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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 REPLY BRIEF

ROSS ARONSTAM & MORITZ LLP

Garrett B. Moritz (Bar No. 5646)
R. Garrett Rice (Bar No. 6242)
A. Gage Whirley (Bar No. 6707)
Hercules Building
1313 North Market Street, Suite 1001
Wilmington, Delaware 19801
(302) 576-1600

KENNEDYS CMK LLP

Marc S. Casarino (Bar No. 3613)
222 Delaware Avenue, Suite 710
Wilmington, Delaware 19801
(302) 308-6645

Attorneys for Defendant Below, Appellant Endurance Assurance Corporation

PHILLIPS McLAUGHLIN
& HALL P.A.

John C. Phillips, Jr. (Bar No. 110)
David A. Bilson (Bar No. 4986)
1200 N. Broom Street
Wilmington, Delaware 19806
(302) 655-4200

Attorneys for Defendant Below/Appellant Swiss Re Corporate Solutions America Insurance Corporation f/k/a North American Specialty Insurance Company

Of Counsel:

James Sandnes
Sarah F. Voutyras
SKARZYNSKI MARICK
& BLACK LLP
One Battery Park Plaza, 32nd Floor
New York, New York 10004
(212) 820-7700

BODELL BOVÉ, LLC

Bruce W. McCullough (Bar No. 3112)
1225 N. King Street, Suite 1000
Wilmington, Delaware 19801
(302) 655-6749

Attorneys for Defendant Below/Appellant Navigators Insurance Company

Of Counsel:

Agelo L. Reppas
Brian J. Watson
BATESCAREY LLP
191 N. Wacker, Suite 2400
Chicago, Illinois 60606
(312) 762-3100

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PRELIMINARY STATEMENT

Alexion's answering brief concedes a key point: The Superior Court "framed its analysis as a comparison of *the SEC Subpoena* to the Securities Action." AB 6-7 (emphasis added); *see also* OB 4 (citing Op. 8, 22, 25-26, 27). Alexion does not even try to defend the comparison that the Superior Court said it was doing. Instead, Alexion asserts that "the *substance* of [the Superior Court's] analysis was broader" and "holistic[]." AB 6-7; *see also* AB 44. Based on this, Alexion claims that the court was really comparing the Securities Action to the SEC investigation.

Both the Superior Court's analysis and Alexion's revisionist claims about the supposed "substance" of the Superior Court's analysis are flawed and contrary to the applicable policy language. The governing policy terms 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 disclosing potential future claims. OB 4-5, 29-31. The Superior Court struggled to fit the square peg of a Notice of Circumstances and resulting Claim scenario into the more familiar round-hole scenario of comparing the interrelatedness of one Claim to a second, subsequent Claim. In this latter scenario, there are two complaints—two accusatory documents—laying out the "who, what, when, where and why" of two claims, which can be laid side-by-side and compared, as in *First*

Solar, Inc. v. National Union Fire Insurance Co. of Pittsburgh, Pa., 274 A.3d 1006 (Del. 2022). By contrast, the Notice of Circumstances is not a Claim, merely notice of *potential future* Claims. The Superior Court did not grapple with the fact that this is not a Claim-versus-Claim scenario, stating that "[t]he federal securities action is not related to *a previous claim*." Op. 1 (emphasis added). But that was not the issue—indeed, it is undisputed that there *was* no "previous claim."

Simply because the SEC investigation did not culminate in an accusatory complaint or even a Wells Notice does not mean that, as the Superior Court mistakenly believed, the SEC Subpoena must be treated as a substitute pleading. Nor does it mean that the Notice of Circumstances should be transformed into a supposed "Claim." Because the Notice of Circumstances analysis is different from a Claim-versus-Claim analysis, cases like *First Solar* are not fully on point.

Nevertheless, even applying Alexion's own flawed analysis, there is substantial factual and legal overlap between the Securities Action's allegations and the facts and circumstances surrounding the Notice of Circumstances. Alexion unwittingly makes the point, by listing a number of what Alexion says are relevant factors, almost all of which actually highlight a close interconnection.

And despite Alexion's efforts to obfuscate the timeline and relevance of the Bloomberg article, as explained in Point I.D below, the Securities Action was an outgrowth of the SEC investigation. Alexion has no answer to the fact that the

SEC itself recognizes that its investigations "routinely" result in follow-on private securities actions. OB 31-32.

Finally, even if this Court determines that the present record does not evince sufficient relatedness between the Notice of Circumstances and Securities Action, the judgment should still be vacated. At the very least, this Court should remand for additional discovery on this point, as explained in Point II below.

ARGUMENT

I. UNDER THE PROPER ANALYSIS, THE SECURITIES ACTION RELATES BACK TO THE NOTICE OF CIRCUMSTANCES.

A. Alexion Concedes That The Superior Court's Analysis Is Flawed.

Alexion concedes that the Superior Court "framed its analysis as a comparison of the SEC Subpoena to the Securities Action," but contends "the *substance* of its analysis was broader" and "holistic[]." AB 6-7; AB 44. Alexion is wrong. Throughout its decision, the Superior Court reiterated that it was comparing the Securities Action strictly to the SEC Subpoena:

- The 2015-2017 Insurers and Hudson Insurance Company's "liability depends on the placement of the Securities Action," which "in turn, hinges on whether the Securities Action is related to *the SEC Subpoena*." Op. 8 (emphasis added).
- "*The SEC Subpoena* and the Securities Action Aren't Meaningfully Linked." *Id.* at 22 (emphasis added).
- The "question is whether [a meaningful] link exists between *the SEC Subpoena* and the Securities Action. It does not." *Id.* (emphasis added).
- "[T]he Court is convinced that *the SEC Subpoena* and Securities Action are not meaningfully linked." *Id.* at 25 (emphasis added).
- "At bottom, the factual connection between *the SEC Subpoena* and the Securities Action is insufficient to make them related." *Id.* at 27 (emphasis added).

The Superior Court referred to the "SEC Subpoena" 26 times in its opinion, while referring to the "Notice of Circumstances" once as a background fact. *Id.* at 11.

Nor should this Court accept Alexion's attempt to spin the Superior Court's analysis as broader than it actually was, by referring to the term "incident." That term is not part of the relevant policy language and is not used to describe the SEC investigation. *Id.* at 1; AB 22, 45. Accordingly, the fact that the Superior Court used the word "incident" reinforces—rather than remedies—the analytical error.

B. The Superior Court Mistakenly Ignored The Notice of Circumstances Provision.

Alexion contends that the scope of the Superior Court's analysis was commensurate with the scope of the Notice of Circumstances. AB 45. Not so. The Superior Court referred to the Notice of Circumstances only once in its ruling (Op. 11), and never addressed the Notice of Circumstances provision under Tower 1 or the manner in which it should be applied. Instead, the Superior Court examined solely the Interrelated Wrongful Acts provision and the Prior Notice Exclusion, construing them in a vacuum under the Tower 2 policies (Op. 18-19), without examining the broad coverage extended to Alexion under Tower 1 by virtue of the Notice of Circumstances provision.

Had the Superior Court done so, it would have concluded that the Securities Action arose from Alexion's Notice of Circumstances. This is because the governing causal nexus—"arising out of"—is construed broadly. *Pac. Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1256-57 & n.42 (Del. 2008) (interpreting "arising out of" broadly in insurance policies as akin to "growing out of," "flowing

from," "done in connection with," "incident to," and "encompass[ing] a meaning broader than mere proximate cause") (citations omitted); *Sycamore P'rs Mgmt., L.P. v. Endurance Am. Ins. Co.*, 2021 WL 4130631, at *14 (Del. Super. Ct. Sept. 10, 2021) (instructing lower courts to implement a meaningful linkage analysis "broadly, where possible, to find coverage") (citing *Pac. Ins.*, 956 A.2d at 1256-57 & n.42).

Contrary to Alexion's assertion, it does not matter that the Tower 2 insurers "are not parties to or third-party beneficiaries of" the Tower 1 policies. AB 41-42. The Tower 2 policies' Prior Notice Exclusion expressly excludes coverage for Claims arising out of a Notice of Circumstances reported and accepted under a prior D&O policy—whatever the terms of the prior policy might be. Those are the negotiated terms to which Alexion agreed.

C. Alexion Fails To Differentiate The Facts And Circumstances Disclosed In The Notice of Circumstances From Those Of The Securities Action.

Because it cannot alter the Notice of Circumstances provision, Alexion instead tries to alter the record. To wit, Alexion collapses the distinction between the SEC Subpoena and SEC investigation, recasting them as one and the same. This is evident from Alexion's modified demonstrative charts. In the Superior Court, Alexion compared the Securities Action to the "FCPA Subpoena" (A998-99), whereas on appeal, Alexion recharacterizes the SEC Subpoena as the "SEC

Investigation" (AB 29-31). But they are not the same. The SEC investigation was broader than the SEC Subpoena and the Notice of Circumstances was broader still.

Because Alexion mistakenly presumes that the relatedness inquiry is confined to the SEC investigation, Alexion's comparative analysis remains artificially narrow. The Notice of Circumstances provision requires a comparison of the Securities Action to the "wrongful acts, facts and circumstances" described in the Notice of Circumstances, which are more than just the SEC investigation. OB 35, 38-39. Despite its concession that the Superior Court employed the wrong analytical framework, Alexion repeatedly urges this Court to compare the "parties, time periods, theories of liability, alleged wrongdoing, and relief" involved in the Securities Action to those involved in the "SEC Investigation." AB 24-25; *see also* AB 4, 5, 6, 22, 29-31 (chart), 39. That is the analysis employed for two complaints in a Claim-versus-Claim scenario—not, as here, a Notice of Circumstances scenario.

But even under the factors Alexion identifies as relevant to the inquiry, there is still a meaningful link between the SEC investigation and Securities Action:

Parties: Alexion was a party to both proceedings. The Notice of Circumstances encompassed future Claims against other insureds, including Alexion's directors and officers, who were eventually named in the Securities

Action. The SEC investigation, like the Securities Action, was directed against Alexion and not just "foreign affiliates of Alexion." AB 30.

Alexion retorts that the relevant parties in the SEC investigation are "the SEC" and "foreign affiliates of Alexion," while the relevant parties in the Securities Action are Alexion, certain officers, and "[a] class of Alexion shareholders." AB 30. By this logic, the parties would ***never*** overlap when comparing a regulatory matter with private litigation because the SEC is a government enforcement agency. Yet Alexion's Notice of Circumstances expressly encompasses not only the SEC investigation, but also "lawsuits brought by private litigants," such as the Securities Action claimants. A530–31.

Type of Action: Despite Alexion's attempt to contrast the "SEC Investigation" against the Securities Action's "Civil Complaint by Shareholders" (AB 30), both proceedings arose from the same facts and circumstances. Indeed, Alexion's Notice of Circumstances expressly encompasses "lawsuits brought by private litigants" (A530–31) and the Securities Action is exactly that. Of course, an SEC investigation can never be precisely the same type of action as a civil shareholder action. But this fact is immaterial, as the Notice of Circumstances provision does not demand identicality. AB 29-31.

Alexion counters that the risk of "lawsuits brought by private litigants" in the Notice of Circumstances is limited to the SEC's "determination[s]," not the

SEC investigation itself. AB 14-15. Again, Alexion is wrong. The Notice of Circumstances provision refers to facts, circumstances, and Wrongful Acts that may give rise to a future Claim. When Alexion reported the SEC investigation, it could not know what, if any, determinations would possibly be made in the future.

[redacted]

[redacted]

Wrongful Acts: Alexion attempts to distinguish the "Alleged Wrongful Acts" at issue in each proceeding, claiming that the SEC investigation was limited to conduct occurring in "Turkey, Russia, Japan and Brazil." AB 30. But the Notice of Circumstances stated that the SEC was investigating "Alexion's activities and policies and procedures *worldwide*." A530 (emphasis added). And Alexion's practices in Brazil featured prominently in the Securities Action as an example of Alexion's alleged wrongdoing. A613-15, A618-20.

Equally meritless is Alexion's attempt to distinguish foreign-grant making practices and improper bookkeeping and internal controls, on one hand, and misrepresentations to the investing public, on the other hand. AB 30. These are not materially different things. Books and records are the foundation of Alexion's SEC Form 10-K and 10-Q filings, which are inherently (mis)representations to the investing public about how Alexion was using its resources to grow its business. Alexion's funding of patient advocacy groups, including in Brazil, was also

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[1] *See, e.g.*, *Republic of Iraq v. ABB AG*, 768 F.3d 145, 171 (2d Cir. 2014) ("We conclude that there is no private right of action under the antibribery provisions of the FCPA ..."); *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1029 (6th Cir. 1990); *Maddox v. CitiFinancial Mortg. Co.*, 2018 WL 1547362, at *1 (W.D. Va. Mar. 29, 2018) ("Neither the FCPA nor UDAAP provide a private cause of action, however.").

squarely at issue in both proceedings. Thus, the alleged misrepresentations in the Securities Action were largely about the same conduct the SEC was investigating.

Alexion protests that the links between the proceedings, including overlapping alleged misconduct, are grounded in "abstract notions" of relatedness. On the contrary, the links are concrete, direct, and meaningful and comport with the broad "arising out of" standard found in the Notice of Circumstances provision. *E.g.*, *Safeway, Inc. v. Liberty Mut. Ins. Co.*, 2009 WL 1209068, at *3 (D. Del. Apr. 30, 2009) (finding coverage based on meaningful link between insured's products and claimant's loss in course of delivering the product, even though the product was not the proximate cause of the loss).

[redacted]

Relief Sought: Alexion's Notice of Circumstances expressly anticipated "lawsuits brought by private litigants" that would seek "[m]onetary damages," which is precisely the relief sought in the Securities Action. A531. This link is not erased by the mere fact that, as Alexion notes, the SEC investigation sought non-monetary relief. AB 5, 7, 24, 31. Given that there is no private cause of action for damages under the FCPA (*see* note 2 above), the relief sought in the SEC investigation would necessarily differ from the monetary damages sought in the Securities Action.

In sum, Alexion's comparison of the SEC Investigation's "parties, time periods, theories of liability, alleged wrongdoing, and relief" to those of the Securities Action complaint is more constrained than the Notice of Circumstances provision allows. AB 24-25. Even applying Alexion's artificially constrained analysis, though, the result is the same: There is a meaningful link between the SEC investigation and Securities Action.

D. Alexion Mischaracterizes the Link Between the Proceedings Through its Brazilian Wrongdoing and the Bloomberg Article.

The Notice of Circumstances was the Insurers' first touchpoint on what would be Alexion's years-long process of coming clean on its improper Soliris sales practices, a process culminating in revelation of the police raid in São Paulo, Brazil, and publication of the Bloomberg article. Alexion attempts to dismiss the Bloomberg article, calling it "extrinsic evidence" and

arguing that it bears only tangential connections to the SEC investigation. AB 36-37. Alexion's efforts fail, as it relies on cherry-picked facts and re-sequencing of events to make the proceedings seem unrelated. But when the facts are viewed in the context of a chronological timeline, they show a direct factual and legal relationship between the SEC investigation and Securities Action:

December 2014. While unknown to the Insurers or the public at the time, an "outside law firm, hired [by Alexion] to review the Company's business practices in Brazil" issued an internal confidential report that the "Company's Brazil operations were '***unethical***.'" A306, A352.

[redacted]

June 2015. On June 18, 2015, Alexion reported the SEC investigation as a Notice of Circumstances that may give rise to a future Claim, including possible "lawsuits brought by private litigants." A531. On June 30, 2015, Chubb accepted the Notice of Circumstances under Tower 1, resulting in a mutual agreement to

place in Tower 1 all Claims that may arise out of the facts, circumstances, and Wrongful Acts reported in the Notice of Circumstances.

December 2016. Following public disclosure that Alexion was conducting an internal investigation into improper Soliris sales practices, and that Alexion's CEO and CFO had abruptly resigned, Alexion's stock price dropped. The Securities Action claimants then filed the original complaint seeking recovery for the stock drop. A227. The original complaint alleged that Alexion had "misrepresented that the steady growth in Soliris sales was due to the progression of its global launch, as opposed to its *improper sales practices*." A235 (emphasis added).

May 2017. Alexion's São Paulo, Brazil, offices were raided by Brazilian authorities as part of a multi-year coordinated federal investigation regarding healthcare fraud in the pharmaceutical industry. A318.

Two weeks later, on May 24, 2017, the Bloomberg article was published. Among other things, the article discussed the raid in Brazil and the SEC investigation: "***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 (emphasis added). In response to this news, Alexion's stock

price dropped further, and its market capitalization plummeted by over $10 billion. A258-59, A265; A682-83.

June 2017. The stock price drop following the Bloomberg article's publication prompted the filing of a consolidated class action complaint alleging wrongdoing dating back to January 2010 and expanded the class period to May 26, 2017. The class period ends two days after publication of the Bloomberg article, which the class plaintiffs state was the corrective disclosure that revealed the "full extent" of Alexion's improper sales practices and resulting stock price drop. A258-59.

The consolidated class action complaint specifically references the Brazilian raid and the ongoing SEC investigation. A605-607, A613-15. The complaint also noted that, as a result of the SEC investigation "*additional details* about Alexion's improper conduct *are likely to emerge*." A615 (emphasis added).

February 2019. Alexion announced that it settled DOJ allegations relating to "kickbacks" to patient advocacy organizations in the United States to increase Soliris sales. A324. The Anti-Kickback laws are the domestic version of the FCPA. *Compare* 15 U.S.C. §§ 78dd-1, *et seq.* (FCPA) (making it unlawful to "offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to … influencing any act or decision of such foreign official, political party, party

official, or candidate in his or its official capacity, [to] securing any improper advantage.") *with* 42 U.S.C. § 1320a-7b(b) (anti-kickback statute cited in the DOJ settlement making it unlawful to "offer[] or pay[] any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person … [to] furnish[] or arrang[e] for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program").

June 2019. The Securities Action operative complaint was filed, which relied on the Bloomberg article and a newly revealed DOJ settlement. A257-58, A264-65, A296-297, A303-306, A322-25. Although this version of the complaint did not specifically reference the SEC Subpoena, it discusses Alexion's Brazilian wrongdoing and the connection to the broader wrongdoing outlined in the Bloomberg article. AB 16.

July 2020. While Alexion's motion to dismiss the Securities Action was pending, Alexion and the SEC announced a settlement under which Alexion agreed to pay approximately $21 million and consent to entry of a cease and desist order. OB 19; A577. The consent order outlined Alexion's wrongdoing in multiple countries, including Brazil. The consent order concludes that Alexion violated the "Exchange Act because its books and

records did not accurately reflect certain expenses and payments, including improper payments to foreign officials and third parties." A576.

September 2020. In support of their opposition to Alexion's motion to dismiss, the Securities Action plaintiffs made a supplemental filing relying on the SEC cease and desist order. AR3-4. The Securities Action plaintiffs described the SEC's findings as "*remarkably similar* to the allegations set forth in the Amended Complaint." AR4 (emphasis added).

August 2021. The Securities Action court denied Alexion's motion to dismiss. *See Boston Ret. Sys. v. Alexion Pharms., Inc.*, 556 F. Supp. 3d 100, 145 (D. Conn. 2021).

June 2022. Following denial of its motion to dismiss, Alexion settled the Securities Action. A947, A961.

* * *

As the foregoing timeline of events shows, the Securities Action arose directly from the accepted Notice of Circumstances advising the Tower 1 insurers of the SEC investigation and SEC Subpoena. Alexion nevertheless maintains that the Superior Court correctly found that the SEC Subpoena and Securities Action are "only loosely connected by Alexion's activities in Brazil," and that the Brazilian connection was merely "tangential." AB 22 (quoting Op. 25). That conclusion cannot be reconciled with the record.

The Superior Court's finding does not account for the *reason* that the Securities Action complaint focused on Brazil. When the June 2019 operative complaint was filed, the Securities Action plaintiffs' information about Alexion's wrongdoing in Brazil came from publicly available sources—including the Bloomberg article. Alexion's grant-making activities in Brazil became a prime *example* of Alexion's wrongful sales practices surrounding Soliris because, by then, that information about Brazil had become publicly available.

That does not mean that the Securities Action plaintiffs were deliberately restricting their allegations to wrongdoing occurring exclusively in Brazil. They plainly intended to sweep within the ambit of their suit improper Soliris sales practices in other foreign countries, as well—they just did not have access to the information that would allow them to make such allegations, as the information was not yet publicly available. This is evident from the Securities Action plaintiffs' allegation that "*additional details* about Alexion's improper conduct *are likely to emerge*." A615 (emphasis added). When such information later became publicly available, through the July 2020 cease and desist order, the Securities Action plaintiffs promptly advised the Securities Action court in (successfully) opposing Alexion's motion to dismiss. AR3-4.

Nor can Alexion's alleged wrongdoing in Brazil be dismissed as a mere "tangential" connection to the Securities Action. According to the Securities

Action pleadings, Alexion caused the Brazilian government to be defrauded out of over $400 million. A306. To put that in perspective, 30% of Brazil's expenditures on prescription drugs were paying for Soliris. *Id.* And, of course, Alexion does not and cannot dispute that its conduct in Brazil was an express subject of both the SEC investigation and the Securities Action.

Considering the progression from the SEC investigation to the Bloomberg article to the Securities Action shows that Alexion's attempt to defend the Superior Court's analysis is flawed. Alexion's alleged wrongdoing in Brazil is but one of multiple indicators that the Securities Action arose from the Wrongful Acts, facts and circumstances that were the subject of the Notice of Circumstances.

E. Finding A Meaningful Link Does Not Render Coverage Illusory.

Alexion's assertion—that coverage would be rendered "illusory," if the Securities Action is not covered under Tower 2—makes no sense. AB 32. The Securities Action is indisputably covered; the only question is under *which* policies, the Tower 1 or Tower 2 policies. Therefore, by definition, coverage for the Securities Action cannot be "illusory." *ACE Capital Ltd. v. Morgan Waldon Ins. Mgmt. LLC*, 832 F. Supp. 2d 554, 572 (W.D. Pa. 2011) (insurance coverage is illusory where the insured purchases no effective protection; a policy is not illusory if it provides coverage for some acts); *Am. Nat'l Prop. & Cas. Co. v. Banks*, 691

F. Supp. 3d 1297, 1302 (D. Colo. 2023) (if an insurance policy covers some risk that the parties can reasonably anticipate, it is not illusory).

Undaunted, Alexion insists that there could never be coverage under the Tower 2 policies, "[i]f the Notice of Circumstances is interpreted to deem *any future claim involving Soliris sales practices* a Claim made during Tower 1." AB 32 (emphasis added). But Tower 2 D&O policies cover a broad array of claims for fiduciary wrongdoing beyond Soliris sales practices. For example, stockholder M&A litigation. And even with respect to Soliris, it is easy to imagine any number of D&O claims involving Soliris that would not relate back to the Notice of Circumstances and, therefore, might be covered under the Tower 2 policies. Suppose that investors sued Alexion for misleading statements about the efficacy of Soliris as a treatment for a rare disease, or misrepresenting health risks associated with Soliris. Or suppose that Alexion faced claims for concealing Soliris manufacturing problems or misrepresenting the status of FDA approval regarding production facilities. Such claims, if made during the Tower 2 policy period, potentially would not have a meaningful link to the Notice of Circumstances. For this additional reason, Alexion's illusory coverage argument misses the mark.

II. ALTERNATIVELY, THE SUPERIOR COURT SHOULD HAVE GRANTED SWISS RE AND NAVIGATORS' REQUEST FOR BROADER DISCOVERY.

Alexion makes multiple incorrect statements about the rulings surrounding Swiss Re and Navigators' request for additional discovery. Trying to dodge the merits of the issue, Alexion asserts—unsupported by any record citation—that the "Insurers did not identify the Superior Court's discovery order in their Notice of Appeal." AB 8. In fact, Swiss Re and Navigators' Notice of Appeal lists the challenged discovery orders and the transcript of the discovery conference. No. 154, 2024 Dkt. 1 at 2.

Continuing to try to argue waiver, Alexion points to Endurance's failure to join Swiss Re and Navigators' Rule 56(f) motion seeking additional discovery. *See* AB 8, 46-47 & n.10. But that is not binding on Swiss Re or Navigators, and Alexion posits no legal or factual basis on which to conclude otherwise. In any event, Endurance's decision does not reflect agreement with Alexion's position—it simply reflects the view that the connection between the Notice of Circumstances and the Securities Action was sufficiently clear on the then-existing record that the issue could be decided for the Tower 2 insurers.

On the merits, Alexion declares that after it produced just six documents, in response to court-ordered discovery, Alexion objected to Swiss Re and Navigators' demand to produce "a laundry list of additional discovery." AB 21. The portion of

the record Alexion cites for this assertion (B0131) did not seek "additional discovery"; rather, the cited portion of the record merely underscores Alexion's failure to comply with even the limited discovery the Superior Court did allow.

Alexion also complains that Swiss Re and Navigators' discovery requests were overly broad. It is true that Swiss Re and Navigators' initial discovery requests sought Alexion's correspondence with the SEC regarding the SEC investigation. Alexion omits to mention, however, that the initial discovery requests were subsequently *narrowed* to things like electronic custodians and search terms that the SEC and Alexion agreed were relevant to the investigation. Neither this information, nor notes and correspondence between Alexion's counsel and SEC staff regarding their weekly meet-and-confers, would have been burdensome to produce.

Equally baseless is Alexion's objection to discovery seeking communications between the SEC and other investigative bodies—specifically, the United States Attorney's Office for the District of Massachusetts, which issued the DOJ grand jury subpoena about Medicare/Medicaid fraud resulting from Soliris sales practices. As Swiss Re and Navigators explained to the Superior Court, the DOJ was part of a series of investigations, actions, and subpoenas relating to the same SEC investigation. A910. Had the DOJ documents evinced broad differences from the SEC investigation, Alexion would have surely produced those

documents below. The fact that Alexion resisted producing these documents suggests that the DOJ and SEC investigations were indeed related.

With only Alexion in possession of the critical documents, Swiss Re and Navigators were put at a distinct disadvantage. That is the whole point of Rule 56(f)—to level to playing field, so that all parties have access to the same relevant facts. Accordingly, if this Court finds that the current record does not show sufficient relatedness between the Notice of Circumstances and Securities Action, a remand for discovery and further proceedings is appropriate.

CONCLUSION

For the reasons stated above, Swiss Re, Endurance, and Navigators respectfully request that this Court grant the relief requested in their Joint Opening Brief.

ROSS ARONSTAM & MORITZ LLP

By: /s/ Garrett B. Moritz
Garrett B. Moritz (Bar No. 5646)
R. Garrett Rice (Bar No. 6242)
A. Gage Whirley (Bar No. 6707)
Hercules Building
1313 North Market Street, Suite 1001
Wilmington, Delaware 19801
(302) 576-1600

KENNEDYS CMK LLP

Marc S. Casarino (Bar No. 3613)
222 Delaware Avenue, Suite 710
Wilmington, Delaware 19801
(302) 308-6645

Attorneys for Defendant Below/Appellant Endurance Assurance Corporation

PHILLIPS McLAUGHLIN
& HALL P.A.

By: /s/ John C. Phillips, Jr.
John C. Phillips, Jr. (Bar No. 110)
David A. Bilson (Bar No. 4986)
1200 N. Broom Street
Wilmington, Delaware 19806
(302) 655-4200

Attorneys for Defendant Below/Appellant Swiss Re Corporate Solutions America Insurance Corporation f/k/a North American Specialty Insurance Company

Of Counsel:

James Sandnes
Sarah F. Voutyras
SKARZYNSKI MARICK
& BLACK LLP
One Battery Park Plaza, 32nd Floor
New York, New York 10004
(212) 820-7700

BODELL BOVÉ, LLC

By: /s/ Bruce W. McCullough
Bruce W. McCullough (Bar No. 3112)
1225 N. King Street, Suite 1000
Wilmington, Delaware 19801
(302) 655-6749

Attorneys for Defendant Below/Appellant Navigators Insurance Company

Of Counsel:

Agelo L. Reppas
Brian J. Watson
BATESCAREY LLP
191 N. Wacker, Suite 2400
Chicago, Illinois 60606
(312) 762-3100

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