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IN THE

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IN RE ALEXION PHARMACEUTICALS, INC. INSURANCE APPEALS	**No. 154, 2024** **No. 157, 2024** CASE BELOW: SUPERIOR COURT OF THE STATE OF DELAWARE C.A. No. N22C-10-340-PRW [CCLD]

APPELLANTS' JOINT OPENING BRIEF

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NATURE OF PROCEEDINGS

This Directors and Officers ("D&O") liability insurance litigation involves claims-made coverage obtained by Plaintiffs Below/Appellee Alexion Pharmaceuticals, Inc. ("Alexion"). During the 2014–2015 policy period ("Tower 1"), Alexion learned that it was under investigation by the Securities and Exchange Commission when it received a subpoena (the "SEC Subpoena") and document preservation letter from the SEC.

Alexion elected to provide its Tower 1 insurers a Notice of Circumstances regarding the SEC's investigation into its "activities and policies and procedures," including its "grant-making activities and compliance with" laws related to sales of Alexion's only drug then in the market, Soliris. Alexion's Notice of Circumstances disclosed to the Tower 1 insurers the prospect of potential private litigation and claims for money damages.

In 2016, private plaintiffs filed a federal securities class action in the United States District Court for the District of Connecticut (the "Securities Action") alleging that Alexion made materially false and misleading statements that did not disclose that Soliris's success was due to improper sales practices. The Securities Action was filed during a new, larger-limits 2015–2017 policy period ("Tower 2").

A dispute arose over whether the Securities Action was covered under Tower 1 or Tower 2. Alexion filed the present action in the Superior Court against

certain Tower 1 and Tower 2 insurers, contending that the Securities Action was covered under either Tower 1 or Tower 2. Before discovery, Alexion moved for summary judgment.

Two of the insurers filed Rule 56(f) affidavits seeking discovery, and asserting the motion was premature. After allowing limited discovery while otherwise denying the Rule 56(f) request, the Superior Court decided the case on cross-motions for summary judgment.

The Superior Court agreed with Alexion that the Securities Action was covered under Tower 2. Believing that the inquiry turned on the degree to which the Securities Action related to the SEC Subpoena, the court found that the matters were insufficiently related for the Securities Action to be covered under the Tower 1 policies. Memorandum Opinion and Order, Exhibit A hereto ("Op."); *see also* Order Entering Final Judgment, Exhibit B hereto. This is the Tower 2 insurers' consolidated appeal from that decision.

SUMMARY OF ARGUMENT

This case boils down to Alexion's attempt to avoid the contractual consequences of a strategic decision it later came to regret. To be clear, all parties agree that Alexion's D&O insurance program covers the Securities Action and that only one coverage tower applies. The dispute is which tower affords coverage: (1) Tower 1, under which Alexion previously specified that future Claims arising from Alexion's improper Soliris sales tactics would be deemed first made; or (2) Tower 2, which Alexion now targets in an effort to grab $20,000,000 in additional limits. Having chosen to issue the Notice of Circumstances to the Tower 1 insurers, Alexion must live with the consequences of that decision: The Securities Action is covered under Tower 1. Alexion's after-the-fact realization that, as things turned out, it would have been more advantageous to assign the loss to Tower 2 cannot nullify the Notice of Circumstances or the governing policy language.

1. The governing policy language dictates that Tower 1 covers the Securities Action. This result follows from the plain language of the Tower 1 policies' Notice of Circumstances provision, which grants Alexion the unilateral right to issue a Notice of Circumstances describing a "Wrongful Act, fact, or circumstance" that may generate future Claims, thereby locking in Tower 1 coverage for future Claims arising from that Wrongful Act, fact, or circumstance—

even if the Claim is made after the Tower 1 policy period. Exercising that right when confronted with the SEC investigation, Alexion chose to issue a Notice of Circumstances to the Tower 1 insurers. Alexion's choice had benefits. It enabled Alexion to secure Tower 1 coverage for future Claims arising from the Wrongful Acts described in the Notice of Circumstances, while at the same time preserving insurance limits under future policy periods for future Claims that did not.

But Alexion's choice also had consequences. Specifically, the Securities Action that later arose from the Notice of Circumstances is deemed first made during the Tower 1 policy period. By the same token, the Tower 2 policies' Prior Notice Exclusion, which excludes Tower 2 coverage for any Claim arising out of "any Wrongful Act, fact, or circumstance" that was the subject of the Notice of Circumstances, eliminated Tower 2 coverage for the Securities Action.

A. The Superior Court misapprehended both the import and application of these policy provisions. The Superior Court erroneously framed the question before it as whether the Securities Action and SEC Subpoena were sufficiently related (Op. 8, 22, 25–26, 27). But the Superior Court compared the wrong things. Alexion's Notice of Circumstances was not limited to the SEC Subpoena. Yet, applying that flawed framework, the Superior Court found an insufficient nexus between the two. The applicable policy language required a determination of whether the Securities Action arose from "any Wrongful Act, fact, or

circumstance" that was the subject of Alexion's Notice of Circumstances—a notice that disclosed the potential for *future* Claims. Conducting the correct analysis compels the conclusion that the Securities Action is covered under Tower 1, not Tower 2.

B. Even applying the trial court's incorrect framework—i.e., comparing the Securities Action solely to the SEC Subpoena—the Securities Action would *still* be covered by the Tower 1 policies. Those policies provide that if a Claim arises out of an "Interrelated Wrongful Act" connected to a Claim made in an earlier policy period, the later Claim will be "deemed" made on the date the earliest such Claim is first made. Even accepting the Superior Court's flawed policy interpretation, the Securities Action and the SEC Subpoena are sufficiently related to conclude that the Securities Action is covered under Tower 1.

2. To be clear, on this record, the undisputed facts demonstrate that the Securities Action is covered under Tower 1. Summary judgment in favor of the Tower 2 insurers on their cross-motion is appropriate. Alternatively, even if this Court concludes that greater evidence of overlap between the Notice of Circumstances and the Securities Action is required, the Superior Court committed further error when it declined to allow more robust discovery into all facts bearing on that question. [redacted]

[redacted] Because Alexion's insurers did not have the same access to this information as Alexion, the Superior Court should have granted additional discovery bearing on the ultimate issue.

STATEMENT OF FACTS

A. The Parties

Alexion is a biopharmaceutical company. A16.

Swiss Re Corporate Solutions America Insurance Corporation ("Swiss Re"), Endurance Assurance Corporation ("Endurance"), and Navigators Insurance Company ("Navigators") were among Alexion's Tower 2 excess D&O liability insurers. Op. 2.

B. Alexion's Multi-Year, Multi-Layer D&O Insurance Program

Alexion purchased a comprehensive claims-made D&O liability insurance program. A370. The insurance program consists of multiple layers of self-insured retentions, primary policies, and excess policies. *Id.* The ABC[1] limits total $85,000,000 in the Tower 1 (2014–2015) policy period and (after the Notice of Circumstances was issued) $105,000,000 in the Tower 2 (2015–2017) policy period. A370.

Most of Alexion's insurers issued policies effective during both the Tower 1 and Tower 2 policy periods. *Id.* Four insurers, however, issued policies effective during only one of those policy periods: (1) Defendant below, Hudson Insurance

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[1] "ABC" refers to D&O policies' three core insuring agreements: (1) Side A, which covers claims against directors and officers not indemnified by the corporation; (2) Side B, which reimburses the corporation when it indemnifies directors and officers; and (3) Side C, which is entity coverage generally limited to securities claims.

Company ("Hudson"); (2) Swiss Re; (3) Endurance; and (4) Navigators. A107, A122, A143, A209. The following graphic depicts where these policies are situated relative to one another within Alexion's insurance program:

	Tower 1 Insurers 2014–2015	**Tower 2 Insurers 2015–2017**
Layer	**Insurer**	**Insurer**
10th Excess – $10m x/s $95m	NONE	**Old Republic**
9th Excess – $10m x/s $85m	NONE	**Navigators**
8th Excess – $10m x/s $75m	Allied World	Allied World
7th Excess – $5m x/s $70m	XL Specialty	XL Specialty
6th Excess – $10m x/s $60m	QBE	QBE
5th Excess – $10m x/s $50m	Aspen	Aspen
4th Excess – $10m x/s $40m	Freedom Specialty	Freedom Specialty
3rd Excess – $10m x/s $30m	Hudson	**Endurance**
2nd Excess – $10m x/s $20m	**Old Republic**	**Swiss Re**
1st Excess – $10m x/s $10m	AIG (Illinois National)	AIG (Illinois National)
Primary – $10m x/s $5m SIR	Chubb (ACE)	Chubb (ACE)
Total ABC Program	**$85m**	**$105m**

C. Coverage Is Limited To Claims First Made During the Policy Period

Alexion's excess policies generally follow form to the scheduled underlying primary policies, both of which were issued by ACE American Insurance Company ("Chubb"). A52, A156. Subject to their terms, conditions, and exclusions, the Chubb primary policies protect Alexion's directors and officers against any Claim of liability to stockholders, the SEC, or third parties for the directors' and officers' wrongful conduct. *Id.* The Chubb primary policies broadly define "Claim" as a demand for "monetary damages or non-monetary or injunctive relief." A55, A159.

In contrast to the broad coverage afforded to its individual directors and officers, coverage for Alexion's own corporate liability is more limited. A54, A158. Such entity coverage is available only for "Loss" resulting from a "Securities Claim," defined as a "Claim, *other than a* civil, criminal, administrative or regulatory *investigation of a Company* ...." A54, A56, A158, A160 (emphasis added).

D. No Coverage for Claims Broadly Related To A Claim First Made, Or A Notice Of Circumstances Given, During A Prior Policy Period

Typical of claims-made insurance programs, Alexion's program is structured so that, in the case of multiple "Claims," all related claims are grouped together and assigned to one policy period. A 61, A165. To that end, the Chubb primary

policies deem all Claims asserting "Interrelated Wrongful Acts" to be one Claim that is first made when the earliest such Claim is made—even if a related Claim is made during a subsequent policy period. A61, A165. "Interrelated Wrongful Acts" is defined as:

> [A]ll Wrongful Acts that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of related facts, circumstances, situations, events, transactions or causes.

A55, A159. This ensures that Alexion will receive coverage for a single loss from a single coverage tower, and cannot aggregate multiple towers' limits. A61, A165.

Where no prior Claim has been made, the Notice of Circumstances provision of Chubb's Tower 1 primary policy governs. A61, A165. The Notice of Circumstances provision grants Alexion the unilateral option to lock in coverage under a single policy period for future Claims that may be made after the policy period expires:

> If, during the Policy Period ... the Insureds first become aware of facts or circumstances which may reasonably give rise to a future Claim covered under this Policy, and if the Insureds give written notice to the Insurer during the Policy Period ... of the identity of the potential claimants; a description of the anticipated Wrongful Act allegations; the identity of the Insureds allegedly involved; the circumstances by which the Insureds first became aware of the facts or circumstances; the consequences which have resulted or may result; and the nature of the potential monetary damages and non-monetary relief; then any Claim which arises out of such Wrongful Act shall be

> deemed to have been first made at the time such written notice was received by the Insurer.

A61, A165.

Under this provision, upon learning of facts and circumstances that *may* give rise to a *future claim*, Alexion may—but is not required to—alert the insurers by providing a Notice of Circumstances. A61, A165. If Alexion's insurers accept the Notice of Circumstances, then any Claim that eventually arises therefrom is deemed first made when the insurers received the Notice of Circumstances. A61, A165.

The Tower 1 policies' Notice of Circumstance provision dovetails with the Tower 2 policies' Prior Notice Exclusion. A79. That exclusion bars coverage for any Claims arising out of a Claim *or* a Notice of Circumstances that is reported and accepted under prior D&O policies, including Tower 1:

> The Insurer shall not be liable for Loss on account of any Claim ... ***alleging, based upon, arising out of, or attributable*** to ***any Wrongful Act, fact, or circumstance*** which has been the subject of ***any written notice given and accepted*** under any other directors & officers policy of which this Policy is a renewal or replacement.

A58, A79 (emphasis added). The exclusion encompasses not only notices of existing Claims, but also future Claims "alleging, based upon, arising out of, or attributable to" any "fact, or circumstance" that was the subject of "any written notice"—including a Notice of Circumstances. A79.

E. Alexion's Miracle Drug, Soliris

Alexion seeks to develop so-called "orphan" drugs, which treat rare diseases. Op. 3. One such drug is Soliris, which treats certain life-threatening blood diseases. *Id.* Soliris has a global market of fewer than 11,000 patients. *Id.* In addition, Soliris is one of the most expensive drugs in the world, with an annual per-patient cost of $500,000 to $700,000. *Id.* Soliris's ultra-expensive price tag means that the only way most patients can realistically afford the life-saving drug is through government assistance. A517–18. As such, obtaining worldwide governmental funding of Soliris was critical to Alexion's financial success.

While Alexion was in the business of trying to develop other such specialized drugs, Soliris was its only commercially salable product. A257, A20–21. Thus, during the relevant time, anything relating to Alexion's sales practices, policies, or procedures necessarily related to Soliris.

F. The 2015 SEC Subpoena and Investigation

Soliris's stratospheric sales success caught the attention of regulators like the SEC, which launched government probes. A941. Although under seal and unknown to Alexion at the time, in March 2015 (during the Tower 1 policy period), the SEC issued a formal investigation order. *Id.* [redacted]

[redacted]

Two months later (still during the Tower 1 policy period), Alexion learned of the SEC investigation when the SEC served Alexion with a subpoena and document preservation demand. A372. [redacted]

G. The 2015 Notice Of Circumstances: Alexion Notifies The Tower 1 Insurers Of Potential Future Claims

A month after receiving the SEC Subpoena, Alexion chose to report the facts and circumstances surrounding the SEC investigation via a Notice of Circumstances to the Tower 1 insurers. A530. The Notice of Circumstances described more than just the SEC Subpoena. *Id.*

The Notice of Circumstances advised that the SEC was investigating Alexion, for, among other things, possible improper "grant-making activities" and "Alexion's activities and policies and procedures worldwide," specifically mentioning Japan, Brazil, Turkey, and Russia. *Id.* Highlighting that the notice was about more than just the SEC Subpoena, Alexion did not even include a copy of the SEC Subpoena with the Notice of Circumstances. *Id.*

The Notice of Circumstances also advised that the SEC had sent a document preservation notice. *Id.* According to the Notice of Circumstances, the preservation notice stated that the SEC "considers documents potentially relevant to the investigation to include, among others, those that 'were provided, created, modified, or accessed to or by' 37 individuals (listed by name on the notice) on or after January 1, 2009." *Id.* Like the SEC Subpoena, Alexion also did not include the document preservation notice with the Notice of Circumstances. *Id.*

The Notice of Circumstances further advised that "[a]ny determination that Alexion's operations or activities are not, or were not, in compliance with existing

United States or foreign laws or regulations, including by the SEC pursuant to its investigation," could give rise to future civil claims:

> Other internal or government investigations or legal or regulatory proceedings, including ***lawsuits brought by private litigants, may also follow as a consequence.*** Monetary damages and non-monetary relief may be a consequence, including criminal or civil damages, disgorgement, penalties, or other monetary or non-monetary sanctions or damages.

A530–31 (emphasis added).

Chubb received the Notice of Circumstances on the same day it was issued, June 18, 2015. A534. Twelve days later, on June 30, 2015, Chubb accepted the Notice of Circumstances under its Tower 1 primary policy. *Id.* Chubb noted that "[t]hus far, there has been no Claim against either the Company as a Defendant or the Company's directors and officers" and that "[t]hus, no coverage would currently be available under the Policy." A535. Alexion never challenged that decision. Alexion and Chubb thereby agreed that any later Claim that arose out of the facts and circumstances described in the Notice of Circumstances would be covered under Tower 1.

H. Alexion Increases Its Coverage Limits

Shortly after issuing the Notice of Circumstances to the Tower 1 insurers, Alexion obtained D&O coverage for the Tower 2 policy period. A52. The new

Tower 2 program increased the limits of Alexion's D&O coverage by $20,000,000. A857.

I. The 2016 Securities Action: The Private Litigation Foreshadowed by the Notice of Circumstances

As foreshadowed in the Notice of Circumstances, Alexion's Soliris sales practices exposed it to additional legal liability in the form of a civil lawsuit. On December 29, 2016 (during the Tower 2 policy period), Alexion stockholders initiated the Securities Action as a class action lawsuit alleging violations of federal securities laws (*Bos. Ret. Sys. v. Alexion Pharm., Inc.*, No. 3:16–cv–02127 (D. Conn. Dec. 29, 2016)). Op. 6. The stockholder plaintiffs accused Alexion of engaging in illicit sales tactics and lying about its marketing strategies, to conceal the true source of Soliris's financial success and to artificially inflate stock prices. A228, A232–42.

The operative Securities Action complaint concentrated on Alexion's worldwide activities between 2013 and 2017, detailing many of the same wrongful acts occurring at the same time and in the same countries as those at issue in the prior SEC investigation. A252. The stockholder plaintiffs alleged that Alexion employed illegal and unethical sales practices, including exorbitant pricing and *use of grants and charitable contributions* to patient advocacy organizations to secure government reimbursement of Soliris prescriptions. A260–61 ¶ 12, A304–06 ¶¶ 155–162.

The stockholder plaintiffs also alleged that Alexion had an improper relationship with a Brazilian patient advocacy organization, among others, and that Alexion exploited this improper relationship to gain greater access to Soliris patients and bilk $400,000,000 from the Brazilian government. A306 ¶ 161. Both Alexion's improper "grant-making activities" and its activities in Brazil were referenced in the Notice of Circumstance. A530.

The operative Securities Action complaint heavily emphasized a May 2017 *Bloomberg News* article, which allegedly exposed the full extent of Alexion's improper sales practices:

> As revealed to the investing public through a May 24, 2017 exposé in Bloomberg News, ... Alexion's management, including the Individual Defendants, ... directed employees to engage in sales tactics they knew were illegal, unethical, and outside of industry standards.
>
> * * *
>
> Bloomberg released an in-depth exposé ... disclosing for the first time many of Alexion's illicit and unethical sales practices. The May Bloomberg Article revealed Alexion's use of in-house nurses, its unlawful relationships with partner labs, and grants that it had made to charitable organizations ... that improperly tried to get the Brazilian government to pay for Soliris.

A257 ¶ 3, A265 ¶ 25.

The *Bloomberg News* article—central to the Securities Action complaint—also discussed the SEC investigation of Alexion's worldwide activities, including

use of grants and charitable donations in Brazil. A526–27. It was publication of the *Bloomberg News* article that allegedly caused Alexion's stock price to plummet, wiping out nearly $10,000,000,000 in stockholder value, which formed the basis of the stockholder plaintiffs' request for damages. A264–65 ¶ 25.

In other words, both the Securities Action and the *Bloomberg News* article emphasized in the Securities Action's operative complaint reference the SEC investigation that was the subject of Alexion's Notice of Circumstances.

The stockholder plaintiffs not only referenced the prior SEC investigation in their pleadings, but identified the SEC's findings resulting from the SEC investigation as evidence of securities fraud. A615, A846. In support of their successful motion to compel production of documents Alexion had produced to the SEC, the stockholder plaintiffs contended that the SEC investigation was "highly relevant," A706–08, because it concerned the "very same types of unethical and illegal behavior," such as "illegal and unethical sales practices and inappropriate business conduct by Alexion employees during the Class Period." A707.

J. Alexion Tenders The Securities Action To The Tower 2 Insurers, Who Deem The Claim First Made In The Tower 1 Policy Period

Days after the Securities Action was filed, Alexion tendered the lawsuit to the Tower 2 insurers. A34. Primary insurer Chubb initially accepted coverage, subject to a reservation of rights, under its Tower 2 policy. A541. But upon reviewing the SEC Subpoena that Alexion had not previously provided, Chubb

altered its coverage position and, based on the Notice of Circumstances, deemed the Securities Action to be a Claim first made during the Tower 1 policy period. A557, A565–66. Citing Alexion's Notice of Circumstances, Chubb advised Alexion that the Securities Action was covered under the Tower 1 policy, not the Tower 2 policy. A557, A565–66.

As reflected in the coverage chart above, Chubb and many other insurers were economically ambivalent as to which tower provided coverage.[2] Even so, most insurers agreed with Chubb and likewise denied coverage under their Tower 2 policies and accepted coverage under their Tower 1 policies. Op. 9 n.49.

K. Alexion Settles The SEC Investigation

In July 2020, the SEC's five-year investigation concluded with a settlement. A570. Alexion paid $21,476,531, consisting of disgorgement of profits, prejudgment interest, and penalties. A577. Although the SEC did not issue a "Wells notice"[3] or file an enforcement action, as a term of the settlement Alexion

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[2] Hudson was the only Tower 1 insurer that was not also in Tower 2. Hudson's position was that the Securities Action was not covered under Tower 1, taking no position as to whether there was coverage under Tower 2. A403, A406.

[3] "A Wells Notice is a notification from the SEC that it intends to recommend bringing an enforcement action against a company or individual and to provide them with an opportunity to respond before the recommendation." *Fannin v. UMTH Land Dev., L.P.*, 2020 WL 4384230, at *7 n.107 (Del. Ch. July 31, 2020), *as corrected* (Aug. 28, 2020).

negotiated, the SEC nevertheless concluded that Alexion had violated federal securities laws—including the FCPA, part of the Exchange Act. A576.

Alexion also consented to the entry of a cease-and-desist order in which the SEC found that: (1) Alexion's foreign subsidiaries (including in Brazil) had made improper payments to government officials, in exchange for beneficial treatment of Soliris; (2) Alexion's foreign subsidiaries (including in Brazil) had falsified records, in an effort to conceal improper third-party payments to government officials and patient advocacy organizations; (3) Alexion's internal accounting controls had failed to detect the falsified records and to prevent improper third-party payments; and (4) Alexion's internal accounting controls were also responsible for other foreign subsidiaries' inaccurate recordkeeping of third-party payments. A571–76.

L. Alexion Settles The Securities Action

In late 2023, after nearly seven years of litigation, Alexion settled the Securities Action for $125,000,000. A947, A961. By then, the primary (issued by Chubb) and first-layer excess policies (issued by AIG company Illinois National) had been exhausted by payment of $27,000,000 in defense costs. A1025. Chubb and AIG had agreed that those costs were covered by their Tower 1 policies, not their Tower 2 policies. A555, A872, A876, A879.

Even without those covered defense costs, the settlement was in excess of either tower of insurance.

M. The Present Action: The Parties Cross-Move For Summary Judgment As To Whether Tower 1 or Tower 2 Responds To The Securities Action

While the Securities Action was pending, Alexion filed this coverage action. A15. Alexion sued: (1) Hudson; (2) the Tower 1 second-layer excess insurer Old Republic[4]; and (3) Tower 2 excess insurers Swiss Re, Endurance, and Navigators.

Alexion alleged that the Securities Action was covered under either Tower 1 or Tower 2. A17, A20-21. Despite having decided to issue the Notice of Circumstances and lock in coverage for future Claims arising therefrom in Tower 1, Alexion—apparently driven by the additional $20,000,000 in limits available in Tower 2—now primarily argued that the Securities Action was covered by Tower 2. A43–45. Alexion alternatively argued that the loss was covered by Tower 1. A46.

Before any discovery had occurred, Alexion moved for partial summary judgment on its claims against Swiss Re, Endurance, and Navigators. Op. 12–13. Endurance cross-moved for summary judgment, contending that the Securities Action was covered by the Tower 1 policies. *Id.* at 13. Swiss Re and Navigators

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[4] Old Republic issued policies in both towers, but in different positions, with the same limits exposed. Once Old Republic paid a single policy limit, Alexion dismissed with prejudice its claims against that insurer. Op. 9 n.49.

filed Rule 56(f) affidavits, and sought to compel Alexion to comply with their discovery requests before proceeding with its summary judgment motion. *Id.*; A467, A492, A815.

The court allowed only limited discovery, in response to which Alexion produced just six documents—consisting of just 23 pages—concerning the SEC investigation. Op. 13; A932–34. When this limited discovery concluded, while preserving their objection to not having received all requested discovery, Swiss Re and Navigators also cross-moved for summary judgment. A860. Alexion and Endurance then filed supplemental briefs. A883, A992.

N. The Ruling Below

On summary judgment, the Superior Court ruled for Alexion. Op. 27–28. Rather than focusing on the Notice of Circumstances as a forward-looking notice of potential future claims, the court framed the issue as "whether the federal securities action is 'related' to a previously reported *incident*." Op. 1 (emphasis added); *see also id.* (stating that the applicable standard considers "whether the two *incidents* are 'meaningfully linked.'" (emphasis added)); *id.* ("Here, the link between the securities action and the *prior incident* is tangential, not meaningful." (emphasis added)).

Instead of comparing the Securities Action to the Notice of Circumstances, the court compared the Securities Action solely to the SEC Subpoena. Op. 25–27.

The court was "convinced that *the SEC Subpoena* and Securities Action are not meaningfully linked" (Op. 25 (emphasis added)), holding that "the factual connection between *the SEC Subpoena* and the Securities Action is insufficient to make them related" (Op. 27 (emphasis added)).

Applying the "meaningful linkage" standard, the Superior Court concluded that "the SEC Subpoena and the Securities Action aren't meaningfully linked." Op. 22. The Superior Court reasoned that the SEC Subpoena and the Securities Action involved different parties, focused on different (albeit overlapping) time periods, raised different theories of liability based on different wrongful acts, relied on different evidence, and sought different relief. Op. 22–27.

The court acknowledged some linkage between the SEC Subpoena and the Securities Action—for example, Alexion's alleged wrongdoing in Brazil. Op. 25. But the court deemed this linkage "tangential, not meaningful," because Alexion's activities in Brazil were "but a small part" of the wrongful acts alleged in the Securities Action and formed "too insubstantial" a nexus between the SEC Subpoena and the Securities Action. Op. 1, 25–27.

The Superior Court ruled that the Tower 2 policies covered the Securities Action. *Id.* Accordingly, the court granted partial summary judgment to Alexion on its claims against Swiss Re, Endurance, and Navigators and denied those insurers' cross-motions. Op. 28.

Following additional briefing regarding prejudgment interest, the Superior Court entered judgment for Alexion and against the Tower 2 insurers. Ex. B ¶¶ 2–3. The court dismissed Alexion's claims against Tower 1 insurer Hudson, as those claims had been pled in the alternative. *Id.* ¶ 5.[5]

These consolidated appeals timely followed.

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[5] Hudson has not sought to intervene in the consolidated appeals, nor has Alexion cross-appealed the dismissal of its claims against Hudson.

ARGUMENT

I. THE TOWER 2 POLICIES DO NOT COVER THE SECURITIES ACTION.

A. Question Presented

Whether the Securities Action is a Claim deemed first made during the Tower 1 policy period, such that Tower 2 affords no coverage. Insurers preserved this issue at A446–55, A739–48, and A855–56.

B. Standard Of Review

"This Court reviews, *de novo*, rulings that involve the interpretation of contract language, including policies of insurance." *Twin City Fire Ins. Co. v. Del. Racing Ass'n*, 840 A.2d 624, 626 (Del. 2003). This Court also reviews *de novo* rulings on cross-motions for summary judgment, without deference to the trial court, as to both the facts and the law. *Wilm. Tr., Nat'l Ass'n v. Sun Life Assurance Co. of Can.*, 294 A.3d 1062, 1071 (Del. 2023); *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996).

C. Merits Of The Argument

In holding that the Tower 2 policies cover the Securities Action, the Superior Court erred by treating the Notice of Circumstances as a "Claim," instead of the disclosure of "facts or circumstances which may reasonably give rise to a *future* claim." The Superior Court then erroneously: (1) compared what it saw as two "Claims"; (2) framed the question before it as whether the Securities Action and

the SEC Subpoena were sufficiently related (Op. 8, 22, 25–26, 27) instead of whether the Securities Action arose from "any Wrongful Act, fact, or circumstance" that was the subject of Alexion's Notice of Circumstances; and (3) as a result of these conceptual errors, misapplied the relevant policy provisions. Once these errors are corrected, the policies' plain language compels the conclusion that the Tower 2 policies do not cover the Securities Action.

1. The policies in context: Claims-Made policies benefit insureds, by allowing them the option of assigning future claims to a single policy period.

Liability policies are generally triggered by two different events. Under occurrence-based policies, coverage is triggered by injury or damage during the policy period. Under claims-made policies, in contrast, coverage is triggered when a claim is first made during the policy period or is deemed first made during the policy period because it resulted from circumstances first noticed during the policy period that could lead to a claim. *F.D.I.C. v. St. Paul Fire & Marine Ins. Co.*, 993 F.2d 155, 158 (8th Cir. 1993); *Hoechst Celanese Corp. v. Certain Underwriters at Lloyd's, London*, 656 A.2d 1094, 1095 n.1 (Del. 1995).

Claims-made policies benefit insurers and insureds alike. From the insurer's perspective, claims-made policies afford greater certainty regarding its exposure. *F.D.I.C.*, 993 F.2d at 158 (explaining that a claims-made policy cuts off the insurer's liability after a certain date, reducing the insurer's exposure and allowing

it to more accurately fix its reserves for future liabilities and compute premiums with greater certainty); *Zuckerman v. Nat'l Union Fire Ins. Co.*, 495 A.2d 395, 399–400 (N.J. 1985) ("The obvious advantage to the underwriter issuing 'claims made' policies is the ability to calculate risks and premiums with greater exactitude since the insurer's exposure ends at a fixed point, usually the policy termination date.").

From the insured's perspective, claims-made policies are more affordable than occurrence-based policies, offer more reliable coverage from the insured's current insurers, and provide retroactive coverage for prior acts that result in claims first made during the policy period (as long as the insured did not know of and conceal a likely claim). *Colliers Lanard & Axilbund v. Lloyds of London*, 458 F.3d 231, 233 (3d Cir. 2006) (applying New Jersey law); *F.D.I.C.*, 993 F.2d at 158.

Of particular relevance here, claims-made policies regularly afford additional protection by permitting the insured to report circumstances that may give rise to future claims—i.e., issue a notice of circumstances—extending the period in which claims can be made against the insured and still trigger the policy. *F.D.I.C.*, 993 F.2d at 158; *see also In re Republic Techs. Int'l, LLC*, 275 B.R. 508, 523 n.13 (Bankr. N.D. Ohio 2002) (observing that claims-made policies allow insureds to report during the policy period circumstances that might give rise to future claims, and if such claims are ultimately made—even after the policy

expires—they will be deemed made when notice was provided); RESTATEMENT OF THE LAW OF LIABILITY INSURANCE § 33 cmt. e (2019) (observing that notice of circumstances provisions give the insured "the option to secure coverage under an existing claims-made policy for a legal action that may be brought in the future").

Although voluntary, issuing a Notice of Circumstances can provide advantages to the insured. For example, an insured can cabin all liability from future claims that result from the subject of the Notice of Circumstances within the existing policy period, thereby assuring that the liability limits of future policy years are preserved for any newly alleged wrongful acts that may result in future Claims. *See* Victor F. Mustelier, *Notice-of-Circumstances Provisions in Claims-Made Policies*, INSURANCE COVERAGE LAW BULLETIN (June 27, 2008), available at https://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2008/06/27/notice-of-circumstances-provisions-in-claims-made-policies/ (explaining the benefits of preserving the current liability limit for future claims and enhancing available coverage in future policy years) (last visited June 3, 2024); *see also* JOHN F. OLSON ET AL., DIRECTOR AND OFFICER LIABILITY: INDEMNIFICATION AND INSURANCE § 12:35 (Dec. 2023) ("The advantage to the insured of submitting a notice of circumstances is that it preserves the insured's rights under the existing policy. If a claim arises out of such circumstances after the expiration of the policy period, the policy will treat such claim as if made during the policy period and therefore

covered subject to the policy's other terms and conditions. Of course, such claims likely will be excluded from coverage under subsequent policies due to that policy's 'prior notice' exclusion.").

It is against this backdrop that the present coverage dispute must be analyzed. Viewed in context, Tower 1 is the proper source of coverage for the Securities Action. Alexion opted to provide a Notice of Circumstances under Tower 1, detailing facts and circumstances concerning potential liability for its improper Soliris sales practices, precisely because Alexion intended to assign all future Claims arising from those Wrongful Acts, facts and circumstances to Tower 1. The contractual consequence of that election is that the anticipated future Claim that eventually materialized, in the form of the Securities Action, is deemed first made during the Tower 1 policy period. It necessarily follows, as explained more fully below, that Tower 2 does not provide coverage.

2. Alexion's choice to tender the Notice of Circumstances assigned future claims, such as the Securities Action, to Tower 1 and triggered Tower 2's Prior Notice Exclusion.

The Tower 1 policies contain a Notice of Circumstances provision that allows Alexion to notify its insurers of facts or circumstances not yet constituting a Claim, but that could reasonably be expected to result in a Claim. A165. To invoke the provision, actual allegations of wrongful conduct are unnecessary—awareness of "facts or circumstances which *may* reasonably give rise to a future

Claim" and "anticipated Wrongful Act allegations" are sufficient. *Id.* (emphasis added). A future Claim arising out of a potential "[w]rongful [a]ct" that Alexion voluntarily discloses is deemed first made when the insurers receive the Notice of Circumstances:

> If, during the Policy Period … the Insureds first become aware of facts or circumstances which may reasonably give rise to a future Claim covered under this Policy, and if the Insureds give written notice to the Insurer during the Policy Period … of the identity of the potential claimants; a description of the anticipated Wrongful Act allegations; the identity of the Insureds allegedly involved; the circumstances by which the Insureds first became aware of the facts or circumstances; the consequences which have resulted or may result; and the nature of the potential monetary damages and non-monetary relief; *then any Claim which arises out of such Wrongful Act shall be deemed to have been first made at the time such written notice was received by the Insurer.*

Id. (emphasis added).

The Notice of Circumstances provision imposes a broad causal nexus—"arising out of"—between the potential "Wrongful Act" and any future Claim. *City of Newark v. Donald M. Durkin Contracting, Inc.*, 305 A.3d 674, 680 (Del. 2023) (interpreting "arising out of" broadly); *accord First Solar, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 274 A.3d 1006, 1013 (Del. 2022) (same); *Pac. Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1257 (Del. 2008) (holding that "arising out of" is broadly construed to require meaningful linkage); *Eon Labs Mfg., Inc. v. Reliance Ins. Co.*, 756 A.2d 889, 893–94 (Del. 2000) (holding that

"arising out of" unambiguously connotes meaningful linkage); *Torrent Pharma, Inc. v. Priority Healthcare Distrib., Inc.*, 2022 WL 3272421, at *10 (Del. Super. Ct. Aug. 11, 2022) (holding that "arising out of" describes "a loose conception of causation").

Applying the Notice of Circumstances provision to the facts of this case, there is a causal nexus between the anticipated "wrongful act" allegations detailed in Alexion's Notice of Circumstances and the Securities Action. Both concerned the same alleged wrongdoing: Alexion's Soliris sales tactics. The Notice of Circumstances reported that Alexion had been served with the SEC Subpoena and was facing potential allegations of wrongdoing surrounding its Solaris sales practices, including grantmaking activities abroad. A530. The Notice of Circumstances also stated that the SEC Subpoena sought information about Alexion's worldwide activities, particularly those in Brazil, Japan, Russia, and Turkey. *Id.* Given that Soliris was Alexion's *only* product being sold at the time (*see* p. 12 *supra*), an investigation of Alexion's worldwide activities was an investigation of Soliris.

Not surprisingly, the Notice of Circumstances disclosed that "lawsuits brought by private litigants, may also follow as a consequence" of the SEC investigation. A531. As the SEC itself has stated, "private plaintiffs routinely bring their own actions alleging fraud against defendants who are also subject to

Commission administrative proceedings." Brief of the SEC, Amicus Curiae, *City of Providence v. BATS Glob. Mkts., Inc.*, (No. 15-3057), 2016 WL 7030327, at *20 (2d Cir. Nov. 28, 2016). In other words, private securities actions "routinely" arise from SEC investigations—exactly what happened here.

The Securities Action likewise alleged wrongdoing in connection with Alexion's Soliris sales tactics, including its grantmaking activities abroad. The stockholder plaintiffs alleged that Alexion had improperly boosted Soliris sales by issuing grants to charitable organizations, including a patient advocacy group in Brazil that used the money to try to get the Brazilian government to pay for Soliris. A304–06.

The Securities Action original complaint referenced the SEC investigation of Alexion's grantmaking activities in Brazil, Japan, Russia, and Turkey. A615. And the operative extensively cited the July 2017 *Bloomberg News* exposé that discussed the SEC investigation of Alexion's worldwide activities, including use of grants and charitable donations in Brazil. A526–27. That *Bloomberg News* article stated:

> For the past two years the Securities and Exchange Commission has been investigating grants made by Alexion in Brazil, Colombia, Japan, Russia, and Turkey, with a focus on potential violations of the Foreign Corrupt Practices Act.

A527. Notably, the Securities Action complaint alleged that immediately following publication of the *Bloomberg News* article, Alexion's stock dropped. A609. While the article discusses a range of Alexion's sale practices related to Soliris, the "facts or circumstances" that are the subject of the Notice of Circumstances are featured in the *Bloomberg News* article that is central to the stockholder plaintiffs' complaint.

Discovery during the Securities Action further illustrates the overlapping alleged wrongdoing. In support of their successful motion to compel production of the documents Alexion had produced to the SEC, the stockholder plaintiffs contended that the SEC investigation was "highly relevant," as it concerned the "very same types of unethical and illegal behavior," and that "Alexion's FCPA violations involved illegal and unethical sales practices and inappropriate business conduct by Alexion employees during the Class Period." A706–08, A715. Alexion acknowledged the allegations that it had improperly contributed to a Brazilian patient assistance organization that fraudulently sought reimbursement of Soliris, and that Alexion was not opposing discovery into its alleged wrongdoing in Brazil. A788.

Given these undisputed facts, the Notice of Circumstances provision that Alexion voluntarily invoked mandates that the Securities Action is a Claim deemed first made when the Tower 1 insurers received the Notice of Circumstances—

June 18, 2015. A534. As a result of that deemer provision, the Securities Action is not a Claim first made during the Tower 2 policy period, and Swiss Re, Endurance, and Navigators therefore owe no coverage. The non-party insurers largely agree with this conclusion. *See* p. 19 *supra*.

Alexion's endeavor to escape the consequences of its Notice of Circumstances is an attempt to steer the Securities Action into a policy period with $20,000,000 in additional limits. Suppose Alexion had not purchased D&O liability insurance after Tower 1 expired, such that Tower 1 was the only source of insurance available to respond to the Securities Action. Alexion would undoubtedly—and correctly—be urging Tower 1 coverage, on the basis that the Notice of Circumstances adequately disclosed the potential alleged wrongdoing. The outcome should be no different simply because, after the fact, Alexion prefers to tap the policy period with higher limits.

The consequence of Tower 1 coverage for the Securities Action is that there is no Tower 2 coverage. The Tower 2 policies' Prior Notice Exclusion provides:

> The Insurer shall not be liable for Loss on account of any Claim ... alleging, based upon, arising out of, or attributable to any Wrongful Act, fact, or circumstance which has been the subject of any written notice given and accepted under any other directors & officers policy of which this Policy is a renewal or replacement.

A79.

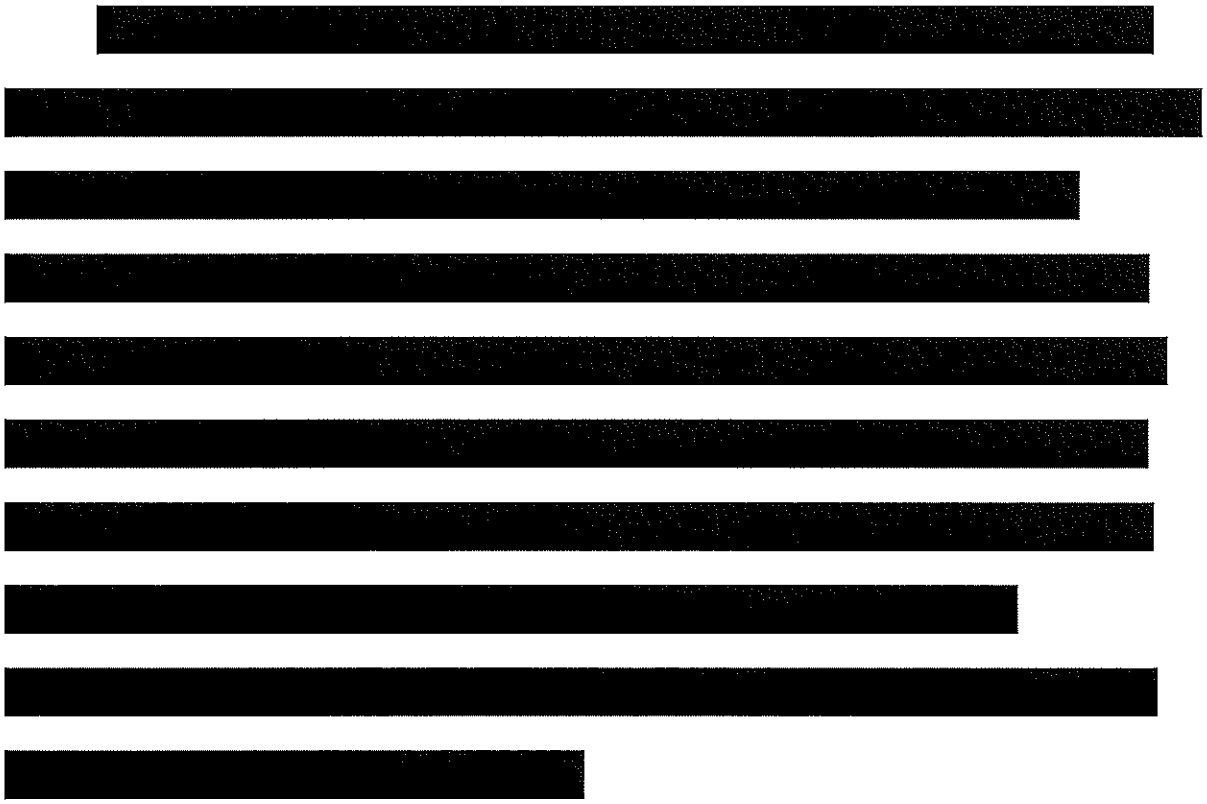
The Prior Notice Exclusion encompasses future Claims that arise from "any Wrongful Act, fact, or circumstance" that has been the subject of "any written notice." *Id.* As a result, in evaluating whether the Prior Notice Exclusion applies, more than just the notice's statement of anticipated "[w]rongful [a]ct" allegations must be considered.

By treating the SEC Subpoena as a Claim, and then comparing "the SEC Subpoena and the Securities Action" (Op. 8, 22, 25–26, 27), the Superior Court artificially curtailed the scope of the inquiry. Reflecting this incorrect analysis, the Superior Court referred to "incidents"—a term that does not appear in the relevant policy language. The Court thus mistakenly framed the issue as "whether the federal securities action is 'related' to a previously reported *incident*." Op. 1 (emphasis added) (stating that the applicable standard considers "whether the two *incidents* are 'meaningfully linked'" and "Here, the link between the securities action and the *prior incident* is tangential, not meaningful." (emphasis added)).

Rather than comparing the Securities Action to the SEC Subpoena alone, the trial court should have more broadly considered whether the Securities Action was "alleging, based upon, arising out of, or attributable to *any* Wrongful Act, fact, or circumstance" described in the Notice of Circumstances. A79 (emphasis added). Had the court done so, it would have concluded that the Prior Notice Exclusion bars Tower 2 coverage for the Securities Action.

This is true for multiple reasons.

First, as explained above, the Notice of Circumstances and the Securities Action concerned the same alleged wrongdoing: Alexion's efforts to increase Soliris sales by improperly using charitable contributions, grants, and other financial incentives to induce government reimbursement. The Notice of Circumstances reported that Alexion was facing an SEC investigation into its grantmaking activities abroad. A530. The Securities Action alleged the same wrongdoing, as underscored by the stockholder plaintiffs during their discovery dispute with Alexion. A707, A715.



Third, the Notice of Circumstances and the Securities Action concerned overlapping time periods. The Notice of Circumstances reported that the SEC had demanded preservation of documents created on or after January 1, 2009, and the SEC investigation referenced in the Notice of Circumstances concluded at the end of 2023. A530. That time period overlaps with the Securities Action's alleged class period—January 30, 2014 to May 26, 2017—by more than three years. A256.

Fourth, the Notice of Circumstances and the Securities Action concerned the same parties and type of claim. The Notice of Circumstances disclosed that the SEC Subpoena and investigation targeted Alexion and/or certain of its directors and officers, and warned of possible "lawsuits brought by private litigants." A531. Exactly as the Notice of Circumstances foreshadowed, the Securities Action was a lawsuit brought by private litigants—Alexion stockholders—against Alexion and its officers and directors. A256.

Finally, the Securities Action concerned the same relief described in the Notice of Circumstances. Like the Notice of Circumstances, which reported that future Claims might seek monetary damages, the Securities Action sought monetary damages. A366.

The following chart summarizes the various ways in which the Securities Action arose out of the "wrongful acts, facts and circumstances" described in the Notice of Circumstances:

	Notice of Circumstances	**Securities Action**
Underlying Wrongful Conduct	Improper sales practices relating to Soliris	Improper sales practices relating to Soliris
Overall Theory	[redacted]	Violations of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder
Time Period		Alleged class period: January 30, 2014 to May 26, 2017
Parties		Stockholder class action against Alexion and its officers

	Notice of Circumstances	Securities Action
Type of Claim	"internal or government investigations or legal or regulatory proceedings, *including lawsuits brought by private litigants*"	Lawsuit brought by private litigants
Nature of Relief	"Monetary damages and non-monetary relief may be a consequence"	Seeks monetary damages

Not only did the Securities Action arise out of the "wrongful acts, facts, and circumstances" described in the Notice of Circumstances, but the Tower 1 insurers accepted Alexion's Notice of Circumstances. Twelve days after Alexion issued the Notice of Circumstances, primary insurer Chubb accepted it as such under Chubb's Tower 1 primary policy. A534. Alexion issued the Notice of Circumstances, and Chubb accepted it, precisely because all understood that the SEC investigation did not constitute a "Claim." A535. This is why Chubb advised Alexion that no coverage was available at that time, but that it would accept the matter as a Notice of Circumstances. *Id.*

Had the trial court correctly evaluated the Securities Action against the Notice of Circumstances—and not just the SEC Subpoena—it would have concluded that the Securities Action is a covered Securities Claim deemed first made during the Tower 1 policy period, and that the Prior Notice Exclusion bars

coverage for the Securities Action under Tower 2. Because the judgment rests entirely on this flawed analysis, it should be reversed.

3. Even applying the Superior Court's incorrect framework, the Securities Action is still covered under Tower 1.

The Superior Court erred in focusing on whether the SEC Subpoena and the Securities Action involved "Interrelated Wrongful Acts." The SEC Subpoena itself was never a Claim; rather, the Notice of Circumstances was notice of potential *future* Claims. Indeed, the policies define a "Securities Claim" as a "Claim, *other than* a civil, criminal, administrative or regulatory *investigation of [Alexion]* ...." A56, A160 (emphasis added).

The difference between the SEC Subpoena (reported via a Notice of Circumstances) and a Claim undercuts the court's citation to *Options Clearing Corp. v. U.S. Specialty Insurance Co.*, 2021 WL 5577251 (Del. Super. Ct. Nov. 30, 2021) (cited at Op. 20–21, 24–25). In that case, the SEC issued an Order Instituting Proceedings, which alleged that the insured had violated certain statutes and regulations and directed an enforcement action to be filed against the insured. *Id.* at *4. Because the Order Instituting Proceedings contained concrete allegations of wrongdoing and sought relief, including a mandatory injunction, the D&O insurers accepted the document as a claim. *Id.* at *5. Here, in contrast, the SEC Subpoena served on Alexion was not an Order Instituting Proceedings, did not

contain any concrete allegations of wrongdoing, did not seek any relief, and did not direct the filing of an enforcement action. Thus, *Options Clearing* is not on point.

Even applying the court's mistaken "Interrelated Wrongful Acts" analysis, and mistaken comparison of the Securities Action to just the SEC Subpoena, the court's conclusion that the two are unrelated is still wrong.

If multiple Claims arise out of "Interrelated Wrongful Acts," all such Claims are "deemed to be first made on the date the earliest of such Claims is first made." A61, A165. The policies define "Interrelated Wrongful Acts" as "all Wrongful Acts that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of related facts, circumstances, situations, events, transactions or causes." A55, A159.

The required "common nexus" is broad. The court's citation to *Pfizer* v. *Arch Insurance*—an abrogated Superior Court decision—illustrates the point. Op. 21 (citing *Pfizer Inc. v. Arch Ins. Co.*, 2019 WL 3306043 (Del. Super. Ct. July 23, 2019), *abrogated by First Solar, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 274 A.3d 1006 (Del. 2022)). *Pfizer* interpreted a similar "Interrelated Wrongful Acts" definition to mean that the claims being compared had to be "fundamentally identical." 2019 WL 3306043, at *5, *7. In support of that proposition, *Pfizer* cited *Medical Depot, Inc. v. RSUI Indemnity Co.*, 2016 WL 5539879 (Del. Super. Ct. Sept. 29, 2016), *abrogated by First Solar, Inc. v.*

National Union Fire Insurance Co. of Pittsburgh, PA, 274 A.3d 1006 (Del. 2022). *Pfizer*, 2019 WL 3306043, at *7 n.54. *Pfizer* rejected the insurer's argument that the causal nexus was more lenient, and did not require the claims to involve precisely the same parties, legal theories, "Wrongful Acts," or requested relief. *Id.*

When presented with the opportunity to adopt *Pfizer*'s "fundamentally identical" standard, this Court refused to do so. *First Solar*, 274 A.3d at 1013 ("Whether a claim relates back to an earlier claim is decided by the language of the policy, not a generic 'fundamentally identical' standard." (citation omitted)). *First Solar*'s holding abrogated the "fundamentally identical" line of cases, including *Pfizer* and *Medical Depot*. *Id.* at 1013 n.45.

In light of *First Solar*, the trial court's adherence to abrogated authorities further underscores the flaws in its analysis. Nor was the court under a misimpression that *Pfizer* was still good law. The court explicitly acknowledged that this Court has rejected the "fundamentally identical" standard. Op. 21 n.112 ("*Pfizer* was abrogated by *First Solar* to the extent it relied on the 'fundamentally identical' standard for relatedness.").

Equally uncompelling was the trial court's reliance on a distinguishable Superior Court decision. *Id.* 20 n.109 (citing *Sycamore P'rs Mgmt., L.P. v. Endurance Am. Ins. Co.*, 2021 WL 4130631 (Del. Super. Ct. Sept. 10, 2021)). *Sycamore Partners* involved policies that defined "Interrelated Wrongful Acts" as

"Wrongful Acts which are based on, arise out of, directly or indirectly result from, are in consequence of or in any way involve any of the same or related or series of related facts, circumstances, situations, transactions or events." 2021 WL 4130631, at *3 (citation omitted). The policies here, in contrast, define "Interrelated Wrongful Acts" in terms of a "common nexus": "Wrongful Acts that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of related facts, circumstances, situations, events, transactions or causes." A55, A159. Whereas the *Sycamore Partners* policies required "the same or related or series of related facts," 2021 WL 4130631, at *3 (citation omitted), the policies here require only a "common nexus [of] any fact ... or series of related facts." A55, A159. Because the subject policies impose a different and more lenient causal standard, *Sycamore Partners* is not on point.

Under this more lenient causal standard, the focus is on similarities, not differences. *See, e.g.*, *W.C. & A.N. Miller Dev. Co. v. Cont'l Cas. Co.*, 2014 WL 5812316, at *7 (D. Md. Nov. 7, 2014) (holding that "the relevant focus is not on any number of *differences* between the [two proceedings]; instead, the relevant focus is on the similarities between the two"), *aff'd*, 814 F.3d 171 (4th Cir. 2016); *Weaver v. Axis Surplus Ins. Co.*, 2014 WL 5500667, at *12 (E.D.N.Y. Oct. 30, 2014) (holding that when the policy language refers to "any fact ... or series of casually or logically connected facts," it is immaterial that one claim may involve

additional facts or allegations), *aff'd*, 639 F. App'x 764 (2d Cir. 2016); *XL Specialty Ins. Co. v. Perry*, 2012 WL 3095331, at *8 (C.D. Cal. June 27, 2012) ("It is not necessary for the alleged wrongs to be temporally identical."); *LaValley v. Va. Sur. Co.*, 85 F. Supp. 2d 740, 747 (N.D. Ohio 2000) (holding that a prior notice exclusion barred coverage, even though the claims "do not perfectly overlap").

Thus, assuming *arguendo* that the only relevant comparison was between the SEC Subpoena and the Securities Action, the two are sufficiently related to meet the broad definition of "Interrelated Wrongful Acts." As the Superior Court conceded, there is some linkage between the matters, including Alexion's alleged wrongdoing in Brazil and a temporal overlap between the alleged wrongdoing. Op. 25. This was sufficient. The policy language does not require perfect overlap. Consequently, even under the trial court's flawed analytical framework, the Securities Action is not covered under Tower 2. The judgment should be reversed for this additional reason.

II. ALTERNATIVELY, ADDITIONAL DISCOVERY IS REQUIRED TO ASSESS WHETHER THE SECURITIES ACTION IS A CLAIM DEEMED FIRST MADE DURING THE TOWER 1 POLICY PERIOD.

A. Question Presented

Whether the Superior Court erred in granting summary judgment to Alexion without allowing sufficient discovery into the facts and circumstances underlying the SEC investigation that was the subject of Alexion's Notice of Circumstances. Swiss Re and Navigators preserved this issue at A860.[6]

This argument seeks alternative relief. If this Court concludes, as Swiss Re and Navigators believe it should, that even on the limited record developed below, the Securities Action arose out of and/or alleged the facts and circumstances that were the subject of the Notice of Circumstances, this question is moot.

B. Standard Of Review

This Court reviews *de novo* a summary judgment ruling. *Wilm. Tr.*, 294 A.3d at 1071. Where—as here—the issue is whether the summary judgment ruling was premature or procedurally unfair, due to the lack of adequate discovery, the standard of review is abuse of discretion. *Id.*; *see also ABB Flakt, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 731 A.2d 811, 815 (Del. 1999).

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[6] This alternative argument is made on behalf of Swiss Re and Navigators only, as Endurance did not make this argument below.

C. Merits Of The Argument

Generally, a court should not entertain a motion for summary judgment before the parties have engaged in discovery. *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168–69 (Del. 2006) ("Before a motion for summary judgment is ripe for decision, the non-movant normally should have an opportunity for some discovery." (citation omitted)); *see also Verizon Commc'ns Inc. v. Ill. Nat'l Ins. Co.*, 2015 WL 1756423, at *3 (Del. Super. Ct. Mar. 20, 2015) (holding that summary judgment is premature, when discovery is warranted).

A summary judgment opponent may request discovery, if it cannot present adequate facts in opposition to the motion:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just.

Del. Super. Ct. Civ. R. 56(f). Normally, this rule comes into play when the opponent cannot state certain facts essential to its position because those facts are within the movant's exclusive knowledge. *Schillinger Genetics, Inc. v. Benson Hill Seeds, Inc.*, 2021 WL 320723, at *16 (Del. Ch. Feb. 1, 2021); *see also N. Am. Phillips Corp. v. Aetna Cas. & Sur. Co.*, 1991 WL 190305, at *1 (Del. Super. Ct.

Aug. 30, 1991) (holding that discovery is "particularly appropriate," where "the relevant facts are exclusively in the control of the moving party").

Here, solely in the event this Court is inclined to find that the Securities Action is covered by Tower 2, the case should be remanded for additional discovery. In that instance, summary judgment was premature, as Alexion moved for such relief before any discovery had taken place. Op. 12–13. While Alexion had all of the information it needed (having been a party to a five-year SEC investigation), the insurers had far less. As set forth in Swiss Re's and Navigators' Rule 56(f) affidavits, discovery was needed to fairly oppose summary judgment—specifically, the facts and circumstances that were the subject of the SEC investigation and what Claims Alexion might have reasonably expected to arise therefrom. A477–91, A502–14. This is because Alexion chose to report the entire SEC investigation as part of the Notice of Circumstances, not merely the SEC Subpoena. And the Notice of Circumstances explicitly recited Alexion's belief that the SEC investigation could—as it ultimately did—lead to civil litigation alleging securities laws violations. A530–31.

Court-ordered discovery was the insurers' lone avenue of relief, as these facts and circumstances are within Alexion's exclusive knowledge. The SEC investigation was confidential, and the SEC never issued a Wells notice or filed an enforcement action or complaint laying out the facts supporting the proposed

enforcement or publicly detailing what the SEC believed Alexion had done wrong. *See* A860, A372, A570; 17 C.F.R. pt. 19, app. A. [redacted] Before approving payment of $21,476,531 to settle the investigation, and submission to a cease-and-desist order, Alexion's management would have known full well all facts and circumstances surrounding the investigation. A572–75.

[redacted]

Given that the investigation spanned five years, the limited production told little of the massive amount Alexion knew as to the likely parties, time periods, theories of liability, evidence, and relief that were the focus of the investigation. The production was woefully insufficient, leaving the insurers to guess what Alexion and its counsel knew about the investigation at the heart of the Notice of Circumstances and what Alexion paid millions of dollars to resolve.

What is more, the missing evidence plainly bore on the coverage dispute. The court made the point itself by focusing on the degree of overlap in the factual connection, including with respect to the parties, overlapping time periods, theories of liability, evidence, and relief. Op. at 27.

Under these circumstances, it was procedurally unfair and fundamentally at odds with Rule 56(f) to permit Alexion to move for summary judgment on whether the Securities Action arose out of the noticed SEC investigation, without allowing Swiss Re and Navigators reasonable visibility into that investigation. Therefore, if this Court does not outright reverse the judgment, it should at least vacate the judgment and remand for additional proceedings.

CONCLUSION

For the foregoing reasons, Swiss Re, Endurance, and Navigators respectfully request that this Court reverse the judgment of the Superior Court and remand with directions to enter judgment for Swiss Re, Endurance, and Navigators and against Alexion. Alternatively, Swiss Re and Navigators respectfully request that this Court vacate the judgment and remand for further proceedings, including additional discovery and renewed motions for summary judgment.

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