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Case Number 217,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

FIRST SOLAR, INC.,	:	
	:	
Plaintiff Below, Appellant,	:	
	:	
v.	:	No. 217,2021
	:	
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., and XL SPECIALTY INSURANCE COMPANY,	:	Court Below – Superior Court of the State of Delaware C.A. No. N20C-10-156 MMJ CCLD
	:	
Defendants Below, Appellees.	:	

APPELLEE NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.'S ANSWERING BRIEF

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NATURE OF THE PROCEEDINGS

This insurance coverage dispute requires this Court to determine the "relatedness" of a securities class action and a subsequent opt-out action brought against Plaintiff-Appellant First Solar. The complaints in both actions alleged that, beginning in 2008, First Solar artificially inflated its stock price by misrepresenting its costs, its liabilities, and the quality of its solar energy products. Both complaints further alleged that, in February 2012, First Solar disclosed manufacturing and product defects, and disappointing financial results, that unraveled its scheme and caused its stock price to plummet. Investors who purchased First Solar's stock between 2008 and 2012 lost millions.

Certain shareholders filed the securities class action in 2012 in the U.S. District Court for the District of Arizona (the "*Smilovits* Action"). A group of investors opted out and, in 2015, they pursued a parallel suit in the same court (the "*Maverick* Action"). Both actions were brought by members of the same class, named the same defendants, involved the same time period, asserted violations of the same provisions of the federal securities laws, and alleged the same fraudulent scheme. Recognizing that the two actions were related, First Solar itself moved to transfer *Maverick* to the same judge that was presiding over *Smilovits*, and it litigated the two cases in tandem until it settled both in 2020.

Notwithstanding First Solar's prior litigation position that the two actions were related, First Solar now contends that its insurance claims for *Maverick* and for *Smilovits* are not "Related Claims" under the insurance policies that Defendant-Appellee National Union Fire Insurance Co. ("National Union") issued. Its reason is clear: First Solar exhausted its tower of insurance for the 2011-2012 policy period, including a $10 million National Union policy, on *Smilovits* and on defense costs for *Maverick*, and it is now looking for more coverage under separate towers of insurance. But because *Smilovits* and *Maverick* are related, First Solar's policies—for both the 2011-2012 policy period and the 2014-2015 policy period for which coverage is now sought—provide that its claim for *Maverick* was first made when it made its Claim for *Smilovits*, during the 2011-2012 policy period. The policies provide that Claims relating to the same underlying facts are covered by the same policy, and they prohibit First Solar from using any later policies.

The Superior Court correctly held that, because of the extensive factual overlap between *Maverick* and *Smilovits*, the class action and its opt-out counterpart were Related Claims under the unambiguous terms of the policies. Indeed, in ruling that they were related, the court held they were "fundamentally identical." First Solar's attempts to distinguish the two cases based on superficial differences are belied by the *Smilovits* and *Maverick* complaints.

This Court should affirm.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court correctly dismissed First Solar's complaint for failure to state a claim. As the Superior Court found, the applicable "Related Claims" provisions of First Solar's policies are "clear and unambiguous." Those provisions preclude coverage for *Maverick* under First Solar's 2014-2015 policies because (a) *Maverick* is related to—indeed, it is an opt-out from—the *Smilovits* class action; and (b) as a "Related Claim," First Solar's Claim for *Maverick* is covered by the same policies that covered *Smilovits*: First Solar's now-exhausted 2011-2012 policies, not its 2014-2015 policies.

a. Both *Maverick* and *Smilovits* "involve the same fraudulent scheme," as both alleged that First Solar "artificially rais[ed] stock prices by misrepresenting First Solar's ability to produce solar electricity at costs comparable to the costs of conventional energy production." Op. 15.[1] Plaintiffs in both actions sued the same defendants, alleged class periods that covered the same 10 months in 2011, relied on many of the same misleading statements and corrective disclosures, and asserted violations of the same federal securities laws. *Id.* at 15-16. The Superior Court correctly concluded that the two actions are related because "[b]oth actions are based on the same subject, have a causal connection, and primarily rely

[1] The Superior Court's opinion ("Op.") is attached as Exhibit 1 to First Solar's Opening Brief.

on the same facts or occurrences." Op. 16. First Solar's attempts to distinguish the *Maverick* and *Smilovits* complaints are superficial, rely on a purported distinction not raised below, and are contrary to the complaints' allegations.

b. As "Related Claims," First Solar's claim for *Maverick* was "a Claim first made at the time of . . . *Smilovits*"—in 2012, years before the inception of First Solar's 2014-2015 policies. Op. 17. First Solar itself recognized that its 2011-2012 policies covered *Maverick*—it requested and accepted reimbursement from its 2011-2012 tower of insurance for *Maverick* defense costs, and it sought coverage under later towers of insurance only *after* it exhausted its 2011-2012 tower. But because the "unambiguous terms of the Primary Policy preclude coverage for claims that predate the inception of the policies," the Superior Court correctly held First Solar cannot state a claim under its 2014-2015 policies. *Id*.

c. While the Superior Court's dismissal was correct, this Court should clarify that "fundamentally identical" is not the standard for determining whether claims are related. The phrase "fundamentally identical" appears nowhere in First Solar's policies and, as Judge LeGrow recently recognized in declining to infer a "fundamentally identical" standard, courts must apply the plain language of the policy. *Sycamore Partners Mgmt., L.P. v. Endurance Am. Ins. Co.*, 2021 WL 4130631, *11 (Del. Super. Sept. 10, 2021). *Maverick* readily meets the standard of relatedness First Solar actually agreed to in its policies.

d. Assuming *arguendo* that First Solar could satisfy its burden to prove that its claim for *Maverick* was first made during the 2014-2015 policy period, coverage would be barred by the Specific Matter Exclusion in the 2014-15 Policy. It expressly excludes coverage for any claim based on "(i) any fact, circumstance, act or omission alleged in" *Smilovits*, or "(ii) any Wrongful Act which is the same as, similar or related to or a repetition of any Wrongful Act alleged in" *Smilovits*.

COUNTERSTATEMENT OF THE FACTS

The facts involve: (1) the applicable provisions of First Solar's policies; (2) the factual allegations in the *Smilovits* and *Maverick* complaints; (3) First Solar's handling of the two actions, including obtaining coverage for both *Smilovits* and *Maverick* under its 2011-2012 policies; and (4) the proceedings below.

A. First Solar's Insurance Policies

This case involves the applicability of provisions in First Solar's policies for two separate policy periods: (1) the 2011-2012 policy period, during which *Smilovits* was filed, and (2) the 2014-2015 policy period, during which the *Maverick* plaintiffs filed suit after opting out of *Smilovits*.

2011-2012 Policy. First Solar purchased a primary D&O policy from National Union for the policy period of November 16, 2011 to November 16, 2012, which provided for a $10 million limit of liability (the "2011-2012 Policy"). B228. The 2011-2012 Policy was a claims-made-and-reported policy, meaning it limited coverage to "Claims first made . . . during the Policy Period . . . and reported to the Insurer pursuant to the terms of this policy." B232. First Solar has exhausted the 2011-2012 Policy, with National Union paying out all $10 million. B405. First Solar also purchased excess insurance coverage from other insurers, and it exhausted the proceeds of the entire insurance tower for the 2011-2012 policy period. *Id*.

2014-2015 Policies. First Solar purchased insurance in subsequent years, including a primary policy from National Union for the November 16, 2014 to November 16, 2015 Policy Period (the "2014-2015 Policy"). A37-144. Like the 2011-2012 Policy, the 2014-2015 Policy was a claims-made-and-reported policy that provided for a $10 million limit of liability. *Id.* First Solar also purchased excess insurance for the 2014-2015 policy period, with XL Specialty Insurance Company ("XL") issuing the first excess policy in the insurance tower. A145-A174. XL's policy generally followed the terms of the 2014-2015 Policy, and it provided a $10 million aggregate limit of liability in excess of the 2014-2015 Policy. *Id.*

National Union's primary policies contain "Related Claims" provisions, and its 2014-2015 Policy also contains a Specific Matter Exclusion. Each provision is independently dispositive here.

1. Related Claims and Relation Back

The Superior Court decided this case based on the "relation back" provision in First Solar's 2014-2015 Policy. That provision, which is substantially the same in both the 2011-2012 Policy and 2014-2015 Policy, provides that any subsequently-made "Related Claim" is deemed first made as of the time of the previously made claim to which it relates:

> (1) [A] Claim was first made and reported in accordance with Clause 7(a) above, then ***any Related Claim that is subsequently made against an Insured and that is reported to the Insurer***

> ***shall be deemed to have been first made at the time that such previously reported Claim was first made***. . . .

A129 ("Relation Back Provision") (emphasis added). The Relation Back Provision further provides that "Claims actually first made or deemed first made prior to the inception date of this policy . . . are not covered under this policy[.]" *Id.*

The 2014-2015 Policy defines a "Claim" as "a civil, criminal, administrative, regulatory or arbitration proceeding for monetary, non-monetary or injunctive relief which is commenced by: (i) service of a complaint or similar pleading . . . ." A60. A Related Claim is "a Claim alleging, arising out of, based upon or attributable to ***any facts or Wrongful Acts that are the same as or related to*** those that were . . . alleged in another Claim made against an Insured." A67 (emphasis added).

2. The Specific Matter Exclusion

The Specific Matter Exclusion in the 2014-2015 Policy reinforces the Relation Back Provision, stating:

> ***[T]he Insurer shall not be liable to make any payment for Loss in connection with:*** (i) any of the Claim(s), notices, events, investigations or actions listed under EVENT(S) below (hereinafter "Events"); (ii) the prosecution, adjudication, settlement, disposition, resolution or defense of: (a) any Event(s); or (b) any Claim(s) or Pre-Claim Inquiry(ies) arising from any Event(s); or ***(iii) any Wrongful Act, underlying facts, circumstances, acts or omissions in any way relating to any Event(s)***.

A82 (emphasis added). The Specific Matter Exclusion lists *Smilovits* among the "Events" excluded from coverage. *Id*.

First Solar agreed in the Specific Matter Exclusion that its insurers "shall not be liable for any Loss in connection with" any Claim "alleging, arising out of, based upon, attributable to or in any way related directly or indirectly, in part or in whole, to an Interrelated Wrongful Act (as that term is defined [in the endorsement]), regardless of whether or not such Claim . . . involved the same or different Insureds, the same or different legal causes of action or the same or different claimants or is brought in the same or different venue or resolved in the same or different forum." A83. The 2014-2015 Policy defines "Interrelated Wrongful Event" as "(i) any fact, circumstance, act or omission alleged in any Event(s) and/or (ii) any Wrongful Act which is the same as, similar or related to or a repetition of any Wrongful Act alleged in any Event(s)." *Id.*

B. The Underlying Smilovits Securities Class Action and Maverick Opt-Out Action

1. First Solar's Fraudulent Scheme

The facts alleged in the *Smilovits* Amended Complaint ("SAC") and the *Maverick* Complaint ("MC") describe First Solar's fraudulent scheme. Each allegation discussed below appears in both complaints.[2]

[2] "When determining whether actions are 'related,' courts compare the allegations in the complaints to determine their similarities and differences." *Providence Serv. Corp. v. Ill. Union Ins. Co.*, 2019 WL 3854261, at *3 (Del. Super. July 9, 2019).

First Solar "manufacture[s] and s[ells] solar modules with an advanced thin film semiconductor technology, and it designs, constructs and sells photovoltaic ("PV") solar power systems." A426 (SAC ¶ 10); *see* A183 (MC ¶ 17). From 2008-2012, First Solar and its officers and directors defrauded investors by misrepresenting the quality and durability of its solar modules and power systems, and by stating that it "had a winning formula for reducing manufacturing costs so rapidly and dramatically ***as to make solar power competitive with fossil fuels***," an achievement that is synonymously referred to as "grid parity." A425 (SAC ¶ 2) (emphasis added); *see also* A535 (SAC ¶ 205(a)); *compare* A179 (MC ¶ 2) ("Since its inception as a public company, First Solar had a grand plan to produce electricity from the sun ***at costs comparable to conventional electricity production methods – otherwise known as grid parity.***") (emphasis added); *see also* A181 (MC ¶¶ 7-8).

The complaints alleged that, in reality, First Solar's solar modules and power systems—and indeed its entire business model—were deeply flawed. *See, e.g.*, A522, A547, A552 (SAC ¶¶ 176, 226, 239); A244, A249 (MC ¶¶ 255, 269). A "heat degradation" problem affected the Company's solar modules, meaning higher temperatures caused the modules to degrade and require maintenance and replacement at an accelerated rate. *See, e.g.*, A425, A434-436 (SAC ¶¶ 3, 34-37); A196, A197-198, A206-207 (MC ¶¶ 72, 79, 111). According to confidential witnesses, heat degradation manifested in First Solar's El Dorado facility in

Southern Nevada no later than 2009. A519-20 (SAC ¶ 167); A192 (MC ¶ 55). Over time, it affected facilities across the Southwest, where First Solar had developed a network of solar-module systems. *See* A522-523 (SAC ¶ 176); A191-192 (MC ¶ 54). Despite the severity of the heat-degradation threat to its business, First Solar concealed that problem from investors. A425, A465-466 (SAC ¶¶ 3, 86); A191-193 (MC ¶¶ 53-54).

Both complaints alleged that First Solar concealed other problems, too. For instance, First Solar reassured customers about its profitability by manipulating its "cost per watt" metric, a "key gauge" for measuring reductions in manufacturing costs and profitability. *See, e.g.*, A428-431 (SAC ¶¶ 21-27); A199-200, A201, A215 (MC ¶¶ 83-89; 90, 149). First Solar also manipulated its financial statements, including by misstating its warranty reserves, concealing the heat degradation and "excursion" issues (described below), and distorting its true revenues. A497-A530 (SAC ¶¶ 139-200); A210-211 (MC ¶¶ 128-33).

The two complaints alleged that the company's officers made repeated misrepresentations on investor calls, in press releases, in SEC reports, and in presentations. *See, e.g.*, A428, A435, A457 (SAC ¶¶ 19, 36, 61); A185, A220-222, A249 (MC ¶¶ 28, 169-74, 269). But, contrary to First Solar's representations, First

Solar knew about and deliberately concealed its problems. A435, A439-40, A441-457 (SAC ¶¶ 35, 44-45, 50-60); A186-189 (MC ¶¶ 33, 37, 40, 45).[3]

As alleged, First Solar's scheme began to unravel in July 2010, when it first disclosed a "manufacturing excursion," a defect in solar modules that caused premature power loss. A431-432 (SAC ¶ 28); A185 (MC ¶ 29). First Solar initially reported that the "excursion" affected no more than 4% of its solar panels, A431-32 (SAC ¶¶ 28-29); A185-86, A216-217 (MC ¶¶ 29-30, 155), and stated that it would cost the company $23.4 million to remedy, A476-478 (SAC ¶ 107); A186 (MC ¶ 32). First Solar later reassured investors that the "claims process" for the excursion was completed, suggesting there would be no further warranty liability exposure. A437-438 (SAC ¶ 40); A222 (MC ¶ 177).

Alarm bells began to sound in October 2011, when First Solar announced that it had terminated its CEO. A549-550 (SAC ¶ 230); A245 (MC ¶ 258). That same day, a Morgan Stanley analyst wrote that the move was "likely a troubling sign of things to come." A550 (SAC ¶ 231); A245 (MC ¶ 258).

The complaints alleged that, by the end of 2011, First Solar was in a spiral. In a December 14, 2011 press release, First Solar stated that it would have to slash its margins. A550-551 (SAC ¶¶ 233-34); A208 (MC ¶ 118). The release caused the

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[3] The *Maverick* complaint relied on at least some of the exact same confidential witnesses as the *Smilovits* complaint. *See, e.g.*, A190-191, A199 (MC ¶¶ 50-51, 85).

price of its stock to plummet. A551 (SAC ¶ 234); A246 (MC ¶ 263). In February 2012, First Solar revealed that its "excursion" would actually cost more than $200 million to remediate, dwarfing the $23.4 million it previously announced. A432 (SAC ¶ 29); A247 (MC ¶¶ 266). The Company also reported a net loss of $39.5 million for 2011. A551 (SAC ¶ 235); A247 (MC ¶ 265). Its share price then dropped precipitously, allegedly resulting in a massive loss for investors. A556 (SAC ¶ 254-56); A242-A243 (MC ¶ 145).

2. First Solar Shareholders File Smilovits on Behalf of a Putative Class That Includes the Maverick Plaintiffs

A few weeks after First Solar's February disclosures, on March 15, 2012, shareholders filed the *Smilovits* Action. The operative complaint named First Solar and its current and former officers and directors as defendants, and it alleged violations of the Securities Exchange Act of 1934. A425 (SAC ¶ 1). It sought to recover for a class of investors—including the *Maverick* plaintiffs—that purchased First Solar stock between April 30, 2008 and February 28, 2012. *Id.* The thrust of the allegations concerned defendants' misrepresentations regarding its "winning formula for reducing manufacturing costs so rapidly and dramatically as to make solar power competitive with fossil fuels." A425 (SAC ¶ 2).

3. The Maverick Plaintiffs Opt Out of Smilovits

The *Maverick* plaintiffs purchased First Solar stock between May 4, 2011 and December 15, 2011—within the *Smilovits* class period. A182-183 (MC ¶ 16). The

Maverick plaintiffs, however, opted out of the class; and on June 23, 2015, they filed their own complaint in the same court as *Smilovits*, naming the same defendants, alleging the same fraudulent scheme, and asserting the same violations of the same federal securities laws. Like *Smilovits*, the thrust of *Maverick* was defendants' misrepresentation of First Solar's "grand plan to produce electricity from the sun at costs comparable to conventional electricity production methods – otherwise known as grid parity." A179 (MC ¶ 2).

4. Maverick and Smilovits Are Litigated Before the Same Judge

Shortly after *Maverick* was filed, First Solar submitted a "Motion to Transfer Related Case," seeking to litigate both actions before the *Smilovits* presiding Judge B50; B75-78. First Solar argued: "The substantial overlap in legal and factual issues and the substantial overlap in parties weigh in favor of transferring the Maverick Fund Action to this Court." B78. The Court granted the motion. B80.

First Solar also filed a stipulation to extend its time to respond to the *Maverick* complaint, arguing it needed to coordinate with the "***related*** securities class action." B132 (emphasis added). It later moved to dismiss *Maverick* as the "latest in a series of securities fraud actions" making "nearly identical allegations" as *Smilovits*. B141. The Court denied that motion, but it cited the overlap between the two matters in multiple rulings in *Maverick*, and it took judicial notice in *Maverick* of facts established in *Smilovits*. B182-183.

The overlap continued throughout the litigation. For instance, the *Maverick* plaintiffs' filed a motion to obtain access to expert materials from *Smilovits*, B81-90, which the court granted, stating: "Considering the degree of overlap in facts, parties, and issues between this [*Maverick*] case and the Smilovits class action, the expert reports of the plaintiffs in Smilovits clearly are relevant to this case," B194. The overlap between the two actions played a significant role in the post-settlement litigation over attorneys' fee as well.[4]

C. First Solar's Insurance Claims for the Underlying Lawsuits

1. Insurers Covered Smilovits and Maverick Under First Solar's 2011-2012 Policies

First Solar filed a Claim for coverage for *Smilovits* under its 2011-2012 policies. B400-B401. First Solar's 2011-2012 tower of insurers, including National Union, accepted coverage and reimbursed First Solar for defense costs. First Solar has now exhausted the coverage that was available under its 2011-2012 tower, and National Union has fully paid its $10 million 2011-2012 Policy. *See* B405.

On June 24, 2015, First Solar reported *Maverick* to First Solar's 2011-2012 tower—which was providing coverage for *Smilovits*—not to its 2014-2015 tower.

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[4] *Smilovits*'s counsel filed a petition for a set-aside of the funds recovered in the *Maverick* Action. B114. The *Maverick* plaintiffs acknowledged the overlap between the two actions, but argued *Smilovits'* counsel failed to pursue key theories and hindered their litigation. B92-B103. The judge denied the application, but acknowledged *Smilovits'* counsel's work "may have benefitted [the *Maverick* Action]." B115.

B362. At the time, First Solar had already exhausted National Union's 2011-2012 Policy. B415. Another insurer, Chubb (Federal), which provided excess coverage for the 2011-2012 policy period, and whose policy was not yet exhausted, accepted coverage, explaining "[a]s the new Maverick litigation is based on the same facts and circumstances of the previously noticed Smilovits class action complaint, Federal treats this matter as a related claim." B414.

For the next five years, First Solar and its 2011-2012 tower of insurers treated *Maverick* as a Related Claim. Immediately after receiving notification that Chubb would treat *Maverick* as related to *Smilovits*, First Solar began submitting invoices to its 2011-2012 tower for *Maverick* defense costs, and it received reimbursement for those costs. *See* B418-437.

First Solar continued submitting invoices to its 2011-2012 tower for all of 2015, until *Maverick* was stayed pending an interlocutory appeal in *Smilovits*. B132, B418-437. When the *Maverick* stay was lifted in 2018, First Solar resumed submitting invoices to the 2011-2012 tower. *See, e.g.*, B438-452. First Solar ultimately incurred more than $80 million in attorneys' fees and costs defending *Smilovits*, and it ultimately settled the case for $350 million. B111, B371. Every insurer in the 2011-2012 tower paid its policy limits. *See* B368-369.

2. After Exhausting the 2011-2012 Policies, First Solar Changed Course and Sought Coverage Under the 2014-2015 Policies

On June 1, 2020, more than five years after *Maverick* was filed, First Solar for the first time sought coverage for *Maverick* under its 2014-2015 insurance tower. *See* B373.[5] First Solar informed its insurers, without providing details, that there was a pending mediator's settlement proposal that could impact coverage. *Id.* Two days later, First Solar entered into a $19 million settlement resolving *Maverick* without informing its 2014-2015 tower that it had done so. *See* B455. First Solar did not provide the 2014-2015 tower with notice of the settlement until two weeks later, on June 17, 2020. *See id.*

National Union denied coverage under the 2014-2015 Policy, in part because First Solar's claim for *Maverick* was (a) related to its claim for *Smilovits* and was thus deemed first made under the 2011-2012 Policy and (b) subject to the Specific Matter Exclusion. B404-B412.

D. Procedural History

After an unsuccessful mediation, First Solar sued National Union and XL, seeking coverage for the *Maverick* settlement under its policies for the 2014-2015 policy period.

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[5] In its complaint, First Solar alleged that it also was seeking coverage under its 2013-2014 policies, but it abandoned that argument below and does not pursue that theory on appeal. *See* B373.

XL moved to dismiss, arguing that (1) *Smilovits* and *Maverick* were "related"; (2) the Specific Matter Exclusion barred coverage for *Maverick*; (3) the Policies' notice provisions bar coverage; and (4) *Maverick* was settled without the insurers' consent, in violation of the Policies. B463-465. National Union joined XL's motion, seeking dismissal under the same policy provisions. B483-488. First Solar then moved for partial summary judgment on the issue of "relatedness," arguing that *Maverick* and *Smilovits* were not "related" under the terms of the 2014-2015 Policy. B385-391.

The Superior Court granted XL's motion to dismiss, granted National Union's joinder, and denied First Solar's motion for partial summary judgment. *See* Op. 17-18. It found that "the *Smilovits* Action and the *Maverick* Action are fundamentally identical" and that *Maverick* was therefore a "Related Claim," meaning it was "Claim first made at the time of the *Smilovits* Action," in 2012. Op. 17. As a result, the court held it was not covered by National Union's policy for the 2014-2015 policy period. *Id.* The Court did not reach Defendants' alternative arguments. *Id.*

This appeal followed.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY DISMISSED FIRST SOLAR'S COMPLAINT BECAUSE THE MAVERICK OPT-OUT ACTION AND THE SMILOVITS SECURITIES CLASS ACTION ARE RELATED

A. Question Presented

Whether the Superior Court correctly held that First Solar's claim for insurance coverage under the 2014-2015 Policy for the *Maverick* Action is "related" to its Claim for coverage of the *Smilovits* Action, meaning the *Maverick* Claim is deemed first filed during the 2011-2012 Policy period and falls outside the scope of the 2014-2015 Policy. Yes. (Preserved at B344-349; B376-383).

B. Scope of Review and Legal Standard

The interpretation of insurance contracts involves legal questions and is thus reviewed *de novo*. *In re Solera Ins. Coverage Appeals*, 240 A.3d 1121, 1130 (Del. 2020). Similarly, "[t]his Court reviews a grant or denial of a motion for summary judgment *de novo*." *Id.* It likewise reviews *de novo* the decision to grant or deny a motion to dismiss. *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011).

Like any other 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). "The Court is also to interpret an insurance policy in a manner that does not render any provisions 'illusory or meaningless.'"

Med. Depot, Inc. v. RSUI Indem. Co., 2016 WL 5539879, *7 (Del. Super. Sept. 29, 2016) (citations omitted).

"Delaware courts will not 'destroy or twist' the words of a clear and unambiguous insurance contract." *Solera*, 240 A.3d at 1131 (quoting *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982)). A policy "is not ambiguous merely because the parties do not agree on its construction." *Id.* A policy "is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *Id.* at 1131 (citations omitted).

C. Merits of the Argument

The Superior Court held that *Maverick* was related to *Smilovits* and was therefore deemed first filed in 2012, before the inception of the 2014-2015 Policy. The Superior Court's holding was correct.

1. Maverick is related to Smilovits

First Solar reported *Smilovits* to National Union under the 2011-2012 Policy. The Relation Back provisions in both the 2011-2012 Policy and the 2014-2015 Policy provide that any subsequent Claim "arising out of, based upon or attributable to the facts alleged" in *Smilovits*, or any Claim "alleging any Wrongful Act which is the same as or related to any Wrongful Act alleged" in *Smilovits* relate back to, and are thus deemed first made, under the 2011-2012 Policy. A67; B241.

First Solar initially reported the *Maverick* opt-out to its 2011-2012 tower as well. First Solar also repeatedly argued that *Maverick* was "related" to *Smilovits* when litigating *Maverick*, affirmatively relying on the "substantial overlap" between the two complaints, and acknowledging that the two complaints contained "nearly identical allegations." B78; B143. Consistent with First Solar's own representations, *Maverick* meets the definition of a Claim "arising out of" and "related to" *Smilovits* and is therefore deemed first made in 2012. Consequently, First Solar was able to (and did) obtain coverage for its Claim for *Maverick* under the 2011-2012 tower. But by the same logic, the 2014-2015 Policy bars additional coverage.

a. The terms "arising out of" and "related to" carry broad meanings

Courts "broadly construe[]" the term "'arising out of' . . . to require some meaningful linkage between the two conditions imposed in the contract." *Pac. Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1257 (Del. 2008). "Delaware law has [] adopted the construction that 'arising out of' is broader than 'caused by,' and is understood to mean 'originating from,' 'having its origin in,' 'growing out of,' or 'flowing from.' In short, it means 'incident to, or having connection with.'" *Goggin v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2018 WL 6266195, *4 (Del. Super. Nov. 30, 2018) (citations omitted).

Further, "[c]laims are 'related' if there is a logical or causal connection between them." *In re DBSI, Inc.*, 2011 WL 3022177, *4 (Bankr. D. Del. July 22, 2011) ("Claims may be related even if they allege different types of causes of action and arise from different acts."); *see also John Wyeth & Bro. Ltd. v. CIGNA Int'l Corp.*, 119 F.3d 1070, 1074 (3d Cir. 1997) (similar; *citing Webster's Third New International Dictionary*, 1916 (1971)).

Finally, because the policies use the disjunctive "or" to distinguish Wrongful Acts that are the same as *or* related to those alleged in *Smilovits*, the Court must interpret "related to" more broadly than "the same as" to give meaning to both clauses. "[E]ach term [] must be afforded a separate and independent meaning." *See IDT Corp. v. U.S. Specialty Ins. Co*., 2019 WL 413692, *9 (Del. Super. Jan. 31, 2019) (ruling defendants incorrectly "offer[ed] a narrow reading" for the definition of "Wrongful Act" because the policy used "a disjunctive 'or'"); *Legion Partners Asset Mgmt., LLC v. Underwriters at Lloyds London*, 2020 WL 5757341, at *8 (Del. Super. Sept. 25, 2020) (similar).

b. Maverick "arises out of" and is "related to" Smilovits

When First Solar shareholders filed *Smilovits* on March 12, 2012, the *Maverick* plaintiffs were members of the putative class. If the *Maverick* plaintiffs had stayed in the class, they would have recovered a portion of the *Smilovits* settlement (and been bound by its terms), just like any other class member.

While the *Maverick* plaintiffs opted out, they complained about the same underlying fraud. In both cases, First Solar shareholders sued the same defendants, alleging the same design defects, manufacturing flaws, cost per-watt metrics, and ultimate grid parity goals, and relying largely on the same alleged corrective disclosures that revealed First Solar's true financial condition. *See* A245-246 (SAC ¶¶ 1-4); A180-A181 (MC ¶¶ 1-8). The allegations span the same timeframe, beginning in 2008 and continuing through February 2012, when First Solar's corrective disclosures unraveled its fraudulent scheme. *See supra* Section B.1. And the purchasing timelines for the two sets of plaintiffs "clearly overlap and cover the same 10 months in 2011." Op. 15.

At their core, both suits alleged the "same fraudulent scheme": "artificially raising stock prices by misrepresenting First Solar's ability to produce solar electricity at costs comparable to the costs of conventional energy production"—whether described as achieving "grid parity" or in some other terms. Op. 16. The complaints' core allegations—whether related to manipulation of "cost per watt" metrics or concealment of "manufacturing excursions"—served that goal. *See* A425, A428-A431 (SAC ¶¶ 2, 21, 28); A180-181, A185 (MC ¶¶ 3-7, 29).

Many of the details in the complaints were identical. Both alleged that First Solar's scheme began when it started to conceal manufacturing and design defects, including a "manufacturing excursion" that could result in premature power loss in

affected modules, *compare* A431-433, A441-447, A545-546 (SAC ¶¶ 28-29, 50, 220) *with* A185-191, A241 (MC ¶¶ 29-51, 242), as well as panel degradation and heat-related problems, *compare* A434-436, A441-448, A553 (SAC ¶¶ 34-36, 50-51, 220), *with* A191-199, A241 (MC ¶¶ 53-82, 242). Both further explained how the heat-related defect was particularly damaging to First Solar's sun-dependent business model. To cover up these defects, First Solar allegedly issued false financial statements that improperly accounted for the costs associated with the modules in violation of GAAP; it also made false and misleading statements regarding its revenues and its success installing modules. *Compare, e.g.*, A497-499 (SAC ¶ 139), *with* A210 (MC ¶ 129).

Having hid the true state of its ability to produce solar power at low costs, First Solar allegedly furthered its scheme by affirmatively promoting its ability to compete with fossil fuels. *Maverick* and *Smilovits* both refer to this goal as achieving "grid parity." *See* A534-535 (SAC ¶ 205(a)); A179 (MC ¶ 2). To achieve "grid parity," First Solar created a "roadmap." *See* A487, A534-537 (SAC ¶¶ 122, 205); A180 (MC ¶ 3). It then used First Solar's artificially lower costs in the roadmap itself, leveraging the purportedly lowered costs as a baseline to show why First Solar's grid parity goals were achievable.[6]

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[6] For example, as detailed in the *Maverick* complaint, First Solar outlined the grid-parity roadmap in 2009 at its Annual Analyst/Investor Meeting in 2009. A204-205 (MC ¶ 103). This roadmap included a roadmap for "reduc[ing] module costs

Given the near-complete overlap in the underlying factual allegations, the Superior Court correctly held that the two shareholder actions were related and fundamentally identical. Op. 17. Thus, the 2014-2015 Policy's Related Claims provision limits Coverage to the 2011-2012 Policy.

c. First Solar's attempts to distinguish Maverick are superficial and directly contradict its prior positions

After asserting that the two actions were "related" in federal court, and after seeking reimbursement for *Maverick* under its 2011-2012 Policies based on a theory of relatedness, First Solar now seeks to expand its insurance coverage beyond the terms of its 2011-2012 policies by contriving a series of *post hoc* distinctions between the two actions. None has merit.

First, First Solar argues that *Maverick* was unique because it focused on "grid parity," which, according to First Solar, was not the focus of *Smilovits*. OB 2. That is wrong. *Smilovits* specifically ***did*** allege misrepresentations related to "grid parity." *See* A534-535 (SAC ¶ 205(a)). And even though the *Smilovits* complaint did not repeat the term "grid parity" as many times as the *Maverick* complaint, the thrust of the allegations was the same: First Solar misrepresented its ability to

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from $0.93 per watt to $0.56-$0.63 per watt." The *Smilovits* complaint similarly alleges these baseline numbers were "misrepresented" as part of First Solar's "continued successful manufacturing cost reduction." A467-468 (SAC ¶ 91).

provide solar power at rates competitive with fossil fuel—which is what "grid parity" means.

Indeed, the second paragraph of the *Smilovits* complaint alleged that First Solar "spent years convincing investors that [it] had a winning formula for reducing manufacturing costs so rapidly and dramatically as to make solar power competitive with fossil fuels." A425 (SAC ¶ 2); *see* A428-429 (SAC ¶ 21). The *Maverick* complaint mirrors those allegations, noting that that "First Solar manipulated its published cost per watt metric," A180 (MC ¶ 5), as part of its fraudulent "plan to produce electricity from the sun at costs comparable to conventional electricity production methods – otherwise known as grid parity." A179 (MC ¶ 2).

Second, there is no support for First Solar's contention (OB 28-30) that the allegations regarding "cost-per-watt" manipulation were unique to *Smilovits*. First Solar defined "cost per watt" broadly to incorporate a number of different costs, and the phrase "cost per watt" appears throughout the *Maverick* complaint. *See, e.g.*, A199-200, A208, A212 (MC ¶¶ 83-89, 117, 137). *Maverick*, like *Smilovits*, alleged that First Solar manipulated the cost-per-watt metric as part of its fraudulent scheme. *Compare, e.g.,* A428-429 (SAC ¶ 21) ("[D]efendants engaged in a scheme to defraud investors by knowingly manipulating the cost-per-watt metric."), *with* A199-200 (MC ¶¶ 83-89) ("Defendants Manipulated First Solar's Published Cost Per Watt Metric Reported to Investors").

This Court should similarly reject First Solar's argument that "'grid parity' is a distinct and much broader metric than module 'cost-per-watt.'" OB 29. As *Maverick* alleged, lowering the Company's "cost per watt" lowered the "overall costs of producing electricity from solar energy and brought the Company closer to being able to create electricity at 'grid parity.'" A199 (MC ¶ 83). The two concepts were intertwined, and they are featured heavily in both complaints.

Third, First Solar's characterization that *Maverick* was "forward-looking" while *Smilovits* was "backward looking" is similarly belied by the two complaints. The *Maverick* complaint states that "[t]he statements alleged to be false and misleading concerned statements of existing or historical fact or conditions," and were ***not*** forward-looking. A248 (MC ¶ 268) ("The statutory safe harbor provid[ing] for forward-looking statements under certain circumstances does not apply to any of the allegedly false statements pleaded in this Complaint."); *see also* A180-181 (MC ¶ 6) (alleging misrepresentations based on "then-existing" problems at First Solar).

Fourth, First Solar also argues—for the first time on appeal—that *Maverick* is distinct because it alleged problems with First Solar's "Systems Business," while *Smilovits* alleged misrepresentations regarding the "Components Business." OB 25-28. To begin, "[b]ecause this argument was not raised below or in the briefs, it is waived." *Mammarella v. Evantash*, 93 A.3d 629, 636 & n.34 (Del. 2014) (citing Supr. Ct. R. 8). In any event, it is a false distinction. The *Maverick* complaint used

the words "Systems Business" only twice (when describing individuals' job titles), which is ***fewer*** times than the same phrase was used in the *Smilovits* complaint. *Compare, e.g.*, A471, A473, A478-479 (SAC ¶¶ 99, 103, 109), *with* A183, A243 (MC ¶¶ 21, 251).

In addition, *Maverick* alleged problems with "the design, manufacture, and sale of solar modules," which mirrors First Solar's *post hoc* definition of its Components Business, OB at 7, and it devoted entire sections of its complaint on the topic, *see, e.g.*, A185-199 (MC at 7-21) (Complaint headings: "Defendants Concealed the Existence and Severity of Known Defects in First Solar's Panels and Manufacturing Process Resulting in Hundreds of Millions of Dollars in Losses"; "Defendants Misrepresented Panel Degradation Rates and Concealed Heat-Related Problems with First Solar's Modules/Systems that Substantially Increased Costs").

Fifth, it is irrelevant that that *Maverick* tacked on additional causes of action to its complaint. Both *Maverick* and *Smilovits* assert violations of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. A556 (SAC ¶¶ 253-56); A250-253 (MC ¶¶ 275-88). Both assert violations of Section 20(a) of the Exchange Act. A557 (SAC ¶¶ 257-58); A253 (MC ¶¶ 289-90). And while *Maverick* also asserts violations of Arizona's securities laws, *see* A.R.S. §§ 44-1999(B), 44-1991(A)(2)-(3), those statutory provisions are nearly identical to Section 20(a) of the Exchange Act and Rule 10b-5. As for *Maverick*'s common law causes of action,

both require proof of a misrepresentation, no different than the federal causes of action.

Nor does it matter that *Maverick* may have sought additional types of damages than the *Smilovits* class. As the Superior Court recognized, the *Maverick* plaintiffs were apparently trying to recover more for themselves, Op. 16, and it is thus no surprise that they asserted additional legal theories to do so. What matters for relatedness, however, is that the underlying conduct forming the basis for *Maverick's* causes of action—regardless of how the legal theories were styled—was the same as *Smilovits*: Both relied "on the same subject, have a causal connection, and primarily rely on the same facts or occurrences." *Id.* And while First Solar points to two corrective disclosures that it contends the *Maverick* plaintiffs relied upon but the *Smilovits* plaintiffs did not (OB 32), both *Maverick* and *Smilovits* each relied on the same disclosures made on October 25, 2011; December 14, 2011; and February 28, 2012. Op. at 15-16.

The superficial nature of First Solar's purported distinctions is evident even from its own chart. OB 26-27. Below, National Union has reproduced First Solar's chart, then added the column on the right, shaded in grey, to illustrate the overlap between *Maverick* and *Smilovits*:

Purported Claim Distinction	**Class Action (*Smilovits*)**	***Maverick* Action**	**Actual Claim Similarities *(New Column)***
Date Filed	March 15, 2012	June 3, 2015	First Solar made its claim for *Maverick* under its 2011-2012 policies and was advised *Maverick* was a Related Claim. *See* A587. First Solar then sought and accepted reimbursement for *Maverick* under its 2011-2012 policies. *See* B368-369; B405-412.
Time Period at Issue	Class Period: April 30, 2008–February 28, 2012	May 2011–December 2011	"Although these periods are technically different, ***they clearly overlap and cover the same 10 months in 2011***." Op. 15 (emphasis added).

Purported Claim Distinction	**Class Action (*Smilovits*)**	***Maverick* Action**	**Actual Claim Similarities *(New Column)***
Alleged Wrongful Conduct	Concealed and misrepresented *historical* manufacturing and design defects impacting First Solar's Components Business	Misrepresented *future-looking* progress toward reaching grid parity, impacting First Solar's Systems Business	"***[B]oth cases involve the same fraudulent scheme***— artificially raising stock prices by misrepresenting First Solar's ability to produce solar electricity at costs comparable to the costs of conventional energy production." Op. 16 (emphasis added).
Business Unit Involved - *Not Raised Below*	Components Business	Systems Business	The *Maverick* complaint used the words "Systems Business" only twice, fewer times than the *Smilovits* complaint. A183, A243 (MC ¶¶ 21, 251). *Maverick* also contains sections discussing problems with First Solar's components business, A185-99 (MC at 7-21).

Purported Claim Distinction	**Class Action (*Smilovits*)**	***Maverick* Action**	**Actual Claim Similarities *(New Column)***
Plaintiffs	Class of all persons who purchased or otherwise acquired First Solar's publicly traded securities from April 30, 2008 to February 28, 2012	Individual Plaintiffs Maverick Fund, L.D.C.; Maverick Fund USA, Ltd.; Maverick Fund II, Ltd.; Maverick Neutral Fund, Ltd.; Maverick Neutral Levered Fund, Ltd.; Maverick Long Fund, Ltd.; and Maverick Long Enhanced Fund, Ltd.	"***The Maverick plaintiffs were originally part of the Smilovits Action before they opted-out*** and filed a new suit." Op. 15 (emphasis added).[7]
Causes of Action	Federal securities claims	Federal securities claims, Arizona securities laws, Common-law fraud, Negligent Misrepresentation	"***[B]oth suits clearly overlap by alleging violations of SEC Rules10b-5 and 20***." Op. 15 (emphasis added). Moreover, every cause of action in both suits requires a misrepresentation.

[7] Although First Solar's chart omitted a "defendants" row, the defendants were identical. A426-428 (SAC ¶¶ 10-17); A179 (MC ¶ 1 n.1).

Purported Claim Distinction	**Class Action (*Smilovits*)**	***Maverick* Action**	**Actual Claim Similarities *(New Column)***
Alleged "Target" for Misrepresentations	All persons who purchased or acquired securities from April 30, 2008, to February 28, 2012	Maverick personnel	"***The Maverick plaintiffs were originally part of the Smilovits Action before they opted-out*** and filed a new suit." Op. 15 (emphasis added).
Dates of Alleged Corrective Disclosures (Non-Overlapping Dates Italicized)	*7/29/2010*, *10/28/2010*, *2/24/2011*, *5/3/2011*, 10/25/2011, 12/14/2011, 2/28/2012	*8/17/2011*, *9/16/2011*, *9/21/2011*, *9/22/2011*, *9/28/2011*, 10/25/2011, 12/14/2011, *2/10/2012*, and 2/28/2012	"[T]he disclosures overlap. The underlying actions rely on an overall different number of disclosures, but they ***both rely on the disclosures made on October 25, 2011; December 14, 2011; and February 28, 2012.***" Op. 15-16 (emphasis added). Every corrective disclosure alleged in *Smilovits* is relied upon in *Maverick*.[8]

[8] *See* A185 (MC ¶ 29, 07/29/2010); A214-215 (*id.* at ¶¶ 146-151, 10/28/2010); A220-222 (*id.* at ¶¶ 168-178, 02/24/2011); A225-226 (*id.* at ¶¶ 186-191, 05/03/2011); A245 (*id.* at ¶¶ 257-258, 10/25/2011); A246 (¶¶ 260-263, 12/14/2011); A247 (¶¶ 265-266, 02/28/2012).

Purported Claim Distinction	**Class Action (*Smilovits*)**	***Maverick* Action**	**Actual Claim Similarities *(New Column)***
Relief Sought	Class certification; actual damages and attorneys' fees	Rescission or rescissionary damages; actual damages; punitive damages for common law fraud; pre- and postjudgment interest and attorneys' fees	Both *Smilovits* and *Maverick* sought "damages," "interest," "costs," "attorneys' fees," and such "other" "relief as the Court may deem just and proper." *See* A557 (SAC at 133, Prayer for Relief), A258 (MC at 80, Prayer for Relief).

2. The Court should reject First Solar's alternative argument that only an unidentified part of the Maverick Action is "related"

At the end of its brief, First Solar offers a fallback argument, contending that even if certain Wrongful Acts from *Maverick* are "related" to *Smilovits*, there would still be some (unidentified) portion of *Maverick* that should be "deemed as . . . unrelated and not 'arising out of'" *Smilovits*. OB 37-38. This argument is baseless.

As the Superior Court held, the two civil proceedings are "related" in their entireties because their allegations depend on the same fraudulent scheme. The two civil proceedings "arise out of" the same facts and the same Wrongful Acts, which are inexorably intertwined in the respective complaints. Op. 16. Indeed, First Solar

offers no conceivable method of distinguishing between the "related" and "unrelated" portions of the *Maverick* Action. None exists.

First Solar's citation to *AT&T Corp. v. Faraday Capital Ltd.*, 918 A.2d 1104, 1109 (Del. 2007), is therefore inapposite. In *AT&T*, the Court held that separate causes of action "***may***" constitute separate "[c]laims," so long as they do not "arise out of the same underlying wrongful conduct," a question that this Court declined to address. *Id.* (emphasis added). But here, the Superior Court correctly found that the two civil proceedings ***did*** arise from the same "wrongful conduct" and that they were related for that reason. Op. 16-17. Moreover, the definition of "Related Claim" in this case is broader than the policy that the court interpreted in *AT&T*; a "Related Claim" is defined as "a Claim alleging, ***arising out of, based upon or attributable to any facts or Wrongful Acts that are the same as or related*** to those that were . . . alleged in a Claim made against an Insured." A67 (emphasis added). Under that broad standard, *Maverick*'s additional fraud-based causes of action does ***not*** change the fact that the Claim itself was related to the same underlying fraud.

II. THE POLICIES DO NOT USE A "FUNDAMENTAL IDENTITY" STANDARD, AND THE TERMS IN THE POLICIES LEAVE NO DOUBT THAT THE MAVERICK OPT-OUT ACTION AND THE SMILOVITS SECURITIES CLASS ACTION ARE RELATED

A. Question Presented

Whether the Superior Court erred in holding that the "Related Claim" provisions in First Solar's policies are governed by a "fundamental identity" standard. Yes. (Preserved at B385-391).

B. Scope of Review and Legal Standard

The standard of review is *de novo*. *See* Argument Section I.A, *supra*.

C. Merits of the Argument

While the Superior Court reached the correct result, it applied a more stringent standard than what First Solar's policies provide. Specifically, the Superior Court accepted First Solar's argument that relatedness is evaluated under a "fundamentally identical" standard. But that "standard" has no basis in the unambiguous terms of First Solar's policies, it involves a misconstruction of other Superior Court decisions, and it was just rejected in another Superior Court decision. *See Sycamore Partners Mgmt, L.P. v. Endurance Am. Ins. Co.*, 2021 WL 4130631, *11 (Del. Super. Sept. 10, 2021).

1. The "fundamentally identical" standard violates multiple canons of policy interpretation

The term "fundamentally identical" appears nowhere in the 2014-2015 Policy. And "neither the Delaware Supreme Court nor any other jurisdiction has adopted 'fundamental identity' as the standard governing all relatedness inquiries, regardless of the contractual language at issue." *Sycamore*, 2021 WL 4130631, at *11. Applying that "standard" therefore runs afoul of the most fundamental canon of contract interpretation: that unambiguous terms be given their "their plain and ordinary meaning." *O'Brien*, 785 A.2d at 291; *see Sycamore*, 2021 WL 4130631, at *11.

First Solar does not dispute this bedrock principle; nor does it contend that any of the contract terms are ambiguous. Instead, it argues that a "reasonable reading of the plain language requires a different lens depending on whether the provision provides or excludes coverage," and it leans heavily on cases imposing the burden of proving a policy exclusion on insurers. OB 19.

The legal principles First Solar cites are inapplicable. The doctrine of *contra proferentem*—under which "the language of an insurance policy must be construed most strongly against the insurance company that drafted the policy"—applies *only* when policy terms are ambiguous. *Med. Depot*, 2016 WL 5539879, at *7. It has no place here, where the definition of a "Related Claim" is "clear and unambiguous." Op. 17.

Requiring "fundamental identity" would violate another contractual canon by rendering policy terms illusory. *See id.* First Solar asks this Court to erase any distinction in the disjunctive list of terms that define a "Related Claim": "arising out of, based upon, . . . ***or*** related to," A67 (emphasis added), and to instead replace each of those distinct terms with two words: "fundamentally identical." But it is well established that "each term [in a Policy] must be afforded a separate and independent meaning," and that the "disjunctive 'or'" requires a broader reading of the policy language. *See IDT Corp.*, 2019 WL 413692, at *9. Any other interpretation would render the Policy terms "illusory or meaningless." *O'Brien*, 785 A.2d at 287 (quoting *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992)).

2. Decisions requiring "fundamental identity" take that phrase out of context from earlier decisions that impose no such requirement

First Solar insists that the "fundamentally identical" standard applies because it "has long been applied by Delaware courts." OB 21. Not so. In addition to involving significantly different facts, First Solar's cited authority shows that "fundamentally identical" has morphed from a descriptive phrase to a prescriptive one, overriding plain policy language and contravening the unchallengeable rule that insurance policies must be interpreted according to their plain meaning. The Superior Court recognized as much just this month. *See Sycamore*, 2021 WL

4130631, at *11 (rejecting "fundamentally identical" standard as inconsistent with policy language and canons of contract interpretation).

The "fundamentally identical" phrase first appeared in *United Westlabs, Inc. v. Greenwich Ins. Co.*, 2011 WL 2623932, *11 (Del. Super. June 13, 2011), *aff'd*, 38 A.3d 1255 (Del. 2012), which held that the "fundamentally identical" nature of the acts at issue in that case was ***sufficient*** to satisfy interrelated wrongful acts provisions. *Id.* at *10-11. But the case did not hold that such a relationship was ***necessary*** to establish relatedness, and the policy language in that case contained no such requirement. *Id.* Instead, the court found that the actions were related because they were fundamentally identical. *Id.*

Put differently, although two "fundamentally identical" claims will necessarily be "related," it does ***not*** follow that, to be "related," claims must be "fundamentally identical." Yet this textbook logical fallacy—conflating sufficient conditions with necessary ones—became the unfounded basis for certain decisions *requiring* fundamental identity.

In *RSUI Indemnity Co. v. Sempris, LLC* (OB at 21), the Court quoted *United Westlabs*, but did not require claims to be "fundamentally identical." 2014 WL 4407717, *6-*7 (Del. Super. Sept. 3, 2014). Rather, the court recognized that it "should use a broad interpretation of the phrases 'arising out of' and 'or in any way involving' to find that the [subject] Lawsuit is related to the Prior Lawsuits." *Id.* at

*6. The Court ultimately held that the underlying cases were not related, partly because "[t]he underlying facts in the Prior Lawsuits, as alleged at the time the [subject] Lawsuit was filed," would not give rise to the Telephone Consumer Protection Act cause of action alleged in the other lawsuit. *Id.* That is not the case here where both *Smilovits* and *Maverick* alleged violations of the same federal securities laws, and where the facts underlying the two lawsuits overlap.

First Solar also relies on *Medical Depot* (OB 33-34), which applied a "fundamentally identical" standard to a broad "related claims" provision. 2016 WL 5539879, at *13-14. *Medical Depot* used the "fundamentally identical" phrase once, holding that the two lawsuits at issue—one alleging wrongful death and the other alleging violation of California's Business & Professions Code—were not related because the "two actions [were] not fundamentally identical." *Id.* at *14. The court did not offer any explanation as to why claims must be "fundamentally identical" to be related, and it appears to have taken that standard out of context from *Sempris* (cited at *Med. Depot*, 2016 WL 5539879, at *13). But in any event, the underlying actions in *Medical Depot* were neither "related" nor fundamentally identical: The relevant facts for an action seeking redress for a "sling[] causing a death" differed entirely from the relevant facts in an action where the plaintiff "never claimed that the sling caused [] physical harm." *Id.* at *14. The only real commonality between the two actions was the manufacture of the sling itself. *See id.* Unlike the distinct

injuries in *Medical Depot*, *Smilovits* and *Maverick* rely on First Solar's misrepresentations about its "ability to produce solar electricity at costs comparable to the costs of conventional energy production," Op. at 16, and they both allege the same economic injury: purchase of First Solar shares at inflated prices.

First Solar's citation to *Providence* fares no better. OB 35 (citing *Providence Serv. Corp. v. Ill. Union Ins. Co*., 2019 WL 3854261, *3 (Del. Super. July 9, 2019)). In that case, the Court acknowledged that "[a]ctions ***may*** be 'related' when they involve 'fundamentally identical' claims." 2019 WL 3854261, at *2 (emphasis added). But the Court did not require that narrow analysis to determine relatedness in all instances. Instead, the court held that the "similarities between the two [underlying] Actions are outweighed by their differences." *Id.* at *4.

In *Pfizer*, the court applied a "fundamentally identical" standard and held that two subject actions with myriad differences were not fundamentally identical. *Pfizer Inc. v. Arch Ins. Co.*, 2019 WL 3306043 (Del. Super. July 23, 2019). In *Pfizer*, the defendants were different companies, the plaintiffs were shareholders of those separate companies, the allegations "involved entirely distinct misrepresentations of very different health risks associated with [a drug]," and those alleged misrepresentations were made by different parties. *Id.* at *10. The court found that the two actions were "truly, in all relevant respects, different." *Id.* None of those myriad differences appear in this case.

First Solar's citation to *Northrop Grumman Innovation v. Zurich American Insurance Company* is similarly inapposite. 2021 WL 347015, *11 (Del. Super. Feb. 2, 2021). It applied the "fundamentally identical" standard, without regard for the text of the policy at issue. *Id.* at *11-12. Moreover, the contentions at issue had far less in common than the two civil proceedings here: They had "[v]ariations in timing, breed of securities violation, *mens rea*, motive, and burdens of proof, under each regulation." *Id.* at *11. Indeed, one set of allegations involved *pre*-merger acts designed to convince shareholders to approve the merger, while the second set involved *post*-merger actions designed to mislead shareholders of the successor company about the value of their investments. *Id.* at *5. In contrast, here, the two civil proceedings "involve the same fraudulent scheme—artificially raising stock prices by misrepresenting First Solar's ability to produce solar electricity at costs comparable to the costs of conventional energy production." Op. 16.

* * *

In sum, First Solar's cited authorities are distinguishable on their facts. But because Delaware law requires that unambiguous contract provisions be applied as written, *Solera*, 240 A.3d at 1131, this Court should also clarify that "fundamental identity" is not the correct standard. The plain, broad language of the policy terms here—"arising out of" and "related to"—are thus irreconcilable with a "fundamentally identical" standard, as courts that have considered the question

(including under Delaware law) agree.[9] As Judge LeGrow recently held, "neither the Delaware Supreme Court nor any other jurisdiction has adopted 'fundamental identity' as the standard governing all relatedness inquiries, regardless of the contractual language at issue." *Sycamore*, 2021 WL 4130631, at *11.

[9] *See, e.g., AT&T Corp. v. Clarendon Am. Ins. Co.*, 2006 WL 1382268, *15 (Del. Super. Apr. 13, 2006) ("[n]othing in the policy requires that a claim involve precisely the same parties[,] legal theories, 'Wrongful Act[s],' or requests for relief") (citation omitted); *RSUI Indem. Co. v. WorldWide Wagering, Inc.*, 2017 WL 3023748, *7 (N.D. Ill. July 17, 2017) (under Delaware law, concluding "[t]he exclusion . . . did not require that litigation be identical to the Riverboat Matter to be excluded from coverage, litigation merely had to arise from or be based in part on the Riverboat Matter."); *see also Zunenshine v. Exec. Risk Indem., Inc.*, 1998 WL 483475, *5 (S.D.N.Y. Aug. 17, 1998) (similar), *aff'd*, 182 F.3d 902 (2d Cir. 1999); *HR Acquisition I Corp. v. Twin City Fire Ins. Co.*, 547 F.3d 1309, 1316 (11th Cir. 2008); *One James Plaza Condo. Ass'n, Inc. v. RSUI Grp., Inc.*, 2015 WL 7760179, *6 (D.N.J. Dec. 2, 2015).

III. THE SPECIFIC MATTER EXCLUSION INDEPENDENTLY PRECLUDES COVERAGE

A. Question Presented

Whether, assuming *arguendo* that First Solar could establish that its claim for *Maverick* was first made and reported during the 2014-2015 policy period and was not related to *Smilovits*, First Solar's claim for *Maverick* is nonetheless barred by the 2014-2015 Policy's Specific Matter Exclusion. Yes. (Preserved at B344-345; B383-B384).[10]

B. Scope of Review and Legal Standard

The standard of review is *de novo*. *See* Argument Section I.A, *supra*. Although the Superior Court did not address the Specific Matter Exclusion below, it was adequately presented, and this Court can affirm for any reason supported in the record. *Hercules Inc. v. AIU Ins. Co.*, 783 A.2d 1275, 1277 (Del. 2000).

C. Merits of the Argument

Assuming *arguendo* that First Solar's claims for *Maverick* and *Smilovits* are not Related Claims, the 2014-2015 Policy's Specific Matter Exclusion provides an alternative basis to affirm.

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[10] Defendants also moved to dismiss because First Solar failed to provide proper notice and failed to obtain consent before settling *Maverick*. B329-334; B344-353. These issues provide two additional alternative bases to affirm.

1. The Specific Matter Exclusion precludes coverage

The Specific Matter Exclusion broadly precludes coverage for any Claim that "aris[es] out of, [is] based upon, attributable to or ***in any way related directly or indirectly, in part or in whole***, to an Interrelated Wrongful Act" alleged in specifically identified matters, including *Smilovits*. A83 (emphasis added). The definition includes "any Wrongful Act which is the same as, ***similar or related to*** or a repetition of any Wrongful Act alleged in [*Smilovits*]." *Id.* (emphasis added). The Specific Matter Exclusion applies here because (as discussed) *Maverick* alleges the same fraudulent scheme as *Smilovits*, it was brought against the same defendants, it related to the same inflated stock price, and it involved many of the same alleged misrepresentations and corrective disclosures.

The differences First Solar identifies—for example the different causes of action—are irrelevant, as the Specific Matter Exclusion applies "regardless of whether or not such Claim . . . involved the same or different Insureds, the same or different legal causes of action or the same or different claimants . . . ." A82-A84. By its express terms, this provision reaches broadly—using expansive phrases like "in any way related directly or indirectly, in part or in whole.". *See Tapestry on Cent. Condo. Ass'n v. Liberty Ins. Underwriters Inc.*, 461 F. Supp. 3d 926, 935 (D. Ariz. 2020) (recognizing "the low standard of 'in any way related.'"); *Sempris*, 2014 WL 4407717, at *6 ("[I]n any way involving" is a "mop-up clause intended to

exclude anything not already excluded by the other clauses."). By its plain terms, the Specific Matter Exclusion encompasses *Maverick*.

2. First Solar's Specific Matter Exclusion arguments underscore the flaws in the "fundamentally identical" test

First Solar does not argue that *Maverick* falls outside the scope of the broad language in the Specific Matter Exclusion. Instead, it falls back on the "fundamentally identical" standard. In doing so, First Solar only illustrates the flaws in that standard, which has no basis in the text of the Specific Matter Exclusion.

First Solar acknowledges (OB 16 n.7) that the Superior Court did not rule on the Specific Matter Exclusion, but it insists (OB 20 n.8) that the Specific Matter Exclusion is the only applicable provision. First Solar then brushes the importance of applying particular provisions aside, asserting that any difference in language between the Specific Matter Exclusion and the "relatedness" provision is immaterial because the "fundamental identity" standard governs no matter what the Policy actually says. *Id.* First Solar's argument thus admits that its "fundamental identity" test has no basis in the language of the 2014-2015 Policy.

Indeed, First Solar asks this Court to apply a "fundamental identity" standard any time successive claims are made, and irrespective of any policy language to the contrary. But the Specific Matter Exclusion is a separate agreed-upon contractual provision that precludes coverage for broad categories of Claims that "in whole or in part" involve the same facts as *Smilovits*. Applying a "fundamentally identical"

standard would render the Specific Matter Exclusion "illusory or meaningless," offending basic principles of contract interpretation. *See Med. Depot*, 2016 WL 5539879, at *7. The Superior Court rejected this argument just recently in *Sycamore*. 2021 WL 4130631, at *11. This Court should follow suit and decline First Solar's invitation to interpret the terms of the Policy without regard to its contractual language. *See Solera*, 240 A.3d at 1131.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Superior Court.

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