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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE VERIZON INSURANCE COVERAGE APPEALS	) No. 558,2018) No. 561,2018) No. 560,2018)) Court Below—Superior Court of the) State of Delaware)) C.A. No. N14C-06-048 WCC) (CCLD)	**PUBLIC VERSION**

REPLY BRIEF ON CROSS-APPEAL OF PLAINTIFFS BELOW-APPELLEES / CROSS-APPELLANTS VERIZON COMMUNICATIONS INC., VERIZON FINANCIAL SERVICES LLC, AND GTE CORPORATION

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NATURE OF THE PROCEEDINGS

In opposing Verizon's[1] cross-appeal, Insurers admit all of the facts demonstrating that the Superior Court's decision to start calculating prejudgment interest as of the 2014 mediation constituted reversible error. Insurers admit that Illinois National denied Verizon's claim for coverage with respect to the *U.S. Bank* Action on June 21, 2011. Zurich admits that it had long since agreed to adopt, and did adopt, that denial. Insurers, including Zurich, admit that the "Securities Claim" argument was litigated by the parties through to final judgment. All Insurers admit that their Securities Claim defense was rejected by the Superior Court, which found the argument to have been invalid from the first moment it was asserted. Finally, no Insurer disputes that, as a matter of law, once an insurer denies coverage with respect to a claim, the policyholder is relieved of further procedural obligations under the policy to trigger its claim for coverage.

Nonetheless, to eliminate or drastically limit Verizon's right to the prejudgment interest necessary to make it whole, Insurers claim that Verizon is not

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[1] All capitalized terms and short-form names have the same meaning as in the Answering Brief on Appeal and Opening Brief on Cross-Appeal of Plaintiffs Below – Appellees/Cross-Appellants Verizon Communications Inc., Verizon Financial Services LLC, and GTE Corporation (Trans. ID 63033329) ("Verizon Br.").

entitled to such interest unless or until it engaged in the futile act of repeatedly demanding that Insurers provide the coverage they had already refused to provide.

Echoing the erroneous decision of the Superior Court, Insurers ask this Court to hold that Verizon did not "unequivocally" demand coverage until it sought mediation of its claims. In essence, they ask the Court to commence prejudgment interest not when Verizon first requested coverage, nor when Insurers unequivocally denied coverage, nor when Verizon responded by challenging that denial, but only when Verizon demanded mediation of the parties' disputes. That assertion improperly delays the start of prejudgment interest from the date of non-performance to the date when the aggrieved party finally seeks redress through a dispute resolution procedure – and is at odds with the fundamental purpose of prejudgment interest in Delaware, which is to make the non-breaching party whole.

More importantly, Insurers argue that even after their 2011 blanket coverage denial, Verizon had an ongoing obligation to continue submitting bills with the magic words "pay these" in order to establish its right to prejudgment interest. That assertion belies common sense. Nor is it supported by the cases Insurers cite, none of which involve a prior blanket denial of the claim. Moreover, it is contrary to controlling law – which Insurers do not even address – holding that an insured need not continue with the futile act of repeatedly appealing to its insurer once coverage has been denied. It also ignores that the undisputed record here is that

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Verizon *did* demand payment, by sending invoices again and again during the two-year period from 2012 to 2014 – not, as in the cases upon which Insurers rely, by simply estimating what costs could be incurred in the future. Contrary to Insurers' characterizations, those invoices were not mere "invitations" to conduct an allocation; they were demands for payment. Thus, even if such explicit continued demands were required in the face of the blanket denial of coverage – which they were not – the Superior Court erred in not measuring prejudgment interest, at the latest, from when those initial demands were made.

Zurich alone adds to these erroneous arguments the assertion that the Court should apply New York law to the interest issues,[2] which would include the timing of the commencement of such interest. Zurich further argues that, under that law, its interest obligation does not begin until the underlying insurers have paid out their limits. Neither of those arguments has merit. As every other Insurer has recognized, and as even the reasoning of the very cases on which Zurich relies mandates, the Superior Court correctly applied Delaware law to the availability, calculation and amount of prejudgment interest. Moreover, even under New York law, the policy language at issue here did not permit Zurich to delay payment – and

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[2] Appellant and Cross-Appellee Zurich American Insurance Co.'s Reply Brief on Appeal and Answering Brief on Cross-Appeal (Trans. ID 63136690) ("Zurich Ans. Br.") at 16.

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thus forestall its obligation for prejudgment interest – on the ground that Verizon, rather than the underlying insurers, paid the losses exhausting underlying limits in the first instance.

In its answering brief, Zurich contends that Verizon's position would create "perverse incentive[s]" or "incentivize gamesmanship."[3] To the contrary, that is precisely what Insurers ask the Court to do. Their scenario would allow an insurer to deny coverage secure in the knowledge that unless the policyholder engaged in the empty exercise of continuing to submit bills the insurer has already said it will not pay or, worse still, unless it actually seeks redress by mediation or court action, the worst fate the insurer faces is having to provide coverage it was required to provide in the first place. To avoid that perverse incentive, and to give effect to longstanding law holding that once an insurer denies coverage it must bear the consequences of that denial, this Court should reverse the interest calculation of the Superior Court, and hold that, in this case, after Insurers' denial, prejudgment interest runs from the date each subsequent cost was incurred and paid by Verizon.

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[3] Zurich Ans. Br. at 26.

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ARGUMENT

I. DELAWARE LAW APPLIES TO QUESTIONS OF PREJUDGMENT INTEREST RAISED IN THIS CROSS-APPEAL

A. The Superior Court's Application Of Delaware Law To The Substantive Coverage Issues Mandates Its Application To The Interest Issues

Like its fellow Insurers, Zurich does not appeal from the Superior Court's application of Delaware law to the substantive coverage issues in this case. Rather, alone among Insurers, Zurich argues that New York law applies to the prejudgment interest issues presented by this appeal, and thus to the timing question presented by this cross-appeal.[4] Thus, it seeks essentially to apply two separate state's laws to this single insurance claim, arguing that while the Court should not disturb the application of Delaware law to the substantive issues, it should apply New York law to the issue of prejudgment interest.[5]

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[4] Zurich's choice-of-law discussion appears in the context of its own appeal from the Superior Court's decision to award *any* amount of prejudgment interest against Zurich. Zurich Ans. Br., Argument, Point II (A). However, Zurich also contends that New York law should be applied to *all* prejudgment interest issues, which would necessarily include those raised by Verizon's cross-appeal. Zurich Ans. Br. at 16 ("on remand, the Superior Court should apply New York law to issues relating to prejudgment interest").

[5] In fact, contradicting its stated position that New York law should apply to interest issues, Zurich relies heavily on Verizon's Delaware interest cases in making its arguments on the cross-appeal as to the appropriate start date for interest. *Id.* at 23-24.

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As an initial matter, that result would violate this Court's direction that choice of law should result in a "consistent, predictable meaning in accordance with the expectations of the parties" and be applied "in a consistent and durable manner that the parties can rely on." *Certain Underwriters at Lloyds, London v. Chemtura Corp.*, 160 A.3d 457, 459-60 (Del. 2017). The parties can hardly have expected that their contractual obligations would be governed by one state, but that their rights and obligations for prejudgment interest owed as result of a breach of those obligations would be governed by another. For that reason, Delaware courts have long held that the substantive right to prejudgment interest in a contract case is governed by the same law that applies to the award of damages itself. *Cooper v. Ross & Roberts, Inc.*, 505 A.2d 1305, 1307 (Del. Super. Ct. 1986).

Zurich suggests that *Cooper* is distinguishable because the Superior Court here "did not conduct a choice of law analysis, and instead defaulted to Delaware law." Zurich Ans. Br. at 13. That is not the case; as set forth in its ruling on prejudgment interest, the Superior Court expressly held that it had chosen to apply Delaware law to the coverage issues presented. 2018 Order at 13 (noting that "in its analysis, it relied solely on Delaware law"). But even if the trial court had applied Delaware law to the coverage issues simply because there was no conflict on those issues with New York law, that would nonetheless require the application of Delaware law to the interest and timing of interest issues. *See, e.g.*, *Great*

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American Opportunities, Inc. v. Cherrydale Fundraising, LLC, 2010 WL 338219, at*8, 30 (Del. Ch. Jan. 29, 2010) (Delaware interest law applies where Delaware law applied to other substantive issues due to lack of conflict in potentially applicable law).

B. The Superior Court Properly Applied Delaware Law To The Coverage Issues

Zurich's contention that New York law applies to the interest and timing of interest issues also fails because Delaware courts have uniformly held that the state of incorporation has the greatest interest in the construction and application of D&O policies, such as those at issue here involving corporate liability relating to a transaction involving Delaware securities. *See Arch Ins. Co. v. Murdock*, 2018 WL 1129110, at *9 (Del. Super Ct. Mar. 1, 2018) (state of incorporation has greatest interest in availability of D&O insurance to issues of "honesty and fidelity to the corporation"); *Mills Ltd. P'ship v. Liberty Mut. Ins. Co.*, 2010 WL 8250837, at *4-6 (Del. Super. Ct. Nov. 5, 2010).

Zurich relegates those holdings to a footnote, claiming that the cases involve different types of policies than those at issue here, and asserting that they are effectively superseded by two cases involving only environmental liabilities under commercial general liability policies, *Chemtura*, 160 A.3d 457, and *Travelers Indemnity Co. v. CNH Industrial America LLC*, 2018 WL 3434562 (Del. July 16, 2018). Zurich Ans. Br. at 16 n.6. In addition, despite the careful and detailed

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analysis set forth in *Arch* in particular, Zurich asks the Court to ignore that case on the unsupported assertion that it "misstates" Delaware law and will "surely" require "correction" when it reaches this Court. *Id.* None of those arguments has merit.

First, Zurich's assertion that the policies at issue in *Arch* and *Mills* "were not intended to provide transaction-related coverage across the country" not only is a distinction without a difference, but it is an inaccurate description of the facts of those cases. The policies in *Arch* and *Mills* were standard D&O policies, with no mention of territorial limitations. In fact, the underlying action at issue in *Mills* was pending in federal court in Virginia. *Mills*, 2010 WL 8250837 at *2 n.2. In short, the policies in *Arch* and *Mills did* provide "coverage across the country" for liabilities faced by Delaware corporations and their officers and directors. Accordingly, the rationale for applying Delaware law set forth in those cases is directly applicable here.

Moreover, to the extent that the Policies differ at all from those at issue in *Arch* and *Mills*, those differences argue even more strongly in favor of the application of Delaware law in this case. Unlike the standard D&O policies in *Arch* and *Mills*, the Policies here were issued specifically to cover liabilities arising from a specific transaction involving Delaware securities that was conducted by a Delaware corporation. JA1312. In addition, the Wrongful Acts being insured

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expressly included potential claims for "breach of duty" against the directors and officers of that Delaware corporation or against Verizon itself for any Securities Claim. JA1277-78 §2(aa)(1-2). If anything, the "transaction based" elements of the coverage *heighten* the Delaware focus of the coverage, and thus Delaware's overriding and predominant interest in application of its own law to that coverage.

Nor can Zurich avoid these precedents on the ground that they predate or are supposedly inconsistent with the analysis applied to the comprehensive general liability policies and environmental claims in *Chemtura* or *Travelers*. As an initial matter, Delaware courts have continued to adhere to the conclusion that the state of incorporation has the predominant interest in the application of its own law to D&O policies even in the wake of *Chemtura* and *Travelers*. Most recently, in *IDT Corp. v. United States Specialty Insurance Co.*, the court – *applying the Chemtura test* for the choice of law standards – confirmed that the state of incorporation has the most significant relationship to a D&O policy:

> Delaware courts have consistently held that Delaware law should be applied to resolve disputes over insurance coverage of directors' and officers' liability. When they must engage in the multifaceted "most significant relationship test, Delaware courts recognize that for directors' and officers' liability, "the insurance risk is the directors' and officers' 'honesty and fidelity' to the corporation[.] So, "the state of incorporation has the most significant relationship" because the policy is issued pursuant to Delaware law, and "Delaware's law ultimately determines whether a director or officer of a Delaware corporation" breaches his or her fiduciary duties.

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2019 WL 413692 at *6 (Del. Super. Ct. Jan. 31, 2019) (citations omitted).[6]

In fact, the application of Delaware law here is in complete accord with the analysis mandated by *Chemtura* and *Travelers*. As this Court held in *Chemtura*, the goal of the choice-of-law analysis is to determine the state with the most significant interest in applying its law to the insurance policy "in a consistent and durable manner that the parties can rely on." 160 A.3d at 460; *see also id.* ("the facts of a particular case might lead to a different outcome" than application of headquarters law). As set forth in *Arch*, *Mills* and *IDT*, that requires application of

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[6] However, Insurers' reliance on *IDT* to suggest that the *U.S. Bank* Action did not allege or involve the purchase or sale of securities is wrong. *See* Reply Brief on Appeal and Answering Brief on Cross Appeal (Trans. ID 63138076) ("Ins. Ans. Br.") at 37-38. Insurers neglect to inform this Court that the Superior Court specifically noted that its conclusion in *IDT* ***would not apply to the policy language and facts of this case***: "[T]he facts surrounding Verizon's 2006 spin-off . . . , and the specific policy language at issue there, are far different than the facts and policy language here." 2019 WL 413692 at *13 n.143. Unlike here, the second prong of the "Securities Claim" definition in *IDT* more narrowly required that the underlying Claim *actually arise from* a purchase or sale of securities. *Id.* at *12-13. In *IDT*, the court found that a claim brought by shareholders of the spunoff entity for wrongful conduct that took place four years after the spinoff did not satisfy this criteria, and rejected the notion that the subsidiary's earlier spinoff itself could satisfy the criteria. *Id.* Here, in contrast, Clause 1(a) of the second prong of the Securities Claim definition merely required that the underlying Claim *contain allegations* relating to the purchase or sale of an Organization's securities. JA1316 § 2(1)(a). It is indisputable that the Litigation Trustee's allegations were premised on third party creditors' purchase of allegedly "worthless" Idearc debt securities as a result of alleged misstatements and omissions made by Verizon in public filings, and thus, fell squarely within the definition at issue. Verizon Br. at 22-25.

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the law of the state of incorporation, which governs the existence, role and duties of Delaware corporations and their directors and officers, to the interpretation and analysis of a policy designed to provide insurance for liabilities arising from those roles and duties.[7] Thus, application of Delaware law in this case not only did not contradict the holdings in *Chemtura* and *Travelers*, it correctly applied the standards required by those holdings.

C. The Procedural Record Is Consistent With The Application of Delaware Law To The Interest Issues Presented Here

To deflect attention from this clear Delaware precedent, Zurich argues that Verizon should be barred from arguing for the application of Delaware law because it has "changed positions" regarding which law applies to those issues. Zurich Ans. Br. at 12-13. Even if that were true,[8] it would be irrelevant. The

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[7] That interest is also reflected in the Policies themselves, which require that in any dispute submitted to ADR, the arbitrator or mediator must consider the law of the policyholder's state of incorporation on the disputed issue. JA1286-87 § 17. Indeed, the *Mills* court held that a similar policy provision reflected the parties' reasonable expectation that the D&O policy would be governed by the law of the state of incorporation. 2010 WL 8250837, at *4.

[8] In reality, Verizon consistently argued that, to the extent an actual conflict of laws existed on the substantive issues, Delaware law would control. JA380-84; JA2307-08. With respect to the interest issues in particular, Verizon argued that it was entitled to prejudgment interest under either Delaware or New York law, but that the higher New York rate was justified because AIG had previously argued for the application of New York law to the coverage issues. JA5390-91. Accordingly, Verizon submitted interest calculations under both Delaware and New York rates,

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Superior Court made clear in both the Summary Judgment Decision and the Final Judgment Order that it had determined that Delaware law applied to the substantive issues before it. 2017 Order at 27; 2018 Order at 13. As discussed above, that determination not only was fully supported by applicable precedent, but requires the application of Delaware law to the interest issues here.

Indeed, if any party is taking inconsistent positions with respect to the choice of law to be applied here, it is Zurich. In its opening brief on this appeal, Zurich expressly adopted the substantive coverage arguments and positions set forth in Insurers' brief, without limitation or alteration. *See* Appellant Zurich's Opening Brief (Trans. ID 62853766) at 1. Insurers, in turn, not only acknowledge that the Superior Court applied Delaware law to those substantive coverage issues, but do not appeal from that determination. More importantly, AIG specifically noted that it "agrees with Verizon that the Superior Court properly applied Delaware law to the issue of prejudgment interest, and adopts Verizon's arguments in that regard." Ins. Ans. Br. at 43-44 n.10. Zurich cannot be heard simultaneously to argue in this Court that Delaware law applies to the scope of its contractual obligations, but that New York law applies to the damages and interest due to Verizon as a result of Zurich's breach of those obligations.

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belying any assertion that it contended that Delaware law did not or could not apply to the award of interest. JA5660-66; JA5769-76; JA6094-114.

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II. INSURERS CANNOT AVOID THE COMMENCEMENT OF PREJUDGMENT INTEREST ON THE GROUND THAT VERIZON NEVER MADE A DEMAND FOR COVERAGE

A. Under Delaware Law, Interest Runs On Post-Denial Defense Costs From The Date They Were Incurred

Just as Insurers admit that Delaware law controls the timing of interest issues in this case, they also are forced to concede the undisputed facts that require reversal of the Superior Court's decision to delay the start of prejudgment interest until the 2014 mediation. In particular, Insurers readily admit that no later than 2011, Verizon had demanded coverage for the *U.S. Bank* Action and they denied that demand.[9] Thus, they admit that, from that moment forward, there was nothing in any bill for services that would have led them to pay any portion of Verizon's costs of defense. They admit, in effect, that any further request by Verizon for that payment would have been futile – a conclusion further borne out by the years of litigation that have ensued without such payment.

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[9] *See* JA1713-19 at 1715 (June 2011 AIG letter denying coverage); JA1727-28 (February 2014 AIG letter repeating same position); JA5896-98 (December 7, 2010 Zurich claim acknowledgement letter for *U.S. Bank* Action, which stated that "any and all coverage defenses" asserted by AIG now or "in the future" are "expressly adopted and incorporated herein as actual or potential coverage defenses of Zurich"); JA5942-44 (October 2012 Zurich letter refusing demand for payment from Trustee because Action was not covered); JA6037 (Zurich claims notes noting coverage "was denied by all Idearc carriers, including Zurich").

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Nonetheless, relying on *Hercules Inc. v. AIU Insurance Co.*, 784 A.2d 481 (Del. 2001) and *Stonewall Insurance Co. v. E.I. du Pont de Nemours*, 996 A.2d 1254 (Del. 2010)[10] – cases in which there had been *no* pre-litigation demand for coverage and *no* blanket coverage denial – Insurers ask this Court to hold that Verizon was required to engage in just that futile act in order to preserve its right to prejudgment interest. That request is not supported by either case.

In both *Hercules* and *Stonewall*, this Court expressly found that, before the coverage action, the policyholder had never demanded ***coverage***, much less payment, from the insurers from which it sought prejudgment interest – and, thus, the insurers there never had occasion to deny coverage, as the Insurers here did. In *Stonewall*, for example, the policyholder had previously sought coverage under 50 other insurance policies, but did not seek coverage under the *Stonewall* policies until August 2006, *after* it had settled and received in excess of 100 million dollars from other insurers. 996 A.2d at 1256. Accordingly, as the Court concluded,

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[10] Citing to language in *Stonewall*, Insurers suggest that prejudgment interest, rather than being a matter of right, is an extraordinary remedy. Ins. Ans. Br. at 40-41. They thus imply that the Superior Court had unfettered discretion to award or calculate such interest. In fact, the decision in *Stonewall* does not indicate any intention by this Court to alter the longstanding recognition in Delaware that prejudgment interest is to be granted as a matter of right, as Delaware courts since *Stonewall* have continued to hold. *See, e.g.*, *Imbert v. LCM Interest Holding LLC*, 2013 WL 1934563, at *11 (Del. Ch. May 7, 2013) ("In Delaware, prejudgment interest is awarded as a matter of right, and should be computed from the date payment is due.").

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"Stonewall *could not have unjustifiably refused* to pay until DuPont demanded payment on August 4, 2006." *Id.* at 1262 (emphasis added).

Similarly, in *Hercules*, the Court found that "[a]lthough Hercules sent various forms of notice regarding potential liability, ***Hercules does not contend that it ever made a demand***." 784 A.2d at 508 (emphasis added). In fact, it expressly noted that the question of what kind of demand was necessary to trigger the right to interest was not before the Court "since Hercules did not make *any* request for payment." *Id.* at 509 n.129. Based on those facts, it echoed the trial court's holding that "it was only with filing of the complaint that the insurers 'undeniably knew that Hercules was making a claim and undeniably decided not to pay.'" *Id.* at 509.[11]

Neither *Stonewall* nor *Hercules* supports the Superior Court's decision to delay the running of prejudgment interest until Verizon demanded mediation of the

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[11] Contrary to Zurich's assertion (Zurich Ans. Br. at 25-26 n.11), Verizon did not distinguish *Hercules* and *Stonewall* solely on the ground that they involved general liability policies, but on the key fact that they did not involve any pre-litigation demand for or denial of coverage. However, the fact that the policies in *Hercules* and *Stonewall* both were part of a broad commercial general liability program under which the policyholder could claim coverage under any of a number of triggered policy years made the insurer's assertion that it did not know its policies would be called upon to pay any portion of the loss more reasonable. There was no such ambiguity here, as the Policies were specifically purchased to cover losses from the Transaction and Verizon immediately sought coverage under them once a claim was asserted.

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parties' disputes. The filing of litigation in both of those cases was *only* a factor in the interest calculation because, on the facts before the Court, that filing *marked the first time the policyholder had sought coverage from the insurer.*[12] Here, in stark contrast, Verizon not only demanded coverage immediately after the *U.S. Bank* Action was filed, but Insurers unequivocally denied any coverage for that claim three years before Verizon demanded mediation. Verizon's decision to seek mediation was not a "first demand" for payment – rather, it was a final attempt to deal with the fact that it had received no payment on prior demands because the claim was wrongfully denied.[13]

Moreover, Insurers' blanket denial meant that it would be futile for Verizon to continue "demanding" payment of further costs as they were incurred. As a

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[12] That is made even clearer by this Court's decision in *Citadel Holding Corp. v. Roven*, 603 A.2d 818 (Del. 1992) (cited in Ins. Ans. Br. at 43; Zurich Ans. Br. at 24). In *Citadel*, the defendant argued that it had not been in breach until plaintiff "made a showing sufficient to invoke his right to [payment]" during the litigation, and thus was not liable for any amount of prejudgment interest. 603 A.2d at 826. The Court rejected that argument and held that plaintiff was entitled to interest from the date payment had been demanded. *Id.* There is no indication that plaintiff sought any other commencement date, likely because the appeal was taken from an order that had denied *any* award of prejudgment interest.

[13] Insurers' effort to avoid interest by characterizing their coverage denial on the Securities Claim issue as "preliminary" (Ins. Ans. Br. at 41) is a fiction. Insurers have never waivered from that position, including in their appeal to this Court, and have withheld payment from Verizon for years on that precise basis. Allowing them now to evade the consequences of their coverage denial by the mere expedient of placing the adjective "preliminary" in the opening paragraph of their denial letter would lead to the very "perverse incentives" Zurich purports to decry.

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matter of controlling case law, nowhere mentioned in any of Insurers' answering briefs, once Insurers issued their blanket denial of coverage for Verizon's defense costs, Verizon was not obligated to engage in that futile act in order to preserve its right to payment or to prejudgment interest.[14] Under longstanding law, Delaware will not require the performance of a futile act in order to preserve contractual rights.[15] Indeed, even AIG acknowledged that, in light of its coverage denial, Verizon was not obligated to seek its consent to defense counsel or keep it apprised of the conduct of its defense.[16]

Delaware courts have applied that fundamental principle to award prejudgment interest from the date costs were incurred once a claim for

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[14] *See Shook v. Hertz Corp.*, 349 A.2d 874, 877 (Del. Super. Ct. 1975) ("An insurer may not thus repudiate a policy, deny all liability thereon, and at the same time be permitted to stand on the failure to comply with a provision inserted in the policy for its benefit.") (citation omitted); *see also Sun-Times Media Grp., Inc. v. Royal & Sunalliance Ins. Co. of Canada*, 2007 WL 1811265, at *12 (Del. Super. Ct. June 20, 2007) ("Because the [insurers] reserved their rights with respect to coverage and later denied coverage, they should not have 'veto power' . . . ."); *Mine Safety Appliances Co. v. AIU Ins. Co.*, 2016 WL 498848, at *5 (Del. Super. Ct. Jan. 22, 2016) (compliance with consent condition futile if insurers "would have denied coverage" regardless of claim's merits).

[15] *Anvil Holding Corp. v. Iron Acquisition Co*, 2013 WL 2249655 (Del. Ch. May 17, 2013) ("The law does not require a futile act.") (citation omitted); *see also Process Indus. v. Delaware Ins. Guar. Ass'n*, 1994 WL 318965 at *9 (Del. Super. Ct. May 25, 1995) (recognizing that an "insured may be relieved of a policy precondition by an insured's conduct such as a refusal to defend").

[16] JA1815-16; JA5860.

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advancement has been denied – precisely the result Verizon seeks here. In *Underbrink v. Warrior Energy Servs. Corp.*, 2008 WL 2262316, at *18-19 (Del. Ch. May 30, 2008), for example, the court held that prejudgment interest would run on advancement amounts incurred before the plaintiff completed required undertakings from the date of undertaking, but on subsequent costs *from the date the costs were incurred.*[17] So, too, having denied coverage, Insurers may not avoid their interest obligation by asserting that such futile demands must be made.[18]

B. In Any Event, Verizon Made Repeated Demands For Payment Prior To The Mediation Sufficient To Trigger Its Right to Interest

Even if Verizon was obligated to take the futile step of repeatedly demanding payment from Insurers, it did so here, long before the mediation in 2014. It is undisputed that Verizon began submitting invoices regularly to AIG

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[17] *See also Citrin v. Int'l Airport Ctrs., LLC*, 922 A.2d 1164, 1168 (Del. Ch. 2006) (after party from whom advancement was sought "ridiculed the very notion that Citrin was entitled to any advancement at all" and refused to allow plaintiff to submit bills for payment, court held that prejudgment interest on further costs would run from the date those costs were incurred); *Imbert*, 2013 WL 1934563, at *11 (awarding interest on initial costs from date of first demand and subsequent costs from date paid by plaintiff).

[18] Moreover, even under New York law, as advocated by Zurich, an insurer's coverage denial is a proper start date for purposes of calculating interest. *See Granite Ridge Energy, LLC v. Allianz Global Risk U.S. Ins. Co.*, 979 F. Supp. 2d 385, 393 (S.D.N.Y. 2013) (ordering interest to be paid from date of insurer's first coverage denial); *see also Danaher Corp. v. Travelers Indem. Co.*, 2015 WL 409525, at *16 (S.D.N.Y. Jan. 16, 2015) (awarding prejudgment interest on unpaid underlying defense costs from date they were incurred).

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beginning in 2012, pursuant to the Policy terms requiring that Insurers advance defense costs within 90 days of receipt of invoices.[19] As Insurers admit, in AIG's July 2011 denial letter, it agreed that director John Diercksen's defense costs were covered even though it insisted that Verizon's were not.[20] Accordingly, thereafter, Verizon sent primary insurer AIG, on a regular basis from 2012 to 2014, a series of emails attaching invoices as well as repeated letters disputing the coverage denial, in addition to similar oral communications.[21] Those communications did not merely advise AIG of the progress of the underlying litigation nor were they

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[19] JA1317 § 8(a). Under the Policy's plain terms, this advancement provision shows that payment was due and owing, and thus prejudgment interest should begin to run, once Verizon sent invoices to AIG. AIG's contention that this provision instead buys it an extra 90 days before interest can begin to accrue on any invoice (Ins. Ans. Br. at 43 n.9) ignores that it governs ***advancement*** of Defense Costs. As AIG ***never*** advanced any costs, it cannot now enforce a provision it breached to reduce its interest obligation.

[20] Ins. Ans. Br. at 41; JA1713-19 at 1715.

[21] *See, e.g.*, JA414-19; JA1721-22 (August 2012 letter noting that Verizon "of course disputes" AIG's refusal to provide coverage to Verizon); JA1730-32; JA2134-37; JA2139-41 and AR60-64 (emails sending invoices to AIG in July 2012, August 2012, September 2012, and November 2012); JA2688-89 (February 2013 email noting Verizon was "shocked" by AIG's "inordinate delay" in responding to its request for explanation as to basis for coverage denial); JA2143-206 (March 2013 email attaching detailed spreadsheet of defense costs invoices); JA1724-25 (Verizon 2014 letter noting that it repeatedly asked for explanation of coverage denial and that Verizon provided complete description of defense costs in 2013 but AIG did not even review information provided); JA2236-44 (AIG chart summarizing various letters demanding coverage); JA4766-70 (Verizon interrogatory response listing numerous communications demanding payment and coverage from AIG); JA5861.

[redacted]

intended simply to facilitate a conversation on the allocation of costs. Ins. Ans. Br. at 41. Rather, these communications reflected a clear demand for payment. Indeed, as the Superior Court found, during the three-year period that Verizon was sending bills to AIG, it simultaneously and repeatedly demanded that AIG reconsider its "Securities Claim" position (2017 Order at 8), and thus, it indisputably demanded that AIG pay 100 percent of its defense costs under its Policies. Given those factual findings, the Superior Court's determination to delay the commencement of prejudgment interest until the demand for mediation constituted reversible error.

In addition, in light of this record, AIG's contention that the first demand for payment was not until Verizon made a demand for mediation in 2014, and that the submission of earlier bills was solely to "allocate" costs, does not bear scrutiny. At a minimum, given Illinois National's coverage position, Verizon demanded that it pay that portion of the costs that even Illinois National deemed to be "covered" – the defense costs for director John Diercksen.[22] By its very nature, that is a demand for "covered" payment sufficient to "start the clock" on interest under the applicable standards, even including *Chemtura* and *Travelers*.

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[22] *See supra* n.21.

[redacted]

For similar reasons, Zurich's attempt to reduce its obligation to pay prejudgment interest based on some unfounded assertion that it was unaware its coverage layer had been reached prior to the mediation is a red herring. Zurich denied coverage for Verizon's costs on the substantive "Securities Claim" grounds long before its excess layer was reached, and therefore it was in breach the moment Verizon incurred those costs. *See supra* n.9. Moreover, Zurich's own internal notes demonstrate that Verizon kept it apprised of the amount spent on the defense, as it was informed as early as September 2012 that "the total in defense [costs] in the aggregate for all defendants are $23.5 million." JA6071. That is further highlighted by the fact that by November 2012 Zurich had retained monitoring counsel because of the "potentially high exposure" presented by the Action. JA6067. More importantly, by email dated June 25, 2013, Verizon specifically informed Zurich that its defense costs were nearing $50 million, and thus Zurich's policy obligations had been triggered. JA417-18; JA1760-61. From at least that date forward, Zurich had *existing* payment obligations that it had already denied, and continued to deny, by adhering to its decision to adopt Illinois National's position that Verizon was not entitled to payment of *any* of its defense costs. Zurich's attempt to bring this case within the ambit of *Hercules* by characterizing Verizon's communications as mere "general updates on the status and purported

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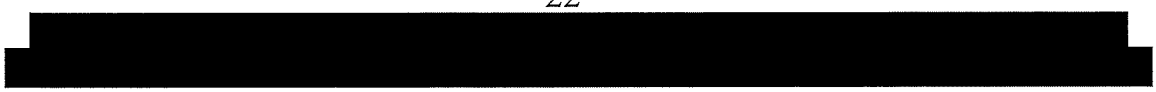
costs of the underlying action" (Zurich Ans. Br. at 25) is belied by this contemporaneous documentary record.

In short, it is Insurers, not Verizon, who are seeking to engage in "gamesmanship." *See* Zurich Ans. Br. at 26. Facing a $14 billion claim, Verizon demanded that its carriers step up to the plate and fulfill their obligations under Policies that, as the Superior Court correctly found, were designed to cover that very type of claim. If Insurers wanted to avoid the risk that they would have to pay interest as a result of an improper denial, they could have paid those defense costs subject to their right of recoupment, and place that risk on Verizon. JA1317 § 8(a). They chose, instead, to hold the money, and that decision must have consequences. Allowing Insurers to evade or limit their obligation for prejudgment interest on this record leads to the very inequities that prejudgment interest was designed to avoid, by allowing the breaching party to benefit from its breach by gaining the time value of money it was required to pay to another. To prevent that outcome, this Court should hold that prejudgment interest begins to run from the date Verizon incurred costs reaching Insurers' respective policy layers.



III. ZURICH MAY NOT FURTHER DELAY THE COMMENCEMENT OF INTEREST UNTIL THE UNDERLYING LIMITS HAVE BEEN PAID BY THE UNDERLYING INSURERS

Recognizing the weakness of Insurers' timing argument on the interest issue, Zurich attempts to avoid the issue altogether by arguing that, under New York law, it cannot be held liable for interest until and unless the underlying insurers have paid out their limits. At its heart, this is just another timing argument – and thus a further attack on Verizon's cross-appeal for an order that interest runs from the date the costs were incurred. Unfortunately for Zurich, it has no merit, for two reasons. First, as set forth above, Delaware law controls the interest issues in this case – and not even Zurich contends that it would be entitled under Delaware law to delay its payment, or the running of interest, on the ground that Verizon, rather than its underlying carriers, paid the defenses costs incurred in the *U.S. Bank* Action.[23]

Second, even if New York law applied to this issue, Zurich was not entitled to delay its payments until the underlying insurers, rather than Verizon, paid those costs. The Zurich policy *expressly* states that it attaches "after all of the Limit(s) of

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[23] *See* Verizon Br. at 84; *Mass. Mut. Life Ins. Co. v. Certain Underwriters at Lloyd's of London*, 2014 WL 3707989, at *6-7 (Del. Super. Ct. June 6, 2014) (holding, under Delaware law, that under almost identical policy language to that here, excess policy's payment obligations can be triggered by policyholder's payment of losses).

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Liability of Underlying Insurance has been exhausted by the *actual payment of loss(es)*" – it does not require underlying insurers to make such payment or otherwise state who must make such payment. JA1374 § I. The Zurich policy also states that it will continue as primary insurance after exhaustion "of the Limit(s) of Liability of Underlying Insurance solely as a result of the *actual payment of loss covered thereunder*." *Id.* § III.B. (emphasis added). As the Superior Court correctly held, the defense costs "actually paid" by Verizon were covered under the terms of the Policies. Thus, those payments were sufficient to exhaust the limits and trigger Zurich's payment and interest obligations.

The cases on which Zurich relies are not to the contrary, and in fact, support Verizon's position. They demonstrate that, under New York law, an excess insurance company has to craft language that specifically permits it to withhold payment until the *underlying insurer* itself has paid out the policy limits when it wants that result. The policies in *In re TIAA-CREF Insurance Appeals*, 192 A.3d 554 (Del. 2018), for example, clearly provided that *the underlying insurers* had to pay "the full amount" before the excess policy would attach, and that the insured could "fill the gap" only where there was a specific agreement with an underlying insurer. *See TIAA-CREF Indiv. & Instit. Servs., LLC v. Illinois Nat. Ins. Co.*, 2017 WL 5197860, at *6-7 (Del. Super. Ct. Oct. 23, 2017), *aff'd*, 192 A.3d 554 (Del.

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2018).[24] Similarly, the excess policies in *Forest Laboratories, Inc. v. Arch Insurance Co.* provided that the excess policy would attach upon "actual payment of a Covered Claim *pursuant to the terms and conditions of the Underlying Insurance thereunder*," and an underlying insurance policy expressly stated that its coverage limits attached "only after the insurers of the Underlying Policies shall have paid in legal currency the full amount of the Underlying Limit." 953 N.Y.S.2d 460, 463 (N.Y. Sup. Ct. 2012) (emphasis added), *aff'd*, 984 N.Y.S.2d 361 (N.Y. App. Div. 2014) (cited in Zurich Ans. Br. at 17-18, 20);[25] *see also JP Morgan Chase & Co. v. Indian Harbor Ins. Co.*, 947 N.Y.S.2d 17, 21 (N.Y. App. Div. 2012) (cited in Zurich Ans. Br. at 19 n.8) (decided under Illinois law; one of excess policies at issue provided that it would attach "only after the Primary and

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[24] Those policies also had "shaving provisions" – not present here – that the Court held contemplated allowing an excess insurer to wait until an underlying insurer settled to make any payment due under the policies. 192 A.3d at *5.

[25] Inexplicably, Zurich continues to maintain that *Ali v Federal Insurance Co.*, 719 F.3d 83, 94 (2d Cir. 2013) (cited in Zurich Ans. Br. at 20 n.9) holds that, even absent such express language, "exhaustion" can result only by an underlying insurer paying its limits. In fact, the *Ali* court *specifically* disavowed any such holding, stating that "[t]he District Court never held that the underlying *insurers* must make payments before the obligations under the relevant excess policies are triggered." 719 F.3d at 92. It further held that requiring payment by the underlying insurer would be inconsistent with other policy provisions regarding the continued availability of excess coverage even if the policyholder failed to maintain the underlying policies or the underlying insurers became insolvent. *Id.* at 92 n.15. Notably, the Zurich policy at issue here contains *precisely* such provisions. *See* JA1374-75 § III.A. (maintenance provision); III.B. (drop down provision).

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Underlying Excess Insurers shall have duly admitted liability and shall have paid the full amount of their respective liability").

In fact, New York cases after *Forest Labs* have held that, where the excess policy does not expressly require payment by the underlying insurer, "exhaustion" may occur once the policyholder pays losses in the amount of the underlying limits. For example, in *Jiang v. Ping An Ins.*, 2018 WL 3349039, at *1 (N.Y. Sup. Ct. July 7, 2018), the excess policy provided that coverage "shall attach only after all such Underlying Insurance has been exhausted by payment of claim(s)." Citing *Forest Labs*, the court held that where the policyholder settled with the underlying insurer for less than the full policy limits, the excess policy would still be triggered *as long as the policyholder itself paid the balance of those limits*. *Id.* at *6.

Thus, even under New York law, Zurich was not entitled to delay its payment – and thus the commencement of its interest obligation – on the ground that Verizon, rather than the underlying insurers, had paid losses in excess of the underlying limits.[26] Accordingly, Zurich's policy was triggered and its obligation

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[26] In fact, in *J.P. Morgan Securities Inc. v. Vigilant Insurance Co.*, 2017 WL 3448370 (N.Y. Sup. Ct. Aug. 7, 2017), the only New York case directly on point, the court rejected excess insurers' claim that they were not obligated to pay interest until the primary insurer had paid its full limits. *Id.* at *2. Although the Appellate Division reversed on other grounds relating to the underlying coverage, it did not address interest. *See* 84 N.Y.S.3d 436 (N.Y. App. Div. 2018); *see also Varda, Inc. v. Ins. Co. of N. Am.*, 45 F.3d 634, 640 (2d Cir. 1995) (contract provision directing

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to pay prejudgment interest began to accrue as early as October 17, 2012 (JA6107 (Finn Reply Affidavit)), as soon as Verizon had paid defense costs the Superior Court correctly held were covered under the Policies in an amount sufficient to exhaust the limits underlying Zurich's policy.

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timing for payment of claim did not "trump[] New York law" on imposition of interest).

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CONCLUSION

For all the foregoing reasons, the Superior Court's calculation of prejudgment interest should be reversed and remanded.

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CERTIFICATE OF SERVICE

Jennifer C. Wasson hereby certifies that, on the 13th of May, 2019, she caused to be filed, via File & Serve*Xpress*, an electronic version of the within document, and to be served via File & Serve*Xpress*, upon all counsel of record.

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