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

| | | |
|---|---|---|
| SERITAGE GROWTH PROPERTIES, L.P., and SERITAGE GROWTH PROPERTIES | ) | |
| Plaintiffs, | ) | |
| v. | ) | C.A. No. N21C-03-015 MMJ CCLD |
| ENDURANCE AMERICAN INSURANCE COMPANY, and ALLIANZ GLOBAL RISKS US INSURANCE COMPANY | ) | |
| Defendants. | ) | |

Submitted: October 12, 2022
Decided: December 19, 2022
Unsealed: January 3, 2023

On Defendants' Motion for Summary Judgment
**DENIED**

On Plaintiffs' Cross-Motion for Partial Summary Judgment
**GRANTED**

On Defendants' Motion to Strike Plaintiffs' Experts
**DENIED AS MOOT**

## OPINION

Jennifer C. Wasson, Esq., Carla M. Jones, Esq., Potter Anderson & Corroon LLP, Wilmington, DE, Matthew J. Schlesinger, Esq. (*pro hac vice*) (Argued), Ralph M. Muoio, Esq. (*pro hac vice*), Colin P. Watson, Esq. (*pro hac vice*) (Argued), Timothy D. Greszler, Esq. (*pro hac vice*), Maura A. Sokol, Esq. (*pro hac vice*), Covington & Burling LLP, Washington, DC, *Attorneys for Plaintiffs*

Thaddeus J. Weaver, Esq., Dilworth Paxson LLP, Wilmington, DE, Michael L. Zigelman, Esq. (*pro hac vice*) (Argued), Catherine S. Lyster, Esq. (*pro hac vice*) (argued), Kaufman Dolowich & Voluck LLP, New York, NY, *Attorneys for Defendant Endurance American Insurance Company*

Thaddeus J. Weaver, Esq., Dilworth Paxson LLP, Wilmington, DE, Erica J. Kerstein, Esq. (*pro hac vice*) (Argued), Dmitriy Gelfand (*pro hac vice*), Robinson+Cole, New York, NY, *Attorneys for Defendant Allianz Global risks US Insurance Company*

**JOHNSTON, J.**

## FACTUAL AND PROCEDURAL CONTEXT

This is a dispute about coverage under a directors and officers ("D&O") insurance policy. On December 18, 2014, Sears Holdings Corporation ("Sears") created a real estate investment trust ("REIT") named Seritage Growth Properties. Seritage Growth Properties was later renamed Old Seritage Growth Properties ("Old Seritage"). Old Seritage was created as a subsidiary to Sears. Sears was the holding company for various companies that operated under two retail brands, Sears and Kmart.

On March 27, 2015, the president of Old Seritage, Robert Riecker ("Riecker"), authorized a rights offering of Old Seritage stock (the "Rights Offering") to raise funds. Riecker was also in senior leadership at Sears. Riecker became the Chief Accounting Officer and Controller of Sears between 2010 and 2011 and was promoted to Head of Capital Markets of Sears in 2016. Riecker later became Sears' Chief Financial Officer in 2017. On June 3, 2015, Rieker formed

"New" Seritage Growth Properties ("New Seritage"). On June 4, 2015, New Seritage purchased the partnership interests of Seritage Growth Properties, L.P. from Old Seritage. On June 8, 2015, New Seritage issued the Rights Offering that allegedly funded the purchase of 266 properties from Sears in a sale-and-leaseback transaction. The New Seritage D&O insurance program also incepted on June 8, 2015, with coverage for Old Seritage that dated back to December 18, 2014.

On July 7, 2015, Edward Lampert ("Lampert") became the Chairman of the Board of Trustees of New Seritage. Lampert remained the Chairman of New Seritage until March 1, 2022. Lampert was also the CEO and Chairman of Sears. Also on July 7, 2015, Old Seritage folded into New Seritage. On the same day, New Seritage purchased the 266 properties from Sears and began to lease those properties back to Sears. The combination of the Rights Offering and sale-lease-back transaction constitute what is known as the "Seritage Transaction."

On July 12, 2016, Sears shareholders filed a consolidated complaint combining four shareholder derivative suits against New Seritage, Lampert, other Sears directors, and others. This consolidated suit is known as the "2015 Derivative Action." The Verified Consolidated Amended Stockholder Derivative Complaint ("2015 Derivative Action Complaint") alleged breaches of fiduciary duty and aiding and abetting breaches of fiduciary duty regarding the Seritage

Transaction. On February 8, 2017, the parties to the 2015 Derivative Action settled the case.

On October 15, 2018, Sears filed for bankruptcy. On April 17, 2019, the Sears unsecured creditors committee filed an action currently pending in the United States Bankruptcy Court for the Southern District of New York (the "Adversary Proceeding"). The Adversary Proceeding's First Amended Complaint ("Adversary Proceeding FAC") was filed on November 25, 2019. It named New Seritage, Lampert, Riecker, and more than fifty other individuals and entities as defendants. The Adversary Proceeding FAC alleges three categories of transactions through which the named defendants allegedly caused billions of dollars to be siphoned out of Sears. However, the transaction relevant to the instant case is the 2015 Seritage Transaction.

QBE Insurance Corporation ("QBE") issued the primary D&O insurance policy to New Seritage for the policy period June 8, 2018 to June 8, 2019. Endurance American Insurance ("Endurance"), Continental Casualty Company (referred to as its parent company, "CNA"), and Allianz Global Risks US Insurance Company ("Allianz") issued excess policies that follow the terms and conditions of the QBE policy.[1]

[1] The Court will only refer to the QBE Policy throughout the opinion. The Endurance and Allianz policies follow the policy language of the QBE Policy, with only minor differences. The

On June 21, 2019, QBE acknowledged that the Adversary Proceeding was a Non-Securities Claim that triggered coverage for New Seritage. On April 13, 2020, QBE sent a supplemental letter acknowledging that the Adversary Proceeding was a Securities Claim under its D&O policy. On November 23, 2020, New Seritage received a check from QBE for $406,629.86 in defense costs related to the Adversary Proceeding. After Aon (Sears' insurance broker) contacted QBE in December 2020, QBE reevaluated the claim. In QBE's reevaluation, it determined the claim was neither a Securities Claim, nor a Non-Securities Claim. Instead, QBE determined the claims for the Adversary Proceeding and 2015 Derivative Action were Related Claims. On January 27, 2021, QBE issued a letter denying coverage for the Adversary Proceeding. QBE reasoned that because the Adversary Proceeding and 2015 Derivative Action were Related Claims, the Adversary Proceeding did not have coverage under QBE's 2018 D&O insurance policy. Following argument on these pending motions, QBE settled this action with Plaintiffs.

On October 30, 2019, CNA adopted QBE's position that the Adversary Proceeding qualified as a Non-Securities Claim. On December 3, 2020, CNA issued a letter adopting QBE's position that the Adversary Proceeding qualified as

Court will treat the QBE Insurance Policy as the operative policy because the Court is not aware of any material differences between the policies that would impact the analysis of these motions.

a Securities Claim. Since its December 3, 2020 letter, CNA has not issued any supplemental coverage letter altering its position. CNA subsequently settled with Plaintiffs.

Plaintiffs filed the instant action seeking a declaration that Defendants are obligated to pay on behalf of New Seritage all loss arising from the Adversary Proceeding, subject only to the respective limits of liability of each of the D&O insurance policies. Plaintiffs also asserted causes of action against QBE for breach of contract and for breach of the duty of good faith and fair dealing.

The parties fully briefed and argued QBE's Motion for Judgment on the Pleadings. However, in a letter to the Court dated March 31, 2022, the parties asked the Court to defer ruling on the Motion for Judgment on the Pleadings. Instead, the parties requested that the Court decide issues on the instant Motions for Summary Judgment. Defendants filed a Motion for Summary Judgment. Plaintiffs filed a Cross-Motion for Partial Summary Judgment. Defendants also filed a Motion to Strike Plaintiffs' Experts.

## SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[2] All facts are viewed in a light most favorable to the non-moving

[2] Super. Ct. Civ. R. 56(c).

party.[3] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[4] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[5] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[6]

## ANALYSIS

### *Choice of Law*

The Court must only resolve the choice of law with respect to whether the claim qualifies as a Related Claim.

> There are . . . three components to [a] choice-of-law analysis: i) determining if the parties made an effective choice of law through their contract; ii) if not, determining if there is an actual conflict between the laws of the different states each party urges should apply; and iii) if so, analyzing which state has the most significant relationship.[7]

The insurance policies do not specify that a particular state's law should apply. Defendants argue New York law applies because Delaware and New York

[3] *Burkhart v. Davies*, 602 A.2d 56, 58–59 (Del. 1991).
[4] Super. Ct. Civ. R. 56(c).
[5] *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[6] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
[7] *Certain Underwriters at Lloyds, London v. Chemtura Corp.*, 160 A.3d 457, 464 (Del. 2017).

have different applicable standards for Related Claims. Defendants also argue Delaware does not have a sufficient relationship with the policies because New Seritage is a Maryland REIT.

Plaintiffs counter that Delaware law applies to D&O coverage regarding Seritage Growth Properties, L.P., which New Seritage owns, because Seritage Growth Properties, L.P. is a Delaware limited partnership.[8] However, New Seritage is a REIT, which is more akin to a holding company. The place where the holding company is incorporated, rather than where its subsidiary is located, will generally be the place with the most significant relationship for purposes of a choice-of-law analysis.[9] Thus, Plaintiffs argue that the Court could also look to Maryland law because New Seritage incorporated under Maryland law and is the named insured.[10]

[8] *See RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 898 (Del. 2021) (concluding Delaware had the most significant relationship in an insurance coverage dispute because of Delaware's substantial interest in applying its laws to interpret D&O policies of Delaware corporations).
[9] *Travelers Indem. Co. v. CNH Indus. Am., LLC*, 191 A.3d 288 (Del. 2018) (applying Texas law to an insurance coverage dispute because the holding company was organized in Texas and applying the law where each subsidiary was located could lead to arbitrary variability).
[10] *See id.* (same); *Murdock*, 248 A.3d at 898 (concluding Delaware had the most significant relationship in an insurance coverage dispute because of Delaware's substantial interest in applying its laws to interpret D&O policies of Delaware corporations).

"Delaware courts avoid, where possible, a choice-of-law analysis if the result would be the same under the law of either of the competing jurisdictions."[11] Where there is no conflict, the Court may apply Delaware law.[12]

Defendants argue New York and Delaware apply different standards when interpreting whether a claim qualifies as a Related Claim. Under Delaware law, "[w]hether a claim relates back to an earlier claim is decided by the language of the policy, not a generic 'fundamentally identical' standard."[13] Under New York law, the Court also must look to the plain meaning of the policy language.[14] New York law also provides: "[T]o establish that a prior [c]laim is interrelated with a subsequent [c]laim, the [c]laims must share a 'sufficient factual nexus.'"[15]

The 2018 QBE Insurance Policy ("QBE Policy"), Section XXIV.W, defines "Related Claims" as: "[A]ll **Claims** based upon, arising out of or resulting from the

[11] *Ferrellgas Partners L.P. v. Zurich Am. Ins. Co*., 2020 WL 363677, at *3 (Del. Super.), *appeal denied*, 2020 WL 764155 (Del. Super.).
[12] *KT4 Partners LLC v. Palantir Techs. Inc.*, 2021 WL 2823567, at *12 (Del. Super.) ("Delaware law applies because there is no actual conflict . . . on the legal standards governing this case.").
[13] *First Solar, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 274 A.3d 1006, 1013 (Del. 2022), *as modified* (Mar. 22, 2022).
[14] *Quanta Lines Ins. Co. v. Invs. Cap. Corp*., 2009 WL 4884096, at *13 (S.D.N.Y.), *aff'd sub nom. Quanta Specialty Lines Ins. Co. v. Invs. Cap. Corp*., 403 F. App'x 530 (2d Cir. 2010) (analyzing the policy terms prior to conducting a "sufficient nexus test").
[15] *Id* at *14 (citing *Zahler v. Twin City Fire Ins. Co*., 2006 WL 846352 (S.D.N.Y.); *Seneca Ins. Co. v. Kemper Ins. Co*., 2004 WL 1145830, at *9 (S.D.N.Y.), *aff'd*, 133 F. App'x 770 (2d Cir. 2005); *Zunenshine v. Executive Risk Indem., Inc*., 1998 WL 483475 (S.D.N.Y.)); *see also Alvarez v. XL Specialty Ins. Co.*, 159 N.Y.S.3d 681, 681 (N.Y. App. Div. 2022), *leave to appeal denied*, 192 N.E.3d 341 (N.Y. 2022) (concluding claims did not share a sufficient factual nexus).

same or related, or having a common nexus of, facts, circumstances or **Wrongful Acts**."

The Court finds that there is no material difference between New York and Delaware law for purposes of evaluating the Related Claims issue in this case. Therefore, the Court need not engage in a choice of law analysis.

### *Adversary Proceeding*

In *Verizon Communications Inc. v. Illinois National Insurance Company*,[16] this Court stated when the duty to advance defense costs is triggered in Delaware:

> Where [the duty to advance] defense costs [is] concerned, the Court must look to the allegations of the underlying complaint in order to determine whether the action states a claim covered by the policy. . . . [T]he test is whether the allegations of the complaint, when read as a whole, assert "a risk within the coverage of the policy."[17]

In *Port Authority of New York & New Jersey v. Brickman Group Limited*,[18] the Court stated the standard for when the duty to defend is triggered in New York:

> The standard used to determine whether a duty to defend has been triggered is whether "the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy."

[16] 2017 WL 1149118 (Del. Super.), *rev'd and remanded sub nom*. *In re Verizon Ins. Coverage Appeals*, 222 A.3d 566 (Del. 2019) (reversed on grounds dealing with the application of the definition of a securities claim).
[17] *Id.* at *6–7 (internal citations omitted); *see also Ferrellgas*, 2020 WL 363677, at *9 ("[T]he proper test for determining duty to advance defense costs is 'whether an action states a *claim covered by the policy*[.]'" (quoting *Verizon*, 2017 WL 1149118, at *6–7) (emphasis in original)).
[18] 115 N.Y.S.3d 246 (N.Y. App. Div. 2019).

> . . . [T]he duty to defend extends to the entire action "if any of the claims against an insured arguably arise from covered events."[19]

New York treats the duty to advance defense costs with the same standard[20] as the duty to defend.[21] "The existence of the duty is dependent upon whether sufficient facts are stated so as to invoke coverage under the policy."[22]

---

[19] *Id.* at 260 (quoting *Fieldston Prop. Owners Assn., Inc. v. Hermitage Ins. Co*., 945 N.E.2d 1013, 1018 (N.Y. 2011)).

[20] *Id.* at 261 ("[S]tate courts generally have viewed an insurer's duty to advance defense costs as an obligation congruent to the insurer's duty to defend, concluding that the duty arises if the allegations in the complaint could, if proven, give rise to a duty to indemnify." (quoting *Liberty Mut. Ins. Co. v. Pella Corp*., 650 F.3d 1161, 1170 (8th Cir. 2011)); *Fed. Ins. Co. v. Kozlowski*, 792 N.Y.S.2d 397, 402 (N.Y. App. Div. 2005) ("The same allegations that trigger a duty to defend trigger an obligation to pay defense costs."); *see also Beazley Ins. Co., Inc. v. Ace Am. Ins. Co.*, 150 F. Supp. 3d 345, 351 (S.D.N.Y. 2015), *aff'd in part*, 880 F.3d 64 (2d Cir. 2018) ("Under New York law, to determine whether an insurer owes a duty to advance defense costs, courts apply the same standard used to assess whether an insurer owes a duty to defend.").

[21] Delaware distinguishes between the duty to defend and the duty to advance defense costs based on whether the complaint *potentially* supports a claim or whether the complaint states a claim. *Ferrellgas*, 2020 WL 363677, at *9 ("While the duty to defend test asks whether the 'factual allegations in the underlying complain[t] potentially support a covered claim[,]' the proper test for determining duty to advance defense costs is 'whether an action states a claim covered by the policy[.]'" (quoting *Verizon*, 2017 WL 1149118, at *6–7)). While Delaware distinguishes between the duty to defend and the duty to advance defense costs, the standard New York applies to the duty to advance defense costs is the same as the standard Delaware applies to the duty to advance defense costs. *Compare Port Auth. of New York & New Jersey*, 115 N.Y.S.3d at 260 ("The standard used to determine whether a duty to [advance defense costs] has been triggered is whether 'the allegations in a complaint *state a cause of action* . . . under the policy.'" (quoting *Fieldston Prop. Owners Assn., Inc. v. Hermitage Ins. Co*., 945 N.E.2d 1013, 1018 (N.Y. 2011) (emphasis added)), *with Ferrellgas*, 2020 WL 363677, at *9 ("[T]he proper test for determining duty to advance defense costs is 'whether an action states a *claim covered by the policy*[.]'" (quoting *Verizon*, 2017 WL 1149118, at *6–7) (emphasis in original)).

[22] *American Home Assur. Co. v. Port Auth. of N.Y.*, 412 N.Y.S.2d 605, 610 (N.Y. App. Div. 1979).

To implicate the duty to advance defense costs, the Adversary Proceeding FAC would need to have alleged a wrongful act, and a claim causing loss and reasonable possibility of recovery.

The Adversary Proceeding FAC alleges New Seritage issued and delivered to Sears the right to purchase new shares of New Seritage common stock at $29.58 per share through the Rights Offering. The Adversary Proceeding FAC alleges that New Seritage used the proceeds from the Rights Offering to purchase the land relating to 266 stores from Sears, and then lease the land back to Sears. It alleges this exercise price was unfair because it was derived from artificially low appraisals of real estate to be transferred. This allegedly gave Sears' shareholders the ability to purchase New Seritage common stock for no consideration to Sears. The purpose of the transaction allegedly was to transfer value away from Sears and to its shareholders.

Riecker allegedly approved the Rights Offering and signed the Form S-1l filed with the Securities and Exchange Commission on April 1, 2015. The Adversary Proceeding FAC alleges that Lampert acted based on his ownership and control of New Seritage. Lampert allegedly orchestrated the Seritage Transaction using his positions as CEO of Sears and Chairman of the Board of New Seritage. He allegedly established the terms of the Rights Offering, along with the rent and other terms of the leases between Sears and New Seritage.

***"Securities Claim"***

Section XXIV.D(2)(b) of the QBE Policy defines "Claim" as: "[A] civil or criminal proceeding, evidenced by: (i) the service of a complaint or similar pleading in a civil proceeding . . . against an **Insured** for a **Wrongful Act**, including any appeal therefrom . . . ."

Section XXIV.BB of the QBE Policy defines "Wrongful Act" as:

> (1) [A]ny error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted by: (a) an **Insured Person** in his capacity as such; or (b) by a **REIT**; or (2) any other matter claimed against an **Insured Person** solely by reason of serving in his capacity as such.

Section XXIV.K(1) of the QBE Policy defines "Insured Person" as:

> [A]ny natural person who was, now is or shall become:
>
> (a) a duly elected or appointed director, officer, **Manager**, trustee, regent, governor, risk manager, comptroller or in-house general counsel of any REIT organized in the United States of America, or in a functionally equivalent or comparable role to any of the foregoing;
>
> (b) a holder of a functionally equivalent position or comparable role to those described in paragraph (a) above in a **REIT** that is organized in a jurisdiction other than the United States of America;
>
> (c) a shadow director pursuant to the United Kingdom Companies Act or any equivalent statute;
>
> (d) any full or part-time employee of a **REIT**, but only with respect to a **Claim**: (i) brought by a securityholder of a **REIT** in his capacity as such; or (ii)

> that is also brought and maintained against an **Insured Person** included in paragraphs (a), (b), or (c) above;
>
> (e) a holder of an equivalent position to those included in paragraph (a) or (b) above in an **Outside Entity**, while serving at the request, or with the knowledge and consent of the **REIT**; or
>
> (f) any person employed by a **REIT** in a capacity as legal counsel to such **REIT** . . . .

Section XXIV.Z(1) of the QBE Policy defines "Securities Claim" as: "[A] **Claim** . . . brought . . . in connection with any interest in, purchase, sale or offer to purchase or sell securities of a **REIT**."

The Court is not bound by characterizations in the causes of action or requests for relief set forth in the Adversary Proceeding FAC.[23] To interpret whether the underlying complaint is a Securities Claim, the Court looks to the "facts stated in the complaint as well as any causes of action, and may review the complaint as a whole and consider all reasonable inferences that may be drawn from the allegations therein."[24]

[23] *Ferrellgas Partners L.P. v. Zurich Am. Ins. Co.*, 2020 WL 363677, at *9 (Del. Super.), *appeal denied*, 2020 WL 764155 (Del. Super.) (citing *IDT Corp. v. U.S. Specialty Ins. Co.*, 2019 WL 413692, at *10 (Del. Super.)); *Legion Partners Asset Mgmt., LLC v. Underwriters at Lloyds London*, 2020 WL 5757341, at *7 (Del. Super.), *reargument denied*, 2020 WL 6338359 (Del. Super.), and *cert. denied*, 2020 WL 6875211 (Del. Super.), and *appeal refused*, 242 A.3d 601 (Del. 2020).

[24] *Ferrellgas*, 2020 WL 363677, at *9 (citing *IDT Corp.*, 2019 WL 413692, at *10)); *see also Legion Partners*, 2020 WL 5757341, at *7 ("[A] reviewing court considers the facts alleged and the reasonable inferences to be drawn from them to determine whether the complaint's allegations, when read as a whole, assert a risk within the policy's coverage.").

The language "in connection with" used in the definition of a Securities Claim "constitutes the broadest possible authorization . . . ."[25] Defendants argue that the Adversary Proceeding does not name Seritage as a party committing wrongful acts. Defendants argue that the Adversary Proceeding FAC does not identify New Seritage as a "culpable party." Defendants argue that the Adversary Proceeding does not include any allegations that New Seritage committed any act in connection with the Rights Offering.

The Court finds the allegations in the Adversary Proceeding FAC demonstrate that the Adversary Proceeding was "in connection with" the Rights Offering. The Rights Offering was an offer to sell securities of a REIT, as contemplated by the Securities Claim definition in the QBE Policy. The Seritage Transaction included the alleged fraudulent transfer of real estate and other assets through a sale-and-leaseback transaction.

[25] *Lillis v. AT & T Corp.*, 904 A.2d 325, 332 (Del. Ch. 2006); *see also S.E.C. v. Zandford*, 535 U.S. 813, 819 (2002) ("In its role enforcing the Act, the SEC has consistently adopted a broad reading of the phrase 'in connection with the purchase or sale of any security.'"); *Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 128–29 (2d Cir. 2001) (concluding that courts have held terms such as "in connection with" to be broader in scope than the term "arising out of"); *Fed. Ins. Co. v. Tri-State Ins. Co.*, 157 F.3d 800, 804 (10th Cir. 1998) ("[T]he general consensus [is] that the phrase 'arising out of' should be given a broad reading such as 'originating from' or 'growing out of' or 'flowing from' or 'done in connection with'—that is, it requires some causal connection to the injuries suffered, but does not require proximate cause in the legal sense."); *Application of Herrero*, 562 N.Y.S.2d 665, 666 (N.Y. App. Div. 1990) (determining an arbitration clause containing the language "in connection with" was broad).

The QBE Policy broadly defined Wrongful Act. The Adversary Proceeding FAC alleged the Seritage Transaction involved both the New Seritage Rights Offering and the sale-and-leaseback of real estate assets. The Rights Offering was a public securities offering to Sears shareholders of rights to purchase New Seritage stock. The Adversary Proceeding FAC alleged the Rights Offering financed the sale-and-leaseback of the real estate. The Court finds the allegations in the Adversary Proceeding FAC demonstrate that the Adversary Proceeding rises to the level of being a claim "in connection with" the offer to sell securities of a REIT.

Therefore, the Court finds Plaintiffs have sufficiently demonstrated a claim for coverage of the Adversary Proceeding as a Securities Claim. The Court grants summary judgment in favor of Plaintiffs on the Securities Claim issue.

***"Non-Securities Claim"***

Section XXIV.P of the QBE Policy defines a "Non-Securities Claim" as: "[A]ny **Claim**, other than a **Securities Claim**, jointly first made against both a **REIT** and an **Insured Person**, and such **Claim** shall continue to be deemed a **Non-Securities Claim** even where it is dismissed or discontinued against the **Insured Person**."

Section XXIV.J of the QBE Policy defines "Insured" as: "[A]ny **REIT** or **Insured Person**." Section XXIV.K(1) of the QBE Policy defines "Insured Person" as:

> [A]ny natural person who was, now is or shall become:
>
> (a) a duly elected or appointed director, officer, **Manager**, trustee, regent, governor, risk manager, comptroller or in-house general counsel of any REIT organized in the United States of America, or in a functionally equivalent or comparable role to any of the foregoing;
>
> (b) a holder of a functionally equivalent position or comparable role to those described in paragraph (a) above in a **REIT** that is organized in a jurisdiction other than the United States of America;
>
> (c) a shadow director pursuant to the United Kingdom Companies Act or any equivalent statute;
>
> (d) any full or part-time employee of a **REIT**, but only with respect to a **Claim**: (i) brought by a securityholder of a **REIT** in his capacity as such; or (ii) that is also brought and maintained against an **Insured Person** included in paragraphs (a), (b), or (c) above;
>
> (e) a holder of an equivalent position to those included in paragraph (a) or (b) above in an **Outside Entity**, while serving at the request, or with the knowledge and consent of the **REIT**; or
>
> (f) any person employed by a **REIT** in a capacity as legal counsel to such **REIT** . . . .

New Seritage qualifies as an insured REIT. Plaintiffs argue Lampert acted in his capacity as Chairman and CEO of New Seritage in connection with the Seritage Transaction. Defendants counter that Lampert was acting solely in his capacity as CEO and Chairman of Sears, which would disqualify him as an Insured

Person under the policy. Defendants argue Lampert could not have acted in his capacity as Chairman of New Seritage because he became the Chairman upon the completion of the Seritage Transaction.

Plaintiffs also argue Riecker acted in his capacity as the sole Trustee, President, and Treasurer of New Seritage in connection with the Seritage Transaction. Defendants counter that Riecker was acting solely in his capacity as Sears' Chief Accounting Officer and Controller.

If a person allegedly is acting in multiple capacities, the Court should look to the basis for the underlying complaint against that individual.[26] Defendants argue that the basis of the Adversary Proceeding FAC is that both Lampert and Riecker used their positions at Sears unfairly to move money out of Sears and into their own pockets. They argue neither Lampert nor Riecker acted in their New Seritage Capacity to conduct the alleged wrongdoing. Plaintiffs argue Lampert and Riecker must have acted in their New Seritage capacities because the Seritage Transaction would not have been feasible unless Lampert and Riecker controlled New Seritage's corporate levers.

The underlying complaint in the instant case is the Adversary Proceeding's FAC. Lampert became Chairman on July 7, 2015, which was also the day New

[26] *XL Specialty Ins. Co. v. AR Capital, LLC*, 2021 WL 353853, at *7–9 (N.Y. Sup. Ct.) (analyzing the basis of the underlying Securities Class Action and Derivative Action complaints to determine the capacity in which the defendants acted to determine insurance coverage).

Seritage purchased the Sears real estate and began to lease it back to Sears. The Court may consider Lampert's alleged actions as Chairman of the Board of Trustees after the Seritage Transaction closed because the Adversary Proceeding FAC alleges Lampert's conduct after July 7, 2015. The Adversary Proceeding FAC alleges: (1) that "Lampert is . . . a chairman of the board of trustees of [New] Seritage;"[27] (2) that Lampert maintained possession and control of the transferred real estate through his ownership and control of New Seritage;[28] and (3) that Lampert "exercised control over the defendants of the Adversary Proceeding . . . by knowingly causing the Seritage Defendants[29] to take title to the transferred real estate."[30]

The Adversary Proceeding FAC also alleges Riecker's acts before the Seritage Transaction closed: (1) that Riecker served as "sole Trustee and as President and Treasurer of Seritage Growth Properties during the period when the Seritage Transaction was being considered;"[31] (2) that Riecker "approved the

[27] Adversary Proceeding FAC, at ¶ 46.
[28] Adversary Proceeding FAC, ¶ 340.
[29] The Adversary Proceeding FAC includes the following as "Seritage Defendants": Seritage Growth Properties, Inc., Seritage Growth Properties, LP, Seritage KMT Mezzanine Finance LLC, Seritage SRC Mezzanine Finance LLC, Seritage KMT Finance LLC, Seritage SRC Finance LLC, Seritage GS Holdings LLC, Seritage SPS Holdings LLC, and Seritage MS Holdings LLC. Adversary Proceeding FAC, at p. 2.
[30] Adversary Proceeding FAC, ¶ 785; *see also* Adversary Proceeding FAC, ¶ 13 (stating Sears was "saddled with hundreds of millions of dollars of rent . . . and termination fees . . . when [Sears] closed unprofitable stores").
[31] Adversary Proceeding FAC, ¶ 62.

Seritage Rights offering on behalf of Seritage in a written resolution dated April 12, 2015;"[32] (3) that Riecker "signed the S-11 governing the Seritage Rights Offering and four amendments thereto," and "was the signatory on each of the various securities filings issued by Sears Holdings related to the Seritage Transaction;"[33] (4) that Riecker "approved the Seritage Rights offering on behalf of Seritage in a written resolution;[34] and (5) that "Riecker was conflicted and engaged in self-dealing."[35]

All Defendants conceded that the Adversary Proceeding was a non-securities claim at some point. The Court finds that the Adversary Proceeding FAC and reasonable inferences from the allegations[36] demonstrate that the Adversary Proceeding FAC alleged Lampert committed a Wrongful Act in his capacity as Chairman and CEO of New Seritage. Lampert allegedly engineered the Seritage Transaction and continued carrying out the terms of the transaction. The parties have stipulated that he is an insured person after he became Chairman and CEO of New Seritage for purposes of this motion.[37]

---

[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Ferrellgas Partners L.P. v. Zurich Am. Ins. Co.*, 2020 WL 363677, at *9 (Del. Super.), *appeal denied*, 2020 WL 764155 (Del. Super.) ("The Court looks at the facts stated in the complaint as well as any causes of action, and may review the complaint as a whole and consider all reasonable inferences that may be drawn from the allegations therein.").
[37] Plaintiffs concede that Lampert is not covered in his capacity as a controlling shareholder.

Insurance coverage exists if either Lampert or Riecker were alleged to have engaged in wrongful conduct in the Adversary Proceeding FAC. The Court need not resolve whether Riecker had coverage under the insurance policy. To qualify as a Non-Securities Claim, a claim must only be made against one Insured Person and a REIT. Because the Court previously concluded Lampert qualified as that Insured Person, the "jointly first made" and "controlled entity" arguments by the Defendants need not be addressed.

The Court may consider the actual allegations from the Adversary Proceeding FAC, along with reasonable inferences.[38] Therefore, the Court finds Plaintiffs have sufficiently demonstrated an alternative claim for coverage of the Adversary Proceeding as a Non-Securities Claim. Summary Judgment is granted in favor of Plaintiffs on the Non-Securities Claim issue.

***First-Filed and "Related Claim"***

New Seritage was formed on June 3, 2015. The stock from the Rights Offering was purchased on July 7, 2015. Defendants argue acts before July 7, 2015 are not covered.

[38] *Ferrellgas Partners L.P. v. Zurich Am. Ins. Co.*, 2020 WL 363677, at *9 (Del. Super.), *appeal denied*, 2020 WL 764155 (Del. Super.) ("The Court looks at the facts stated in the complaint as well as any causes of action, and may review the complaint as a whole and consider all reasonable inferences that may be drawn from the allegations therein.").

"Claims-made" insurance policies provide coverage for claims that are made, or filed, within the policy period. In contrast, an occurrence insurance policy provides coverage for incidents that occur during a policy period. The QBE Policy at issue in this case is a claims-made policy covering the period of June 8, 2018 to June 8, 2019. The Adversary Proceeding was filed on April 17, 2019, which falls within the QBE Policy's Policy Period.

"Whether a claim relates back to an earlier claim is decided by the language of the policy, not a generic 'fundamentally identical' standard."[39] Section XXIV.W of the QBE Policy defines a "Related Claim" as: "[A]ll claims based upon, arising out of or resulting from the same or related, or having a common nexus of, facts, circumstances or **Wrongful Acts**." Section IX of the QBE Policy states: "All **Related Claims** shall be deemed a single **Claim** first made during the **Policy Period** in which the earliest of such Related **Claims** was either first made or deemed to have been first made in accordance with Section VI. REPORTING."

*The Adversary Proceeding and the*
*2015 Derivative Action Qualify as Related Claims*

Defendants contend that the Adversary Proceeding and the 2015 Derivative Action are related claims. Defendants argue this would take the Adversary

[39] *First Solar, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 274 A.3d 1006, 1013 (Del. 2022), *as modified* (Mar. 22, 2022).

Proceeding outside of the QBE Policy's 2018 to 2019 Policy Period, effectively nullifying insurance coverage under the QBE Policy.

In *First Solar*, the Delaware Supreme Court concluded that two claims constituted related claims based on the language of the insurance policy at issue.[40] The related claims provision required the court to determine whether the second claim "ar[ose] out of, [was] based upon or attributable to any facts or Wrongful Acts that [were] the same as or related to" the first claim. The first and second claims both: (1) contained identical defendants; (2) came from a similar time period; (3) included the same overall theory of the case (Defendants' fraudulent scheme to inflate price of publicly traded securities); (4) contained much of the same relevant statements and evidence; and (5) included much of the same claimed damages (violations of § 10(b) and § 20(a) of the Securities Exchange Act of 1934 and SEC Rule 10(b)(5), though the second claim also included common law fraud).[41] The Court clarified that the claims and evidence need not be absolutely identical to constitute related claims under the policy language.[42] Rather, the claims and evidence should be substantially similar.[43]

[40] *Id.* at 1007.
[41] *Id.* at 1014–15.
[42] *Id.* at 1016.
[43] *Id.*

While the two claims had various differences, the Supreme Court focused on the similarities between the underlying facts for each of the claims. Because the "[a]ctions involve[d] 'the same subject, as well as common facts, circumstances, transactions, events, [] decisions,'" and wrongful acts, the Supreme Court concluded the claims were related.[44] The Supreme Court concluded that because the claims were related, no coverage existed under the policy's Related Claim Exclusion.[45]

The Court must look to the policy language defining Related Claims to determine whether two claims are related.[46] The policy language defining a related claim in *First Solar* is substantially similar to the policy language in the instant case. Like the definition in *First Solar*, the Related Claims definition in the instant case requires the Court to primarily focus on the similarities between the underlying facts for the related claims—not on the parties involved or the types of claims involved. While the parties and types of claims involved may appear to support a finding that the two claims are related, the policy language instructs that the core inquiry should be based on the underlying facts.[47]

---

[44] *Id.* at 1016–17 (quoting *United Westlabs, Inc. v. Greenwich Ins. Co.*, 2011 WL 2623932, at *11 (Del. Super.), *aff'd*, 38 A.3d 1255 (Del. 2012)).
[45] *Id.* at 1018.
[46] *First Solar, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 274 A.3d 1006, 1013 (Del. 2022), *as modified* (Mar. 22, 2022).
[47] *See id.* at 1014–16 (referring to various categories of comparison between the alleged actions, but ultimately focusing on the fact that the complaints involved "the same subject, as well as common facts, circumstances, transactions, events, and decisions." (quoting *United Westlabs,*

In *Nomura Holding America, Incorporated v. Federal Insurance Company*,[48] the Southern District of New York applied New York's "factual nexus" test to related claims.[49] Again, the Court looked to the underlying facts between the two complaints to determine whether the claims were related.[50] The two complaints relied on the same specific representations, statements, and inaccuracies.[51] Because the complaints relied on the same underlying facts, they shared a "strong factual nexus," and constituted related claims.[52] This "factual nexus" inquiry is similar to that required by the language of the QBE Policy in the instant case.

Plaintiffs allege that the Adversary Proceeding and the 2015 Derivative Action are not related claims because they contain various differences. The Sears shareholders brought the 2015 Derivative Action, while the Sears creditors brought the Adversary Proceeding.[53] The 2015 Derivative Action alleged New Seritage only aided and abetted the breach of fiduciary duty, while the Adversary

---

*Inc. v. Greenwich Ins. Co.*, 2011 WL 2623932, at *11 (Del. Super.), *aff'd*, 38 A.3d 1255 (Del. 2012)); *see also id.* at 1017 (concluding that the difference in damages was immaterial because "the thrust of the Wrongful Acts alleged in the two Actions is the same regardless of how damages are claimed").

[48] 45 F. Supp. 3d 354 (S.D.N.Y. 2014), *aff'd but criticized*, 629 F. App'x 38 (2d Cir. 2015).

[49] *Id.* at 370.

[50] *Id.* ("In order to ascertain whether a sufficient factual nexus exists, the Court must undertake a 'side-by-side review' of the factual allegations in the Plumbers' Union Amended Complaint and the Underlying Actions.").

[51] *Id.* at 371.

[52] *Id.* at 372.

[53] *Compare* Verified Consolidated Am. Stockholder Derivative Compl. (hereinafter, "2015 Derivative Action Compl."), at p. 1, *with* Adversary Proceeding FAC, at p. 1–3.

Proceeding alleged direct wrongdoing by New Seritage, Lampert, and Riecker.[54] The 2015 Derivative Action asserts breach of fiduciary duty claims, while the Adversary Proceeding asserts bankruptcy-related claims.[55]

However, both the Adversary Proceeding and the 2015 Derivative Action arise out of and rely on the Seritage Transaction. Each allege that Lampert, Riecker, and Sears' other controlling shareholders, officers, and directors caused Sears to enter the Seritage Transaction to transfer valuable assets away from Sears (and to New Seritage) for their personal benefit and to the detriment of Sears.[56] Both actions allege the Seritage Transaction harmed Sears by undervaluing the real estate transferred to New Seritage and leaving Sears with unfavorable lease terms.[57] Both actions also allege Lampert and other Sears controlling shareholders breached their fiduciary duties by causing Sears to participate in the Seritage Transaction.[58]

In *Alvarez v. XL Specialty Insurance Company*,[59] the Supreme Court of New York analyzed the underlying facts of the Adversary Proceeding and 2015

[54] *Compare* 2015 Derivative Action Compl., ¶ 192, *with* Adversary Proceeding FAC, ¶¶ 9–12, 36, 62, 339–40.
[55] *Compare* 2015 Derivative Action Compl., ¶¶170–200, *with* Adversary Proceeding FAC, ¶¶ 540–68.
[56] 2015 Derivative Action Compl., ¶¶ 1–2; Adversary Proceeding FAC, ¶¶ 12–13.
[57] 2015 Derivative Action Compl., ¶¶ 9, 47, 78, 196; Adversary Proceeding FAC, ¶ 10.
[58] 2015 Derivative Action Compl., ¶¶ 170–82; Adversary Proceeding FAC, ¶¶ 577–88.
[59] 2020 WL 7011751 (N.Y. Sup. Ct.).

Derivative Action (though under a different insurance policy, with different policy language), and determined that the claims were related.[60] The Court explained:

> The claims against plaintiffs in the [Adversary Proceeding] regarding the Seritage Transaction "aris[e] out of" or "involv[e]" the same transaction that was at issue in the [2015] Derivative Action: Sears' sale of its interest in 266 real properties to Seritage, and its subsequent lease-back of 224 of those properties. Both the shareholders in the Derivative Action and the Creditors' Committee in the Underlying Action allege that the former officers and directors of Sears, plaintiffs here, violated their fiduciary duties to Sears by agreeing to the Seritage Transaction. Indeed, the Creditors' Committee seeks to unwind the settlement agreed to in the Derivative Action and the judgment entered by the Delaware Court approving that settlement and the release it provided.[61]

Because both the 2015 Derivative Action and Adversary Proceeding relied upon the Seritage Transaction, the Court concluded the claims were related.[62]

Plaintiffs argue that the language of the related claim definition in *Alvarez* is broader than the language of the related claim definition at issue in the instant case. In *Alvarez*, the insurance policy defined "Interrelated Wrongful Acts" as: "Wrongful Acts based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any of the same or related, or series of related, facts, circumstances, situations, transactions, or events."[63]

---

[60] *Id.* at *4.
[61] *Id.*
[62] *Id.*
[63] *Id.* at *3.

The Court finds that although this policy language is broader than the policy language in the instant case, the analysis is substantially similar. In both policies, the Court must determine if the claims arise from the same underlying facts.

The Court finds that under the QBE Policy language, the Adversary Proceeding and 2015 Derivative Action constitute related claims. The underlying facts for each claim rely on the Seritage Transaction and facts arising from it.

*Treatment of Related Claims*

The Plaintiffs allege that the parties did not intend for related claims to be excluded from the policy. The Plaintiffs point to extrinsic evidence supporting this conclusion, including: (1) policy negotiations removing exclusions for specific litigation; (2) policy negotiations removing exclusions for prior and pending litigation; and (3) the fact that the Treatment of Related Claims provision in the QBE Policy cannot direct coverage to a previous time period because there is not a previous QBE policy. However, the only way the Court can consider this extrinsic evidence is if the policy is ambiguous.

In *Borough of Moosic v. Darwin National Assurance Company*,[64] the Third Circuit concluded that a related claims provision in an insurance policy operated as an exclusion to the insurance policy.[65] The insurance policy's provision that dealt

[64] 556 F. App'x 92, 95 (3d Cir. 2014).
[65] *Id.* at 98.

with the treatment of related claims stated: "All Related Claims will be treated as a single Claim made when the earliest of such Related Claims was first made, . . . ." The provision operates to limit coverage under the policy by directing a "new" claim to have coverage under a previous policy.[66] Thus, the provision was exclusionary.[67]

The treatment of related claims policy language is also exclusionary in *First Solar*. The operative policy in *First Solar* stated: "Claims actually first made or deemed first made prior to the inception date of this policy . . . are not covered under this policy."[68] This language operates to exclude any claim that relates back to a time before the policy period.

While the policy language defining a related claim in the instant case operates similarly to the policy language defining a related claim in *First Solar*, the policy language differs with respect to how it treats claims deemed first made prior to the inception date of the policy. In contrast to both *First Solar* and *Borough of Moosic*, the policy language in Section IX of the QBE Policy states: "All **Related Claims** shall be deemed a single **Claim** first made during the **Policy Period** in which the earliest of such Related **Claims** was either first made or deemed to have

[66] *Id.* at 97.
[67] *Id.* at 98.
[68] *First Solar, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2021 WL 2563023, at *3 (Del. Super.), *aff'd*, 274 A.3d 1006 (Del. 2022), *as modified* (Mar. 22, 2022).

been first made in accordance with Section VI. REPORTING." The QBE Policy does not state that a related claim is not covered under the insurance policy, nor does it point to any policy period other than the defined **Policy Period** (in bold and capitalized). Item 2 of the QBE Policy defines **Policy Period** as being from June 8, 2018 to June 8, 2019.

The Court finds the QBE Policy language is not exclusionary. The policy language is not ambiguous. The defined term—Policy Period—makes the operation of the Treatment of Related Claims section clear. The policy will provide coverage for future claims that are related to claims deemed first filed under the policy. In effect, the provision is prospective, not retrospective. The use of the defined term, Policy Period, prevents the Adversary Proceeding from relating back to a time period before June 8, 2018. Thus, even though the Adversary Proceeding and 2015 Derivative Action qualify as Related Claims under the policy language, the Treatment of Related Claims provision permits the Adversary Proceeding to be deemed first made within the 2018–2019 Policy Period. The Court finds coverage cannot be denied on the basis that the Adversary Proceeding and 2015 Derivative Action are Related Claims. Summary Judgment is granted in favor of Plaintiffs on the Related Claim issue.

## CONCLUSION

The Court finds that there is no material difference between New York and Delaware law for purposes of evaluating the Related Claims issue in this case. The Court finds Plaintiffs have sufficiently demonstrated a claim for coverage of the Adversary Proceeding as a Securities Claim. The Court finds Plaintiffs have sufficiently demonstrated an alternative claim for coverage of the Adversary Proceeding as a "Non-Securities Claim." The Court finds coverage cannot be denied on the basis that the Adversary Proceeding and 2015 Derivative Action are Related Claims.

On the Plaintiffs' Motion for Partial Summary Judgment, the Court hereby **GRANTS** declaratory judgment against Defendants.

The Court hereby **DENIES** Defendants' Motion for Summary Judgment. Defendants must provide coverage for the Adversary Proceeding.

The Court hereby **DENIES** Defendants' Motion to Strike Plaintiffs' Experts as moot.

**IT IS SO ORDERED.**

*/s/ Mary M. Johnston*
Judge Mary M. Johnston