EFiled: Jan 21 2025 04:39PM EST
Filing ID 75480841
Case Number 461,2024

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]

APPELLEE MARKEL AMERICAN INSURANCE COMPANY'S JOINDER TO APPELLEES GREAT AMERICAN INSURANCE COMPANY, BRIDGEWAY INSURANCE COMPANY, AND THE 2023-2024 INSURERS' RESPECTIVE ANSWERING BRIEFS AND ANSWERING BRIEF

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NATURE OF THE PROCEEDINGS

Appellee Markel American Insurance Company ("MAIC") hereby joins and adopts in their entirety the following filings in the above-captioned case: (1) the Answering Brief of Appellee Great American Insurance Company ("Great American") (Transaction ID No. 75476801) filed on January 21, 2025 (the "Great American Answering Brief") with respect to Excess Insurance Policy No. MKLM3MXM000267 issued by MAIC to Origis USA, LLC (“Origis USA”) for the Policy Period of June 10, 2021 to June 10, 2022 (the "2021-2022 MAIC Excess Policy"); and (2) the Answering Brief of Appellee Bridgeway Insurance Company (“Bridgeway”) (Transaction ID No. 75479421) filed on January 21, 2025 (the “Bridgeway Answering Brief”), and the Answering Brief of Certain Appellees in the 2023-2024 Tower (the “2023-2024 Excess Insurers”) (Transaction ID No. 75473619) filed on January 21, 2025 (the "2023-2024 Excess Insurers’ Answering Brief") with respect to Excess Insurance Policy No. MKLM1MXM000925 issued by MAIC to Origis USA for the Policy Period of February 4, 2023 to February 4, 2024 (the “2023-2024 MAIC Excess Policy,” and together with the 2021-2022 MAIC Excess Policy, the “MAIC Excess Policies”).

Additionally, MAIC hereby submits this answering brief in opposition to the appeal of Origis USA and Guy Vanderhaegen (collectively, “Appellants”) of the May 9, 2024 Memorandum Opinion and Order issued by the Superior Court granting

Motions to Dismiss this action and a June 26, 2024 bench ruling denying Appellants' Motion for Clarification to address: (1) why Appellants' claims against MAIC fail on ripeness and standing grounds as to the both MAIC Excess Policies; and (2) why dismissal is also appropriate given material misrepresentations made in the application to the 2023-2024 MAIC Excess Policy.

SUMMARY OF ARGUMENT

1-10. Denied. MAIC adopts and incorporates by reference the Summary of Argument sections of the Great American Answering Brief, the Bridgeway Answering Brief, and the 2023-2024 Excess Insurers' Answering Brief.

MAIC respectfully submits that on February 14, 2023, Appellants and several non-insured affiliates were sued by certain investors in Origis USA (the "Underlying Plaintiffs"), who alleged that they sold their majority interest in the company for a grossly deficient price pursuant to a September 14, 2020 Share Redemption Agreement (the "SRA") (the "Underlying Action"). Thereafter, Appellants sought coverage under two towers of insurance. On each tower, MAIC issued excess policies which do not attach until exhaustion of $15 million in underlying insurance, in addition to the applicable self-insured retentions of the primary policies on each tower to which the MAIC Excess Policies generally follow form. Despite this, MAIC (and other excess insurers on both towers) have been named in a coverage action commenced by Appellants in Delaware Superior Court (the "Coverage Action"), which was dismissed on May 9, 2024.

MAIC agrees that the Coverage Action was properly dismissed, and joins in the arguments raised by the other appellees in the Great American Answering Brief, Bridgeway Answering Brief, and 2023-2024 Excess Insurers' Answering Brief in

support of affirming that dismissal. However, there were several additional arguments, which MAIC raised in support of dismissal of the Coverage Action, but that were not addressed in the May 9, 2024 dismissal order.

First, there is no ripe dispute between Appellants and MAIC, as Appellants have failed to plead a reasonable likelihood that costs incurred in the Underlying Action have or will exceed $15 million (in addition to the respective self-insured retentions of the primary insurance policies on both towers), and in light of Appellants' March 25, 2024 dismissal from the Underlying Action, the quantum of defense costs is now static.

Second, because Appellants were dismissed from the Underlying Action, there is no longer any actual case or controversy concerning any insurer's current duty to advance defense costs. Therefore, Appellants lack standing to maintain the Coverage Action against MAIC.

Finally, Origis USA failed to disclose in its application for the 2023-2024 MAIC Excess Policy that merely three (3) months prior, it received an indemnity notice (the "Indemnity Notice") under the SRA in which the Underlying Plaintiffs announced their intention to investigate potential claims against Appellants. These omissions were known to Appellants, were material to the risk insured by MAIC's policy, and caused MAIC to insure a risk that it otherwise would not have insured. Furthermore, the unambiguous terms of the application, which are incorporated by

endorsement into the 2023-2024 MAIC Excess Policy, expressly exclude coverage for any claim that arises from any "fact, circumstance, or situation" that the Insured was aware of, but failed to disclose on the application for coverage. As a result, Appellants cannot recover under the 2023-2024 MAIC Excess Policy.

STATEMENT OF FACTS

To avoid duplication, MAIC respectfully refers the Court to the facts set forth in the Great American Answering Brief, Bridgeway Answering Brief, and 2023-2024 Excess Insurers' Answering Brief. The following facts are relevant to the additional grounds upon which no coverage is available under the MAIC Excess Policies, as discussed further below.

A. The Underlying Plaintiffs Sell Their Interests in Origis USA LLC.

Origis USA is a solar energy start-up founded in Belgium by Guy Vanderhaegen. A00534 at ¶ 6. Underlying Plaintiffs Pentacon BV and Baltisse NV were early investors in Origis USA. By 2019, the Underlying Plaintiffs, with their employees, each effectively held approximately a 29% indirect interest in Origis USA, while Vanderhaegen held approximately a 22% interest in Origis USA. A00535 at ¶ 10. On September 14, 2020, the Underlying Plaintiffs entered into the SRA, through which their positions would be transferred to Origis USA for a total of $105 million in two closings to occur on October 15, 2020 and January 4, 2021, respectively. A00539 at ¶¶ 23; A00569-70 at ¶¶ 115-17.

Nevertheless, it is alleged that Appellants were "already actively lining up such a sale even *before* signing the SRA." A00575 at ¶ 134 (emphasis in original). By July of 2021, it is alleged that Origis USA had formally retained investment

bankers, identified a pool of potential buyers, and circulated NDAs and an Information Memorandum to those potential buyers. A00579 at ¶ 148. On September 8, 2021, Origis USA reached a deal to be acquired by Antin Infrastructure Partners ("Antin"). On October 18, 2021, Antin and Origis USA publicly announced that they had agreed on a sale of Origis USA. A00581 at ¶ 154. In 2022, Origis USA's minority shareholder announced that it had sold its equity in Origis USA to Antin for 12x cost and had realized a gain of $429 million. This announcement implied a valuation for Origis USA of $1.4 billion, which the Underlying Plaintiffs allege was "totally at odds with the facts as [Appellants] had represented them to [the Underlying Plaintiffs]." *Id.* at ¶ 155.

B. Following the Antin Sale, the Underlying Plaintiffs Demand Indemnity From Origis USA.

On October 7, 2022, in accordance with Section 8.3(b) of the SRA, the Underlying Plaintiffs served Origis USA with a "formal indemnity notice that set out Plaintiffs' indemnification claims under the SRA." *Id.* at ¶ 156. On October 18, 2022, Appellants responded to the Indemnity Notice. A00581-82 at ¶ 157. The Underlying Plaintiffs allege that Appellants disputed their claims "in conclusory fashion but provided no factual or legal basis for denying them, nor any benign explanation for the massive increase in Origis USA's value in the short time between the signing of the SRA and the closings and the $1.4 billion Antin purchase." *Id.* at ¶ 157.

It is further alleged that the Underlying Plaintiffs demanded access to information from Origis USA pursuant to Section 8.4 of the SRA in order to "carry out a complete investigation of their claims." A00582 at ¶ 158. In particular, the Underlying Plaintiffs allege as follows:

> [Appellants] produced only a small portion of the information [Underlying Plaintiffs] requested. Rather than a complete production, [Appellants] proposed a list of search terms, to which [Underlying Plaintiffs] proposed revisions. But then [Appellants] refused to produce all documents responsive to their own proposed search terms. [Appellants] instead produced the Antin transaction documents as well as an overwhelming amount of irrelevant technical information from the Antin data room. Beyond that, [Appellants] produced *only* certain documents expressly relating to discussions with investment bankers and the financing of the buyout and largely did so from the email account of a single custodian—Vanderhaegen. [Appellants] also failed to provide access to Origis employees for interviews as provided for in the SRA.

Id. at ¶ 159 (italics in original). The Underlying Plaintiffs note that Appellants' "failure to provide all information necessary for Plaintiffs to investigate their claims breached Plaintiffs' information access rights in the SRA." *Id.* at ¶ 160.

C. Origis USA Fails to Disclose the Indemnity Notice in the Munich RE Application.

On January 27, 2023, a little over three (3) months after receiving and responding to the Indemnity Notice, Origis USA completed an application for directors and officers liability ("D&O") insurance with Bridgeway (the "Munich RE

Application").[1] A00343-351. Section II. ("Insurance and Claim History") of the Munich RE Application, Question 3 (entitled: Warranty: Prior Knowledge of Facts/Circumstances/Situations) requires the Applicant to represent as follows: "No person or entity proposed for coverage is aware of any fact, circumstance, or situation which he or she has reason to suppose might give rise to any claim that would fall within the scope of the proposed Liability Coverage Part(s"). A00344. Despite having received the Indemnity Notice merely three (3) months earlier, Origis USA checked "NONE." *Id.*

Question 3 of the Munich Re Application also contains an express prior knowledge exclusion, which provides: "Without prejudice to any other rights and remedies of the Company, the **Applicant**[2] understands and agrees that if any such fact, circumstance, or situation exists, whether or not disclosed in response to Question 3 above, any claim or action arising from such fact, circumstance, or situation is excluded from coverage under the proposed policy, if issued by the

[1] We note that the version of the 2023-2024 MAIC Excess Policy found in Appellant's appendix includes an incomplete, unexecuted version of the Munich RE Application. The complete, executed version of the Munich RE Application is included elsewhere in Appellant's appendix as an attachment to RSUI Policy No. NHS703910 (the "RSUI Excess Policy"). As such, all citations herein refer to the Munich RE Application as attached to the RSUI Excess Policy.

[2] Terms in bold are defined in the Bridgeway Policy.

Company." *Id.* The Munich RE Application was executed by Guy Vanderhaegen as CEO and President of Origis USA. A00351.

Subsequently, and in reliance upon the Munich RE Application, Bridgeway issued primary insurance policy no. 8JA7DO0002051-01 to Origis USA for the Policy Period of February 4, 2023 to February 4, 2024 (the "Bridgeway Policy"). Also, in reliance upon the Munich Re Application, MAIC issued the 2023-2024 MAIC Excess Policy to Origis USA. The 2023-2024 MAIC Excess Policy reflects a Limit of Liability of $2,500,000, and is excess $15,000,000 in underlying insurance. Unless otherwise indicated, the 2023-2024 MAIC Excess Policy generally "follows form" to the Bridgeway Policy. A00439 at Section I.

Endorsement No. MMX 1208 05 10 of the 2023-2024 MAIC Excess Policy (entitled "Reliance Upon Other Insurer's Application") provides that "[i]n consideration of the premium charged, it is understood and agreed that [MAIC] has relied upon the statements in the following application(s): Munich RE, including materials attached thereto, completed by the **Parent Company** designated in Item 1. of the Declarations and such application(s) is/are made a part of this policy and operates as the Insurer's own application." A00444 at Endorsement No. MMX 1208 05 10.

D. The Underlying Action Arises from the Same Facts, Circumstances, or Situations as the Indemnity Notice.

On February 14, 2023 – only ten days after the inception of the 2023-2024 MAIC Excess Policy – the Underlying Plaintiffs commenced the Underlying Action against Appellants. On June 12, 2023, the Underlying Plaintiffs filed a first amended complaint, which is the operative pleading in the Underlying Action. Like the Indemnity Notice, the Underlying Action alleges that Appellants were engaged in a "deliberate and fraudulent scheme to acquire [the Underlying Plaintiffs'] combined majority interest in Origis USA for a price far below its true value[.]" A00533 at ¶ 1. It is further alleged that Appellants' "fraud, breaches of their fiduciary duties, and breaches of the SRA were the direct causes of hundreds of millions of dollars in damages" to the Underlying Plaintiffs, representing "the difference between the payment they received and the value of their ownership based on the Antin purchase price and/or the present value of the interests which were unlawfully taken from them[.]" A00542 at ¶¶ 32-33.

E. Origis USA Notices the Underlying Action for Coverage under the MAIC Excess Policies.

On March 9, 2023, Appellants tendered the Underlying Action to their insurers, including MAIC. A00777 at ¶ 38. Appellants seek coverage under two towers of insurance: (1) for claims first made during the policy period of June 20,

2021 to June 10, 2022 (the "2021-2022 Tower"[3]); and (2) for claims made during the policy period of February 4, 2023 to February 4, 2024 (the "the 2023-2024 Tower"). On the 2021-2022 Tower, the 2021-2022 MAIC Excess Policy reflects a Limit of Liability of $5 million, and attaches only after exhaustion of $15 million in underlying limits, in addition to the applicable $100,000 self-insured retention of Primary Insurance Policy No. DOLE069395 issued by Great American (the "2021-2022 Great American Policy"). A00238 at Declarations, Item 3; A00239 at Item 5; A00241 at Section I. On the 2023-2024 Tower, the 2023-2024 MAIC Excess Policy reflects a Limit of Liability of $2.5 million, and attaches only after exhaustion of $15 million in underlying limits, in addition to the applicable $150,000 self-insured retention of the Bridgeway Policy. A00436 at Item 3; A00437 at Item 5; A00439 at Section I.

F. <u>Appellants are Dismissed From the Underlying Action.</u>

On July 28, 2023, defendants in the Underlying Action (including Appellants Origis USA and Mr. Vanderhaegen) filed motions to dismiss. On March 25, 2024, the Court issued an Opinion and Order (the "Dismissal Order") through which Origis USA was dismissed from the Underlying Action (*see* Dismissal Order at B00081),

[3] The various policies in the 2021-2022 Tower, including the 2021-2022 MAIC Excess Policy, went into run-off coverage through November 18, 2027 with respect to Wrongful Acts which occurred on or prior to the November 18, 2021 sale of Origis USA to Antin.

while Guy Vanderhaegen was dismissed in his insured capacity as a director or officer of Origis USA (*see* Dismissal Order at B00114) ("Here, it is clear that Vanderhaegen did not make the misrepresentations in furtherance of Origis USA's business; rather, he (allegedly) did so to benefit himself and the other Vanderhaegen entities in their capacity as owners of Origis USA"). Thus, as of March 25, 2024, there is no longer any claim pending against Appellants in the Underlying Action, and no further costs of defense have been (or can be) expended to defend any Insured.

G. <u>Procedural History.</u>

Although MAIC has not issued a substantive coverage position for either MAIC Excess Policy, it was nevertheless named as a defendant in the Coverage Action which was commenced in the Superior Court of the State of Delaware on July 13, 2023. (D.I. 1). On October 4, 2023, motions to dismiss were filed by 2021-2022 Tower insurers Axis Insurance Company ("Axis") (D.I. 91) and Great American (D.I. 93). MAIC filed a joinder on October 4, 2023, in which it joined and adopted the arguments raised in the Great American and Axis briefs as to the 2021-2022 MAIC Excess Policy. (D.I. 94). On October 4, 2023, MAIC filed its own separate motion to dismiss to raise additional arguments as to the 2023-2024 MAIC Excess Policy. (D.I. 95). Additionally, on October 4, 2023, the 2023-2024 Excess Insurers (including MAIC) moved to dismiss the Coverage Action. (D.I. 96).

On December 14, 2023, Appellants filed a consolidated brief which, *inter alia*, opposed the motions to dismiss filed by the 2023-2024 Excess Insurers, Great American, Axis, and MAIC's separate motion to dismiss. (D.I. 120). On January 26, 2024, the 2023-2024 Excess Insurers (including MAIC) filed a reply in further support of their motion to dismiss. (D.I. 129). On January 26, 2024, Great American also filed a reply (D.I. 128), which MAIC joined (D.I. 131). On January 26, 2024, MAIC filed a reply in further support of its separate motion to dismiss (D.I. 132), and a supplemental joinder to the 2023-2024 Excess Insurers' reply (D.I. 133).

On May 9, 2024, the Superior Court issued a Memorandum Opinion and Order granting the motions to dismiss of Great American and the 2023-2024 Excess Insurers, which did not address the issues raised in MAIC's separate motion to dismiss or joinder to the 2023-2024 Excess Insurers' reply. (D.I. 158). On May 16, 2024, Appellants filed a motion for clarification. (D.I. 161). On May 23, 2024, Great American filed an opposition to the motion for clarification. (D.I. 165). On May 23, 2024, MAIC filed a joinder which adopted the arguments raised in Great American's opposition to the motion for clarification and also raised additional arguments. (D.I. 166). On June 27, 2024, Appellants' motion for clarification was denied. (D.I. 169). On November 4, 2024, Appellants filed a notice of appeal. (D.I. 173).

ARGUMENT

I. MAIC Joins and Adopts the Respective Answering Briefs of Great American, Bridgeway, and the 2023-2024 Excess Insurers.

As an initial matter, MAIC hereby joins and adopts in their entirety the Great American Answering Brief, Bridgeway Answering Brief, and 2023-2024 Excess Insurers' Answering Brief. In the Great American Answering Brief, Great American argues, *inter alia*, that the trial court properly concluded that Appellants could not bring suit against insurers pursuant to the Great American Policy's "No Action" clause. As the 2021-2022 MAIC Excess policy generally "follows" form to the Great American Policy, MAIC joins, adopts, and incorporates by reference all of the arguments and authorities contained in the Great American Answering Brief (including the appendices, declarations, and exhibits referenced therein) as to the 2021-2022 MAIC Excess Policy. In connection with this Joinder, MAIC reserves its right to be heard at any future hearing on this matter on the grounds set forth in the Great American Answering Brief, without prejudice or waiver of any other defenses MAIC may possess or assert in this proceeding.

With respect to the Bridgeway Answering Brief and 2023-2024 Excess Insurers' Answering Brief, Bridgeway and the 2023-2024 Excess Insurers argue that, *inter alia*, the trial court properly concluded that the "Prior Acts Exclusions" contained in their respective policies preclude coverage under the 2023-2024 Tower. The 2023-2024 MAIC Policy generally "follows" form to the Bridgeway Policy, and

in no event grants broader coverage than would be provided by any of the underlying policies.[4] Accordingly, MAIC joins, adopts, and incorporates by reference all of the arguments and authorities contained in the Bridgeway Answering Brief and 2023-2024 Excess Insurers' Answering Brief (including the appendices, declarations, and exhibits referenced therein) as to the 2023-2024 MAIC Excess Policy. In connection with this Joinder, MAIC reserves its right to be heard at any future hearing on this matter on the grounds set forth in the Bridgeway Answering Brief or 2023-2024 Excess Insurers' Answering Brief, without prejudice or waiver of any other defenses MAIC may possess or assert in this proceeding.

[4] The 2023-2024 MAIC Excess Policy expressly provides, in relevant part, that "[t]his Policy, except as stated herein, is subject to all terms, conditions, representation and limitations as contained in the **Followed Policy** [*i.e.*, the Bridgeway Policy] […] and *to the extent coverage is further limited or restricted thereby, in any other* ***Underlying Policy(ies)*** [*i.e.*, the respective policies issued by the 2023-2024 Excess Insurers below MAIC's layer]. *In no event shall this Policy grant broader coverage than would be provided by any of the* ***Underlying Policy(ies)***. A00439 at Section I. (bold in original, emphasis in italics added).

II. There is No Justiciable Controversy Between Appellants and MAIC.

A. Questions Presented

- Whether the purported dispute between MAIC and Appellants is unripe for adjudication. Yes. (Preserved at B00001-05; B00064-72).
- Whether Appellants lack standing to maintain the Coverage Action against MAIC. Yes. (Preserved at B00075-77).

B. Scope of Review

On appeal, a trial court's granting of a motion to dismiss is reviewed *de novo*. *First Solar, Inc. v. Nat'l Union First Ins. Co.*, 274 A.3d 1006, 1011 (Del. 2022). This Court also reviews a trial court's interpretation of an insurance policy *de novo*. *Id.* (citing *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011)). Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented. *See* Del. Supr. Ct. R. 8. Although the May 9, 2024 decision of the Superior Court dismissing the Coverage Action does not address these questions, they were nevertheless preserved in the Superior Court and are now properly before this Court for consideration pursuant to Supreme Court Rule 8. *See Watkins v. Beatrice Cos.*, 560 A.2d 1016, 1020 (Del. 1989) ("In determining whether an issue has been fairly presented to the trial court,

this Court has held that the mere raising of the issue is sufficient to preserve it for appeal.")

C. Merits of Argument

In order to adjudicate a matter, a court must have a justiciable controversy before it. *Employers Ins. Co. of Wausau v. First State Orthopaedics, P.A.*, 312 A.3d 597, 606–07 (Del. 2024). The four aspects of justiciability include standing, mootness, ripeness, and political question. *Id.* at 607. In Delaware, for an "actual controversy" to exist, the following four prerequisites must be satisfied: (1) it must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; (4) the issue involved in the controversy must be ripe for judicial determination. *XL Specialty Ins. Co. v. WMI Liquidating Tr.*, 93 A.3d 1208, 1217 (Del. 2014). Here, Appellants cannot demonstrate that any purported controversy with MAIC is ripe for judicial determination, and Appellants lack standing.

1. There Is No Ripe Dispute Between Appellants and MAIC.

Delaware courts cannot exercise jurisdiction over a case unless the underlying controversy is ripe, *i.e.*, has "matured to a point where judicial action is appropriate." *Id.* A dispute will be deemed unripe where the claim is based on "uncertain and

contingent events" that may not occur, or where "future events may obviate the need" for judicial intervention. *Id* at 1217-18. In the insurance context, an insured must establish a "reasonable likelihood" that coverage under the disputed policies will be triggered. *Id.* at 1218. In *XL Specialty*, this Court found a claim to be unripe where the "only presently existing claims that might arguably implicate" the policies in question were defense costs, but that the underlying plaintiff "has not alleged that any amounts that could implicate coverage" under those policies, or that the "pled facts establish a reasonable likelihood that any such future amounts will go unpaid." *Id.* at 1218-19. As noted by this Court, "[t]he most obvious harm that could necessitate judicial intervention at this stage—that coverage claims have gone (or will likely go) unpaid—has yet to become a 'real world' problem." *Id.* at 1220. As any judicial resolution of the coverage dispute at that stage "would necessarily be based on speculation and hypothetical facts, and ultimately could prove unnecessary," this Court found the insureds' claim for coverage to be unripe. *Id.* at 1211.

Additionally, the *XL Specialty* Court found that "[f]urther complicating the coverage questions is the applicability of the retention, about which any determination would necessarily be speculative." *Id.* at 1217; *see also Nat'l Fire & Marine Ins. Co. v. Genesis Healthcare, Inc.*, 2023 WL 8711823 (3d Cir. Dec. 18, 2023) (wherein the Third Circuit, applying Pennsylvania law, recently dismissed a

declaratory judgment claim for coverage finding that there was no evidence that the insured would exhaust its self-insured retention and that because the "claim involves uncertain and contingent events" and the likelihood of the insured exceeding its SIR "does not constitute a substantial threat of real harm" any determination of coverage "would constitute and advisory opinion.")

MAIC respectfully submits that this Court should apply the same principled reasoning of *XL Specialty* and *Genesis Healthcare* and dismiss Appellants' claims against MAIC on ripeness grounds. Appellants have not demonstrated that any previously-incurred defense costs in the Underlying Action have reached the attachment point of either MAIC Excess Policy. The 2021-2022 MAIC Excess Policy sits above three underlying layers of coverage that comprise $15 million of underlying limits of liability, in addition to the applicable $100,000 self-insured retention of the Great American Policy. *See* A00238 at Declarations, Item 3; A00239 at Item 5; A00241 at Section I. Likewise, the 2023-2024 MAIC Excess Policy sits above six underlying layers of coverage that comprise $15 million of underlying limits of liability, in addition to the applicable $150,000 self-insured retention of the Bridgeway Policy. *See* A00436 at Item 3; A00437 at Item 5; A00439 at Section I.

For the reasons outlined in the Great American Answering Brief, Bridgeway Answering Brief, and 2023-2024 Excess Insurers' Answering Brief, MAIC disputes

that the Underlying Action triggers coverage under *either* the 2021-2022 Tower or 2023-2024 Tower, let alone *both* towers. However, assuming *arguendo* that Appellants are correct in that the Underlying Action triggers coverage under one or both towers, they nevertheless have pled no facts from which this Court could find a reasonable likelihood that defense costs incurred in the thirteen (13) months between the commencement of the Underlying Action on February 14, 2023, through the March 25, 2024 Dismissal Order, have exceeded $15.1 (or $15.15) million, such that either of MAIC's excess layers are implicated.

Appellants gloss over this critical point in their Opening Brief by making the vague, conclusory, and unsupported statement that they have incurred "substantial" fees in the Underlying Action – which naturally begs the question of how one is to quantify "substantial." *See* Appellants' Opening Brief at 1. Still, MAIC need not speculate on whether Appellants could have incurred the requisite quantum of defense fees to reach the respective attachment points of the MAIC Excess Policies, as the burden is on Appellants to bring their claim within coverage, which they have not done. *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Rhone-Poulenc Basic Chemicals Co.*, 1992 WL 22690, at *5 (Del. Super. Ct. Jan. 16, 1992), *affd sub nom. Rhone- Poulenc Basic Chemicals Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192 (Del. 1992) ("[t]he duty to defend is determined by comparing the allegations contained in the underlying complaint with the terms of the policy"); *see also Westport Ins.*

Corp. v. Hippo Fleming & Penile L. Offs., 791 F. App'x 321, 324 (3d Cir. 2019) ("[a] duty to defend does not arise merely because it is possible to imagine a set of facts within the insurance contract's coverage that was not pleaded."). In the end, Appellants' vague allegations fall considerably short of there being a "reasonable likelihood" that fees incurred in the Underlying Action could ever implicate MAIC. Accordingly, any judicial intervention at this stage is simply unwarranted.

At best, adjudicating MAIC's obligations under either of the MAIC Excess Policies would be wholly speculative, hypothetical, and "ultimately could prove unnecessary." *XL Specialty*, 93 A.3d at 1217. However, MAIC's obligations have been rendered even more remote in light of Appellants' dismissal from the Underlying Action. Any defense costs incurred by Appellants – to the extent they are covered at all, which MAIC disputes – are static, and cannot possibly implicate MAIC on either tower (nor have Appellants pled any facts suggesting as much). Additionally, Appellants' dismissal has foreclosed the possibility of a settlement or a judgment which could reach MAIC's respective layers. In their Opening Brief, Appellants make the puzzling statement that Origis USA "continues to incur certain Defense Costs related to [the Underlying Action]" despite the Dismissal Order, without explaining how or why that is the case. *See* Appellants' Opening Brief at 1, n.1. More importantly, Appellants have pled no facts indicating that ongoing

defense costs in the Underlying Action – to the extent there are any such costs – could ever implicate MAIC.

Because Appellants' vague, unsupported claims are unripe as to the MAIC Excess Policies, the Coverage Action should be dismissed.

2. <u>Appellants Lack Standing to Maintain the Coverage Action as to MAIC.</u>

With respect to standing, Delaware generally follows the requirements of Article III, as follows: (1) plaintiff must allege an injury in fact, which is both concrete and actual or imminent (and not hypothetical nor conjectural); (2) plaintiff must show that the injury is caused by the defendant's actions; and (3) plaintiff must show that their requested relief is likely to redress the injury. *First State Orthopaedics*, 312 A.3d 597 at 607–09 (finding plaintiff lacked standing due to no injury in fact and no redressability). Where a plaintiff seeks a declaratory judgment, it must show that, absent a favorable outcome in litigation, the defendant's wrongful conduct will go unchecked. *Id.* at 613. In *First State Orthopaedics*, this Court held that forward-looking relief such as a declaratory judgment was inappropriate when it would not redress the only existing or imminent injury the plaintiff could point to, which was the insurer's previous alleged wrongful conduct that had ceased. *Id.* at 613-15.

Here, Appellant Origis USA was dismissed from the Underlying Action (*see* Dismissal Order at B00081), while Appellant Guy Vanderhaegen was dismissed in

his insured capacity as a director or officer of Origis USA (*see* Dismissal Order at B00114). Thus, even assuming that Appellants' claim against MAIC was ripe for adjudication (which, as demonstrated above, is not the case), declaratory relief would be inappropriate because the dismissal forecloses any existing or imminent injury to Appellants. Because Appellants were dismissed from the Underlying Action, there is no longer any actual case or controversy concerning any insurer's current advancement of defense costs on either tower. In light of their dismissed status, Appellants cannot meet their burden of establishing that they allege any injury in fact, much less that any said injury was caused by MAIC as to any advancement of defense costs under the MAIC Excess Policies, or that any relief before this Court could redress that injury.

As Appellants have no standing to seek advancement of defense costs in light of their dismissal from the Underlying Action, the Coverage Action should be dismissed as to MAIC.

III. Appellants Made Material Misrepresentations in the Application to the 2023-2024 MAIC Excess Policy.

A. Question Presented

Whether no coverage is available under the 2023-2024 MAIC Excess Policy due to material misrepresentations made by Origis USA in its application for insurance. Yes. (Preserved at B00010-27; B00044-59).

B. Scope of Review

In the interest of brevity, MAIC respectfully refers the Court to the Scope of Review section at II.B. above, which applies equally to this Scope of Review section.

C. Merits of Argument

Solely with respect to the 2023-2024 MAIC Excess Policy, Origis USA failed to disclose material facts regarding prior potential claims when it applied for coverage with MAIC on January 27, 2023. Because these omissions were known to Appellants, were material to the risk insured by the 2023-2024 MAIC Excess Policy, and caused MAIC to insure a risk that it otherwise would not have insured, Origis USA cannot recover under the 2023-2024 MAIC Excess Policy.

Section 2711 of Title 18 of the Delaware Code prevents recovery under an insurance contract where the insured makes misrepresentations, omissions, or concealment of facts or incorrect statements if they are:

(1) Fraudulent; or

(2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or

> (3) the insurer in good faith would either not have issued the policy or contract, or would not have issued it at the same premium rate or would not have issued a policy or contract in as large an amount or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

18 *Del. C.* § 2711; *see also United Westlabs, Inc. v. Greenwich Ins. Co.*, 2011 WL 2623932, at *12 (Del. Super. Ct. June 13, 2011), *aff'd*, 38 A.3d 1255 (Del. 2012). Under Section 2711, each of these three requirements are in the disjunctive. Thus, the insurer need not prove that the misrepresentations or omissions were fraudulent if the statements were material, or if the insurer would not have issued the policy if it had known the true facts "as required either by the application for the policy or contract or otherwise." 18 *Del. C.* § 2711.

Section 2711 permits an insurer to defeat recovery under an insurance contract when the statement is material or when the insurer "in good faith would either not have issued the policy or contract, or would not have issued it at the same premium rate." *Mulrooney v. Life Ins. Co.*, 2014 WL 4407854, at *9, (Del. Super. Ct. Sept. 3, 2014). A misrepresentation or omission is material "if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so." *United Westlabs*, 2011 WL 2623932, at *12-15 (insured prevented from recovering pursuant to 18 *Del. C.* § 2711 where: (1) it omitted its involvement with an arbitration and an earlier action; and (2) failed to

disclose past involvement in "any lawsuit, charges, inquiries, investigations or proceedings," which were material).

In *United Westlabs*, the insured ("UWL") did not disclose its involvement in a January 2007 arbitration and related February 2007 action involving Seacoast Laboratory Data Systems ("Seacoast") in its application for insurance. *Id.* In 2009, UWL was again involved in litigation with Seacoast, for which the insurer denied coverage. *Id.* at *10. The Superior Court of Delaware, New Castle County, found that the application, which sought disclosure of "claims, suits or proceedings ... made during the past five years against [UWL]...." was unambiguous, as it was undisputed that Seacoast did not disclose the 2007 arbitration or action. *Id.* at *12. Next, the court held that UWL made a material omission on the application, since the February 2007 action involved "claims that were material to [the insurer's] acceptance of the risk." *Id.* The court further observed as follows:

> It was reasonable to foresee that UWL's involvement in the January 2007 Arbitration and the February 2007 Action could lead to liability during the Axis Policy period. Ultimately, that is precisely what happened. The Court finds that Axis certainly would have considered this information in determining whether to issue insurance to UWL. If Axis nonetheless would have issued UWL insurance, perhaps it would have done so at a premium. Therefore, UWL's involvement in "claims, suits, or proceedings" was material. Section 2711 prevents UWL from recovery under the Axis Policy.

Id. In other words, to establish materiality, an insurer must prove only that the information was sought by the insurer, and/or that, but for the omission or misrepresentation, the insurer would not likely have issued the same policy or

charged the same premium. *Zurich Am. Ins. Co. v. Syngenta Crop Prot., LLC*, 2020 WL 5237318, at *10 (Del. Super. Ct. Aug. 3, 2020).

Applying these standards to the facts here, it is clear that information about potential claims is objectively material to any underwriter, as this informs the risk taken by the insurer. Further, Origis USA cannot dispute that MAIC sought and relied upon the absence of potential claim information when it underwrote the 2023-2024 MAIC Excess Policy. This is demonstrated by the fact that MAIC added Endorsement No. MMX 1208 05 10 to the 2023-2024 MAIC Excess Policy, confirming that MAIC expressly "relied upon the statements in the [Munich RE Application]," and that the Munich RE Application "is/are made a part of [the 2023-2024 MAIC Excess Policy]." A00444. Thus, MAIC clearly considered potential claim activity to be material to its underwriting.

MAIC would not have issued the policy, would have charged a higher premium, or would have excluded the Underlying Plaintiffs' ongoing dispute with Origis USA from coverage, had it known the complete facts about the Antin transaction, the Indemnity Notice (and Origis USA's response thereto), and the numerous documents exchanged between Appellants and Underlying Plaintiffs in the months leading up to the issuance of the 2023-2024 MAIC Excess Policy.

As here, a misrepresentation is a question of law when the evidence is susceptible to only one interpretation. *United Westlabs, Inc.*, 2011 WL 2623932, at

*15. Here, it is undisputed that Origis USA did not disclose the Indemnity Notice in the Munich RE Application, which is an unambiguous contractual agreement that is binding on Appellants and should be construed according to its plain and ordinary meaning. *Realty Assocs. Fund III, L.P. v. Lucent Techs., Inc.*, 2004 WL 2830893, at *3 (Del. Super. Ct. Apr. 30, 2004). Additionally, it was reasonable to foresee that the Indemnity Notice could lead to liability during the 2023-2024 MAIC Excess Policy period of February 4, 2023 to February 4, 2024, and as in *United Westlabs,* "Ultimately, that is precisely what happened." *Id.* at *12. The Underlying Plaintiffs had sold their majority interest in Origis USA for $105 million, only to discover in 2022 that the Antin transaction implied a valuation of Origis USA of $1.4 billion, which was "totally at odds with the facts as [Appellants] had represented them to [the Underlying Plaintiffs]." A00581 at ¶ 155. Through the Indemnity Notice, Origis USA knew that the Underlying Plaintiffs sought to assert claims under the SRA, and had requested the production of documents to investigate those claims. *See Infinity Q Cap. Mgmt., LLC v. Travelers Cas. & Sur. Co.,* 2022 WL 3902803, at *15–16 (Del. Super. Ct. Aug. 15, 2022), *aff'd sub nom, In re Infinity Q Cap. Mgmt., LLC,* 297 A.3d 287 (Del. 2023) (holding that coverage was barred under a prior knowledge exclusion where a prospective insured had "any knowledge or information of any act, error, omission, fact or circumstance" that might give rise to a claim under the policy). Origis USA's omissions clearly implicate Sections

2711(2) and (3), as those omissions were known to the insured, were material to the risk insured by the policy, and caused MAIC to insure a risk that it otherwise would not have insured.

In addition, the Munich Re Application contains an express prior knowledge exclusion that provides, in relevant part, that "the **Applicant** [*i.e.*, Origis USA] understands and agrees that if any such fact, circumstance, or situation exists, whether or not disclosed in response to Question 3 above, any claim or action arising from such fact, circumstance, or situation is excluded from coverage under the proposed policy, if issued by the Company." A00344. Based on the four-corners of the Coverage Action (and pleadings from the Underlying Action incorporated by reference therein), Origis USA was clearly aware of "fact[s], circumstance[s], [and] situation[s]" concerning the Indemnity Notice that it failed to disclose in the Munich Re Application. *See* A00344 at Section 3. The four-corners of the Coverage Action (and pleadings from the Underlying Acton) also make clear that the Underlying Action (which is the matter submitted for coverage under the 2023-2024 MAIC Excess Policy) arises from such "fact[s], circumstance[s], [and] situation[s]." *See Pac. Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1256-57 & fn 42 (Del. 2008) (construing the phrase "arising out of," which is the functional equivalent of "arising from" broadly to mean "originating from," "having its origin in," "growing out of," or "flowing from").

Finally, because the Underlying Action and 2023-2024 MAIC Excess Policy are referred to and relied upon by Origis USA in the Coverage Action, this Court may properly consider both here. In particular, this Court may consider documents outside the pleadings when "the document is integral to a plaintiff's claim and incorporated into the complaint," or "when the document is not being relied upon to prove the truth of its contents." *Windsor I, LLC v. CWCapital Asset Mgt. LLC*, 238 A.3d 863, 873 (Del. 2020). An underlying complaint (in its entirety) is necessarily "referred to and relied upon" by an insured in an action for declaratory judgment, as it is "integral to [that] action." *Harman Intl. Industries Inc. v. Illinois Natl. Ins. Co.*, 2023 WL 3055217, at *6 (Del. Super. Ct. Apr. 24, 2023). Accordingly, the face of the pleadings of the Underlying Action are properly

considered here, together with the face of the pleadings of the Coverage Action.

Similarly, the court may rely on the text of a policy, even if it is not included in the complaint. *Harper v. State Farm Mut. Automobile Ins. Co.*, 2022 WL 17494200, at *1 and n.7 (Del. Super. Ct. Dec. 8, 2022); *see also Bramble v. Old Republic Gen. Ins. Corp.*, 2017 WL 345144, at *2 (Del. Super. Ct. Jan. 20, 2017) (quoting terms of policy and allegations of underlying complaint in granting insurer's motion to dismiss under Rule 12(b)(6)). Notably, Endorsement No. MMX 1208 05 10 of the 2023-2024 MAIC Excess Policy (entitled "Reliance Upon Other Insurer's Application") provides that the Munich RE Application is "made a part of

[the 2023-2024 MAIC Excess Policy] and operates as [MAIC's] own application." A00444 at Endorsement No. MMX 1208 05 10. Indeed, "[w]hen the policy contains a clause declaring that the application forms a part of the policy, it thereby becomes a part of the contract, and all the *material* statements in the answers of the applicant are thereby changed from representations into warranties." *Baltimore Life Ins. Co. v. Floyd*, 94 A. 515, 519 (1915) (emphasis in original); *see also Mulrooney*, 2014 WL 4407854, at *6 ("The first page of the policy states, in plain English, that the application was part of the policy"). Thus, the Munich RE Application is also properly before this Court.

In sum, coverage for the Underlying Action under the 2023-2024 MAIC Excess Policy is excluded under the plain and unambiguous language of the prior knowledge exclusion in the Munich Re Application, which bars coverage for any "claim or action arising from [a] fact, circumstance, or situation" that Origis USA failed to disclose in the Munich Re Application. *See Infinity Q Cap. Mgmt., LLC* 2022 WL 3902803 at *15–16; A00444, Endorsement No. MMX 1208 05 10; *see also* A00344, Section 3. As a result, Origis USA cannot recover under the 2023-2024 MAIC Excess Policy as a matter of law and fails to state a claim upon which relief can be granted against MAIC.

CONCLUSION

For each of the foregoing reasons, MAIC respectfully submits that the Superior Court's decision dismissing the Coverage Action should be affirmed in its entirety.

Respectfully submitted,

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Dated: January 21, 2025