**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

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| IMMUNOMEDICS, INC., *a wholly owned subsidiary of* GILEAD SCIENCES, INC., | ) | |
| Plaintiff, | ) | |
| | ) | C.A. No. N23C-08-179 PRW CCLD |
| v. | ) | |
| HUDSON INSURANCE COMPANY, | ) | |
| Defendant. | ) | |

Submitted: March 4, 2024
Decided: March 18, 2024

**MEMORANDUM OPINION AND ORDER**

*Upon Plaintiff Immunomedics, Inc.'s Motion for Partial Summary Judgment*, **GRANTED.**

*Upon Defendant Hudson Insurance Company's Cross-Motion for Summary Judgment*, **DENIED.**

John P. DiTomo, Esquire, Miranda N. Gilbert, Esquire, MORRIS, NICHOLS, ARSHT & TUNNELL, LLP, Wilmington, Delaware; Adam Ziffer, Esquire, Meredith Elkins, Esquire, Jason Sumbaly, Esquire, COHEN ZIFFER FRENCHMAN & MCKENNA, New York, New York, *Attorneys for Plaintiff Immunomedics, Inc.*

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**WALLACE, J.**

## I. INTRODUCTION

Plaintiff Immunomedics, Inc. is a biotechnology company that develops antibody-drug conjugates for cancer treatment. Its flagship drug, IMMU-132, weathered a tumultuous development process. As a result, Immunomedics faced numerous lawsuits.

Defendant Hudson Insurance Company provided Immunomedics' third-layer excess liability insurance coverage as part of an insurance tower for specified policy periods. In response to the lawsuits it faced, Immunomedics requested insurance coverage under those policies. It received payment from the first- and second-layer insurers, but Hudson denied coverage.

In its denial, Hudson insisted that one of those IMMU-132 lawsuits related to another. So, Hudson said, payment was barred by the insurance policy provisions precluding coverage for related claims. Immunomedics filed suit and now seeks partial summary judgment. Hudson countered with its own motion for summary judgment on all counts.

At bottom, this dispute is about whether the at-question IMMU-132 lawsuits are meaningfully linked to each other. They aren't. The IMMU-132 lawsuits have different parties, time periods, theories of liability, evidence, and relief sought. There being no meaningful link, Immunomedics motion must be **GRANTED**, and Hudson's cross-motion must be **DENIED**.

## II. FACTUAL AND PROCEDURAL BACKGROUND

### A. THE PARTIES

Immunomedics is a Delaware company principally operating out of California[1] and a wholly owned subsidiary of Gilead Sciences, Inc., a Delaware company also operating out of California.[2] Defendant Hudson Insurance Company is a Delaware company operating out of New York.[3]

### B. FACTUAL HISTORY

Immunomedics is a developer of antibody-drug conjugate technology.[4] Its lead drug, developed as IMMU-132, recently received FDA approval for the treatment of people with metastatic triple-negative breast cancer.[5]

Immunomedics purchased a series of Director and Officers (D&O) liability insurance policies insuring it against third-party claims that might allege wrongful conduct.[6] National Union Fire Insurance Company of Pittsburgh, PA ("AIG") issued a Broad Form Management Liability primary policy (the "AIG Primary Policy") to Immunomedics for the 2016-2017 policy period, extended by

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1 Complaint for Breach of Contract and Declaratory Judgment ("Compl.") ¶ 11 (D.I. 1).

2 *Id.*

3 *Id.* ¶ 12.

4 *Id.* ¶ 16.

5 *Id.*

6 *Id.* ¶ 17.

endorsement to be effective through July 2018.[7]

In addition to the AIG Primary Policy, Immunomedics purchased excess coverage from: XL Specialty Insurance Company, which provided $5 million in coverage excess of $5 million;[8] Argonaut, which provided $5 million in coverage excess of $10 million;[9] and Hudson, which provided $5 million in coverage excess of $15 million.[10] The Hudson Policy follows form to the Argonaut Policy, which in turn follows form to the AIG Primary Policy.[11]

Immunomedics and its directors and officers were defendants in three recent civil actions: the *Fergus* Action,[12] the *venBio* Action,[13] and the *Odeh* Action.[14] A brief description of each follows.

### 1. The *Fergus* Action

The *Fergus* Action was a securities class action filed on behalf of all investors

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[7] Opening Brief in Support of Plaintiff's Motion for Partial Summary Judgment on Relatedness ("Pl.'s Mot."), Ex. B ("AIG Primary Policy") (D.I. 21).

[8] Pl.'s Mot., Ex. C ("XL Specialty Policy").

[9] Pl.'s Mot., Ex. D ("Argonaut Policy").

[10] Pl.'s Mot., Ex. E ("Hudson Policy").

[11] All relevant policy provisions are contained in the AIG Primary Policy. Thus, the AIG Primary Policy is the operative policy for this dispute.

[12] *Fergus v. Immunomedics, Inc., et al.*, No. 2:16-cv-03335-KSHCLW (D.N.J.) (the "*Fergus* Action").

[13] *venBio Select Advisor LLC v. Goldenberg, et al.*, C.A. No. 2017-0108 (Del. Ch.) (the "*venBio* Action").

[14] *Ahmad Odeh, Individually and on Behalf of All Others Similarly Situated v. Immunomedics, Inc., et al.*, No. 2-18-cv-17645-ESK (D.N.J.) (the "*Odeh* Action").

who purchased or otherwise acquired Immunomedics securities between May 2, 2016 and June 24, 2016 (the "*Fergus* Class Period").[15] The *Fergus* plaintiffs asserted claims against Immunomedics and certain of Immunomedics' executive officers and directors, alleging violations of Section 10(b) and 20(a) of the Securities Exchange Act of 1934 (the ""Exchange Act"), 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5.[16] The individually-named defendants in the *Fergus* Action include the company's CEO Cynthia Sullivan, CFO Peter Pfreundschuh, and founder and board chairman David Goldenberg.[17]

According to the *Fergus* complaint, Immunomedics "made a series of false and/or misleading statements, and/or omitted to state material facts necessary to make the statements not misleading to attract a much-needed licensee and to increase the price of Immunomedics shares, allowing [Immunomedics] to profit."[18]

The *Fergus* complaint focuses on Immunomedics' actions leading up to and during the June 2016 Annual Meeting of the American Society of Clinical Oncology ("ASCO").[19] It alleges that the *Fergus* defendants "falsely claimed that Immunomedics would present previously undisclosed updated results from its Phase

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[15] Pl.'s Mot., Ex. H ("*Fergus* Complaint") ¶ 1.

[16] *Id.*

[17] *Id.* ¶¶ 25-28.

[18] *Id.* ¶ 1.

[19] *Id.*

2 study of patients with metastatic triple negative breast cancer."[20] The expectation of those previously undisclosed new results "drove up the price of Immunomedics stock, and the *Fergus* defendants were able to time the sale of stock to take advantage of the higher stock price."[21] But the *Fergus* defendants actually had data already made public, contradicting their previous promises and violating their agreement with the ASCO to only present materially new or different data.[22]

When ASCO discovered that the data had previously been made public and contained no materially new or updated results, ASCO canceled the presentation and retracted any forthcoming publication of it.[23] On the day of the presentation, the *Fergus* defendants admitted via press release that the presentation had been cancelled, but disputed ASCO's justification for doing so.[24] That news "drove down the price of Immunomedics shares" for the next several trading days.[25] In the press release, the *Fergus* defendants said they believed the results and reports were, in fact, new data to be presented later that month.[26] But when that later date arrived,

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[20] *Id*. (internal citations omitted).

[21] *Id*.

[22] *Id*. ¶¶ 7-10.

[23] *Id*. ¶ 10.

[24] *Id*. ¶ 11.

[25] *Id*.

[26] *Id*. ¶ 12.

there was no presentation made.[27] Consequently, Immunomedics' share price dropped even further.[28] In the interim, Chairman Goldenberg and CEO Sullivan dumped $4.9 million worth of stock.[29]

The *Fergus* plaintiffs thus alleged that they purchased Immunomedics stock at artificially purchased prices during the *Fergus* Class Period.[30] As a result of the *Fergus* defendants' alleged misrepresentations, the *Fergus* plaintiffs claimed economic loss.[31]

**2. The *venBio* Action**

The *venBio* Action was a derivative lawsuit filed in 2017 by Immunomedics' largest stockholder, venBio Select Advisor LLC ("venBio").[32] The *venBio* complaint consisted of three causes of action alleging breach of fiduciary duty against Immunomedics' then-board of directors (the "*venBio* Pre-Meeting Board"): (1) interfering with the Stockholder Franchise;[33] (2) completing the "Seattle

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[27] *Id.* ¶ 12.

[28] *Id.*

[29] *Id.*

[30] *Id.* ¶ 14.

[31] *Id.*

[32] *See generally* Pl.'s Mot., Ex. F ("*venBio* Complaint").

[33] *Id.* ¶¶ 159-173.

Genetics Transaction";[34] and (3) amending the company's by-laws to include a mandatory advancement amendment and retroactive indemnification agreement.[35] The defendants in the *venBio* Action were former Immunomedics board members Robert Forrester, Jason Aryeh, Geoff Cox, and Bob Oliver.[36] Immunomedics was also a nominal defendant.[37]

The *venBio* Action focuses on the activities of Immunomedics' former board members leading up to the company's 2016 Annual Meeting.[38] During that period, Immunomedics was close to launching IMMU-132.[39] But according to the *venBio* complaint, Immunomedics made "a number of serious missteps that significantly delayed IMMU-132's development."[40] To illustrate, the complaint points to Immunomedics' ejection from the June 2016 ASCO meeting, as well as the *venBio* Pre-Meeting Board's pursuit of "a dilutive financing deal that knocked the Company's stock down to near 52-week lows."[41]

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[34] *Id.* ¶¶ 174-187. The "Seattle Genetics Transaction" refers to the global licensing arrangement the *venBio* Pre-Meeting Board entered into with Seattle Genetics on February 10, 2017–four business days before the rescheduled Annual Meeting.

[35] *Id.* ¶¶ 188-193.

[36] *Id.* ¶¶ 30-34.

[37] *Id.* ¶ 29.

[38] *Id.* ¶ 81.

[39] *Id.* ¶¶ 59-64.

[40] *Id.* ¶ 61.

[41] *Id.* ¶¶ 68-69.

By November 2016, venBio—as Immunomedics' largest stockholder—had enough of the *venBio* Pre-Meeting Board and its alleged missteps. So, it filed a "preliminary proxy statement" with the SEC nominating four new board candidates for election.[42] venBio also engaged in proxy solicitation to help garner support for its newly assembled board ballot.[43] Later that month, venBio filed materials with the SEC describing a number of board and management failures prompting venBio to nominate a majority slate of dissident director candidates.[44]

In response to venBio's SEC filing and proxy solicitation, "the *venBio* Pre-Meeting Board devised a scheme to keep themselves in office, to the detriment of the Company's owners, its stockholders."[45] The *venBio* Pre-Meeting Board's actions during this time period led to the three counts in the *venBio* complaint.

First, the *venBio* Pre-Meeting Board delayed the Annual Meeting until February 2017.[46] After delaying the meeting, the board appointed four new majority directors while two other directors simultaneously resigned.[47] Those new board members—the named *venBio* defendants—were "highly interconnected and had multiple current and past relationships with each other" and were added in an effort

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[42] *Id.* ¶ 76.

[43] *Id.* ¶ 82.

[44] *Id.* ¶ 78.

[45] *Id.* ¶ 5.

[46] *Id.* ¶ 81.

[47] *Id.* ¶ 88.

"to maintain the incumbent directors in office."[48]

Next, the *venBio* Pre-Meeting Board entered into the Seattle Genetics Transaction, a $2 billion licensing agreement granting Seattle Genetics sole responsibility for testing, manufacturing, and commercializing IMMU-132.[49] The *venBio* Complaint alleged that the Seattle Genetics Transaction was "rushed into" "in an effort to influence the vote at the Annual Meeting and entrench [the *venBio* Pre-Meeting Board] in office."[50] It further alleged that the motivation to enter into the Seattle Genetics Transaction was to "announce a transformative transaction—regardless of whether it was the best deal possible for the Company and its stockholders—to increase their chances for re-election to the Board."[51]

Last, the *venBio* Pre-Meeting Board considered and approved two amendments to the company's by-laws, along with "onerous, one-sided, and ill-advised indemnification agreements."[52] The first by-law amendment changed the voting standard for directors from a majority vote to a plurality vote.[53] The second by-law amendment required mandatory advancement for indemnified parties and

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[48] *Id.* ¶¶ 88, 90, 92.

[49] *Id.* ¶¶ 103, 122-131.

[50] *Id.* ¶ 109.

[51] *Id.* ¶ 113.

[52] *Id.* ¶ 133.

[53] *Id.* ¶ 134.

retroactive indemnification agreements with each director and officer.[54] The *venBio* Complaint characterizes these changes as "self-dealing."[55]

The *venBio* Action identified the above-stated occurrences as breaches of the *venBio* Pre-Meeting Board's fiduciary duties and claimed substantial harm to the company as a direct result.[56]

**3. The *Odeh* Action**

The *Odeh* Action was a federal securities class action filed in 2018 in the District of New Jersey.[57] The *Odeh* Complaint asserted two causes of action: (1) violation of Sections 10(b) and Rule 19b-5 of the Exchange Act;[58] and (2) violation of Section 20(a) of the Exchange Act.[59] The putative class was made up of persons who purchased or otherwise acquired Immunomedics' publicly traded securities between February 9, 2018 and January 17, 2019 (the "*Odeh* Class Period").[60] Immunomedics, Inc. was a named defendant.[61] So were Immunomedics' CEO (Michael Pehl), CFOs (Usuma Malik and Michael Garone), CTO (Morris

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[54] *Id.* ¶ 138.

[55] *Id.* ¶ 139.

[56] *Id.* ¶¶ 171-172, 186, 192.

[57] *See generally* Pl.'s Mot., Ex. G ("*Odeh* Complaint").

[58] *Id.* ¶¶ 139-144.

[59] *Id.* ¶¶ 145-148.

[60] *Id.* ¶ 1.

[61] *Id.* ¶ 27.

Rosenberg), and certain members of the board of directors (Dr. Behzad Aghazadeh, Scott Canute, Peter Hutt, and Dr. Khalid Islam) during the *Odeh* Class Period.[62] The named defendants in the *Odeh* Action began their terms as officers and directors during or after March 2017.[63]

In late Spring 2017, after the delayed Annual Meeting and the culmination of the *venBio* Action,[64] a newly-formed board of directors attempted to "establish the necessary manufacturing infrastructure for IMMU-132 for the specific purpose of obtaining FDA approval and launching the drug in the United States during 2018."[65] Between November 2017 and February 2018, Michael Pehl and Morris Rosenberg were hired "to further bolster the perceived expertise of the new management team" and to "assure investors that Immunomedics would remain on track" to deliver

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[62] *Id*. ¶¶ 28-48.

[63] *Id*.

[64] The *Odeh* Complaint provides a brief overview of the *venBio* Action. *See id*. ¶¶ 60-65. But that overview is distinguished within the complaint from *Odeh*'s operative facts:

> On May 5, 2017, *following* venBio's successful campaign to place its people on Immunomedics' Board of Directors, [Immunomedics] announced that Seattle Genetics had agreed to terminate the licensing agreement and *settle the related litigation with venBio*. . . . the new Board of Directors had conducted a review of the strategy of the Company . . . . Indeed, *after*: . . . (b) Aghazadeh, Canute, Hutt and Islam *successfully removed Immunomedics management who were purportedly responsible* for those failures; and (c) the repeated assurances to investors that the Company *under new management* could deliver IMMU-132 to the market, Defendants knew that any failure to do so would be harshly judged by investors and the market.

*Id*. ¶¶ 65, 67 (emphasis added).

[65] *Id*. ¶ 7.

IMMU-132 to market.[66]

In January 2018, though, a major snag occurred.[67] Word spread of a serious data integrity breach at Immunomedics' manufacturing plant where IMMU-132 would be commercially manufactured if approved by the FDA.[68] Immunomedics described the breach internally as "involving Company personnel deliberately manipulating bioburden samples, deliberately misrepresenting test procedures in batch records and intentionally backdating batch records (including the dates of the analytical results)."[69] The *Odeh* complaint described this breach as "a critical risk to FDA approval . . . if the Company failed to demonstrate to the FDA that it had determined the scope of the data integrity breach and remediated it, the FDA would not approve IMMU-132."[70]

Public documents revealed that the *Odeh* defendants were "immediately" made aware of the data breach at Immunomedics' manufacturing plant.[71] And the breach was "immediately" reported to the FDA.[72] Yet, as the *Odeh* complaint alleged, the *Odeh* defendants "deliberately withheld from the FDA . . . facts

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[66] *Id.* ¶ 8.

[67] *Id.* ¶ 9.

[68] *Id.*

[69] *Id.*

[70] *Id.* ¶ 9 (cleaned up).

[71] *Id.* ¶ 10.

[72] *Id.*

underlying the scope of the data integrity breach and whether it was ever remediated."[73]

The *Odeh* complaint identified specific statements from the individual *Odeh* defendants characterized as misleading investors and the FDA on the data breach's importance and remediation status.[74] These statements allegedly constituted "false statements and omissions" that failed to disclose the truth of the data breach that occurred.[75]

In June 2018, while "the truth of the data breach was still unknown by the market," Immunomedics sold over 1.7 million shares of stock for net proceeds of $300 million.[76] The SEC filing made pursuant to that sale acknowledged the risk of a security breach without disclosing that a serious data breach had already occurred.[77] Each named *Odeh* defendant signed the SEC filing.[78]

Soon thereafter, the FDA investigated Immunomedics' manufacturing plant.[79] In August 2018, the FDA asked for proof via a letter that the data breach had been

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[73] *Id*.

[74] *Id*. ¶¶ 10-14.

[75] *Id*. ¶ 146.

[76] *Id*. ¶ 15.

[77] *Id*.

[78] *Id*.

[79] *Id*. ¶ 16.

resolved and said that they could not grant approval unless proven.[80] They did not receive their requested proof.[81]

In December 2018, an independent equity analyst issued a public report disseminating the details of that August exchange, resulting in a steep decline in Immunomedics' shares.[82] The *Odeh* defendants attempted to remedy the situation by issuing what the *Odeh* complaint described as "additional false and misleading statements to investors through friendly equity analysts."[83] Ultimately, the FDA rejected approval of IMMU-132 due to the unresolved issues at the manufacturing plant.[84] As a result, Immunomedics' stock fell significantly.[85] The *Odeh* Action ensued.

In Count I, the *Odeh* plaintiffs alleged that "Defendants disseminated or approved . . . false statements . . . which they knew or deliberately disregarded were misleading in that they contained misrepresentations and concealed material facts . . ."[86] According to the *Odeh* complaint, the *Odeh* defendants failed in their duty to "promptly disseminate truthful information with respect to Immunomedics'

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[80] *Id.* ¶ 17.

[81] *Id.*

[82] *Id.* ¶ 18.

[83] *Id.* ¶¶ 19-20.

[84] *Id.* ¶ 20.

[85] *Id.*

[86] *Id.* ¶ 140.

operations and performance that would be material to investors" in compliance with the SEC's rules.[87] The *Odeh* plaintiffs said that, as a result of those alleged violations, they suffered damages because "in reliance on the integrity of the market, they paid artificially inflated prices for Immunomedics securities and experienced losses when the artificial inflation was released from Immunomedics securities as a result of the revelations and prices decline . . . ."[88] Further, the *Odeh* plaintiffs "would not have purchased Immunomedics securities at the prices they paid, or at all . . . ."[89]

In Count II, the *Odeh* complaint alleged that the *Odeh* defendants violated Section 20(a) of the Exchange Act.[90] It said that Immunomedics, by virtue of the individually-named defendant board members, had power to control or influence the particular transactions giving rise to the securities violations, and exercised the same.[91]

In sum, the *Odeh* Complaint alleged that "[t]he declines in Immunomedics' stock price on November 7, 2018, December 20, 2018, and January 18, 2019 were a direct result of the nature and extent of Defendants' prior misstatements and

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87 *Id.* ¶ 142.

88 *Id.* ¶ 143.

89 *Id.*

90 *Id.* ¶¶ 145-148.

91 *Id.* ¶ 147.

omissions being revealed to investors and the market."[92] The *Odeh* plaintiffs, they alleged, suffered economic losses as a direct result.[93]

**4. THE INSURANCE POLICIES**

The following of Immunomedics' policy provisions are pertinent to these motions. Clause 1 of the AIG Primary Policy, as amended by Endorsement No. 69, governs insurance coverage of insured persons and organizations. It provides:

> This policy shall pay the **Loss** of an **Organization**, that arises from any:
>
> (1) **Claim** (including any **Insured Person Investigation**) made against any **Insured Person** (including any **Outside Entity Executive**) for any **Wrongful Act** of such **Insured Person** occurring on or prior to the Effective Time; . . . .
>
> But only to the extent that such **Organization**, has indemnified such **Loss** of, or paid such **Loss** on behalf of, the **Insured Person.**
>
> This policy shall pay the **Loss** of any **Insured Person** that no **Organization** has indemnified or paid, and that arises from any:
>
> (1) **Claim** (including any **Insured Person Investigation**) made against such **Insured Person** (including any **Outside Entity Executive**) for any **Wrongful Act** of such **Insured Person** occurring on or prior to the **Effective Time**; . . . .
>
> This policy shall pay the **Loss** of any **Organization**, that:
>
> (1) arises from any **Securities Claim** made against such **Organization** for any **Wrongful Act** of such **Organization** occurring on or prior to

[92] *Id.* ¶ 132.

[93] *Id.* ¶¶ 137-138, 143, 148.

> the **Effective Time**; . . . .[94]

"**Claim**" is defined, in relevant part, as "a civil . . . proceeding for monetary, non-monetary, or injunctive relief which is commenced by: (i) service of a complaint . . . ."[95] "**Loss**" means, in relevant part, "damages, settlements, judgments . . . ."[96] The "**Effective Time**" is defined as February 9, 2018.[97] The "**Discovery Period**" means six years from February 9, 2018.[98]

"**Securities Claim**" means, in relevant part,

> a **Claim**…made against any **Insured**: (1) alleging a violation of any law, rule or regulation…which is: . . . (ii) brought by a security holder or purchaser or seller of securities of an **Organization** with respect to such security holder's, purchaser's or seller's interest in securities of such **Organization** . . . .[99]

"**Wrongful Act**" is defined as:

> (1) any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or act . . . (i) with respect to any **Executive** of an **Organization**, by such **Executive** in his or her capacity as such or any matter claimed against such **Executive** solely by reason of his or her status as such . . . or (2) with respect to an **Organization**, any actual or alleged breach of duty, neglect, error, misstatement, omission or act by such **Organization**, but solely in

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[94] AIG Primary Policy § End. 69 (replacing the provisions of § 1 (Insuring Agreements)) (bold in original). All bolded terms are defined in the AIG Primary Policy.

[95] *Id.* § 13 (Definitions) (bold in original).

[96] *Id.* (bold in original).

[97] *Id.* (bold in original).

[98] *Id.* (bold in original).

[99] *Id.* (bold in original).

regard to a **Securities Claim**.[100]

Section 7(b)(1) of the AIG Primary Policy governs related claims. It says that, if a "**Claim**" is first made and reported during the "**Policy Period**" or "**Discovery Period**," "then any **Related Claim** that is subsequently made against an **Insured** . . . shall be deemed to have been first made at the time that such previously reported **Claim** was first made."[101] "**Related Claim**" is defined to mean "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**."[102]

Section 7(b) of the AIG Primary Policy, as modified by Endorsement No. 20, provides the "Prior Notice Exclusion." It reads:

> The **Insurer** shall not be liable to make any payment for **Loss** in connection with any **Claim** . . . alleging, arising out of, based upon or attributable to the facts alleged or to the same or related **Wrongful Acts** alleged or contained, in any **Claim** . . . that has been reported, or in any circumstances of which notice has been given, under any directors and officers liability insurance policy in force prior to the inception date of this policy unless coverage for such **Claim** . . . is properly denied under such policy for reasons other than sufficiency of notice or the failure of the **Insured** to satisfy any of its obligations under the policy.[103]

Endorsement Number 60 of the AIG Primary Policy is the "Specific Litigation

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[100] *Id.* (bold in original).

[101] *Id.* § 7(b)(1) (bold in original).

[102] *Id.* § 13 (Definitions) (bold in original).

[103] *Id.* § End. 20 (modifying certain provisions of § 7(b)) (bold in original).

Exclusion." That exclusion states:

> the **Insurer** shall not be liable to make any payment for **Loss** in connection with: . . . (iii) any **Claim** alleging, arising out of, based upon, attributable to or in any way related directly or indirectly, in part or in whole, to an **Interrelated Wrongful Act** (as that term is defined below), regardless of whether or not such **Claim** involved the same or different **Insureds**, the same or different legal causes of action or the same or different claimants or is brought in the same or different venue or resolved in the same or different forum.[104]

For the purposes of the Specific Litigation Exclusion, an "**Interrelated Wrongful Act**" means: "(i) any fact, circumstance, act or omission alleged in any **Event(s)** and/or (ii) any **Wrongful Act** which is the same as, similar or related to or a repetition of any **Wrongful Act** alleged in any **Event(s)**."[105] And the definition of "**Event(s)**" includes "1. Securities Claim filed on June 09, 2016."[106]

### 5. NOTICE BY IMMUNOMEDICS AND HUDSON'S COVERAGE POSITION

After the *Odeh* Action was filed, Immunomedics notified its insurers of the claim.[107] AIG first acknowledged coverage under the AIG Primary Policy.[108] Once that policy was exhausted, XL Specialty Insurance Company and Argonaut paid their full limits of liability as the first- and second-layer excess insurers.[109] Hudson

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[104] *Id.* § End. 60 (bold in original).

[105] *Id.* (bold in original).

[106] *Id.*

[107] Compl. ¶ 52.

[108] *Id.* ¶ 53.

[109] *Id.*

denied coverage for the *Odeh* Action as the third-layer excess insurer.[110]

Hudson took the position that the *Odeh* Action is related to the *venBio* Action.[111] Thus, Hudson argued that the *Odeh* Action should be deemed to have been made either during the 2015-2016 policy period or the 2016-2017 policy period, when Hudson did not insure Immunomedics.[112]

### 6. PROCEDURAL HISTORY

Immunomedics initiated this action in August 2023.[113] In its complaint, Immunomedics brought two causes of action: (1) breach of contract against Hudson for not providing coverage for the *Odeh* Action subject to its $5 million limit of liability (Count I);[114] and (2) a request for a declaration by the Court of Hudson's obligations under its issued policy (Count II).[115] Hudson timely answered the complaint.[116]

Now, Immunomedics moves for partial summary judgment on the issue of relatedness.[117] Hudson opposes the motion and cross-moves for full summary

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[110] *Id.* ¶ 54.

[111] *Id.* ¶ 56.

[112] *Id.*

[113] *See generally id.*

[114] *Id.* ¶¶ 63-67.

[115] *Id.* ¶¶ 68-73.

[116] D.I. 20.

[117] *See generally* Pl.'s Mot.

judgment.[118] The Court having heard the parties at argument, their cross-motions are now ripe for decision.

## III. PARTIES' CONTENTIONS

Immunomedics contends that the *Odeh* Action is not related to the *venBio* Action.[119] Thus, Immunomedics insists that Hudson's denial of coverage under either the Related Claims provision or the Prior Notice Exclusion is improper.[120] Immunomedics says that the *Odeh* Action concerned entirely different defendants, timelines, damages, and alleged Wrongful Acts than the *venBio* Action.[121] Immunomedics also points to this Court's decision in *Pfizer Inc. v. Arch Insurance Company* to dispute Hudson's contention that the actions are related simply because both involve efforts to market a single drug.[122] Additionally, Immunomedics argues that Hudson's broad interpretation of the relatedness provisions would render coverage for any subsequent claim in the tiered policy structure illusory, as all claims would relate back to some previous action.[123]

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[118] *See generally* Defendant Hudson Insurance Company's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment and Opening Brief in Support of its Motion for Summary Judgment ("Def.'s Mot.") (D.I. 27).

[119] Pl.'s Mot. at 22-31.

[120] *Id*.

[121] *Id*. at 22.

[122] *Id*. at 23-25 (citing 2019 WL 3306043 (Del. Super. Ct. July 23, 2019)).

[123] Plaintiff's Omnibus Brief in Opposition to Defendant's Motion for Summary Judgment and in Further Support of Plaintiff's Motion for Partial Summary Judgment on Relatedness ("Pl.'s Re. Br.") at 24-28 (D.I. 30).

Immunomedics also contends that the Specific Litigation Exclusion does not bar coverage. It says that the *Odeh* Action and the *Fergus* Action are not "Interrelated Wrongful Acts" as that term is defined in the exclusion.[124]

Hudson opposes Immunomedics' motion and cross-moves for summary judgment on both Immunomedics' counts.[125] Hudson contends that the *Odeh* Action and the *venBio* Action are related claims such that the Related Claims provision and the Prior Notice Exclusion bar coverage.[126] Hudson argues that the data breach in the *Odeh* Action was "merely a symptom of the underlying problem that shareholders had been complaining about for years: that Immunomedics was mismanaging the commercialization of IMMU-132 such that the Company—and its stockholders—were damaged."[127] According to Hudson, "[i]t is this pattern of misconduct that is the 'meaningful linkage that binds the matters together: both the *venBio* Action and the *Odeh* Action address a pattern of mismanagement and misconduct resulting in a continuing failure to obtain FDA approval and commercialization of IMMU-132."[128]

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[124] *Id*. at 31-34.

[125] *See generally* Def.'s Mot.

[126] *Id*. at 20-30.

[127] *Id*. at 22.

[128] *Id*. At oral argument, Hudson also repeatedly emphasized its view that "bringing a drug to market" is what meaningfully links the actions.

Hudson further posits that the Specific Litigation Exclusion bars coverage.[129] Hudson says that because the *Fergus* Action and the *venBio* Action are related claims, the *Odeh* Action must be barred under that exclusion.[130] Hudson also argues that like the *Fergus* Action, the *Odeh* Action "arises from shareholders' dissatisfaction with the management of Immunomedics."[131]

## IV. LEGAL STANDARD

Summary judgment is warranted "if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits" show "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[132] The movant bears the initial burden of proving its motion is supported by undisputed facts.[133] If the movant meets its burden, the non-movant must show there is a "genuine issue for trial."[134] To determine whether a genuine issue exists, the Court construes the facts in the light most favorable to the non-movant.[135]

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[129] *Id*. at 30-31.

[130] *Id*.

[131] *Id*.

[132] Del. Super. Ct. Civ. R. 56(c); *Options Clearing Corp. v. U.S. Specialty Ins. Co.*, 2021 WL 5577251, at *7 (Del. Super. Ct. Nov. 30, 2021).

[133] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[134] Del. Super. Ct. Civ. R. 56(e); *see also Brzoska v. Olson*, 668 A.2d 1355. 1364 (Del. 1995) ("If the facts permit reasonable persons to draw but one inference, the question is ripe for summary judgment.").

[135] *Judah v. Del. Tr. Co.*, 378 A.2d 624, 632 (Del. 1977).

The "Court may not be able to grant summary judgment 'if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record.'"[136] But "[i]f the Court finds that no genuine issues of material fact exists, and the moving party has demonstrated [its] entitlement to judgment as a matter of law, then summary judgment is appropriate."[137]

"These well-established standards and rules apply in full when the parties have filed cross-motions for summary judgment."[138] Filing cross-motions for summary judgment doesn't act *per se* as a concession that there are no genuine factual disputes.[139] "But, where cross-motions for summary judgment are filed and neither party argues the existence of a genuine issue of material fact, 'the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the[m].'"[140]

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[136] *Radulski v. Liberty Mutual Fire Ins. Co.*, 2020 WL 8676027, at *4 (Del. Super. Ct. Oct. 28, 2020) (quoting *CNH Indus. Am. LLC v. Am. Cas. Co. of Reading*, 2015 WL 3863225, at *1 (Del. Super. Ct. June 8, 2015)).

[137] *Brooke v. Elihu-Evans*, 1996 WL 659491, at *2 (Del. Aug. 23, 1996) (citing *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322 (Del. Super. Ct. 1973)); *see also Jeffries v. Kent Cty. Vocational Tech. Sch. Dist. Bd. of Educ.*, 743 A.2d 675, 677 (Del. Super. Ct. 1999) ("However, a matter should be disposed of by summary judgment whenever an issue of law is involved and a trial is unnecessary." (citing *Mitchell v. Wolcott*, 83 A.2d 759, 761 (Del. 1951)).

[138] *Radulski*, 2020 WL 8676027, at *4 n.35 (collecting cases); *see also Sarraf 2018 Fam. Tr. v. RP Holdco, LLC*, 2022 WL 10093538, at *5 (Del. Super. Ct. Oct. 17, 2022); *Zenith Energy Terminals Joliet Hldgs. LLC v. CenterPoint Props. Tr.*, 2023 WL 615997, at *8 (Del. Super. Ct. Jan. 23, 2023).

[139] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

[140] *Radulski*, 2020 WL 8676027, at *4 (alteration in original) (quoting Del. Super. Ct. Civ. R. 56(h)).

## V. DISCUSSION

### A. THE *ODEH* ACTION AND THE *VENBIO* ACTION ARE NOT RELATED.

Immunomedics primarily argues that the *Odeh* Action and the *venBio* Action are not "Related Claims" as that term is defined in the AIG Primary Policy.[141] In Hudson's cross-motion, it argues that the *Odeh* Action is related to the *venBio* Action and that coverage is excluded as a result, both under the Related Claims provision and by the Prior Notice Exclusion.[142]

Delaware law governs the policies.[143] As the insured, Immunomedics has the burden to prove "that a claim is covered by an insurance policy."[144] If Immunomedics meets that burden, "the burden shifts to the insurer to prove that the event is excluded under the policy."[145] The Related Claims provision and the Prior Notice Exclusion will only bar coverage if the *Odeh* Action is "related" to the *venBio*

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[141] Pl.'s Mot. at 22-31.

[142] Def.'s Mot. at 20-30. Since these two policy provisions are identical in language and effect, they will be analyzed together.

[143] Immunomedics contends Delaware law applies to this dispute. Pl.'s Mot. at 19. Hudson doesn't appear to argue otherwise. And there is little doubt now that Delaware law is most-oft applicable to Delaware corporations' D&O coverage questions. *See RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 900-01 (Del. 2021) ("[I]n the vast majority of cases, Delaware law governs the duties of the directors and officers of Delaware corporation to the corporation, its stockholders, and its investors. As such, corporations must assess their need for D&O coverage with reference to Delaware law." (internal citation omitted)).

[144] *Virtual Bus. Enters., LLC v. Maryland Cas. Co.*, 2010 WL 1427409, at *4 (Del. Super. Ct. Apr. 9, 2010) (citing *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997)).

[145] *Id*. (citation omitted).

Action as that term is defined by the policies.[146]

Under Delaware law, "the principles of insurance contract interpretation are well-established and are grounded in the parties' intent, as expressed through their contractual language."[147] This Court must analyze "unambiguous insurance policies according to their ordinary meaning."[148] And if an insurance contract's language is "clear and unambiguous, the parties' intent is ascertained by giving the language its ordinary and usual meaning."[149] An unambiguous contract doesn't take on ambiguity just because the parties disagree over its proper construction.[150] No, a contract is ambiguous only when its relevant provisions are "reasonably or fairly susceptible" to "different interpretations or may have two or more different meanings."[151]

"Insurance contracts should be interpreted as providing broad coverage to align with the insured's reasonable expectations."[152] And generally, the insured's

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[146] *See Options Clearing Corp.*, 2021 WL 5577251, at *7 ("The Insurers' Exclusions will only bar coverage if the Enforcement Actions are related to the 2012-2014 OCIE Letters under the Policies' definition of relatedness.").

[147] *Sycamore P'rs Mgmt., L.P. v. Endurance Am. Ins. Co.*, 2021 WL 4130631, at *10 (Del. Super. Ct. Sept. 10, 2021) (citing *RSUI Indem. Co.*, 248 A.3d at 905-06); *see also Options Clearing Corp.*, 2021 WL 5577251, at *7.

[148] *Id*. at *11 (citing *In re Solera Ins. Coverage Appeals*, 240 A.3d 1121, 1131 (Del. 2020)).

[149] *RSUI Indem. Co.*, 248 A.3d at 905 (internal quotation marks and citation omitted).

[150] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

[151] *Id*. (citation omitted).

[152] *RSUI Indem. Co.*, 248 A.3d at 906 (citation omitted).

burden is to show that a claim falls within the contract's coverage scope, while the insurer's burden "is to establish that a claim is specifically excluded."[153] Courts interpret such exclusionary clauses with "a strict and narrow construction and give effect to such exclusionary language only where it is found to be specific, clear, plain, conspicuous, and not contrary to public policy."[154]

In the AIG Primary Policy, "**Related Claims**" is defined as:

> 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 either: (i) alleged in another **Claim** made against an **Insured**; or (ii) the subject of a **Pre-Claim Inquiry** received by an **Insured Person**.[155]

The Related Claims provision states that if a "**Claim**" is first made and reported during the "**Policy Period**" or "**Discovery Period**," "then any **Related Claim** that is subsequently made against an **Insured** . . . shall be deemed to have been first made at the time that such previously reported **Claim** was first made."[156] And, according to the provision, "**Claims** actually first made or deemed first made prior to the inception date of this policy . . . are not covered under this policy."[157]

The Prior Notice Exclusion reads:

> The **Insurer** shall not be liable to make any payment for **Loss** in connection with any **Claim** . . . alleging, arising out of, based upon or

[153] *Id.* (internal quotation marks and citation omitted).

[154] *Id.* (cleaned up) (citation omitted).

[155] AIG Primary Policy § 13 (Definitions) (bold in original).

[156] *Id.* § 7(b)(1) (bold in original).

[157] *Id.* (bold in original).

> attributable to the facts alleged or to the same or related **Wrongful Acts** alleged or contained, in any **Claim** . . . that has been reported, or in any circumstances of which notice has been given, under any directors and officers liability insurance policy in force prior to the inception date of this policy unless coverage for such **Claim** or **Pre-Claim Inquiry** is properly denied under such policy for reasons other than sufficiency of notice or the failure of the **Insured** to satisfy any of its obligations under the policy.[158]

This language is clear and unambiguous,[159] so the terms will be interpreted "according to their plain, ordinary meaning."[160] The operative phrase to interpret here is "alleging, arising out of, based upon or attributable to."

Delaware courts may look to dictionaries to assist in determining the plain meaning of an undefined term.[161] And the our Supreme Court has defined "arising out of" to mean "some meaningful linkage" in the insurance policy context.[162] Too, this Court has logically extended the meaning of "arising out of" to the other grouped

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[158] *Id*. § End. 20 (modifying certain provisions of § 7(b)) (bold in original).

[159] Both the Delaware Supreme Court and this Court have construed similar language. *See Options Clearing Corp.*, 2021 WL 5577251, at *8 (construing an insurance policy with a "prior notice exclusion" nearly identical to the one at issue here); *First Solar, Inc.*, 274 A.3d 1006, 1013-14 (Del. 2022) (construing an insurance policy with a "related claim provision"); *Pac. Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1256-57 (Del. 2008) (construing "arising out of" language in an insurance contract); *Alexion Pharmaceuticals, Inc. v. Endurance Assurance Corp. f/k/a/ Endurance Reinsurance. Corp. of Am., et al.*, 2024 WL 639388, at *8 (Del. Super. Ct. Feb. 15, 2024) (same).

[160] *First Solar, Inc.*, 274 A.3d at 1013 (internal quotation marks and citation omitted).

[161] *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006).

[162] *Pac. Ins. Co.*, 956 A.2d at 1257; *Eon Labs Mfg., Inc. v. Reliance Ins. Co.*, 756 A.2d 889, 894 (Del. 2000); *see also Options Clearing Corp.*, 2021 WL 5577251, at *8 (interpreting "arising out of" to mean some "meaningful linkage"); *Sycamore P'rs Mgmt., L.P.*, 2021 WL 4130631, at *12 (same).

terms in policy language.[163] Specifically, this Court has extended the same "meaningful linkage" definition to other language in the insurance policy, namely, "based upon or attributable to."[164] Same here.

The question, then, is whether a "meaningful link" exists between the *Odeh* Action and the *venBio* Action such that they are related claims. In *First Solar, Inc.*, the Delaware Supreme Court compared the two actions at issue to determine whether a meaningful link exists, and evaluated: (1) the parties, (2) the relevant time period, (3) the overall theory of liability, (4) sampling of relevant evidence, and (5) the claimed damages.[165] This Court has evaluated similar factors to determine relatedness.[166] Examination of those same factors here reveals that there is no meaningful link between the *venBio* Action and the *Odeh* Action.

First, the parties in each action are different. In the *venBio* Action, brought by venBio, the named defendants were then-board members Robert Forrester, Jason Aryeh, Geoff Cox, and Bob Oliver.[167] In the *Odeh* Action, brought by a putative class of Immunomedics stockholders, the named defendants were board members

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[163] *Options Clearing Corp.*, 2021 WL 5577251, at *8.

[164] *Id.*

[165] *See First Solar, Inc.*, 274 A.3d at 1014.

[166] *See, e.g.*, *Options Clearing Corp.*, 2021 WL 5577251, at *9 (evaluating: the types of investigation, the relevant time periods, the regulations allegedly violated, and the wrongful conduct alleged); *Sycamore P'rs Mgmt., L.P.*, 2021 WL 4130631, at *13 (evaluating: the allegations made, the theories of liability, and the facts constituting the "Wrongful Acts").

[167] *venBio* Complaint ¶¶ 29-34.

Dr. Behzad Aghazadeh, Scott Canute, Peter Hutt, and Dr. Khalid Islam, along with then-CEO Michael Pehl, then-CFOs Usama Malik and Michael Garone, and then-CTO Morris Rosenberg.[168] While Immunomedics, Inc. was indeed named in both actions, it was only a nominal defendant in the *venBio* Action.[169] None of the board members or officers in the *Odeh* Action served in their roles during the *venBio* Action.[170] So, there is no meaningful linkage between the parties.

Second, the relevant time periods differ. The *venBio* Action focuses on the actions of Immunomedics' former board members leading up to the company's 2016 Annual Meeting.[171] Those actions took place between June 2016 and February 2017.[172] In contrast, the *Odeh* Action focuses on the actions of Immunomedics' newly-formed board of directors starting in January 2018, when a data breach occurred at Immunomedics' main manufacturing plant.[173] Thus, the relevant time periods do not overlap.

Third, the overall theories of liability are not the same. The *venBio* Action alleged that the *venBio* Pre-Meeting Board breached their fiduciary duties owed to

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[168] *Odeh* Complaint ¶¶ 28-48.

[169] *venBio* Complaint ¶ 29.

[170] Notably, the named board members in the *Odeh* Action are the same individuals that venBio campaigned to place on the Immunomedics board, further emphasizing that the *Odeh* Action picked up after the *venBio* Action had turned that page.

[171] *venBio* Complaint ¶ 81.

[172] *Id*.

[173] *Odeh* Complaint ¶¶ 9-14.

Immunomedics by interfering with the Stockholder Franchise, completing a self-serving transaction, and making certain changes to the company's by-laws.[174] The *Odeh* Action, on the other hand, alleged that Immunomedics and certain of its directors and board members violated specific SEC regulations by making false statements and concealing material facts relating to a single data breach.[175] Therefore, the overall theories of liability in the *venBio* Action (breach of fiduciary duty) and the *Odeh* Action (failing to comply with SEC regulations) are entirely different.

Fourth, the relevant evidence varies. The relevant evidence in the *venBio* Action concerns the *venBio* Pre-Meeting Board's activity leading up to the 2016 Annual Meeting, including the Seattle Genetics Transaction in February 2017 and the amended by-laws that same month. Comparatively, the relevant evidence in the *Odeh* Action concerns the actions of Immunomedics board members immediately during and after the January 2018 data breach. That includes the statements made to the SEC, the FDA, and investors between January 2018—when the breach occurred—and December 2018—when the independent equity analyst issued the public report. There is very little, if any, overlap between what could be considered relevant evidence to the *venBio* Action and to the *Odeh* Action.

[174] *venBio* Complaint ¶¶ 159-173.

[175] *Odeh* Complaint ¶¶ 139-148.

Fifth, the complained-of damages are distinguishable. The *venBio* plaintiffs claim substantial harm to the company itself stemming from the *venBio* Pre-Meeting Board's alleged breaches of their fiduciary duties.[176] The *Odeh* plaintiffs claim economic losses in the form of devalued stock that was purchased at artificially high prices.[177] The damages pled in each take distinctly different forms.

So, all five factors employed in *First Solar, Inc.* weigh against a finding of meaningful linkage here.

But Hudson suggests that Delaware courts engage (or should engage) some broader sense of the "meaningful linkage" requirement to establish relatedness.[178] To Hudson, the running theme of Immunomedics' general mismanagement of the commercialization of IMMU-132 such that the company and its stockholders were damaged should be enough.[179] In Hudson's view, "[i]t is this pattern of misconduct that is the 'meaningful linkage' that binds the matters together."[180]

Not so. Hudson's broad interpretation of "meaningful linkage" proposes barring coverage for the *Odeh* Action simply because it shares background facts with the *venBio* Action. This Court requires more than that to establish a meaningful link.

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[176] *venBio* Complaint ¶¶ 171-172, 186, 192.

[177] *Odeh* Complaint ¶¶ 137-138, 143, 148.

[178] Def.'s Mot. at 22.

[179] *Id.*

[180] *Id.*

In *Sycamore Partners*, this Court stated,

> the Insurers propose a definition of arising out of that would bar coverage for the Nine West Claims simply because they share background facts in common with the Jones Shareholder Suits. But, to bar coverage, the Policies' plain language requires a *meaningful* link that connects the factual circumstances underpinning the alleged Wrongful Acts challenged in each litigation. On that plain language, it is not sufficient for two Claims to mention some of the same facts. . . . Two Claims do not "involve" and are not "consequence[s] of" the same Wrongful Acts merely because the underlying claimants, to aid readers in understanding and situating their allegations, recounted the history of two temporally related but substantively unassociated transactions.[181]

Likewise, the *venBio* and *Odeh* complaints recount Immunomedics' troubled launch of IMMU-132 to aid readers in understanding and situating their independent allegations. That shared backdrop does not meaningfully link claims that are otherwise substantively unassociated with one another.[182]

A quick glance at Delaware case law offers further support. For example, in *First Solar, Inc.* and *United Westlabs, Inc. v. Greenwich Insurance Co.*,[183] the plaintiffs engaged in a continuous series of related acts that constituted a single

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[181] *Sycamore P'rs Mgmt., L.P.*, 2021 WL 4130631, at *14; *see also Alexion Pharmaceuticals, Inc.*, 2024 WL 639388, at *8 (cautioning against interpreting similar policy language to mean "sharing 'any' commonality" suffices to make two claims related (quoting *Pfizer Inc.*, 2019 WL 3306043, at *5)).

[182] Furthermore, such an interpretation would make it impossible for one-trick companies like Immunomedics to receive coverage beyond the first lawsuit leveled against them. If such background facts alone constitute a meaningful link, then companies that have only one product or provide a single service would have just one chance at coverage. The one-and-done effect of Hudson's "meaningful linkage" interpretation is untenable.

[183] 2011 WL 2623932 (Del. Super. Ct. June 13, 2011).

wrongful act under the policies at issue.[184] In *First Solar, Inc.*, our high court found that the two claims at issue there "were based on the same underlying wrongful conduct—a fraudulent scheme to raise First Solar's stock price by misrepresenting its [photovoltaic power] capabilities."[185] Here, the *venBio* Action was based on the Pre-Meeting Board's breaches of their fiduciary duties leading up to the 2016 Annual Meeting, while the *Odeh* Action was based on misrepresentations made by board members and officers regarding a data breach that occurred in 2018. That can hardly be characterized as "the same underlying wrongful conduct."

Hudson contends that the two at-issue actions here are most similar to those in *Seritage Growth Properties, L.P. v. Endurance American Ins. Co.*[186] The *Seritage* decision concerned whether an "Adversary Proceeding" related to an earlier "Derivative Action."[187] Both claims were brought against Seritage's officers and directors based on their actions surrounding one specific transaction that occurred in 2015 (labeled the "Seritage Transaction").[188] Indeed, the Seritage Transaction was the underlying basis for both claims.[189] So, in *Seritage* this Court held that the

[184] *See First Solar, Inc.*, 274 A.3d at 1017 (discussing *United Westlabs, Inc.* and finding the facts there analogous to those in *First Solar, Inc.*).

[185] *See id*. at 1017 n.73.

[186] 2022 WL 18046813 (Del Super. Ct. Dec. 19, 2022); Def.'s Mot. at 28-29.

[187] *Seritage Growth Properties, L.P.*, 2022 WL 18046813, at *9-11.

[188] *Id*. at *1.

[189] *Id*. at *11.

Derivative Action and Adversary Proceeding were related because "[t]he underlying facts for each claim rely on the Seritage Transaction and facts arising from it."[190] But no singular underlying event or transaction exists here that might similarly relate the *Odeh* Action to the *venBio* Action.

This situation is more akin to that in *Pfizer*.[191] There, the claims were linked in that they involved overlapping misrepresentations about potential ill-effects of the same drug.[192] Yet, they were found to be unrelated because "one claimed alleged false representations regarding the cardiovascular risks associated with Celebrex and the other alleged false and misleading statements regarding the gastrointestinal health risks of Celebrex."[193] As the *Pfizer* court noted, "[i]n short, while there may be some thematic similarities, the Underlying Actions are truly, in all relevant respects, different."[194] So too here.

At bottom, the *venBio* Action and the *Odeh* Action contain different parties alleging different wrongful acts in different time periods relying on differing evidence and claiming different damages. Accordingly, no "meaningful link" exists

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[190] *Id.*

[191] 2019 WL 3306043 (Del. Super. Ct. July 23, 2019), *abrogated by First Solar, Inc.*, 274 A.3d 1912-13. *Pfizer Inc.* was abrogated by *First Solar* to the extent it evoked a "fundamentally identical" standard for relatedness.

[192] *Id.* at *10.

[193] *Id.*

[194] *Id.*

between the *Odeh* Action and the *venBio* Action rendering them related claims under the AIG Primary Policy.

### B. THE SPECIFIC LITIGATION EXCLUSION DOES NOT BAR COVERAGE.

Hudson also argues that the Specific Litigation Exclusion bars coverage—that is, Hudson says that the *Odeh* Action is sufficiently related to the *Fergus* Action to bar coverage under the exclusion.[195] The same Delaware law governing contract interpretation applies to the Court's analysis here.[196] The Specific Litigation Exclusion provides:

> the **Insurer** shall not be liable to make any payment for **Loss** in connection with: . . . (iii) any **Claim** alleging, arising out of, based upon, attributable to or in any way related directly or indirectly, in part or in whole, to an **Interrelated Wrongful Act** (as that term is defined below), regardless of whether or not such **Claim** involved the same or different **Insureds**, the same or different legal causes of action or the same or different claimants or is brought in the same or different venue or resolved in the same or different forum.[197]

An "**Interrelated Wrongful Act**" means: (i) any fact, circumstance, act or omission alleged in any **Event(s)** and/or (ii) any **Wrongful Act** which is the same as, similar or related to or a repetition of any **Wrongful Act** alleged in any **Event(s)**.[198] "**Event(s)**" has a definition that includes the "Securities Claim filed on June 09,

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[195] Def.'s Mot. at 30-32.

[196] *See* Part V(A), *supra*.

[197] AIG Primary Policy § End. 60 (bold in original).

[198] *Id*.

2016."[199] It is undisputed that the "Securities Claim filed on June 09, 2016" is the *Fergus* Action.

The terms of the Specific Litigation Exclusion are clear and unambiguous, so the Court will interpret them "according to their plain, ordinary meaning."[200] The provision excludes coverage for claims "alleging, arising out of, based upon, attributable to or in any way related directly or indirectly . . . to an Interrelated Wrongful Act.[201] Like before, a meaningful link between the two claims is therefore required.[202] And an "Interrelated Wrongful Act" means "any fact, circumstance, act or omission alleged in" the *Fergus* Action, or "any Wrongful Act which is the same as, similar or related to or a repetition of an Wrongful Act alleged in" the *Fergus* Action.[203] So, in order for the Specific Litigation Exclusion to bar coverage, Hudson must show that the *Odeh* Action is meaningfully linked to the *Fergus* Action.

Hudson makes no such showing. Instead, Hudson presumptively alleges that because "the *Fergus* Action and the *venBio* Action were determined to be Related Claims" in a prior arbitration, the *Odeh* Action and the *Fergus* Action are claims based on Interrelated Wrongful Acts.[204] That argument relies on the Court finding

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[199] *Id.*

[200] *First Solar, Inc.*, 274 A.3d at 1013 (internal quotation marks and citation omitted).

[201] AIG Primary Policy § End. 60 (bold in original).

[202] *See First Solar, Inc.*, 274 A.3d at 1013.

[203] AIG Primary Policy § End. 60 (bold in original).

[204] Def.'s Mot. at 30-31.

that the *Odeh* Action and the *venBio* Action are related. But as previously discussed, the *Odeh* Action has no meaningful linkage with the *venBio* Action.[205] Thus, the relationship between the *Odeh* Action and the *Fergus* Action must be analyzed independently.[206]

Hudson also broadly asserts that "[j]ust like the *Fergus* Action, the *Odeh* Action arises from shareholders' dissatisfaction with the management of Immunomedics."[207] According to Hudson, "[t]his commonality of facts and circumstances are Interrelated Wrongful Acts."[208] But the *Odeh* Action and the *Fergus* Action are substantively dissimilar.

The *Fergus* Action concerns the actions of certain of Immunomedics' board members and directors from May 2016 to June 2016 leading up to the ASCO conference. The *Fergus* plaintiffs alleged that the *Fergus* defendants artificially inflated their stock prices by falsely claiming that they had new IMMU-132 data to present at that conference, when in fact they only had old data. The *Fergus* Action does not extend into 2017 and beyond—its operative facts go no further than June 2016. Conversely, the *Odeh* Action begins in January 2018 when the data breach

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[205] *See* Part V(A), *supra*.

[206] Moreover, the cited-to arbitration decision that the *venBio* and *Fergus* actions were related has no bearing whatsoever on whether the *Odeh* and *Fergus* actions are related. *See* Def.'s Mot. at 14-16.

[207] Def.'s Mot. at 30-31.

[208] *Id*.

occurred and goes forward from there. It involves entirely different parties, theories of liability, relevant evidence, and claimed damages.

Thus, the *Fergus* Action is not an "Interrelated Wrongful Act" to the *Odeh* Action as that term is defined in the AIG Primary Policy. Resultingly, the Specific Litigation Exclusion does not bar coverage of the *Odeh* Action.

## VI. CONCLUSION

Hudson fails to meet its burden to establish that coverage should be excluded based on relatedness, either under the Related Claims provision or the Specific Litigation Exclusion. Accordingly, Immunomedics' Partial Motion for Summary Judgment on Relatedness is **GRANTED**, and Hudson Insurance's Motion for Summary Judgment is **DENIED**.

**IT IS SO ORDERED.**

Paul R. Wallace, Judge

Original to Prothonotary

cc: All Counsel via File and Serve