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IN THE SUPREME COURT OF THE STATE OF DELAWARE

--	)	No. 558,2018
IN RE VERIZON INSURANCE	)	No. 561,2018
COVERAGE APPEALS	)	No. 560,2018
	)	Court Below—Superior Court of the
	)	State of Delaware
	)	C.A. No. N14C-06-048 WCC (CCLD)
	)	
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OPENING BRIEF OF APPELLANTS ILLINOIS NATIONAL INSURANCE CO., NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PA, AND U.S. SPECIALTY INSURANCE COMPANY

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NATURE OF PROCEEDINGS

This insurance coverage dispute arises out of an underlying lawsuit in which Appellee Verizon Communications, Inc. ("Verizon") was accused of saddling a newly divested business with unsustainable debt. After the new corporation—known as Idearc—declared bankruptcy, the designated litigation trustee—U.S. Bank N.A.—sued Verizon, two related companies, and John Diercksen, who was an Idearc director and Verizon officer. The lawsuit ("*U.S. Bank*" or the "*U.S. Bank* Action") alleged legal theories common in bankruptcy proceedings and corporate governance disputes, including breaches of fiduciary duties, fraudulent transfers, unlawful dividends, unjust enrichment, and alter ego liability. Notably, U.S. Bank did not seek recovery for any securities law violations, such as under the Securities Exchange Act of 1934, SEC Rule 10b-5, or the like.

Verizon ultimately prevailed in *U.S. Bank* and thereafter sought to recoup its litigation defense costs—totaling over $48 million—under a directors-and-officers ("D&O") insurance policy issued by Appellant Illinois National Insurance Company, as well as under follow-form policies issued by excess carriers. Although the primary D&O policy covered Diercksen's defense costs arising from any Claim, it covered Verizon's defense costs only when, among other things, they arise from a "Securities Claim." The policy narrowly defined a "Securities Claim" as (1) an alleged violation of a "regulation, rule or statute regulating securities" that (2) either arises from the "purchase or sale" of securities or is brought by an Idearc or Verizon "securities holder."

Notwithstanding this specific policy language and the undisputed fact that *U.S. Bank* did not allege a violation of any law that regulates securities specifically, the Superior Court held that the *U.S. Bank* Action constituted a covered Securities Claim. The court entered summary judgment in favor of Verizon and ordered the insurers to cover Verizon's substantial defense costs. In reaching this result, the Superior Court not only disregarded the plain meaning of the policy language, but also flipped the burden onto the insurers to *disprove* coverage, contrary to black letter Delaware law on insurance contracts. The court also gleaned textual ambiguity without analyzing the relevant text, context, or structure of policy; broke with every other court that has construed similar language; and improperly relied on (and misinterpreted) extrinsic evidence and interpretive canons to expand the scope of coverage.

It is the province of the judiciary to interpret contracts, not rewrite them. If allowed to stand, the decision below will undercut Delaware's public policy of "staying in its lane" vis-à-vis federal securities regulation and will transform insurance coverage meant to protect individual corporate directors and officers into coverage for corporations themselves instead. Indeed, the decision below has already spurred corporations to file suit in Delaware seeking to broaden corporate coverage at the expense of coverage for individual D&Os. This Court should reverse.

SUMMARY OF ARGUMENT

1. The Superior Court erred in holding that the *U.S. Bank* Action is a covered Securities Claim. *U.S. Bank* did not assert a violation of any "regulation, rule or statute regulating securities," as the policy requires. The text and structure of the policy make clear that the phrase "regulating securities" means to control activities pertaining to securities in particular, as opposed to other matters in general. Verizon's contrary reading, adopted by the Superior Court below, would render superfluous the separate and independent requirement—discussed in point 2 below—that a Securities Claim must either involve a "purchase or sale" of securities or be brought by a "security holder." That separate requirement guarantees that any Securities Claim *always* will involve securities in some respect, leaving no role for the "regulating securities" condition as it was interpreted by the Superior Court. The U.S. Supreme Court has adopted a common-sense interpretation of the word "regulating" as referring to laws that regulate the relevant subject matter specifically, not incidentally, and there is no principled basis for applying a contrary meaning here.

Moreover, interpreting the phrase "regulating securities" to cover general laws that touch only incidentally on securities, as the Superior Court did below, treats laws of general applicability as securities regulations. That approach is inconsistent with Delaware's public policy of "staying in its lane" by recognizing and respecting the distinction between internal corporate governance law and federal securities regulation. The Superior Court's holding also potentially erodes insurance coverage for corporate directors and officers if entities may consume such coverage for matters only incidentally touching on securities.

Furthermore, even if the fiduciary-duty breaches, unjust enrichment, or alter ego violations alleged in *U.S. Bank* could be said to "regulate securities," this Court should still reverse because common-law duties are not "regulations, rules or statutes." The Superior Court's contrary interpretation cannot be squared with the text, context, or purpose of the policy, understandings within the industry, or the evolution of the relevant policy language.

Basic analytical errors paved the way to the Superior Court's wrong result. The court flipped the burden onto the insurers to *disprove* coverage; it erroneously found ambiguity in the policy language without analysis; it resolved that nonexistent ambiguity by misapplying the doctrine of *contra proferentum*; and it improperly—and inaccurately—considered extrinsic evidence, resolving disputed issues of fact that should have precluded summary judgment.

2. The Superior Court further erred in relieving Verizon of its burden to establish that the *U.S. Bank* Action satisfied other elements of a Securities Claim as well. A Securities Claim must either arise from a "purchase or sale" of securities or be brought by a "security holder." The Idearc spinoff transaction, by design, did not

involve a purchase or sale of securities. Verizon instead structured the spinoff as an exchange of assets between Verizon and its wholly owned subsidiary. In securities parlance, an internal transfer of assets is not a "purchase or sale," as Verizon itself told the SEC and its own shareholders at the time.

Moreover, *U.S. Bank* was not brought by a security holder. The suit was brought by a litigation trustee appointed during Idearc's bankruptcy. The Superior Court interpreted "by a security holder" to mean "*on behalf of* a security holder." But the court may not rewrite the plain language of the contract, which elsewhere shows that the parties knew how to refer to suits brought on behalf of others and chose not to do so here. The *U.S. Bank* Action simply is not a Securities Claim.

STATEMENT OF FACTS

A. Factual Background

1. The Spinoff of Idearc from Verizon

In 2005, Verizon decided to divest the subsidiary that operated its print and electronic directories business. *U.S. Bank Nat. Ass'n v. Verizon Commc'ns, Inc.*, 892 F. Supp. 2d 805, 808 (N.D. Tex. 2012). Verizon initially considered an outright sale of the subsidiary, but after learning that such a move would expose the company to substantial taxes, Verizon pursued the tax-free alternative of spinning off the subsidiary to Verizon's shareholders instead. *Id.*

Verizon executed the divestiture by incorporating Verizon Directories Disposition Corporation in Delaware in June 2006, later changing its name to Idearc, Inc. *Id.* Verizon named its Executive Vice President for Strategic Planning, John Diercksen, as Idearc's sole director. Ex. C at 7. In that capacity, Diercksen selected five individuals to serve as Idearc's directors after the spinoff, approved the spinoff, and then resigned from Idearc. The new directors then ratified the spinoff. *U.S. Bank*, 892 F. Supp. 2d at 809-10.

The divestiture occurred on November 17, 2006. Idearc transferred to Verizon nearly $10 billion in debt and cash, as well as 146 million shares of Idearc stock. Verizon then distributed shares of Idearc stock to its own shareholders as a tax-free dividend. After the divestiture was complete, Verizon sold the remaining fractional shares on the open market and exchanged Idearc debt for previously issued Verizon debt held by investment banks. Ex. C at 2.

2. The Idearc Runoff Policy and the "Securities Claims" Definition

Verizon purchased D&O insurance in connection with the formation of Idearc. Verizon considered several potential policy structures, [redacted]. JA4203-11.[1] While Verizon could have sought insurance to cover corporate entities for claims arising from the divestiture, Verizon ultimately chose a narrower, less costly structure, purchasing a new policy—the Idearc Runoff Policy—from Illinois National. This policy did not cover all losses arising out of the spinoff transaction, nor did it cover any losses incurred solely by Idearc or Verizon. Instead, the policy covered Idearc's directors and officers for losses arising from any official duties, and Verizon's directors and officers for losses arising from their official duties related to the divestiture.

The policy covered losses resulting from legal proceedings initiated during a "runoff" period of six years after the spinoff transaction—long enough for applicable statutes of limitations to expire. The policy included a $7.5 million "retention," meaning that Verizon retained the risk of loss up to $7.5 million, and Illinois

[1] Citations to "JA" refer to the Joint Appendix to the Consolidated Cases filed contemporaneously herewith.

National would be liable for covered losses only in excess of that amount, capped at an aggregate limit of $15 million. JA1270, 1280-81.

The main coverage clauses of the policy focused on individuals. Coverage A insured "the Loss of any Insured Person arising from a Claim made against such Insured Person for any Wrongful Act." "Claim" was broadly defined to include, as relevant here, a civil proceeding for monetary relief. JA1274. "Wrongful Act" meant "any actual or alleged breach of duty, neglect, [or] error" with respect to the director or officer's official duties or capacity. JA1277-78. "Loss" included damages, settlements, and defense costs. JA1276. And the policy defined "Insured Person" to include D&Os of Idearc for all purposes and D&Os of Verizon "solely for Wrongful Acts … arising from the divestiture of [Idearc] from [Verizon]." JA1276, 1312, 1316. Coverage B insured "the Loss of [Idearc or Verizon] arising from a Claim against an Insured Person …, but only to the extent that such Organization has Indemnified such Insured Person." JA1273. Together, these two clauses covered losses incurred by Insured Persons (D&Os) and losses incurred by an Organization (Verizon or Idearc) to the extent it indemnified those covered D&Os. In other words, the policy generally covered defense costs incurred by or on behalf of D&Os, but not those incurred by Idearc or Verizon on their own behalves.

These two D&O coverage clauses are not at issue here. Instead, this appeal focuses on a separate, narrower policy provision that addresses defense costs that are jointly incurred by Verizon or Idearc and one or more of its D&Os. Under the "Preset Allocation" clause in Endorsement #7, the policy provided that, "[i]n connection with any Securities Claim," and "for any Loss incurred while a Securities Claim … is jointly made and maintained against both [an] Organization and one or more Insured Person(s), this policy shall provide coverage for 100% of such Loss." JA1318. For non-Securities Claims, joint defense costs were subject to a "fair and equitable allocation" between the D&Os and the entity, whereby the insurers covered the defense costs of the D&Os only. JA1318.

These provisions reflect a common approach to joint defense costs. Joint defenses present particular challenges for D&O insurance because they can lead to costly disputes about how to allocate limited proceeds between the covered individual and the non-covered entity. *See, e.g.*, *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1432-33 (9th Cir. 1995). These disputes are "especially problematic in securities class action lawsuits," where "even a small percentage allocation dispute can involve a large amount of money." JA4352.

One solution to this problem is simply to cover the losses not only of individual D&Os, but also of the entity. Another option is to agree beforehand what percentage of jointly incurred defense costs the insurer will cover. JA4353. Here, the standard form on which the Idearc Runoff Policy is written—the 2/2000 Form, finalized in February 2000—followed the entity coverage approach. JA1270. At

Verizon's request, however, Endorsement #7 "delete[d]" the standard entity coverage clause "in its entirety" and replaced it with a preset allocation. JA1317-18.

The Preset Allocation clause at the heart of this appeal covered defense costs and other losses jointly incurred by Verizon and an insured D&O, but only for "Securities Claim[s]." *Id.* Endorsement #7 defines a Securities Claim as:

> [A] Claim made against any Insured Person:
>
> (1) alleging a violation of any federal, state, local or foreign regulation, rule or statute regulating securities (including, but not limited to, the purchase or sale or offer or solicitation of an offer to purchase or sell securities) which is:
>
>> (a) brought by any person or entity alleging, arising out of, based upon or attributable to the purchase or sale or offer or solicitation of an offer to purchase or sell any securities of an Organization; or
>>
>> (b) brought by a security holder of an Organization with respect to such security holder's interest in securities of such Organization; or
>
> (2) brought derivatively on the behalf of an Organization by a security holder of such Organization, relating to a Securities Claim as defined in subparagraph (1) above.

JA1316-17.

Under the Preset Allocation clause and this Securities Claim definition, Verizon must prove at least four elements to establish coverage for its own defense costs: (1) that the costs arise from a legal proceeding initiated against an insured D&O during the runoff period, (2) that the costs were incurred "[i]n connection with a[] Securities Claim"; (3) that the costs were "jointly incurred" by Verizon and an insured D&O; and (4) that the costs exceed the $7.5 million retention. The summary judgment decision below turned on the second criterion—whether Verizon incurred defense costs in connection with a "Securities Claim."

3. The Follow-Form and Verizon Policies

In addition to the primary Idearc Runoff Policy issued by Illinois National, Verizon also purchased excess insurance policies from nine other insurers, including Appellants Zurich American Insurance Company and U.S. Specialty Insurance Company. Ex. B at 4. The excess policies were "follow-form" policies, incorporating the terms of the primary Illinois National policy. Ex. C at 3. Together, these policies provided $95 million of combined coverage. Ex. B at 3-4.

This entire "tower" of policies was in addition to the standard insurance policies that Verizon purchased annually for its own D&Os. The relevant Verizon policies here cover the period October 31, 2008 to October 31, 2009, as the first legal proceedings against Verizon D&Os relating to the divestiture were initiated in that 2008-09 policy period. The primary Verizon policy for that period was issued by Appellant National Union Fire Insurance Company of Pittsburgh, Pa. Excess policies were issued by ten other insurers, including U.S. Specialty. JA200-01.

4. Idearc's Bankruptcy and the *U.S. Bank* Action

Following the spinoff, Idearc operated as an independent, publicly traded company. In 2009, however, Idearc filed for Chapter 11 bankruptcy. The confirmed plan of reorganization ultimately established a litigation trust to pursue certain causes of action on behalf of the debtors and the estates—including claims against Verizon and "against [Idearc's] officers or directors." JA4320. U.S. Bank N.A. was appointed the litigation trustee authorized to pursue these claims, acting as the "representative and the successor in interest" of the debtors and the estates. JA4324.

In 2010, U.S. Bank sued Verizon, two related entities, and Diercksen. The gravamen of the lawsuit was that "Verizon determined that it could obtain approximately $9.5 billion … to the injury of Idearc and Idearc's creditors by stripping Idearc of cash and burdening Idearc with massive debt." JA1648-49. The complaint asserted three theories of relief. First, the complaint asserted five counts against Verizon for fraudulent transfers in violation of Texas law and the U.S. Bankruptcy Code, alleging that the directories business Idearc received from Verizon was not of "reasonably equivalent value," JA1675, to the substantial debt and cash Idearc transferred to Verizon in exchange. JA1657-75. Second, the complaint asserted one count for unlawful dividends against both Verizon and Diercksen, alleging that they caused Idearc to issue dividends despite not having the "surplus" or "net profits" required under Delaware law. JA1665. Third, the complaint asserted common-law counts for breach of fiduciary duty against Diercksen and Verizon, as well as counts against Verizon for aiding and abetting Diercksen's breach of fiduciary duty, for unjust enrichment, and for alter ego liability. JA1659-60, JA1665-75.

U.S. Bank proceeded to a bench trial, at which Verizon and Diercksen prevailed. *U.S. Bank Nat. Assn v. Verizon Commc'ns*, 2013 WL 230329 (N.D. Tex. Jan. 22, 2013). In defending the *U.S. Bank* Action, Verizon and Diercksen incurred more than $48 million in defense costs. Ex. C at 9.

Verizon notified Illinois National and National Union of the *U.S. Bank* Action and sought coverage for its defense costs under the Idearc Runoff Policy and Verizon's 2008-09 D&O policy. Illinois National and National Union responded that they assumed Verizon would indemnify Diercksen for his defense costs, which the insurers would then cover if those costs exceeded the applicable policy retention. But the insurers explained that the Idearc Runoff Policy did not cover Verizon's own defense costs because the *U.S. Bank* Action "does not constitute a Securities Claim." JA1715.

B. Procedural History

On June 4, 2014, Verizon filed this lawsuit against Illinois National, National Union, U.S. Specialty, Zurich, and other excess insurers, seeking coverage for defense costs incurred in *U.S. Bank* and three other lawsuits. JA199.[2]

Four months later, on September 24, 2014, Verizon moved for partial summary judgment, seeking a ruling that the *U.S. Bank* Action is a covered Securities Claim as a matter of law. JA23-24. On March 20, 2015, the Superior Court denied Verizon's motion. Even though no one had contended that the Securities Claim definition was ambiguous or relied on extrinsic evidence for its meaning, the court opined that "there is a sufficient ambiguity in the language of the policy such that prior communications and the dealings between the parties may become relevant." Ex. D at 8. Beyond describing the parties' positions, the court never analyzed the language of the Securities Claim definition or explained why the text was susceptible to more than one reading.

[2] Verizon later conceded that defense costs incurred in two of those lawsuits are not covered because those suits were brought solely against Idearc and Verizon. JA5380. As to the the third action—*U.S. Bank National Association v. Coticchio*, No. 651132/2013 (N.Y. Sup. Ct.)—the parties agree that if *U.S. Bank* constitutes a Securities Claim, then *Coticchio* does as well. Alternatively, if *U.S. Bank* is not a Securities Claim, then *Coticchio* is irrelevant, because Verizon incurred less than $400,000 defending *Coticchio*, JA5463-5650—far below the $7.5 million retention.

On May 20, 2016, after discovery, the parties cross-moved for summary judgment on whether the *U.S. Bank* Action is a Securities Claim. JA115-22. On March 2, 2017, the Superior Court granted summary judgment in favor of Verizon. Again, however, the court never explained why the Securities Claim definition was ambiguous. Despite acknowledging that Verizon, as the insured, "bear[s] the burden of proving that a claim is covered by an insurance policy," Ex. C at 16, the court faulted the *insurers* for "fail[ing] to show that their interpretation is the only fair one." *Id.* at 27. The court ultimately rested its ruling on extrinsic evidence, while "[r]esolving any uncertainty in [Verizon's] favor." *Id.* at 30.

On March 24, 2017, Verizon moved for entry of final judgment and prejudgment interest based on the defense costs incurred in *U.S. Bank* and *Coticchio*. *Supra* n.2. In opposition, Zurich and certain other excess insurers argued that even if *U.S. Bank* were a Securities Claim, not all of the defense costs were "jointly incurred" or reasonable. On May 16, 2018, the Superior Court granted Verizon's motion, refusing to allow the excess insurers to litigate those issues. Ex. B at 16-21. The court entered final judgment on October 4, 2018. Illinois National, National Union, U.S. Specialty, and Zurich filed timely notices of appeal. JA6481-97.

ARGUMENT

I. The *U.S. Bank* Action Is Not Covered as a "Securities Claim" Because It Did Not Allege a Violation of a "Regulation, Rule or Statute Regulating Securities"

A. Question Presented

Whether Verizon carried its burden to establish coverage under the Idearc Runoff Policy by demonstrating that the *U.S. Bank* Action "alleg[ed] a violation of a[] regulation, rule or statute regulating securities." (Preserved at JA4132.)

B. Scope of Review and Legal Standard

"[T]he interpretation of insurance contracts involves legal questions[,] and thus the standard of review is *de novo*." *Lank v. Moyed*, 909 A.2d 106, 108 (Del. 2006) (brackets and quotation marks omitted). "This Court reviews *de novo* the Superior Court's grant or denial of summary judgment." *Pavik v. George & Lynch, Inc.*, 183 A.3d 1258, 1265 (Del. 2018) (quotation marks omitted).

The rules for construing an insurance contract are well-settled. The insured "ha[s] the burden of proving that it [i]s entitled to coverage." *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997). The burden shifts to the insurer to disprove coverage only if the insured proves that the loss falls within the policy, and the insurer then seeks to avoid coverage under an exclusion. *See id.* & n.5 (citing *E.I. dupont de Nemours & Co. v. Admiral Ins. Co.*, 711 A.2d 45, 54 (Del. Sup. Ct. 1995)); 17A Couch on Insurance §§ 254:11-12 (3d ed. Dec.

2018 Update). There is no exclusion at issue here, so the burden remains with Verizon at all times.

Like any contract, "the terms of an insurance contract are to be read as a whole and given their plain and ordinary meaning." *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 291 (Del. 2001). "Where the language of a policy is clear and unequivocal, the parties are to be bound by its plain meaning," *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 69 (Del. 2011), and "extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract[,] or to create an ambiguity," *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997). Only if the policy language is ambiguous may a court "consider extrinsic evidence of the parties' intent." *ConAgra Foods*, 21 A.3d at 72. The court's task is to "giv[e] sensible life to a real-world contract," taking into account "[t]he basic business relationship between [the] parties." *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 913, 927 (Del. 2017).[3]

[3] The Idearc Runoff Policy has no choice-of-law clause. Absent any conflict of law, Delaware law applies as the law of the forum. The Superior Court relied on Delaware law on summary judgment and when entering final judgment. Ex. B at 11-13.

C. Merits of Argument

1. The *U.S. Bank* Action Did Not Allege a Violation of Any Law "Regulating Securities"

a. General Legal Duties that Apply to Non-Securities Matters Do Not "Regulate Securities"

Verizon's coverage demand fails on the plain and unambiguous text of the policy. The Securities Claim definition in the Idearc Runoff Policy is limited to a claim "alleging a violation of a[] … regulation, rule or statute *regulating securities*." JA1316 (emphasis added). To "regulate" means "to control (an activity or process) esp. through the implementation of rules." Ex. C at 25. A law "regulating securities" thus naturally refers to one that controls activities pertaining to securities specifically, as opposed to other matters generally. The *U.S. Bank* Action, however, alleges violations of general legal commands, not ones that specifically regulate securities.

Neighboring language confirms this reading of "regulating securities." The Securities Claim definition covers alleged violations of regulations, rules, or statutes "regulating securities (including, but not limited to, the purchase or sale or offer or solicitation of an offer to purchase or sell securities)." JA1316. That parenthetical phrase provides a non-exhaustive list of activities that a law "regulating securities" would govern. The listed items compose the principal objects of the most well-known federal statutes and rules specifically regulating securities—the 1933 and

1934 Acts and SEC Rule 10b-5. *See* 15 U.S.C. § 77a *et seq.*; 15 U.S.C. § 78a *et seq.*; 17 C.F.R. § 240.10b-5. It stands to reason that laws "regulating securities" should be fundamentally *like* the 1933 and 1934 Acts and Rule 10b-5—that is, they should principally regulate *securities*. *See Pizzadili Partners, LLC v. Kent Cty. Bd. of Adjustment*, 2016 WL 4502005, at *8 (Del. Super. Ct. Aug. 26, 2016) ("the principle of *ejusdem generis* applies equally to … specific words following general ones, to restrict application of the general terms to things that are similar to those enumerated").

The structure of the Securities Claim definition likewise supports reading the phrase "regulating securities" to refer only to laws that have as their principal purpose the regulation of securities, as opposed to general laws that merely could apply to securities in some instances. The Securities Claim definition has two components: *first*, a Securities Claim must allege a violation of a "regulation, rule or statute regulating securities"; *second*, it must either involve a "purchase or sale … [of] securities," or be brought "by a security holder … with respect to such security holder's interest in securities." JA1316-17. The second component of the definition guarantees that a Securities Claim will *always* involve securities in some respect. Thus, if, as Verizon argued and the Superior Court held, "regulating securities" just means regulating general activities that happen to involve securities in this instance, then the "regulating securities" condition is superfluous. An alleged violation of *any* "regulation, rule or statute" arising from the "purchase or sale of securities" or brought "by a security holder" will *inevitably* involve securities. Consequently, under Verizon's interpretation, adopted by the court below, the words "regulating securities" could be excised from the definition without changing its meaning at all:

> a violation of any federal, state, local or foreign regulation, rule or statute ~~regulating securities (including, but not limited to, the purchase or sale or offer or solicitation of an offer to purchase or sell securities)~~ … arising out of, based upon or attributable to the purchase or sale … [of] securities… or brought by a security holder … with respect to such security holder's interest in securities ….

By contrast, if the "regulating securities" element in the first part of definition means regulating securities *specifically*, then that part of the definition does additional work. In particular, the "regulating securities" element would further limit the universe of laws that can be invoked in a case involving a "purchase or sale of securities" or brought by "a security holder." An antitrust claim, for example, would not be covered, even if brought by a security holder. The "regulating securities" element makes clear that a Securities Claim not only must involve a particular type of subject matter or plaintiff (definition clause 2), but also must allege a violation of a particular type of legal duty (clause 1). This Court must "give each provision and term effect, so as not to render any part of the [Securities Claim definition] mere surplusage." *Chicago Bridge*, 166 A.3d at 927 n.61. Only the insurers' interpretation gives effect to the words "regulating securities."

Other courts interpreting virtually identical policy language have reached the same conclusion. As a New York appeals court explained, "[t]he clear language of the policy does not encompass losses arising from an action … claiming only common-law breach of fiduciary duty," because the "fairness rule is not a rule regulating securities. It is a standard to review corporate transactions…." *XL Specialty Ins. Co. v. Loral Space & Commc'n, Inc.*, 918 N.Y.S.2d 57, 64 (N.Y. App. Div. 2011). The Ninth Circuit likewise has held that "[v]ague references to potential securities violations are not enough" for a claim to constitute a Securities Claim. *Kollman v. Nat'l Union Fire Ins. Co.*, 542 F. App'x 649, 649 (9th Cir. 2013); *see also Kollman v. Nat'l Union Fire Ins. Co.*, 2007 WL 2344825, at *4 (D. Or. Aug. 13, 2007) ("[C]onduct may include stock transactions without stating a claim for a securities violation."), *aff'd*, 542 F. App'x 649; *Herbalife Int'l, Inc. v. Nat'l Union Fire Ins. Co of Pittsburgh, Pa.*, No. 2:06-cv-6312, slip op. at 4 (C.D. Cal. Sept. 19, 2007) (corporate governance and related statutes do not "regulate securities") (attached as Ex. E).

This universal understanding of the phrase "regulating securities" is reinforced by the U.S. Supreme Court's interpretation of a materially identical phrase in ERISA. Generally, ERISA preempts state laws that "relate to any employee benefit plan." 29 U.S.C. § 1144(a). A savings clause, however, exempts from preemption "any law of any State which regulates insurance, banking, or securities." *Id.* § 1144(b)(2)(A).

Interpreting what it means to "regulate insurance, banking, or securities," the Supreme Court adopted a "common-sense view of the word 'regulates'"—that "in order to regulate" an industry, a law must "be specifically directed toward that industry" and "not just have an impact" on it. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987). In *Dedeaux*, an employee brought state common-law breach of contract and tort counts against an insurance company. In holding that ERISA preempted those causes of action, the Court held that "a common-sense understanding of the phrase 'regulates insurance' does not support the argument that the Mississippi law of bad faith falls under the saving clause … [e]ven though the Mississippi Supreme Court has identified its law of bad faith with the insurance industry." *Id.* As the Court explained, "the roots of this law are firmly planted in the general principles of Mississippi tort and contract law. Any breach of contract, and not merely breach of an insurance contract, may lead to liability for punitive damages under Mississippi law." *Id.* General contract laws, the Court thus held, are not laws that "regulate insurance." *Id.* Notably, the Court resolved the case on the plain meaning of the statutory text—"regulates insurance, banking, or securities"—and did not resort to other indicia of intent.[4]

Other courts have applied the same common-sense interpretation when deciding whether state laws "regulate securities" under § 1144(b)(2) of ERISA. For example, in *Michigan Carpenters Council Health & Welfare Fund v. C.J. Rogers*, 933 F.2d 376 (6th Cir. 1991), the Sixth Circuit found "without merit" an argument that a Michigan business reorganization law was one that "regulates securities." *Id.* at 383. The court acknowledged that the law "undisputedly" *related* to securities because "any statutory provision which redefines a creditor's right in a corporation necessarily has an impact upon 'securities.'" *Id.* "That is not to say, however, that the Michigan Act was designed to 'regulate securities.'" *Id.* "To the contrary," the court held, Michigan's general business law was intended to govern the lawful operation of corporations within the state; only the separate state *securities* act had the effect of "regulating securities." *Id.* at 383-84.

There is no principled basis to give the words "regulating securities" a different meaning in this case than the "common sense" interpretation applied by the

[4] *Accord Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 334 (2003) ("It is well established in our case law that a state law must be 'specifically directed toward' the insurance industry in order to fall under ERISA's saving clause [as a law 'regulating insurance']; laws of general application that have some bearing on insurers do not qualify."); *Yardley v. U.S. Healthcare, Inc.*, 698 A.2d 979, 984 (Del. Super. Ct. 1996) (similar), *aff'd*, 693 A.2d 1083 (Del. 1997).

U.S. Supreme Court. In fact, a contrary reading would produce absurd results, covering alleged violations of legal commands no reasonable person would describe as "regulating securities." Consider, for example, a director who coerces a buyer into purchasing securities through threats of violence in order to prop up the corporation's stock price. Or imagine a corporate officer who steals a buyer's identity and uses that stolen identity to purchase securities and vote in the board's favor on a controversial proxy vote. If "regulating securities" covers any legal rule that happens to touch upon securities in a given case, then suits for civil extortion or identity theft would be Securities Claims. That is "an absurd result … that no reasonable person would have accepted when entering the contract." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010).

b. *U.S. Bank* Alleged Violations Only of General Legal Duties

Applying these principles here, the *U.S. Bank* Action is not a Securities Claim. U.S. Bank alleged violations of fiduciary duties, the Delaware General Corporation Law (DGCL), Texas and federal fraudulent transfer statutes, and common-law principles of unjust enrichment and alter ego. U.S. Bank did not allege a violation of "any regulation, rule, or statute regulating securities."[5]

[5] Although the Superior Court examined the "allegations of the complaint" rather than the asserted legal causes of actions to determine whether *U.S. Bank*

Fiduciary Duty Counts

The *U.S. Bank* Action involved three interrelated fiduciary causes of action: breach of fiduciary duty, promoter liability, and aiding and abetting. JA1659-60, JA1665-72. Fiduciary duty is a general common-law duty that arises whenever "one person reposes special trust in another or where a special duty exists on the part of one person to protect the interests of another." *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 113 (Del. 2006). Promoter liability is simply a form of breach of fiduciary duty. *Gladstone v. Bennett*, 153 A.2d 577, 582 (Del. 1959); JA1672. And aiding and abetting a breach of fiduciary duty is derivative of an underlying fiduciary breach. *Gatz v. Ponsoldt*, 925 A.2d 1265, 1275 (Del. 2007).

The fiduciary principles that underlie each of these causes of action govern a wide array of circumstances that have nothing to do with securities. For example, fiduciary duties apply in the relationships between attorneys and their clients, *In re Kennedy*, 442 A.2d 79, 89 (Del. 1982), guardians and their wards, *In re Boyd*, 2014 WL 3906773, at *3 (Del. 2014), special education teachers and their students, *Vicky M. v. Ne. Educ. Intermediate Unit 19*, 486 F. Supp. 2d 437, 459 (M.D. Pa. 2007), and even priests and their counselees, *Doe v. Evans*, 814 So. 2d 370, 375 (Fla. 2002). Even in the corporate context, "[c]onduct that may constitute a breach of fiduciary

constituted a Securities Claim, Ex. C at 16, the court never identified any relevant difference between those approaches in the context of this case.

duty need not involve a security at all; it can, for example, involve the wrongful taking of a corporate asset (regardless of whether the asset is a security)." JA4406 (expert declaration of Professor Hamermesh). Principles of fiduciary duty do not in any sense "regulat[e] securities" specifically.

Delaware General Corporation Law

The *U.S. Bank* count for unlawful dividends likewise does not allege a violation of any law "regulating securities." This count instead alleges a violation of sections 170, 173, and 174 of the DGCL. JA1665. The DGCL is a general corporate governance statute that regulates the formation of corporations, their structure and powers, and the rights and obligations of various stakeholders. *See generally* Del. Code Ann. tit. 8.

The three DGCL provisions invoked in *U.S. Bank* concern dividends, not securities. As relevant here, section 170 authorizes the directors of a corporation to "declare and pay dividends upon the shares of its capital stock" out of the corporation's "surplus" or "net profits." Section 173 provides that "[d]ividends may be paid in cash, in property, or in shares of the corporation's capital stock," but "[n]o corporation shall pay dividends except in accordance with" the DGCL. And Section 174 provides for joint and several liability for directors "[i]n case of any willful or negligent violation of ... § 173."

Regulating dividend payments by a financially solvent company, however, is quite different from regulating securities. The DGCL dividend provisions do not protect securities holders or control how securities are bought or sold. Rather, they prevent corporate assets from being stripped away in the form of improper dividends, "protecting the integrity of a corporation's stated capital" and "those who have extended credit to a corporation and who have relied on stated capital as a trust fund for the security of creditors." *Johnston v. Wolf*, 487 A.2d 1132, 1134 (Del. 1985). Even Verizon's expert has described the DGCL dividend provisions as a "regulation of capital" for the "protection of creditors." JA5157. These provisions control and regulate the internal affairs of corporations and the relationships among directors, creditors, and shareholders—not securities.

Fraudulent Transfer

The *U.S. Bank* fraudulent transfer counts also do not allege violations of any law "regulating securities." These counts allege violations of the Texas Uniform Fraudulent Transfer Act ("TUFTA") and sections 544(b) and 550 of the U.S. Bankruptcy Code. "TUFTA's purpose is to prevent debtors from prejudicing creditors by improperly moving assets beyond their reach." *Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560, 566 (Tex. 2016). The pertinent provisions set forth standards for establishing a fraudulent transfer and specify creditors' remedies. *See* Tex. Bus. & Com. Code Ann. § 24.005-006, 008. The relevant Bankruptcy Code provisions empower the bankruptcy trustee to "set aside transfers that unfairly or improperly deplete assets or dilute the claims against those assets." *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 888 (2018). Section 544(b) "detail[s] [the trustee's] power to avoid [transfers] based on rights that unsecured creditors have under nonbankruptcy law"—here, under TUFTA. *Id.* And section 550 "identifies the parties from whom the trustee may recover either the transferred property or the value of that property to return to the bankruptcy estate." *Id.* at 889.

These provisions do not regulate securities. None of the fraudulent transfer statutes cited in the *U.S. Bank* operative complaint contains the word "security" or "securities." The allegedly fraudulent transfers in *U.S. Bank* happened to involve securities, but these provisions regulate *all* fraudulent transfers, regardless of the nature of the property in question. Tex. Bus. & Com. Code Ann. § 24.002. If a fraudulent transfer of securities means that fraudulent transfer statutes "regulat[e] securities," then a fraudulent transfer of a prize bull means that those statutes also regulate livestock. Indeed, Verizon's own expert *agreed* that on Verizon's reading, [redacted] JA3393. Common sense dictates otherwise.

Unjust Enrichment and Alter Ego

Verizon did not argue below that the unjust enrichment or alter ego counts in *U.S. Bank* involved laws "regulating securities," and for good reason. Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010). Unjust enrichment thus has nothing to do with regulating securities, as it may arise from any transaction for goods or services. *See, e.g., Alltrista Plastics, LLC v. Rockline Indus.*, 2013 WL 5210255, at *11 (Del. Sup. Ct. Sep. 4, 2013) (unjust enrichment from undelivered "household wet wipes").

The alter ego doctrine similarly cannot be construed as a regulation of securities, as it governs the rights and obligations of corporations that are only nominally independent. *W. Coast Opportunity Fund v. Credit Suisse Sec.*, 12 A.3d 1128, 1132 n.6 (Del. 2010). Alter ego allegations arise in a variety of contexts completely divorced from securities. *E.g., Island Architectural Woodwork, Inc. v. NLRB*, 892 F.3d 362, 370-71 (D.C. Cir. 2018) (business changed corporate form to avoid collective bargaining obligations to workers).

c. The Superior Court Misapplied Basic Rules of Contract Interpretation

The Superior Court's contrary construction of the Securities Claim definition stemmed from fundamental errors of contract interpretation. Although Verizon had the burden of proving it was entitled to coverage under the policy, *E.I. du Pont*, 693 A.2d at 1061, the Superior Court flipped this burden at the outset. The court paid lip service to the rule that an "insured[] ultimately bear[s] the burden of proving that a claim is covered by an insurance policy," Ex. C at 16 (quotation marks omitted), but then consistently placed the burden on the insurers to *disprove* coverage. In the court's view, the insurers "*failed to show* that their interpretation [of the contract] is the only fair one." *Id.* at 27 (emphasis added). The court expressly "[r]esolv[ed] any uncertainty in *Plaintiffs'* favor." *Id.* at 30 (emphasis added). And the court likened this case to one where "it was the burden of the *insurer* to identify a distinction between" the risk covered by the policy and the risk for which the insured sought coverage. *Id.* at 25 (quotation marks omitted). These misstatements of law contradict "[t]he principle that the insured has the burden of proving that its claimed loss falls within the coverage of the insurance policy," a principle that "is sufficiently established to be described as 'hornbook law.'" 17A Couch on Insurance § 254:11 (3d ed. Dec. 2018 Update).

The Superior Court also erred in finding ambiguity in the Securities Claim definition. In its first summary judgment opinion, the court asserted—without textual analysis—that "it would be difficult to find reasonable minds do not differ in regards to this contract language." Ex. D at 9. But the court never explained *why* reasonable minds could differ, or *how* there was "sufficient ambiguity" in the policy language. *Id.* at 8-9. Instead, the court based its ruling on the hope that discovery relating to extrinsic evidence might simplify the court's interpretive task. *Id.* at 8.

But when the Superior Court revisited the issue on Verizon's renewed motion for summary judgment, the court did not fill this gap in reasoning. Rather, the court simply repeated verbatim its own conclusory statements about ambiguity from its earlier opinion. Ex. C at 10. The court offered no substantive textual analysis of the phrase "regulating securities" beyond describing the parties' competing positions. In passing, the court quoted the definition of "regulate" in Black's Law Dictionary, *id.* at 25, but never explained how that definition supports reading "regulating securities" to cover regulations, rules, or statutes that are not targeted at securities specifically.

The Superior Court's approach is contrary to law. "An insurance contract is not ambiguous simply because the parties do not agree on its proper construction." *ConAgra Foods*, 21 A.3d at 69 (quotation marks omitted). Even a "split in the case law concerning the meaning of a term does not render that meaning ambiguous in the Delaware courts." *O'Brien*, 785 A.2d at 289. A contract is ambiguous only if—after exhausting all textual and structural tools of interpretation—it is still "reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *ConAgra Foods*, 21 A.3d at 69 (quotation marks omitted). The court never evaluated the policy language in this manner.

At most, the court rejected the insurers' argument that Verizon's interpretation would "broaden what it means to 'regulate' securities to anything that somehow involved securities and thus would encompass any number of claims clearly not covered by the Polic[y]." Ex. C at 30-31 (quotation marks omitted). The insurers had explained that a broad ruling would, for example, turn "all domestic relations law [into] laws 'regulating securities' where the marital assets include securities." *Id.* at 31. The court responded that the Idearc Runoff Policy only covers "claims against an Insured Individual *in his or her capacity as a public company director or officer*." *Id.* But that response misses the point. Even if *other* parts of the policy might preclude covering domestic relations claims, an inescapable consequence of the court's ruling is that domestic relations laws are (or can be) laws "regulating securities." That is quintessentially "an absurd result." *Osborn*, 991 A.2d at 1160.

d. The Decision Below Contradicts Delaware Public Policy

The Superior Court's holding that corporate governance laws of general application somehow "regulat[e] securities" contravenes Delaware's strong public policy of "staying in its own lane"—that is, recognizing and respecting the distinction between internal corporate governance law and federal securities regulation. As former Chief Justice Steele has explained, there is a "federal lane" focused on "market fraud and disclosure," and a "state lane" focused on "monitoring the structure of internal corporate governance." Myron T. Steele, *Sarbanes-Oxley: The Delaware Perspective*, 52 N.Y.L. Sch. L. Rev. 503, 506 (2008); *see also*

Sciabacucchi v. Salzberg, 2018 WL 6719718, at *23 (Del. Ch. Dec. 19, 2018) (contrasting Delaware's "traditional lane of corporate governance" with "the federal lane of securities regulation"). Delaware courts routinely rely on the separate "evolved roles of state regulation of internal corporate affairs and federal regulation of securities markets." *Uni-Marts, Inc. v. Stein*, 1996 WL 466961, at *7 (Del. Ch. Aug. 12, 1996). Likewise, on the federal side, federal securities laws contain "Delaware carve-outs," which save certain class actions alleging state-law internal governance violations from being precluded by the federal Securities Litigation Uniform Standards Act. *Malone v. Brincat*, 722 A.2d 5, 13 (Del. 1998).

The regulatory division of labor embodied in Delaware's "stay-in-your-lane" policy is part of the "commercial context" of the Idearc Runoff Policy. *Chicago Bridge*, 166 A.3d at 927. Verizon is a Delaware corporation, and the insurers all do business in Delaware. JA203-05. For these sophisticated parties, to say that a law "regulat[es] securities" is to refer to federal securities regulation and state blue sky laws, in contradistinction to internal corporate governance regulation. Saying that common-law duties, general corporation laws, and fraudulent transfer statutes somehow "regulat[e] securities," by contrast, is like driving on the wrong side of the road.

If allowed to stand, the Superior Court's expansive reading of "Securities Claim" also could erode insurance coverage for individual D&Os, who are the primary intended beneficiaries of these policies. JA4214. A broad interpretation of "Securities Claim" will likely result in more entities successfully obtaining coverage for fiduciary-type claims that were not intended to be covered by the policy. Because insurance coverage is capped, *see* JA1270, more coverage for entities means less coverage for D&Os. That, in part, is why D&O insurance policies generally limit entity coverage and preset allocation clauses to Securities Claims—to preserve finite policy proceeds for D&Os. Delaware courts should not adopt an expansive and counter-textual meaning of "Securities Claim" that undermines the purpose of D&O policies and forces the directors and officers of Delaware corporations to compete for insurance coverage with the companies they lead.

2. The Phrase "Regulation, Rule or Statute" Does Not Encompass Common-Law Duties

The fact that the *U.S. Bank* Action does not allege a violation of any law "regulating securities" disposes of this appeal and renders moot all other issues. But the Superior Court erred further in holding that the common-law duties raised in *U.S. Bank* qualified as "regulations, rules, or statutes." If this Court were to decide that some aspect of the *U.S. Bank* Action relating to fiduciary breaches, unjust enrichment, or alter ego "regulates securities," this Court should still reverse because such common-law duties are not "regulations, rules or statutes."

a. The Text, Context, and Structure of the Securities Claim Definition Does Not Include Common-Law Duties

As noted, the Securities Claim definition is limited to claims "alleging a violation of a[] … *regulation, rule or statute* regulating securities." JA1316 (emphasis added). The counts for breach of fiduciary duty, unjust enrichment, and alter ego liability in *U.S. Bank* do not trigger coverage under the Idearc Runoff Policy because they do not allege violations of any "regulation, rule or statute." Each of these causes of action arises under judge-made common law. *See Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 176 (Del. 2002) (fiduciary duty); *Rossdeutscher v. Viacom, Inc.*, 768 A.2d 8, 18 (Del. 2001) (unjust enrichment); *Kuroda v. SPJS Holdings, L.L.C.*, 2010 WL 4880659, at *3 (Del. Ch. Nov. 30, 2010) (alter ego).

As a matter of plain meaning, judge-made common-law duties are not "statute[s]" enacted by a legislature or "regulation[s]" promulgated by an administrative agency. Nor, in this context, do common-law duties qualify as "rules." "The traditional canon of construction, *noscitur a sociis*, dictates that words grouped in a list should be given related meaning" because "a word is known by the company it keeps." *Zambrana v. State*, 118 A.3d 773, 779 n.35 (Del. 2015) (quotation marks omitted). Here, whatever broad meaning the word "rule" could have in the abstract, when sandwiched between the words "regulation" and "statute," it refers to an administrative rule promulgated by an executive or administrative agency. Interpreting the word "rule" broadly to encompass *any* legal command, including common-law duties—as the Superior Court did below—would render the neighboring words "regulation" and "statute" superfluous. Reading "rule" to refer to administrative rules thus is necessary to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995).

Furthermore, "[w]here [a contract] includes particular language in one section … but omits it in another section …, it is generally presumed that [the drafters] act[ed] intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation marks omitted). The Idearc Runoff Policy expressly mentions "common" law on five different occasions. The policy even references the common law elsewhere in Endorsement #7, obligating Idearc and Verizon to indemnify their directors and officers "to the fullest extent that an Organization is permitted or required to provide such indemnification pursuant to law, ***common or statutory***." JA1319 (emphasis added); *see also* JA1313, 1328, 1344 (Endorsements #4, 13, and 25). These express references show that the parties "kn[ew] how to" refer to the common law when they wanted to. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626 (2018); *see also Roseton OL, LLC v. Dynegy Holdings*

Inc., 2011 WL 3275965, at *10 (Del. Ch. July 29, 2011). In the Securities Claim definition, they chose not to do so.

The "commercial context" of the Idearc Runoff Policy further supports this interpretation. *Chicago Bridge*, 166 A.3d at 927. In the securities field, every major federal and state statute uses the word "rule" to refer to administrative rules. Examples include the Securities Act of 1933, 15 U.S.C. § 77s(a); the Securities Exchange Act of 1934, 15 U.S.C. § 78w(a).; the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7202(a); the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5389; the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 77p(d)(3); New York's Martin Act, N.Y. Gen. Bus. Law, Art. 23-A, §§ 352-e(1)(b); and the Delaware Securities Act, 6 *Del. C.* § 73-102(b)-(c).

b. The Superior Court Again Misapplied Basic Rules of Contract Interpretation

All of the fundamental contract law errors that pervaded the Superior Court's misinterpretation of the phrase "regulating securities" also infected its misinterpretation of the word "rule." *See supra*, pp. 30-32. For example, the court asserted that "[n]othing in the Polic[y]'s definition of Securities Claim purports to exclude common law rules." Ex. C at 25. But the question is not whether the insurers have shown that the Securities Claim definition *excludes* alleged violations of common-law duties, but whether *Verizon* has shown that it *includes* them. *See E.I. du Pont*, 693 A.2d at 1061.

The sum total of the Superior Court's textual analysis of the word "rule" was a citation to Black's Law Dictionary, which "defines 'rule' as 'an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation,' which includes '[a] judicial order, decree, or direction; ruling.'" Ex. C at 24-25 (quoting *Rule*, Black's Law Dictionary (10th ed. 2014)). But another legal dictionary defines "rule" as "all or part of a statement (as a regulation) by an administrative agency that has general or particular applicability and future effect and that is designed to implement, interpret, or prescribe law or policy." Merriam-Webster's Dictionary of Law 439 (1996). These different definitions do not mean that the word "rule" is ambiguous. "Ambiguity is a creature not of definitional possibilities but of … context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Indeed, "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (L. Hand, J.), *aff'd*, 326 U.S. 404 (1945).

The Superior Court never went beyond the abstract dictionary definition to analyze *how* the word "rule" is used in this particular contract. And to the extent the court discussed the purpose of the Securities Claim definition, it expressed confusion, finding it "unclear why this limitation [on the Preset Allocation Clause] exists." Ex. D at 7. The court also dismissed the insurers' reading of the word "rule" as "technical." Ex. C at 23, 26. But the Idearc Runoff Policy "should receive a literal and technical interpretation," as it is a highly technical document drafted and negotiated by lawyers, underwriters, and brokers "who count on [their words] being respected in a precise and literal way." *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1171 (Del. 1995) (quotation marks omitted).

3. The Superior Court Misapplied *Contra Proferentem* and Misinterpreted Extrinsic Evidence

Because the plain text of the Securities Claim definition unambiguously does not include the violations alleged in *U.S. Bank*, this Court need not address the Superior Court's extra-textual analysis of *contra proferentem* and the extrinsic evidence. But if this Court reaches those issues, it should correct the Superior Court's misapplication of *contra proferentem* and acknowledge that these disputed facts, viewed in the light most favorable to the insurers, independently preclude summary judgment.

The Superior Court never actually held that the parties intended the phrase "regulating securities" to mean "incidentally relating to securities," or the word "rule" to mean "judge-made law." Instead, the court merely found Verizon's interpretation of the Securities Claim definition "reasonable," and then relied on the doctrine of *contra proferentem*—whereby a contractual provision is construed against the drafter—to interpret the policy against the insurers. Ex. C at 21, 30.

But *contra proferentem* is not a substitute for ordinary principles of contract interpretation. It is a "last resort" for construing an ambiguous contract where "extrinsic evidence does not reveal the parties' intent." *ConAgra Foods*, 21 A.3d at 72. The doctrine "has little utility" in contracts between sophisticated parties with similar bargaining power, *Wilmington Firefighters Ass'n, Local 1590 v. City of Wilmington*, 2002 WL 418032, at *10 (Del. Ch. Mar. 12, 2002), and does not apply at all where both parties are knowledgeable and "the terms of [the] agreement resulted from a series of negotiations between experienced drafters," *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1114 (Del. 1985).

While the insurers drafted the 2/2000 Form on which the Idearc Runoff Policy was written, Verizon absolutely did not accept it wholesale like a contract of adhesion. It was Verizon's broker who chose the 2/2000 Form and Endorsement #7 (among many available forms and endorsements) for the Idearc Runoff Policy. JA4383. The policy includes thirty-two endorsements, including one that was a non-standard "manuscripted" endorsement drafted by Verizon's broker "specifically for this policy." JA4263. Verizon and its broker also declined to purchase the 3/2006 Form Endorsement, [redacted]

JA4317-18. Under these circumstances, the doctrine of *contra proferentum* has no application.

Nor should the Superior Court have reached and resolved disputed extrinsic evidence. To the extent this Court reaches the issue, that evidence only confirms that the phrase "regulating securities" does not include laws that only incidentally touch securities, and the phrase "regulation, rule or statute" does not include judge-made common-law duties.

With respect to "regulating securities," the 2/2000 Form at issue here is the first Illinois National D&O policy form that included that phrase in the Securities Claim definition. That limiting phrase does not appear in the earlier 5/1995 Form, the Securities Plus Endorsement to that Form, the 4/1998 Form, or even the 3/2006 Form Endorsement. JA4297-4309. The only reasonable inference is that the phrase "regulating securities" was inserted to provide a meaningful limitation on the preceding phrase "regulation, rule or statute."

With respect to "regulation, rule or statute," the Securities Claim definition in the 2/2000 Form modified the definitions in two prior forms—the Securities Plus Endorsement to the 5/1995 Form and the 4/1998 Form. The definitions in both of those earlier forms expressly included certain common-law claims, covering losses resulting from alleged violations of "any law, regulation or rule, whether statutory or *common law*." JA4300, JA4308 (emphasis added). The Securities Claim definition in the 2/2000 Form deleted that longstanding express reference to common-law allegations. And the primary drafter explained in a sworn affidavit that that definitional change was "intended to … restrict coverage" to exclude common-law claims. JA4157.

In reaching a contrary conclusion, the Superior Court relied on four other pieces of extrinsic evidence, misconstruing all four. First, the court relied on marketing materials accompanying the 2/2000 Form, which "characterize[d] that form as an 'expansion' of prior offerings in that it would provide … 'enhanced coverage for securities liability.'" Ex. C at 28 (quoting JA3038). The court suggested that the insurers misled customers by "touting their more expansive coverage" while employing intentionally vague policy language they could later use to deny coverage. *Id.* at 32. The court's disputed characterization is irrelevant because this case concerns allegations of breach of contract, not false advertising. But more fundamentally, the court's accusation of marketing misconduct is unsupported by the record. Just because the 2/2000 Form expanded securities coverage in some respects does not preclude it from narrowing the scope of coverage in other respects. The 2/2000 Form [redacted]. JA3026, 3031, 3039-40. Nothing in the marketing materials suggests that the 2/2000 Form covers common-law claims or alleged violations of general legal commands that only incidentally involve securities.

Second, the court relied on a preliminary coverage analysis in an unrelated insurance claim submitted by Verizon. In that instance, a National Union claims adjuster advised Verizon that a lawsuit alleging breach of fiduciary duty against Verizon subsidiary Celutel, Inc. "appear[ed] to meet the … definition of Securities Claim" in the Verizon D&O policy. Ex. C at 28-29 (quoting JA3079). As a matter of law, however, an insurer's handling of a separate, independent claim cannot create coverage where none otherwise exists. It is a well-settled "general principle" that waiver and estoppel "may not be invoked to bring within the coverage of an insurance policy risks, property or losses not covered by the policy's terms or expressly excluded therefrom." *Axis Reinsurance Co. v. HLTH Corp.*, 993 A.2d 1057, 1063 (Del. 2010) (quotation marks omitted); *see Charter Oil Co. v. Am. Employers' Ins. Co.*, 69 F.3d 1160, 1168 (D.C. Cir. 1995). Compelling policy considerations support that rule. Relying on a determination in an unrelated insurance claim to compel coverage would effectively punish insurers for granting coverage. And prospectively, it would incentivize insurers to scrutinize even the most minor coverage claims, lest a court later rely on a preliminary decision to bind the insurer and compel coverage.

Regardless, the preliminary Celutel coverage letter is irrelevant. The letter is from 2009, years after the negotiation of the Idearc Runoff Policy in 2006. "[R]elevant extrinsic evidence is that which reveals the parties' intent *at the time they entered into the contract*." *Eagle Indus.*, 702 A.2d at 1233 n.11. A single letter also cannot establish any "course of dealing." *Id.* at 1233. And the author of the letter testified that he was inexperienced at the time, "made [a] mistake," and later "learned that these policies are looking for actual violations of securities laws," not "breach of fiduciary duty." JA4417. The manager who took over the Celutel file confirmed that his predecessor's preliminary coverage determination was a mistake, which was not retracted only because the lawsuit in question settled for [redacted]. JA4312, JA4442.

Third, the trial court relied on the SEC Form 10 that Verizon filed in connection with the Idearc spinoff transaction. That form "set[] forth the specifics of the spin transaction[,] including several risk factors"—among them, "that the transaction could be alleged to involve an unlawful dividend or to constitute fraudulent transfers." Ex. C at 29. In the court's view, because the insurers "review[ed]" the Form 10 before finalizing the Idearc Runoff Policy, the Form 10 "supports that the Insurers understood that the Polic[y] w[as] intended to cover the very risks presented by the *U.S. Bank* Action." *Id.* at 29. Illinois National's underwriter, however, offered unrebutted testimony that [redacted]

[redacted], which the Form 10 describes in detail. JA3285.

The fact that the Form 10 references a given risk does not mean that the insurers agreed to cover that risk. The Form 10 is mentioned in the Policy only in Endorsement #3, which states that Verizon qualifies as an "Organization" solely for wrongful acts arising out of the divestiture, "inclusive of all component steps as reflected in the Distribution Agreement which is filed as an exhibit to Amendment 4 of the Form 10." JA1312. The Form 10 thus was simply a convenient way to reference the Distribution Agreement. And the Form 10 lists numerous risks plainly outside the policy's coverage. For example, the Form 10 notes that if the divestiture "does not qualify as a tax-free transaction, tax could be imposed"; that a "non-competition agreement with Verizon" could be held unenforceable; and that Idearc's "executive team has not previously worked together to lead an independent company." JA2754-59. But that does not mean that the insurers agreed to insure Verizon against losses due to tax liabilities, the unenforceability of a non-competition agreement, or ordinary managerial incompetence. The insurers agreed to cover only those losses specified in the policy, and nothing more.

Fourth, the trial court relied on the evolution of form policies. In the court's view, the insurers were "unable to provide a reasonable explanation as to why [they] … went from a clear unequivocal phrase limiting coverage in both the 1995 and

1998 form to the present language." Ex. C at 28. That criticism is confused on every level. An affidavit submitted by the 2/2000 Form's principal drafter explains that the Securities Claim definition was modified to *restrict* coverage. JA4157. And contrary to the court's assertion, the 4/1998 Form did not unequivocally "limit[] coverage"—it expressly covered common-law counts and did not contain the "regulating securities" language added in the 2/2000 Form. JA4308.

* * *

Because the *U.S. Bank* Action did not allege a violation of a "regulation, rule or statute regulating securities," this Court should reverse.

II. The *U.S. Bank* Action Is Not Covered as a "Securities Claim" Because It Fails Other Requirements of the Definition

A. Question Presented

Whether Verizon carried its burden to establish coverage under the Idearc Runoff Policy by demonstrating (1) that the *U.S. Bank* Action was a claim "brought by a person alleging, arising out of, based upon or attributable to the purchase or sale or offer or solicitation of an offer to purchase or sell any securities of [Verizon or Idearc]," or (2) that U.S. Bank was a "security holder of [Verizon or Idearc]." (Preserved at JA4141.)

B. Scope of Review and Legal Standard

The applicable scope of review and governing rules of contract interpretation are set forth in Part I.B, *supra*.

C. Merits of Argument

Even if the *U.S. Bank* Action alleged violations of a "regulation, rule or statute regulating securities," it still fails another requirement of the Securities Claim definition. The definition provides that a Securities Claim also must either concern a "purchase or sale" of securities or be brought "by a security holder." *U.S. Bank* falls short on both accounts.

1. The *U.S. Bank* Action Did Not Concern a "Purchase or Sale" of Securities

The Idearc Runoff Policy provided coverage for a Securities Claim if it "alleg[es], aris[es] out of, or [is] based upon or attributable to the purchase or sale" of securities (among other conditions). JA1316. But the spinoff at issue in *U.S. Bank* did not involve a purchase or sale of securities. While Verizon considered an "outright sale" of its directories business, it decided against doing so because "then Verizon would have been subject to billions in tax liability." *U.S. Bank*, 892 F. Supp. 2d at 808, 824 & n.6. Instead, Verizon structured the transaction as a spinoff, whereby Verizon exchanged assets with Idearc when Idearc was still Verizon's wholly owned subsidiary and then distributed Idearc's stock to Verizon's shareholders as a dividend. *See U.S. Bank Nat. Ass'n v. Verizon Commc'ns, Inc.*, 761 F.3d 409, 426-28 (5th Cir. 2014); JA4392.

In securities parlance, "purchase or sale" refers to "[a]n arms-length stock-for-assets trade between two distinct and independent corporations." *Rathborne v. Rathborne*, 683 F.2d 914, 918 (5th Cir. 1982). An internal transfer of assets between a parent and its subsidiary is not a "purchase or sale," because it is a "self-dealing transaction" in which the parent "relinquishe[s] nothing in the exchange." *Int'l Controls Corp. v. Vesco*, 490 F.2d 1334, 1343 (2d Cir. 1974); *see In re Penn Central Sec. Litig.*, 494 F.2d 528, 532-39 (3d Cir. 1974). Courts have applied this common understanding to spinoffs, *Rathborne*, 683 F.2d at 919, and to insurance coverage disputes arising from spinoffs. In *Federal Insurance Co. v. Campbell Soup Co.*, a New Jersey appellate court held that a parent-subsidiary stock transfer as part of a spinoff was not a "purchase or sale" of securities under an insurance policy because the transaction was merely "an intra-corporate exchange, a movement of assets from one corporate pocket to the other." 885 A.2d 465, 469-70 (N.J. Super. Ct. App. Div. 2005).

So too here. In defending *U.S. Bank*, Verizon made emphatically clear that [redacted] JA4196. As Verizon told the *U.S. Bank* court, "[t]he [*U.S. Bank*] Complaint nowhere alleges that either [Verizon] or Diercksen solicited a single individual or entity to buy Idearc stock. To the contrary, as part of the Spin-Off, [Verizon] distributed, without charge, the shares in Idearc to its own existing shareholders …." JA4193; *see also id.* ("[A]s part of the Spin-Off, … [Verizon] did not sell a single share to anyone…."). Verizon likewise told its investors and the SEC that the spinoff involved a "tax-free distribution," not a purchase or sale of securities. JA2786.

In reaching a contrary conclusion, the Superior Court ignored the nature of the transfer between Idearc and Verizon. Instead, the court focused on tangential transactions, in which *after* the distribution of Idearc stock, Verizon sold "fractional shares of Idearc stock in the financial market," and investment banks exchanged previously purchased Verizon debt securities for new Idearc debt securities, which the investment banks then sold to other buyers. Ex. C at 33; *see id.* at 2 n.6. But *U.S. Bank* did not allege any wrongful conduct in those post-divestiture transactions.

The gravamen of the *U.S. Bank* Action was not that Verizon or Diercksen did anything wrong in connection with a purchase or sale of securities, but rather that the directories business was not worth the $10 billion in shares, debt, and cash Idearc transferred to Verizon. Even Verizon's expert agreed that [redacted] JA4007. The *U.S. Bank* Action was based upon alleged wrongdoing in the Verizon-Idearc transfer, ***not*** in any tangential transaction involving sales of fractional Idearc shares to third parties or exchanges of Verizon and Idearc debt. The *U.S. Bank* Action did not concern a "purchase or sale" of securities.

2. U.S. Bank Was Not a "Security Holder"

The *U.S. Bank* Action also was not brought "by a security holder." The Idearc Runoff Policy provided that if a claim does not involve a "purchase or sale" of securities, it can still be a Securities Claim if it is brought "by a security holder"—either directly or derivatively on behalf of an Organization. JA1316-17. But *U.S. Bank* was not brought "by a security holder," directly or derivatively. It was brought by U.S. Bank, which was the trustee of a litigation trust formed in Idearc's bankruptcy. *U.S. Bank*, 892 F. Supp. 2d at 807, 812.

The Superior Court did not dispute that U.S. Bank was not a security holder. Instead, the court held that the phrase "by a security holder" in the policy really means by *or on behalf of* a security holder. In the court's view, *U.S. Bank* satisfied this requirement because although that lawsuit was brought by U.S. Bank, it "was brought derivatively *with respect to* Idearc's creditors['] interests in certain debt securities." Ex. C at 33 (emphasis added). "[I]t is not the proper role of a court," however, "to rewrite or supply omitted provisions to a written agreement." *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998). The policy uses the phrase "on the behalf of" in a different portion of the Securities Claim definition. JA1317 ("brought derivatively *on the behalf* of an Organization by a security holder" (emphasis added)). The parties thus knew how to refer to suits brought "on the behalf of" others, but chose not to do so in this part of the Securities Claim definition. *See Epic Sys.*, 138 S. Ct. at 1626; *see also Roseton OL*, 2011 WL 3275965, at *10.

The Superior Court did not ground its interpretation of the phrase "by a security holder" in the text or context of the Securities Claim definition. Instead, the court relied on a separate provision in the policy, which provided that the "[b]ankruptcy or insolvency of any Organization … shall not relieve the Insurer of any of its obligations hereunder." JA1319. The court read this provision to expand the scope of the Securities Claim definition to cover claims that are not *in fact* brought by a security holder, but *could have been* brought by a holder of Idearc debt securities before Idearc's bankruptcy. Ex. C at 33-34. But nothing in the bankruptcy provision purports to expand the policy's scope of coverage. The provision merely clarifies that bankruptcy does not "relieve" Illinois National of any existing obligation.

The purpose of the bankruptcy provision, moreover, has nothing to do with the Securities Claim definition. The next clause of the bankruptcy provision provides that the policy "is intended as a matter of priority to protect and benefit the Insured Persons [*i.e.*, D&Os] such that, in the event of bankruptcy of [Verizon or Idearc], the Insurer shall first pay [the D&Os] under Coverage[] A … prior to paying [Verizon or Idearc to reimburse indemnification] under Coverage B." JA1319. Together, the order-of-payments clause and the neighboring bankruptcy clause protect insured D&Os, in the event of bankruptcy, from having policy proceeds paid to the bankruptcy estate—and from there to all of Verizon's or Idearc's creditors—rather than to the directors and officers.

Absent such provisions, "[w]hen a liability insurance policy provides direct coverage to the debtor as well as the directors and officers, the general rule is that since the insurance proceeds may be payable to the debtor they are property of the debtor's estate." *In re Allied Digital Techs. Corp.*, 306 B.R. 505, 510-11 (Bankr. D. Del. 2004). The bankruptcy provision avoids that common problem. It does not transform parties who are not security holders into security holders. Nor does it otherwise expand the Securities Claim definition to cover claims not encompassed within its plain terms.

CONCLUSION

The judgment of the Superior Court should be reversed.

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CERTIFICATE OF SERVICE

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