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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ORIGIS USA LLC, and
GUY VANDERHAEGEN,

Plaintiffs-Below/Appellants,

v.

GREAT AMERICAN INSURANCE COMPANY, AXIS INSURANCE COMPANY, MARKEL AMERICAN INSURANCE COMPANY, BRIDGEWAY INSURANCE COMPANY, RSUI INDEMNITY COMPANY, ASCOT SPECIALTY INSURANCE COMPANY, ENDURANCE ASSURANCE COMPANY, BERKSHIRE HATHAWAY SPECIALTY INSURANCE CORPORATION, IRONSHORE INDEMNITY, INC., and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

Defendants-Below/Appellees.

No. 461, 2024

On Appeal from the Superior Court of the State of Delaware

C.A. No. N23C-07-102 SKR [CCLD]

ANSWERING BRIEF OF CERTAIN DEFENDANTS-BELOW/APPELLEES EXCESS INSURERS IN THE 2023-2024 TOWER

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Defendants-Below/Appellees RSUI Indemnity Company ("RSUI"), Ascot Specialty Insurance Company ("Ascot"), Endurance Assurance Corporation ("Endurance"), Berkshire Hathaway Specialty Insurance Corporation ("Berkshire"), Ironshore Indemnity, Inc. ("Ironshore"), and National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union") (collectively, "2023 Excess Carriers"),[1] submit this answering brief in opposition to the appeal of Origis USA and Guy Vanderhaegen of the May 9, 2024 Memorandum Opinion and Order issued by the Superior Court that granted the 2023 Excess Carriers' motion to dismiss (the "Order").[2]

[1] Markel American Insurance Company ("MAIC"), which also issued an excess policy for the Policy Period of February 4, 2023 to February 4, 2024, joins, adopts, and incorporates the 2023 Excess Carriers' Answering Brief for the reasons set forth in its own Answering Brief filed concurrently herewith.

[2] Appellants' Opening Brief addresses the trial court's June 26, 2024 Bench Ruling that denied their motion for clarification of the May 9, 2024 Memorandum Opinion and Order as it relates to arguments directed to the 2021 Tower of Insurance. This Answering Brief of the 2023 Excess Carriers takes no position with respect to that part of the May 9, 2024 Memorandum Opinion and Order granting the motion to dismiss filed on behalf of the moving 2021-22 Insurers or the June 26, 2024 Bench Ruling.

NATURE OF PROCEEDINGS

In this action, Appellants seek coverage under two separate towers of claims-made Directors and Officers liability insurance for one underlying civil proceeding pending against them, and other defendants, in the Southern District of New York (the "Underlying Action"). That suit was brought by former investors in Origis USA's parent company (the "Investor Plaintiffs") related to the alleged fraudulent inducement of those investors into a share redemption transaction completed by January 2021 that was the precursor to a sale of control of Origis in November 2021 that personally benefited Appellant Vanderhaegen to the Investor Plaintiffs' substantial detriment.

The first of two insurance towers (the "2021 Tower") incepted in 2021 with a primary policy issued by Great American. While normally a claims-made policy covers claims first made during the policy period, the Great American Policy was amended by endorsement effective November 18, 2021 to add an "Extended Reporting Period" or "ERP" to provide coverage for claims first made against Insureds anytime during the period ending on November 18, 2027, so long as those claims (i) alleged any Wrongful Act committed on or before ***November 18, 2021*** and (ii) were otherwise covered by the Great American Policy.

With a new owner, Origis' second tower incepted on February 4, 2023 (the "2023 Tower"), with a primary policy issued by Bridgeway Insurance Company

("Bridgeway"). The 2023 Excess Carriers each issued excess policies that follow form to the Bridgeway policy, except where otherwise provided therein (the "2023 Excess Policies"). Each of these 2023 Excess Policies include prior acts exclusions (the "Prior Acts Exclusions") and/or other provisions that expressly exclude coverage for Loss, including defense costs, in connection with any Claim, as that term is defined in the Bridgeway policy, that allege, arise out of, are based upon or attributable to, directly or indirectly, in whole or in part, actual or alleged Wrongful Acts that first occurred prior to ***November 18, 2021***, the same cut-off date that the 2021 Tower ERP used to extend coverage for Wrongful Acts occurring prior to that date.

As discussed more fully below, the date November 18, 2021, which Appellants refer to as the "Cut-off Date," coincides with the change-in-control transaction whereby Antin Infrastructure Partners purchased a controlling interest in Origis USA. The wrongdoing and claims alleged in Underlying Action are the events leading to that November sales transaction. Thus, the Superior Court correctly held that the Underlying Action "centers on alleged wrongs that occurred too early to be eligible for coverage under the [2023Tower]." Accordingly, this Court should affirm.

SUMMARY OF ARGUMENTS OF 2023 EXCESS INSURERS

1 to 7. The assertions in paragraphs 1 to 7 of Appellants' Opening Brief relate only to claims against the 2021 Tower insurers, (not the 2023 Excess Carriers), and will presumably be addressed by the carriers on that tower. The 2023 Excess Carriers therefore respond herein only to Appellants' numbered paragraphs 8-10 applicable to the 2023 Carriers.

8. Denied. The Operative Amended Complaint in the Underlying Action (the "Underlying Complaint") is based entirely upon allegations that the Appellants fraudulently induced the Investor Plaintiffs to enter into a Share Redemption Agreement (the "SRA") whereby their shares were redeemed by Origis USA's parent company at unfair prices based upon knowingly false valuations and misrepresentations made to them by Appellants. Appellants' claimed entitlement to coverage under the 2023 Tower hinges upon three paragraphs of the Underlying Complaint describing Investor Plaintiffs' attempt to investigate their fraud claims by demanding "access to the information from Origis necessary to carry out a complete investigation of their claims." The Superior Court correctly concluded that Paragraphs 158-160 of the Underlying Complaint do not constitute a separate Claim, as defined in the 2023 Bridgeway policy and, in any event, are excluded by the Prior Acts Exclusion in the 2023 Excess Carriers' policies.

9. Denied. The Superior Court correctly concluded that these three paragraphs do not constitute a separate Claim under the Bridgeway Policy to which the 2023 Excess Policies follow form. This issue is addressed in Bridgeway's Answering Brief, submitted concurrently herewith. The 2023 Excess Carriers adopt and incorporate Bridgeway's Answering Brief. Moreover, Paragraphs 158-160 of the Underlying Complaint do not constitute a separate Claim under the unambiguous definition of "Claim" in the Bridgeway Policy.

10. Denied. The Superior Court correctly held that even if the three paragraphs describing Investor Plaintiff's demand for information to substantiate their claims for pre-November 18, 2021 fraud were a separate Claim, the broad language of the Prior Acts Exclusions in the 2023 Excess Policies precludes coverage. The Superior Court correctly held that those three paragraphs allege only a cover-up of the Appellants' fraudulent inducement of the SRA in 2019/2020, by refusing to provide the information demanded once it was revealed that the fraud "arose out of" a Wrongful Act that first occurred before November 18, 2021, *i.e.*, the fraudulent inducement of the SRA. The sole paragraphs of the Underlying Complaint—upon which Appellants exclusively rely—state that the Investor Plaintiffs were foiled in their attempt to discover "all information necessary for Plaintiffs to investigate their claims" of fraud in connection with the SRA. Ultimately, the SRA "contractual obligations" would not have existed (and could not

have been breached) but for the alleged fraudulent inducement [Wrongful Act prior to November 18, 2021], which created the SRA in the first place.

STATEMENT OF FACTS

I. ORIGIS USA'S INSURANCE PROGRAMS

Prior to the change-in-control transaction effected by the sale of a controlling interest in Origis USA to Antin Infrastructure Partners ("Antin") as of November 18, 2021 (the "Antin Transaction"), Origis USA was insured under a series of claims-made directors and officers insurance policies, including for the period June 10, 2021 to June 10, 2022. A00073-74 at ¶¶ 24-27.

The primary insurer on Origis USA's insurance tower in effect at the time of the Antin Transaction was Great American Insurance Company. A00074 at ¶ 25. Additional layers of excess insurance that generally follow form to the Great American primary policy also provided coverage to Origis USA. A00074 at ¶ 24.

As is typical in the wake of a change-in-control transaction, the Great American Policy was endorsed to provide coverage for Claims first made against any Insured for a period of 72 months after the transaction, through November 18, 2027, with respect to any Wrongful Act committed on or before that November 18, 2021 change-in-control transaction date. A00074 at ¶ 24; A00182.

II. THE 2023-2024 POLICIES

Simultaneously with the endorsement to the Great American Policy effective November 21, 2021, and the change in its ownership, Origis USA purchased a series of annual claims-made policies from a separate group of insurers, including for the Policy Period February 4, 2023 to February 4, 2024 (*i.e.*, the 2023 Tower.). The

primary carrier on the 2023-2024 Tower is Bridgeway, which is filing a separate Answering Brief. A chart showing the 2023 Tower structure appears in Appellants' Opening Brief at p. 9.

The supposed "hook" the Appellants use to argue that the 2023 Tower is somehow implicated is the filing of the Underlying Complaint during this new policy period. But the 2023 Excess Policies each contain unambiguous and explicit exclusions that foreclose coverage for any liability for any Claim arising out of acts prior to the change in control on or about November 18, 2021—the "Prior Acts Exclusions", *see* B00029-B00033.[3]

The Prior Acts Exclusions exclude coverage for any Claim arising out of alleged wrongdoing which first occurred before November 18, 2021 (the "Prior Acts

[3] The 2023 Excess Policies follow form to the Bridgeway Policy and incorporate coverage restrictions or limitations set forth in underlying excess policies. *See, e.g.,* Berkshire Excess Policy ("This policy shall provide coverage in accordance with the same terms, conditions and limitations of the **Followed Policy** [the Bridgeway Policy], or any more restrictive provisions of the **Underlying Excess Policies**, except as otherwise set forth in this policy." (bold in original) A00395; B00030; MAIC ("[t]his Policy, except as stated herein, is subject to all terms, conditions, representation and limitations as contained in the **Followed Policy** [the Bridgeway Primary Policy] […] and *to the extent coverage is further limited or restricted thereby, in any other* ***Underlying Policy(ies)*** [*i.e.*, the other 2023 Excess Policies]. *In no event shall this Policy grant broader coverage than would be provided by any of the* ***Underlying Policy(ies)***.") (bold in original) A00439; B00032. *See Health Corp. v. Clarendon Nat'l Ins. Co*., 2009 WL 2215126, at *14 (Del. Super. Ct. July 15, 2009); *see also Fed. Ins. Co. v. Raytheon Co*., 426 F.3d 491 (1st Cir. 2005) (holding that where an exclusionary provision bars coverage in an underlying policy, it will also bar coverage in an excess policy).

Date" or the "Cut-off Date"). For example, the RSUI First Excess Policy contains a Prior Acts Exclusion providing that:

> The **Insurer** shall not be liable to make any payment for **Loss** in connection with any **Claim** made against any **Insured** that *alleges, arises out of, is based upon or attributable to, directly or indirectly, in whole or in part, any actual or alleged* **Wrongful Acts** which first occurred prior to November 18, 2021.

RSUI Policy (Form RSG 206069 1009) (A00334) (bold and underlining in original, emphasis in italics added).

The Prior Acts Exclusions contained in each of the 2023 Excess Carriers' respective excess policies are worded virtually identically to that in the RSUI Excess Policy or incorporate the prior acts exclusions contained in underlying excess policies.[4] For example, the Berkshire Excess Policy includes a prior acts exclusion that provides:

> [T]he **Insurer** shall not be liable to make any payment for **Loss** (as that term is defined in the **Followed Policy**) in connection with any **Claim** (as that term is defined in the **Followed Policy**) made against any **Insured** alleging, arising out of, based upon or

[4] *See* B00029-B00033; A00362 - Ascot Excess Policy, Endorsement No. 4, Form EXE-E049-1219-00 (Prior Acts Date of November 18, 2021); A00379 - Endurance Excess Policy, Endorsement No. 2, Form PEO 0510 0413 (Prior Acts Date of November 28, 2021); A00401 - Berkshire Hathaway Excess Policy, Endorsement No. 5, Form EP-XS-078-10/2016 (Prior Acts Date of November 18, 2021); A00417 - Ironshore Excess Policy, Endorsement No. 8, Form EDO002 (Prior Acts Date of January 4, 2022); A00464 - National Union, Compl. Ex. L, Endorsement No. 3, Form 103430 (Prior Acts Date of November 18, 2021).

> attributable to any **Wrongful Acts** (as that term is defined in the **Followed Policy**) committed or allegedly committed prior to November 18, 2021 or **Wrongful Acts** (as that term is defined in the **Followed Policy**) occurring after such date that are logically or causally connected by any fact, circumstance, situation, event, transaction, cause or series of related facts, circumstances, situations, events, transactions or causes thereto.

A00401 (Form EP-XS-078-10/2016) (bold in original).[5]

To assist the Superior Court in evaluating their Motion to Dismiss, the 2023 Excess Carriers included Appendix A to their Opening Brief setting forth the key provisions of each of the 2023 Excess Carriers' policy provisions. Inexplicably, Appendix A was omitted from the Appendix submitted by Appellants on this appeal. It is submitted herewith at B00029-B00033.

III. THE UNDERLYING CLAIM

Origis USA is a Florida-based (Delaware incorporated) U.S. operating subsidiary of Origis Energy NV (collectively, "Origis"). Ownership of Origis was closely held. Origis' CEO and operating officer, Plaintiff-Appellee Guy Vanderhaegen, held approximately a 22% interest. Two European entities, Pentacon BV and Baltisse NV ("Investor Plaintiffs"), were also major investors and in 2019 (the relevant period to this dispute) each effectively held an approximately 29%

[5] The Ironshore Excess Policy has slightly different but equally effective prior wrongful acts exclusion language and includes a prior acts date of January 4, 2022. A00417 (Endorsement No. 8); B00031.

indirect interest in Origis, with combined control of 58% of the company. The remaining 20% minority interest was held by an institutional investor.

In 2019, a stock redemption transaction (the "Redemption") pursuant to the SRA dated September 14, 2020 was effectuated whereby the two European Investor Plaintiffs' shares were redeemed by Origis. A00539 ¶ 23. This Redemption of 58% of the company stock had the effect of vastly increasing Vanderhaegen's percentage ownership of Origis at that time.

According to the operative First Amended Complaint in the Underlying Action (the "Underlying Complaint"), the SRA and Redemption were the first step in a longstanding scheme by Vanderhaegen to "gain total control of the company, and expropriate for himself an overwhelming portion of the value of Origis USA held by" the Investor Plaintiffs. A00553 at ¶ 63. Investor Plaintiffs allege that they conveyed their interests in accordance with the SRA on closing in October 2020 and January 2021 at a price Appellants knew was "unconscionably deficient." A00695 at ¶ 133.

Then, in the second step, the Investor Plaintiffs allege that a short time after the SRA and Redemption, Vanderhaegen as controlling shareholder sold Origis USA to Antin at a valuation six times as high as the one Investor Plaintiffs received for their shares. A00695 at ¶ 133; A00700 at ¶ 152. This resulted in Vanderhaegen allegedly receiving hundreds of millions of dollars more than he would have, absent

the allegedly fraudulent SRA and Redemption. This second, change-in-control transaction was announced in October 2021 and closed on November 18, 2021—*i.e.*, the date used in the 2021 Tower ERP and in the 2023 Tower's Prior Acts Exclusion.

Investor Plaintiffs claim that it was not until early 2022 that the approximate value of the Antin Transaction became public and known to Plaintiffs. A00581 at ¶ 155. "The announcement potentially implied a valuation for Origis USA of well over $1 billion—totally at odds with the facts as [Appellants] had represented them to" Investor Plaintiffs. After investigating their claims against Appellants, Investor Plaintiffs cried foul and transmitted on October 7, 2022 a "formal Indemnity Notice that set out [Investor] Plaintiffs' indemnification claims under the SRA" and demanded information relevant to their claims pursuant to the SRA. A00581-A00582 at ¶¶ 156-158. Pentacon and Baltisse filed the Underlying Action making the foregoing allegations of a fraudulent scheme for which Appellants seek coverage here.[6]

[6] The Underlying Action was originally commenced in the Supreme Court of the State of New York, County of New York (Index No. 650847/2023). The Underlying Action was removed to the U.S. District Court, Southern District of New York, on March 14, 2023, where it remains pending (Case No. 1:23-cv-02172-KPF). Appellants admit that Origis USA is no longer a party to the Underlying Action by virtue of the Opinion and Order dated March 25, 2024, granting in full Origis USA's Motion to Dismiss. Opening Brief at 1, n. 1.

The Underlying Complaint (A00529-A00610), of course, speaks for itself as to its contents and to which the Court is respectfully referred for the allegations and legal claims made therein. It suffices to say for this Answering Brief that the Appellants' characterization of the Underlying Complaint, set forth in Section I of the Statement of Facts and II.C of their Opening Brief (pp. 7, 39), is inaccurate and incomplete. Their discussion ignores hundreds of paragraphs in the Underlying Complaint detailing Appellants' own allegedly fraudulent conduct dating to 2019 and culminating in the November 18, 2021 sale of a controlling interest in Origis to Antin. Appellants reference only the date of the underlying Investors Plaintiffs' share redemption in October 2020 and January 2021, and the November 2021 sale to Antin that allegedly revealed the fraud to the Investors. *See id.* And even when they do discuss those allegations, the Opening Brief omits all other specific date references in the Underlying Complaint, which obscures the fact that all of the alleged wrongful acts occurred *prior* to the cut-off date for the 2023-2024 policy period. Indeed, the Opening Brief states that the Underlying Complaint "is largely focused on alleged events prior to the November 2021 Antin Purchase," elsewhere stating "many—if ***not most***—of the Wrongful Acts alleged in the UAC are focused on fraud, misrepresentation and related conduct in inducing the Investors to enter into the SRA—all of which allegedly occurred prior to the Cut-Off Date." (Opening Brief at 7, 38 (emphasis added)). While at first blush such statements *seem like* candid

acknowledgements by the Appellant, referring to 249 of 252 paragraphs in the Underlying Complaint as "many" of the allegations is, in reality, a deliberate understatement. Read in context, the entire Underlying Complaint relates to pre-November 18, 2021 wrongs.

The allegations of the Underlying Complaint make clear the timeline showing that the conduct for which the Investor Plaintiffs seek redress all occurred *well before* the November 18, 2021 Prior Acts Date in the 2023 Excess Policies. Investor Plaintiffs allege that Vanderhaegen and Origis USA "engaged in certain deceitful and conspiratorial conduct—that induced the Investors to enter into the SRA and redeem their ownership interests in Origis Energy in a manner that caused them economic damage." A00950. The SRA was executed as of September 14, 2020 (A00569 at ¶115), and the Redemptions were finalized in closings in October 2020 and January 2021 (A00690 at ¶ 117; A00687 at ¶ 108). The Underlying Complaint alleges that Origis and Vanderhaegen (defendants in the Underlying Action and Plaintiffs-Appellants here) "deliberately withheld critical information and intentionally misrepresented material facts to [Underlying] Plaintiffs relating to the value of Origis USA and its assets, including its pipeline of solar energy projects, cash flows, profit margins, platform, and goodwill" (A0533 at ¶ 2), and then "deceitfully acquired [Underlying] Plaintiffs' shares . . . [and] proceeded

with their plan to turn around and sell Origis USA, which they did, for well over a billion dollars" (*id.* at ¶ 4).

The Underlying Complaint alleges that Vanderhaegen first proposed to buy the Investors' interests in ***April 2019***, based on a knowingly false valuation, and continued his efforts ***between December 2019 and February 2020*** based on phony valuations. A00553-A00555 at ¶¶ 66–69, 80-82. The purchase price of the Investors' interests was set on ***February 3, 2020***, and reduced further to close the redemption by ***April 4, 2020***, based allegedly on further "lies" by Vanderhaegen. A00563 at ¶¶ 95–96 (emphasis added). The Underlying Complaint alleges that the Investors expressed concerns about the valuation ***in the summer of 2020***, in response to which Vanderhaegen provided a set of valuations on ***September 10, 2020***, "doubl[ing] down on these knowingly false valuations by going through it in detail on the phone with [Underlying] Plaintiffs, assuring them all over again of their accuracy." A00564 at ¶¶ 99–100 (emphasis added). The Underlying Complaint further alleges that ***"[f]ollowing the effective date of the SRA on September 14, 2020, and before the closings [on October 15, 2020 and January 4, 2021]***, Defendants continued to intentionally withhold, among other material information, the secret internal and other valuations of Origis USA, accurate information on Origis USA's pipeline of projects, and material information regarding an ongoing Origis USA sales process." A00573-A00574 at ¶ 127 (emphasis added).

Appellants do not dispute that all of those allegations precede the Prior Acts Date. Nevertheless, Appellants claim entitlement to coverage under the 2023 Excess Policies hinging exclusively upon three paragraphs of the Underlying Complaint, which they now contend constitute a separate and distinct Claim (as that term is defined in the 2023 Policies) from the pre-November 18, 2021 fraudulent scheme. Those allegations read in their entirety:

> Defendants Fail to Fulfill their SRA Obligation ***to Allow [the Investors] to Investigate their Claims***
>
> 158. In conjunction with the Indemnity Notice, [the Investors] demanded access to the information from Origis ***necessary to carry out a complete investigation of their claims***. [The Investors] had the right to this information pursuant to Section 8.4 of the SRA.
>
> 159. Defendants produced only a small portion of the information [the Investors] requested . . . .
>
> 160. The failure to provide all ***information necessary for [the Investors] to investigate their claims*** breached [the Investors'] information access rights in the SRA. But for these breaches, [the Investors] would be ***able to set forth their claims with even more particularity***.

A00582 (emphasis added).

Notably, these three allegations did not appear in the original underlying Complaint (A00474-526) but were only added in the underlying Amended Complaint (A00529-610 at A00582) by the Investor Plaintiffs to address arguments

by the defendants in the Underlying Action regarding lack of particularity under Fed. R. Civ. P. 9(b).

Appellants' Complaint filed in this action (the "Coverage Complaint"), did not even identify those paragraphs as the basis for their allegation that the Underlying Complaint triggered coverage under the 2023 Excess Policies. It was not until Appellants' response to the 2023 Excess Carriers' motions to dismiss, that they, for the first time, pointed to those three paragraphs of the Underlying Complaint that they contend show wrongful conduct during the 2023-2024 Tower period. A00597.

IV. PROCEDURAL HISTORY

Appellants filed their coverage Complaint in this action on July 13, 2023. On October 4, 2023, certain of the 2023 Excess Carriers filed a motion to dismiss the Complaint. (D.I. 96). National Union filed a Joinder in the 2023 Excess Carriers' motion to dismiss on October 4, 2023. (D.I. 98).

Appellants responded to the 2023 Excess Carriers' motion to dismiss, as well as additional motions filed by carriers on the 2021 Tower, by way of a Consolidated Brief in Opposition on December 14, 2023. (D.I. 120). The 2023 Excess Carriers filed their reply on January 26, 2024 (D.I. 129), in which National Union joined. (D.I. 130). Also on January 26, 2024, Markel American Insurance Company filed a supplemental joinder to the reply brief of the 2023 Excess Carriers. (D.I. 133).

The Superior Court heard argument on the motions to dismiss on March 13, 2024. On May 9, 2024, the Superior Court issued a Memorandum Opinion and Order granting the motion to dismiss the 2023 Excess Carriers. (D.I. 158). This appeal ensued.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY HELD THAT PARAGRAPHS 158-160 OF THE UNDERLYING COMPLAINT ARE NOT A SEPARATE "CLAIM" IMPLICATING COVERAGE UNDER THE 2023 POLICIES

A. Question Presented

Whether Paragraphs 158-160 of the Underlying Complaint fail to state a separate Claim? Yes. (Preserved at A00925-A00928; A01187-A01196; A01223-A01233).

B. Scope of Review

This Court reviews the Superior Court's grant of a motion to dismiss and its interpretation of insurance policy language *de novo*. *First Solar, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,* 274 A.3d 1006, 1012 (Del. 2022). "Interpreting an unambiguous contract, including an insurance policy, is a question of law that appropriately may be resolved on the pleadings." *Jarden, LLC v. ACE Am. Ins. Co.*, 2021 WL 3280495, at *4 (Del. Super. Ct. July 30, 2021), *aff'd*, 273 A.3d 752 (Del. 2022) (TABLE).

C. Merits of Argument

The 2023 Excess Carriers adopt the arguments set forth in the Answering Brief of Appellee Bridgeway at pp. 9-19, filed concurrently herewith, establishing that the Superior Court correctly held that the allegations that Appellants failed to provide

information demanded by the Investor Plaintiffs do not constitute a separate "Claim" triggering coverage under the 2023 Policies.

Moreover, the Court should reject Appellants' attempt to circumvent the Prior Acts Exclusions by modifying the definition of "Claim" to which the exclusions apply by isolating a few allegations and labeling such allegations as a separate "Claim." Contrary to Appellants' contention, the policies' definition of a "Claim" is not limited to a "[w]ritten demand first received by an Insured for monetary, non-monetary, declaratory or injunctive relief," but separately includes a "[c]ivil proceeding commenced by the service of a complaint or similar pleading." This unambiguous definition of "Claim" has been enforced by courts throughout the United States. *See, e.g.*, *Las Vegas Sands, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2024 WL 4279382, at *3 (D. Nev. Sept. 23, 2024); *Stoneburner v. RSUI Indem. Co.*, 598 F. Supp. 3d 1292, 1297 (D. Utah 2022).

Appellants seek to have this part of the definition of "Claim" deemed superfluous. However, "the fundamental rule of contract interpretation [is] to 'give effect to all terms of the instrument.'" *In re Verizon Ins. Coverage Appeals*, 222 A.3d 566, 575 (Del. 2019*)* (quoting *Elliott Assocs. v. Avatex Corp*., 715 A.2d 843, 854 (Del. 1998)). Absent ambiguity, a Delaware court will not destroy or twist policy language under the guise of construing such language. *Hallowell v. State Farm Mut. Auto. Ins. Co.,* 443 A.2d 925, 926 (Del. 1982). Thus, "[c]ontracts are to be interpreted

in a way that does not render any provisions 'illusory or meaningless.'" *See O'Brien v. Progressive N. Ins. Co*., 785 A.2d 281, 287 (Del. 2001) (quoting *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992)).

The Court's decision in *AT&T Corp. v. Faraday Cap. Ltd*., 918 A.2d 1104, 1108-09 (Del. 2007), does not alter this result. Indeed, the *Faraday* decision relied on the New York district court's decision in *Home Ins. Co. of Illinois v. Spectrum Information Technologies, Inc.*, 930 F. Supp. 825, 846 (E.D.N.Y 1996), which addressed a *different* definition of "Claim": "Section II(B) of the [policy] defines 'claim' as 'a written demand by a third party for monetary damages, *including* the institution of suit or a demand for arbitration.'" (emphasis added). With regard to the definition of "Claim" similar to the one at issue here, in *XL Specialty Ins. Co. v. Agoglia*, 2009 WL 1227485, at *8 (S.D.N.Y. Apr. 30, 2009), New York courts subsequently have held that a "'claim' is defined as a legal proceeding and not . . . as each separate portion of a complaint specifying the legal theories defining a cause of action or the relief the plaintiff seeks." *See id*., *aff'd sub nom*. *Murphy v. Allied World Assurance Co. (U.S.)*, 370 F. App'x 193 (2d Cir. 2010). Accordingly, the Court should apply the unambiguous definition of "Claim" in the policies at issue here and find that Paragraphs 158-160 of the Underlying Complaint do not constitute a separate Claim.

Finally, even if Appellants could delete parts of the definition of Claim, the Underlying Complaint does not seek any "monetary, non-monetary, declaratory or injunctive relief" for those three paragraphs.

II. THE PRIOR ACTS EXCLUSIONS IN THE 2023 EXCESS POLICIES PRECLUDE COVERAGE ENTIRELY FOR THE UNDERLYING LAWSUIT

A. Question Presented

Whether the Superior Court correctly held that coverage for the Underlying Lawsuit is precluded by the Prior Acts Exclusions of the 2023 Excess Policies. Yes. (Preserved at A00896-A00907; A01162-A01178; A01234-A01249).

B. Scope of Review

This court reviews *de novo* the Superior Court's grant of a motion to dismiss and its interpretation of insurance policy language. *First Solar,* 274 A.3d at 1012. "Interpreting an unambiguous contract, including an insurance policy, is a question of law that appropriately may be resolved on the pleadings." *Jarden*, 2021 WL 3280495, at *4.

C. Merits of Argument

Coverage for the Underlying Lawsuit is Precluded by the Prior Acts Exclusions in the 2023 Excess Policies

Appellants devote only a few pages of their Opening Brief to the Prior Acts Exclusions. Moreover, Appellants make no reference to this Court's decision in *First Solar,* 274 A.3d 1006. In *First Solar*, this Court, in affirming the Superior Court's dismissal of the action at the pleading stage, held that whether a claim relates back to an earlier claim under a claims-made liability policy is not decided by "the erroneous 'fundamentally identical'" standard applied by some lower courts but

instead must be determined by the plain policy language at issue.[7] *Id.* at 1007. That is precisely what the Superior Court did in this action.

In *First Solar*, this Court further noted the breadth of the Related Claim definition at issue in that case, *i.e.*, a "Claim alleging, arising out of, based upon or attributable to any facts or Wrongful Acts that are the same as or related to those that were . . . alleged in a Claim made against an Insured." 274 A.3d at 1013. Applying that language, this Court framed the issue on the insurers' motion to dismiss as whether a later lawsuit "raises Claims that 'aris[e] out of, [are] based upon or attributable to any facts or Wrongful Acts that are the same as or related to'" the earlier lawsuit. *Id*. at 1013-14 (alterations in original).

Appellants' failure to cite to *First Solar* is fatal to this appeal. Indeed, the language of each of the Prior Acts Exclusions at issue on this appeal is even broader than in *First Solar*.

The RSUI First Excess Policy, for example, contains a prior acts exclusion providing that:

> The **Insurer** shall not be liable to make any payment for **Loss** in connection with any **Claim** made against any **Insured** that *alleges, arises out of, is based upon or attributable to, directly or indirectly, in whole or in part, any actual or alleged* **Wrongful Acts** which first occurred prior to November 18, 2021.

[7] As in *First Solar*, the policies at issue here are claims-made policies.

A0034 (bold and underlined in original, emphasis in italics added). Each of the Prior Acts Exclusions are similarly clear, unambiguous and broad. B00029-B00033.

Under *First Solar*, the determination of whether the Prior Acts Exclusions apply is determined by reference to the applicable policy language, which bars coverage for any Wrongful Act that arises out of, is based upon or attributable to, directly or indirectly, in whole or in part, any actual or alleged **Wrongful Acts** which first occurred prior to November 18, 2021. *First Solar*, 274 A.3d at 1007.

The three paragraphs pertaining to conduct by the Insureds after the November 18, 2021 Prior Acts Date relate simply to Appellants' alleged failure to provide requested information "necessary to carry out a complete investigation of [Plaintiff Investors'] claims" of fraud predating the closing of their share redemption in October 2020 and January 2021. The Superior Court correctly framed the inquiry as "whether the failure to comply with the Investors investigation 'arose from' the conduct that necessitated the investigation," and correctly concluded that it did.

Seritage Growth Properties, L.P. v. Endurance American Insurance Co., 2022 WL 18046813 (Del. Super. Ct. Dec. 19, 2022), considered whether two actions were related under the analytical framework set forth by the Supreme Court in *First Solar*. At issue were consolidated derivative lawsuits filed in 2016 alleging breach of fiduciary duty and aiding and abetting claims in connection with a corporate transaction in 2015 (the "Seritage Transaction"), and a subsequent adversary

proceeding filed in 2019 involving the Seritage Transaction and subsequent transactions. *Id.* at *1. Based upon the Supreme Court's decision in *First Solar*, the *Seritage* Court framed the inquiry as whether the underlying facts for each claim rely on the Seritage Transaction and facts arising from it. Similarly, here, it is beyond cavil that the allegations regarding Appellants' failure to provide information requested by the investors after discovery of the alleged fraud rely upon, arise from, originate from, and bear a meaningful linkage to the SRA and the 2020/2021 share redemptions allegedly induced by fraud.

The Superior Court did not, as Appellants assert, rely solely on the fact that Paragraphs 158-160—the only allegations that Appellants claim trigger coverage—appear in the same Underlying Complaint together with the remaining 249 paragraphs alleging fraud.[8] Rather, the Superior Court read Paragraphs 158 to 160 according to the plain language of the allegations and in context with the Underlying Complaint as a whole:

> In context with the rest of the Underlying Complaint, Paragraphs 158 through 160 reflect that the Investors merely wished to explain that there could be additional information that would support their action. . . .[T]hose allegations are <u>little more than an aside</u> in a lengthy

[8] As Judge Rennie noted, "[r]elatedness inquiries almost invariably involve an analysis of whether one litigation is related to another litigation." Order at 19, citing *Alexion Pharms., Inc. v. Endurance Assurance Corp.*, 2024 WL 639388, at *8-10 (Del. Super. Ct. Feb. 15, 2024).

> complaint that brings plenty of proper Claims—but only Claims for pre-November 2021 Wrongful Acts.

Order at 18 (emphasis added). The fact that the Superior Court dispensed with Appellants' arguments for coverage under the 2023 Excess Policies is simply an acknowledgement that the relatedness inquiry is:

> less complicated when comparing one allegation in a complaint to another allegation in the same complaint. It is even simpler where, as here, the first allegation is an excluded wrongful act and the second allegation is the cover-up of that wrongful act. Indeed, it is difficult to conceive a much better fit for the term "arising out of" than the way a cover-up is predicated on an initial wrong.

Order at 19. In concluding that Paragraphs 158-160 arise out of the underlying fraud alleged in the Underlying Complaint, the Superior Court is not erroneously drawing inferences, it is reading the plain language of the allegations.

The Superior Court was not persuaded by Appellants' argument that Paragraphs 158-160 are "substantively different conduct" (Opening Brief at 43). Appellants cannot save themselves by suggesting that the Court failed to address their argument. The Court did, in fact, address them in the form of its conclusion that these allegations were "little more than an aside in a lengthy complaint." Order at 19. Appellants' argument that the alleged failure to provide information demanded to support the Investor Plaintiffs' fraud claims was "temporally remote" from the actual fraud claims is not persuasive. Indeed, Appellants' own brief which states, "Paragraphs 158- 160 of the UAC allege that the Insureds breached their contractual

obligations to provide certain information to the Investors long after they sold their shares" is fatal to their argument. The "contractual obligations" were set forth in the SRA. The Underlying Complaint asserts that the SRA was the result of fraudulent inducement. Thus, according to the Underlying Complaint, the contract (the SRA and its associated contractual obligations) would never have existed and could not have been "breached" "long after [Investors] sold their shares" but for the pre-November 18, 2021 Wrongful Acts alleged in the Underlying Complaint– *i.e.,* the fraudulent inducement which created the contract in the first place.

The Underlying Complaint, in chronological order, first details the numerous misrepresentations by Appellants that culminated in the SRA and share Redemption, Investor Plaintiffs' discovery of the terms of the Antin Transaction, and the conclusion that they had been defrauded. Only thereafter does the Underlying Complaint reference the demand for information to investigate these fraud claims and Appellants' continuous refusal to provide such information.[9] Finally, as the Court explained and Appellant does not dispute, "[t]he Underlying Litigation does not seek any relief for that purported breach." Order at 18. Thus, the allegations

[9] Appellants' argument that the Superior Court failed to address that Paragraphs 158-160 are "pled in a separate section of the Underlying Complaint" is incomprehensible. The Underlying Complaint included subheadings corresponding with the chronology of events. Paragraphs 158-160 appear under the heading "2. Defendants Fail to Fulfill their SRA Obligation to Allow Plaintiffs to Investigate their Claims."

provide background information but are not at issue in the litigation. The primary relief sought in the Underlying Action is to have the SRA contract declared "null and void by reason of fraud." No relief is demanded in the Underlying Complaint for a Court to enforce obligations set forth in a contract that should be declared "null and void by reason of fraud."

CONCLUSION

For the foregoing reasons, this Court should affirm the Superior Court's dismissal of this action as against the 2023 Excess Carriers.

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