Alterra contends.

This is critically important because, if *Office Depot* is persuasive on that score, it supports *reversal* rather than affirmance. Hertz's policy expressly contains coverage for the "entry of a formal order of investigation." A106 (Clause 2(b)(6)(ii)). It also contains a completely separate pathway to coverage "once such Insured Person is *identified in writing* by such investigating authority as a person against whom a proceeding described in Definition (b)(2) may be commenced," which was the exact text at issue in *Office Depot*. A106 (Clause 2(b)(6)(i)), *compare Office Depot, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburg, PA*, 453 F. App'x 871, 876 (11th Cir. 2011) (quoting the identical text to Clause 2(b)(6)(i)).

This presents a stark problem for Alterra. If it is true that "identified in writing" is a requirement that the SEC use the Insured Person's name, then the *lack* of that requirement in Clause 2(b)(6)(ii)—the provision at issue here—mandates that the clause must have a different meaning. *See Freeman v. X-Ray Assocs., P.A.*, 3 A.3d 224, 229 (Del. 2010) (explaining that this Court "cannot overlook the . . . use of different terms" because such a rule would be "at odds with the commonly accepted rule of . . . interpretation that requires [the Court] to give each distinctive term an independent meaning"); *JJS, Ltd. v. Steelpoint CP Holdings, LLC*, 2019 WL

5092896, at *7 (Del. Ch. Oct. 11, 2019) (explaining that variation in contractual terms creates a "presum[ption] that the parties intended a variation in meaning"). In short, if this Court finds *Office Depot* to be persuasive, it only demonstrates that Alterra knew how to require an Insured Person's name in a document *but did not put such a requirement in the relevant clause*.

The policy simply does not require the SEC to use the Insured Persons' names. Nor does *Office Depot* impose this requirement. Alterra's only argument therefore fails.

B. The SEC order unambiguously directs an investigation of Insured Persons.

The SEC order directs an investigation into, at minimum, the former CEO and CFO of Hertz. The order both identifies those two specific Insured Persons by title and alleges violations of law that could only be committed by those two Insured Persons. Indeed, Hertz explained at length in its opening brief that many legal authorities establish that the rules that were the subject of the investigation the SEC directed to be made into the CEO and CFO could only have been violated by those two individual, natural persons. Opening Br. 23–27. Alterra offers no answer.

That surrender is fatal because it reveals that the order is indistinguishable from an order titled "in the matter of Hertz" that contains the directive that "an SEC investigation be made into Mark Frissora, the CEO of Hertz, for securities law violations." The preceding example is a *statement* that expresses the *proposition*

that the SEC intended to order an investigation into a person named Mark Frissora. It is also redundant because the then-CEO of Hertz and Mark Frissora are the same person.

The SEC is capable of expressing the proposition that it is investigating an individual Insured Person using multiple clear and unambiguous statements. *Cf. Mallory*, 600 U.S. at 136 & n.5. The SEC could use that person's name, or it could use a title that only that person holds. It could also say it is investigating violations of laws that could only be violated by that person. The SEC chose the latter two paths in the SEC order, but the result remains unambiguous. The SEC directed an investigation be made into Insured Persons when it entered the formal order.[3]

Alterra offers only a nonresponse—buried in a footnote. It merely suggests that the SEC's references to Hertz's CEO and CFO were "generic references" that "fail[ed] to identify any specific officer or director as a wrongdoer by name." Ans. Br. 30 n.9 (internal quotation marks omitted). Alterra did not engage with the argument that the specific rules alleged to be violated, including Rules 13a-14, 13b2-2, and 13b2-1, necessitated an investigation of the CEO and CFO, Insured Persons

[3] A speaker can express the same *proposition* by using a syntactically distinct *statement*. The most basic illustration of this principle is that 2 + 2 = 4 and two plus two equals four express the same proposition in a linguistically distinct way. This is why courts, including this Court, soundly reject rules of decision that require 'magic words.'

under the policy because those rules could only ever be violated by such Insured Persons. As a result, the SEC order is a Claim, and this Court should reverse.

II. ***ANSFIELD* AND *RAMIREZ* ARE COVERED CLAIMS, AND THE FEES AT ISSUE HERE ARE COVERED BECAUSE THEY WERE EQUALLY NECESSARY TO THE DEFENSE OF THOSE CLAIMS.**

This appeal raises a basic question presented by the related *Ramirez* and *Ansfield* claims: is there a factual dispute over whether some or all of the fees at issue in this case would have solely resulted from the *Ramirez* and *Ansfield* claims if the SEC had never been involved? This question was directly presented to the Superior Court, and, indeed, the Superior Court decided the question. A424–25; Ex. A at 25–27. Alterra's *response* is that there is a legal impediment to reaching the fact question: whether the word "solely" bars a factual determination on allocation here. There is not much of a dispute between the parties about the answer to the first question, the question presented, but the parties differ significantly on the interpretation of "solely."

In response Alterra misses the point by arguing that Hertz would have spent the same amount of fees "regardless of whether *Ramirez* or *Ansfield* had been filed." Ans. Br. 35 (cleaned up). But this case presents the *inverse* question: whether Hertz would have incurred some or all of the fees regardless of the SEC proceeding and investigation of Hertz and its directors and officers.

The same is true of Alterra's argument that the SEC proceeding had to arise out of the *Ramirez* or *Ansfield* litigation to achieve coverage. This argument misapprehends the relevant question, which is whether Hertz's defense of itself and

its directors and officers in the *Ramirez* and *Ansfield* litigation would have resulted in some or all of the same legal work and fees regardless of whether the SEC proceeding and investigation occurred.

Alterra's only argument is that the word "solely" in the definition of Defense Costs resolves this issue. To reiterate, Hertz's commonsense position is that Alterra owes Hertz for any Defense Costs that "solely" resulted from the admittedly covered *Ramirez* and *Ansfield* class actions. The logic of the larger settlement rule explains that the correct way to calculate that amount is to pretend as if the SEC never sent any letter or entered any order. Any amounts remaining in that hypothetical scenario that would have been spent defending *Ramirez* and *Ansfield* are covered because they "solely" resulted from those actions. And any such amount is admittedly covered, as Alterra still does not contest that those actions were covered by the policy. *See* Ans. Br. 36.

Alterra never confronts the fundamental problem with its interpretation of its policy. Its interpretation *negates* coverage for *admittedly covered* claims if a related and uncovered matter results in defense work that also must be done to defend the covered claim. Opening Br. 37–39.

If this Court endorses Alterra's view of "solely," then insurance companies will use this language as a backdoor to deny coverage that was sought and bought for directors and officers every time there is a related uncovered claim that does not

require any additional legal work but does require the same legal defense as the covered claim. This interpretation is contrary to the reasonable expectation of D&O coverage—or any insurance coverage—that was sought and bought by Delaware insureds. *Cf. Clover Health Invs., Corp. v. Berkley Ins. Co.*, 2023 WL 1978227, at *10 (Del. Super. Ct. Feb. 6, 2023) (explaining that Delaware law requires coverage that was sought and bought). The consequences of that backdoor are not trivial. Consider three scenarios:

> 1. A sues B for breach of fiduciary duty. B's insurance policy covers loss resulting solely from breaches of fiduciary duty but excludes fraud claims. A obtains B's insurance policy during the litigation and adds a fraud claim based on the same facts, knowing that an uncovered claim will increase settlement pressure. The Insurer then issues a denial of B's defense because all of the fees being spent are equally attributable to the defense of the fraud and breach of fiduciary duty claims.
>
> 2. A sues B for negligence. B's defense to the negligence claim is that A has the wrong guy and C committed the negligence. B is insured solely for negligence claims. A amends and adds a claim for recklessness. The Insurer then denies a defense for the negligence claim because B's only defense does not arise solely out of the negligence claim.
>
> 3. Class of shareholders A sues company and directors B for errors, omissions, and misstatements in 10-K filings. B's defense is that there were not any errors, omissions, or misstatements. B is insured solely for shareholder suits. The SEC then files an action against B alleging the same errors, omissions, and misstatements. B's defense is that there were not any errors, omissions, or misstatements. The Insurer then denies coverage for any defense fees B spends developing its defense that there are not any errors, omissions, or misstatements because those fees are not "solely" attributable to A's lawsuit.

These results are untenable and contrary to any reasonable expectation of a corporation or individual purchasing insurance.

If this Court agrees that "solely" does not go as far as Alterra attempts to take it, the proper course is to reverse and remand for a factual determination on the allocation of Defense Costs. That determination, under the larger settlement rule, is how many dollars of the fees at issue in this case would have been spent defending the *Ramirez* and *Ansfield* claims if the SEC had never done anything.

ClubCorp, Inc. v. Pinehurst, LLC, 2011 WL 5554944, at *14 (Del. Ch. Nov. 15, 2011), is an illustrative case. In that case, the Court of Chancery considered whether an amount of loss was attributable "solely" to one company or whether that amount "represent[ed] the aggregate cost of defending" multiple defendants. *Id.* The court explained that "additional evidence concerning proper apportionment of that cost and, arguably, the parties' intent regarding the term 'Losses arising *solely* out of,' would clarify matters as to this critical" question. *Id.* In other words, the Court of Chancery did not take the *possibility* of loss overlapping between covered and uncovered claims as defeating coverage simply because of the word "solely;" it appropriately acknowledged that there was a fact issue to determine. This Court should follow the same commonsense reading and reverse.

Because the only question that needs to be answered for reversal is whether a fact question exists, the larger settlement rule is not technically necessary for

summary judgment to be reversed. The larger settlement rule is simply the legal principle that would be used to resolve how that fact question on allocation would be handled by the Superior Court after reversal, and it helps explain why Alterra and the Superior Court are logically mistaken about the question that needs to be answered with regard to the related and covered *Ramirez* and *Ansfield* claims. It would make good sense to decide the application of the rule at this stage, but it is not a formal necessity, as summary judgment must be denied if there is a genuine dispute of material fact. *AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 443 (Del. 2005). So, even if the larger settlement rule was not yet presented below, this Court can still reverse summary judgment based on the material fact question of whether the fees would have solely arisen from the *Ramirez* and *Ansfield* claims without any involvement of the SEC.

III. EACH OF ALTERRA'S KITCHEN-SINK ARGUMENTS FAILS, AND THIS COURT COULD DECLINE TO REACH EACH ARGUMENT.

Alterra presents three additional arguments in favor of affirmance. This Court may disregard each argument. The first two (notice and exhaustion) were not considered by the Superior Court, and this Court regularly sends such questions back to the Superior Court for resolution in the first instance. *See, e.g., Wilmington Tr., Nat'l Assoc. v. Sun Life Assurance Co. of Canada*, 294 A.3d 1062, 1077 (Del. 2023). The final argument (collateral estoppel) is procedurally improper because Alterra failed to file a cross-appeal: Alterra seeks a reversal of the Superior Court's collateral estoppel holding, and that reversal would diminish Hertz's rights under the judgment below.

On the merits, each of the three alternative arguments are inadequate to affirm. If Hertz prevails on the *Ramirez* and *Ansfield* issues, none of these three arguments is a bar to proceeding, and Alterra does not argue otherwise. But, in any event, each argument fails, and this Court can soundly affirm.

A. Notice was timely under the policy.

Hertz gave timely notice under Clause 7(b), the governing policy provision:

> [A] Claim which is subsequently made against an Insured and reported to the Insurer alleging, arising out of, based upon or attributable to the facts alleged in the Claim for which . . . notice has been given, or alleging any Wrongful Act which is the same as or related to any Wrongful Act alleged in the Claim of which such notice has been given, shall be considered related to the first Claim and made at the time such notice was given.

A124.

Compliance with this provision is simple. There are two conditions: (1) A later Claim is "reported to the Insurer"; (2) that later Claim is related to or alleges the same or related Wrongful Acts as the earlier Claim that has been noticed.

The operation of this provision is also simple. When those two conditions are met, the later Claim "shall be considered related to the first Claim and made at the time such notice was given." A124. To be clear: if Claim 1 is noticed on date X and Claim 2 is related to Claim 1 and "reported to the Insurer," then Claim 2 is also considered noticed on date X.

Hertz complied with both conditions. First, Alterra does not dispute that Hertz "reported" the SEC order to Alterra. That report occurred in 2018. Ans. Br. 45 (admitting the same). Second, Alterra does not contest that the *Ramirez* and *Ansfield* claims are "related" in the relevant way to the SEC order. Indeed, this has been Alterra's consistent position for a long time. A503 (Alterra in 2019 explaining that the SEC order "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).

Because Hertz complied with both conditions, it receives the benefit of the provision, which is that the later-reported claim—the SEC order—"shall be

considered related to the first Claim and made at the time such notice was given." A124.

Hertz gave timely notice of the *Ramirez* Claim to Alterra on November 25, 2013. A433.[4] The policy therefore deems the SEC order noticed on the same date, November 25, 2013, and such notice is timely under the policy. Alterra's reference to the 60-days-from-the-end-of-the-policy-period limit is a non sequitur because November 25, 2013 falls within the policy period, and the 60-day limit does not apply to the reporting of a related Claim. Ans. Br. 45. Alterra's notice defense fails.

B. Hertz's loss has reached Alterra's policy, and the plain text of the policy defeats Alterra's only contrary argument.

Alterra's policy also defeats its exhaustion argument. Specifically, parts of Alterra's policy that were omitted from its answering brief resolve this question. Here is the complete relevant clause:

> Liability shall attach to the Insurer only after the insurers of the Underlying Insurance, the Insureds or an excess difference-in-conditions ("DIC") insurer pay in legal currency as loss under the Underlying Insurance the full amount of the Underlying Limit.

A171. The underlined portions were omitted from Alterra's brief.

This text does two dispositive things. First, it allows Hertz—"the Insureds"—to "pay . . . as loss under the Underlying Insurance the full amount of the Underlying Limit." Alterra acknowledges that the Insureds can pay the Underlying Limit. Ans.

[4] The *Ansfield* Claim, which alleged the same and similar Wrongful Acts, was reported as a related Claim to *Ramirez* on July 8, 2014. A486–87.

Br. 48. Second, it *does not require the "loss" to be covered* under the Underlying Insurance. Indeed, the Alterra policy proves this conclusion. The operative language quoted above is an endorsement that was bargained for by the parties, and the *only* revision the endorsement makes is reflected in this strikethrough:

> Liability shall attach to the Insurer only after the insurers of the Underlying Insurance, the Insureds or an excess difference-in-conditions ("DIC") insurer pay in legal currency as ~~covered~~ loss under the Underlying Insurance the full amount of the Underlying Limit.

Compare A168, *with* A171.

This deletion is dispositive: Alterra has no textual support for its argument that the underlying loss must be *covered*. In fact, it bargained for the opposite. Nevertheless, Alterra's insists that the defense costs must be "covered loss under the Underlying Insurance." Ans. Br. 49; *id.* at 48 (alleging the New York court held "that the Underlying Insurance policies . . . do not cover those amounts"); *id.* (explaining "the exhaustion requirement can only be satisfied by loss that is *covered under the Underlying Insurance*"); *id.* at 49 (explaining that the New York judgment "precludes Hertz from re-litigating the issue of coverage under the Underlying Insurance"); *id.* at 50 (explaining "[t]he issue of coverage . . . was fully litigated"); *id.* at 51 (referring again to "*covered loss*"); *id.* (italicizing again "*covered* loss"). This argument plainly fails in the light of the endorsement that specifically deletes the "covered" requirement from the policy.

Finally, absent the "covered" argument, Alterra does not dispute that the amounts at issue would reach its policy or that the amounts are "loss." Because the endorsement the parties bargained for defeats Alterra's argument and the amounts are sufficient to enter Alterra's coverage, Alterra's exhaustion argument fails.

C. Collateral estoppel does not apply.

Collateral estoppel is not properly before this Court.

Although collateral estoppel does not apply, this Court does not need to reach the issue. Alterra declined to file a cross appeal, and that decision means that this court cannot "enlarg[e] [Alterra's] own rights or lessen[] the rights of [Hertz]." *See Haley v. Town of Dewey Beach*, 672 A.2d 55, 58 (Del. 1996) (citing *United States v. Am. Railway Express Co.*, 265 U.S. 425, 435 (1924)); *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 815 n.13 (Del. 2013) (explaining that the "proper standard" remains *Haley*'s rule).[5] A collateral estoppel holding (on any issue, including

[5] Federal authority exists barring the affirmance on an alternative ground in the absence of a cross appeal when the alternative ground would diminish the going-forward rights of the appellant. *See, e.g., Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1191 n.11 (Del. 1988) (explaining that this court finds federal decisions persuasive). For example, the D.C. Circuit has explained that expanding the preclusive effect of a judgment on appeal requires a cross appeal. *Shatsky v. Palestine Liberation Org.*, 955 F.3d 1016, 1029 (D.C. Cir. 2020); *see also Fedor v. United Healthcare, Inc.*, 976 F.3d 1100, 1107 (10th Cir. 2020) (explaining that expanding the preclusive benefit to the appellee of a judgment requires a cross appeal). And the Seventh Circuit has explained that imposing a potential burden on a litigant in potential future litigation by affirming on an alternative ground is a sufficient diminishment of the appellant's rights to require a cross appeal. *See EEOC v. Chicago Club*, 86 F.3d 1423, 1432 (7th Cir. 1996).

exhaustion) would "lessen[] the rights of [Hertz]," so a cross appeal should have been filed to obtain an affirmance on that ground. *Haley*, 672 A.2d at 58.

A finding on appeal of collateral estoppel when the Superior Court exercised its discretion to deny that ruling below would diminish Hertz's rights. Such a finding would, in potential future coverage litigation, require Hertz to litigate in the penumbra of both the collateral effect of the merits adjudication here and the collateral effect of the New York decision, as a finding that the New York decision is collaterally preclusive would itself be given collateral estoppel effect. Because Hertz's rights would be diminished, Alterra should have filed a cross appeal if it wanted to press this argument. *Haley*, 672 A.2d at 58.

Alterra's collateral estoppel arguments fail.

The Court should affirm the Superior Court's collateral estoppel holding. Judge Wallace properly exercised his discretion in declining to hold that collateral estoppel barred the Claim against Insured Persons. The application or non-application of collateral estoppel is committed to the sound "discretion[] [of] the trial court." *Martin v. Reedy*, 194 A.D.2d 255, 260 (N.Y. 3d Dep't 1994); 73A N.Y. Jur. 2d Judgments § 341 (2024) (explaining that in New York the "application" of collateral estoppel "is discretionary with the trial court"); *accord* 9 Carmondy-Wait 2d New York Practice § 63:459 (2024); *see also Envolve Pharmacy Solutions, Inc. v. Rite Aid Headquarters Corp.*, 2023 WL 2547994, at *11 (Del. Super. Ct. Mar. 17,

2023) ("[T]rial courts have broad discretion to determine whether collateral estoppel should apply in a given instance.") (internal quotation marks omitted) (Delaware law).[6] Alterra offers no argument that the Superior Court acted outside its discretion in declining to apply collateral estoppel, so this Court can affirm on that ground alone.

Alterra's collateral estoppel argument also fails out of the gate for a basic reason. Alterra did not explain how either relevant holding collaterally estops Hertz from litigating whether the SEC order is a Claim against Insured Persons under Clause 2(b)(6)(ii) of the policy. In its motion to dismiss ruling, the New York court explained that the allegations relevant to the Insured Persons claim there were "conclusory" because they did not include the required "content of th[e] [tolling] agreements" with the Insured Persons. *Hertz Global Holdings, Inc. v. Nat. Union Fire Ins. Co. of Pittsburgh*, 530 F. Supp. 3d 447, 458–59 (S.D.N.Y. 2021). It also gave an alternative holding for the "independent reason" that Hertz "d[id] not allege that it ever submitted a claim for reimbursement" for a Claim against Insured Persons. *Id.* at 459. It described the second holding as a lack of "notice" issue. *Id.* Alterra offers no explanation for why either holding is identical to the issue presented

[6] New York law applies to determine the preclusive effect of a New York judgment. *Accord* Ans. Br. 53. But it is possible that the discretion of the Superior Court is a procedural issue governed by Delaware law. Regardless, both states acknowledge that the trial court has significant discretion over the application or non-application of collateral estoppel.

here. That failure means that it does not meet its burden to "prove[] the requisite identity of the issue between this case and the prior." *D'Arata v. New York Cent. Mut. Fire. Ins. Co.*, 564 N.E.2d 634, 666 (N.Y. 1990); *Howard v. Stature Elec., Inc.*, 20 N.Y.3d 522, 525 (N.Y. 2013).

Alterra only argues that the issue in the New York litigation "was identical to the decisive issue in this action: whether the same SEC Investigation is a Claim against an Insured Person under the terms of the same Primary Policy . . . ." Ans. Br. 54. But Alterra offers no explanation for why the issues are identical. It is Alterra's burden to explain why a holding discussing tolling agreements—which involves a separate policy provision—has any relevance to a case that presents an issue regarding the SEC order, but Alterra did not offer such an explanation. Alterra fails to point this Court to language or a holding in the New York decision that decided the issue presented here: whether the formal order of investigation is a Claim against Insured Persons because it specifically identifies at least two Insured Persons under investigation by title and also orders an investigation into rules that could only be violated by those two Insured Persons.

Alterra also cannot show identity of the issues for another reason. The contract between Alterra and Hertz is a *separate* contract from its contract with each underlying insurer. *See Aspen Specialty Ins. Co. v. RLI Ins. Co.*, 194 A.D.3d 206, 214 (N.Y. 1st Dep't 2021). This fact necessarily defeats the identity of issues, but,

again, Alterra totally failed to meet its burden to show the identity of the issues on any level. The Superior Court thus was well within its discretion in declining to apply collateral estoppel.

Alterra's collateral estoppel argument also fails because New York law does not apply collateral estoppel to alternative holdings made by the trial court. Alterra relies on *Tydings v. Greenfield, Stein & Senior, LLP*, 897 N.E.2d 1044 (N.Y. 2008), but its description of that decision is inaccurate.

First, Alterra says that New York law gives preclusive effect to an alternative holding when the "court addressed the issue with 'unhurried and painstaking care.'" Ans. Br. 55. This characterization leaves out a key point from *Tydings*: the New York Court of Appeals has "not been willing to extend" the decision that quote is from—*Malloy v. Trombley*, 405 N.E.2d 213 (1980), which is also the only decision of that court giving collateral effect to alternative holdings of a trial court. *Tydings*, 897 N.E.2d at 1047.

Second, Alterra also neglected to include the second part of *Tyding*'s characterization of the rule that the New York Court of Appeals has refused to apply in later cases, that the trial court's "finding on the . . . issue was pragmatically not open to any serious dispute." *Id.* (quoting *Malloy*, 405 N.E.2d at 217 (Fuchsberg, J. concurring) (cleaned up)); *see also Malloy*, 405 N.E.2d at 217 (Fuchsberg. J. concurring) (explaining that it was also important that there was "nothing complex

about the case"). Alterra makes no argument that the New York court's alternative holding was "not open to any serious dispute."[7]

Third, in a footnote, Alterra suggests that failure to appeal displaces the *Tydings* alternative-holdings rule. Ans. Br. 55 n.17. This argument is wrong. *Tydings* itself cites a case holding the opposite. *O'Connor v. G & R Packing Co.*, 423 N.E.2d 397, 398, 400 (N.Y. 1981) (explaining that "[n]o appeal was taken from the dismissal of the action against the railroads" and holding that the alternative holding in "the prior action should not be given preclusive effect").[8]

None of the questions presented in this appeal are collaterally estopped, and this Court can soundly reach the merits.

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[7] To the extent that there are adverse New York holdings that are relevant to the question presented here, those holdings are open to serious dispute, which is demonstrated by Hertz's arguments regarding the first question presented in this appeal.

[8] Alterra's only additional argument for the non-application of *Tydings* is that an unpublished federal court decision, making an *Erie* guess about New York law, explains that a trial court's alternative holding is binding if it is not "casual nor of any lesser quality than had the outcome . . . depended solely on the alternative issue." Ans. Br. 55 (quoting *Travelers Indem. Co. v. Northrop Grumman Corp.*, 2021 WL 4255073, at *5 (S.D.N.Y. Sept. 17, 2021)). This Court can safely ignore this non-precedential decision. The district court in that case quoted the *Malloy* case *majority opinion*, but the New York Court of Appeals in *Tydings* clearly acknowledged that the *Malloy* rule was either modified by "Judge Fuchsberg['s]" concurring opinion because his "vote was necessary to the outcome" or that the concurring opinion outright controlled the rule. *Tydings*, 897 N.E.2d at 1047. And the description of *Malloy* in *Tydings*, as laid out above, as the relevant holdings from New York's highest court, is binding on this Court for the purposes of New York law. In any event, Alterra did not explain why the New York decision is of sufficient quality to warrant preclusion under its incorrect characterization of the rule.

CONCLUSION

The Court should reverse the grant of summary judgment in Alterra's favor and remand for further proceedings.

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