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IN THE SUPREME COURT OF THE STATE OF DELAWARE

STILLWATER MINING COMPANY, Plaintiff-Below, Appellant v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, ACE AMERICAN INSURANCE COMPANY, and QBE INSURANCE CORPORATION, Defendants-Below, Appellees.	No. 24, 2022 ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE C.A. No.: N20C-04-190 AML CCLD CONSOLIDATED

OPENING BRIEF ON APPEAL OF PLAINTIFF-BELOW/APPELLANT STILLWATER MINING COMPANY

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NATURE OF PROCEEDINGS

Plaintiff-Below/Appellant Stillwater Mining Company ("Stillwater") appeals the Superior Court's Memorandum Opinion (attached as Exhibit A), which granted the Defendants-Below/Appellees' ("the Insurers") motion to dismiss Stillwater's Amended Complaint with prejudice. The Defendants-Below/Appellees are primary insurer National Union Fires Insurance Company of Pittsburgh, PA ("NUFI"); and excess insurers ACE American Insurance Company and QBE Insurance Corporation ("Excess Insurers"). Stillwater also appeals from the Superior Court's oral ruling denying its motion to voluntarily dismiss, without prejudice, its Delaware complaint (Mem. Op., pp. 12-13, A0155), and the Order denying Stillwater's motion to stay this action in favor of its Montana action. (A601).

The Insurers issued Directors and Officers ("D&O") Policies to Stillwater, a Montana citizen with its principal place of business in Montana. (A0198-0284). During the policy period of May 1, 2016 to August 1, 2017, Stillwater stockholders filed the Appraisal Action,[1] under 8 *Del. C.* §262. (A0167-196, ¶¶20-21). Without reserving rights or disclaiming coverage, the Insurers refused to advance pay defense costs for the Appraisal Action as required by the D&O Policy. (A0185).

[1] *In re Appraisal of Stillwater Mining Company*, C.A. No. 2017-0385-JTL, Delaware Chancery Court ("Appraisal Action").

Stillwater defended itself in the Appraisal Action with no contribution from the Insurers, incurring over $23 million in attorneys' fees and other costs. (A180).

Three years after tender of the defense, the Insurers initiated an action in Delaware, seeking a declaration of no coverage for the Appraisal Action. Stillwater then counter-sued in a separate action, naming excess insurers as parties because the defense costs in the Appraisal Action exceeded NUFI's policy limit. (Mem. Op., p. 10; A0180). The Superior Court consolidated the two actions and re-aligned the parties, naming Stillwater as plaintiff. (Mem. Op, p. 10). The Superior Court then stayed the action pending resolution of the appeal of *Solera Holdings, Inc. v. XL Specialty Ins. Co.*, 213 A.3d 1249 (Del. Super. 2019) ("*Solera I*"). This Court reversed *Solera I*, holding for the first time that an action under Delaware's appraisal statute is not for a "violation" of law. *In re Solera Ins. Coverage Appeals*, 240 A.3d 1121 (Del. 2020) ("*Solera II*"). After that decision, Stillwater filed an action in Montana state court stating its Montana law claims for estoppel arising from NUFI's and the Excess Insurers' breach of the duty to defend under §28-11-316, Montana Code Annotated ("MCA"), and for violations of Montana's Unfair Trade Practices Act, §33-18-242, MCA, *et seq*. (A0529-551).

Simultaneously, Stillwater moved the Superior Court for voluntary dismissal of its Delaware indemnification complaint in favor of its Montana failure-to-defend action. (A0044-51). When the Superior Court denied dismissal without

prejudice (A0155), Stillwater amended its Delaware complaint to assert its Montana law defense demand-based claims herein, and sought a stay (A0167-196) in favor of allowing its Montana action to proceed. Stay was denied. (A0601-602). The Insurers moved to dismiss all of Stillwater's claims under Superior Court Civil Rule 12(b)(6) ("Rule 12(b)(6)"). (A0309-345). The Superior Court erroneously determined that Delaware law applied to all of Stillwater's claims, and then dismissed all of those claims with prejudice. (Mem. Op., pp. 27-28).

Stillwater appeals from the denial of the motion to voluntarily dismiss its initial complaint without prejudice; the denial of its motion to stay this action in favor of its Montana state court action; and the grant of the Insurers' motion to dismiss all of Stillwater's claims with prejudice under Rule 12(b)(6).

SUMMARY OF ARGUMENT

1. Montana law, and not Delaware law, applies to the claims asserted by Stillwater in the Amended Complaint. Montana has the most significant relationship to the litigation because Montana strictly regulates the defending and handling of insurance claims under policies of insurance issued in Montana, and no parties to this dispute have their principal places of business in Delaware, where Stillwater alone of the parties is incorporated, but does not have an office or otherwise carry out its Montana-specific business of hard rock metal mining and processing. In addition, the undisputed evidence establishes the policy was negotiated, made and performed in Montana. At the very least, Montana law must be applied to the uniquely Montana-law claims asserted in Counts 3 and 4 based on the Insurers' breach of duties imposed by Montana statute upon insurers who issue policies in Montana, as all the Insurers here did.

2. The Superior Court committed reversible error in dismissing all three of Stillwater's claims with prejudice based solely on its finding that Delaware law should be applied to coverage claims. Two of the claims are duty-to-defend-based claims viable *without* reaching the coverage, *i.e.,* duty-to-indemnify, question. In considering whether NUFI breached its duty to defend a Montana insured, the court may not consider whether coverage actually extends to the loss, but rather can consider only whether the insurer made an unequivocal demonstration that no

possibility of coverage exists. *Tidyman's Mgmt. Servs. Inc. v. Davis*, 330 P.3d 1139, 1149 (Mont. 2014) ("*Tidyman's I*"). Similarly, an insurer may be found liable for violating the UTPA by failing to affirm or deny coverage timely, or for failing to investigate, regardless of the ultimate coverage determination. §33-18-242, MCA. The Superior Court erred in dismissing these viable claims without considering the merits.

3. The Superior Court abused its discretion in denying Stillwater's motion to voluntarily dismiss this action in favor of pursuing its Montana claims in a Montana venue. The Superior Court ignored controlling law by refusing dismissal in the absence of finding any prejudice to the Insurers that would result from dismissal, in particular because the court expressly acknowledged all other factors weighed in favor of voluntary dismissal.

4. The Superior Court also abused its discretion in denying Stillwater's motion for a stay. The court's primary reason for denying the stay – the timing of the motion – is clearly erroneous. Moreover, the Superior Court misapplied the *Cryo-Maid* factors.

I. STATEMENT OF FACTS

A. STILLWATER'S PROCUREMENT OF THE D&O POLICIES IN MONTANA

In 2016, while working at her office in Columbus, Montana, Stillwater employee Ranetta Jones reviewed, selected, and procured the D&O Policies from NUFI and the Excess Insurers. (A0556, ¶7). The Policies listed Stillwater's headquarters in Columbus, Montana as the "Named Entity Address" in the Declarations. (A0558, ¶45). The Policies' premiums were paid from Montana, and the Policies were delivered to Stillwater in its Columbus, Montana office. (A0557, ¶¶8, 9, A0198-284). Having issued insurance policies to an insured (Stillwater) in Montana, the Insurers subjected themselves to the regulation of the Montana Insurance Code – Title 33 of the Montana Code Annotated – including the Montana Unfair Trade Practices Act ("UTPA"). *See* §§33-15-101, *et seq.;*33-18-201, *et seq.,* MCA.

The D&O Policies were in effect during the relevant policy period from May 1, 2016 to August 1, 2017. (A0558). The NUFI D&O Policy covered Stillwater for "Loss of any Organization: (1) arising from any Securities Claim made against such Organization for any Wrongful Act of such Organization . . . ." (A0182, ¶45). The D&O Policy defined "Loss" to include "Defense Costs," and required that the Insurers "advance" Stillwater's Defense Costs "on a current basis" as they were billed. (A0183, ¶¶49-51). In the Policy, NUFI acknowledged Montana's

regulatory authority over insurance, adding an endorsement to the Policy stating that it would conform to Montana law: "The Provisions of this policy conform to the minimum requirements of Montana law and control over any conflicting statutes of any state in which the Insured resides on or after the effective date of this policy." (A0184, ¶54).[2] The Montana Supreme Court has long informed insurers who sell policies in Montana that through such a "conformed to statute" endorsement, the provisions of Montana's statutes -- including the duty-to-defend statute, §28-11-316, and the UTPA -- "clearly override[]" any conflicting language in the policy. *Peris v. Safeco Ins. Co.*, 916 P.2d 780, 784 (Mont. 1996) (conforming policy to UTPA).

B. STILLWATER'S TENDER OF THE APPRAISAL ACTION TO THE INSURERS

During the relevant policy period, Stillwater stockholders filed the Appraisal Action[3] under 8 *Del. C.* §262. (A0173, ¶¶20-21). The Appraisal Action alleged a multitude of wrongful acts by Stillwater and its officers, in particular its former CEO, all of which required defense by Stillwater. (A0174-178). On April 25, 2017, Stillwater notified NUFI and the Excess Insurers of the appraisal demands

[2]The excess policies are follow-form policies that incorporate the NUFI Policy's terms and conditions. (Mem. Op., fn 13).

[3]*In re Appraisal of Stillwater Mining Company*, C.A. No. 2017-0385-JTL, Delaware Chancery Court ("Appraisal Action").

within days of receiving them, and specifically requested that NUFI "confirm approval to incur defense costs." (A0184, ¶55; A0299). The D&O Policies conformed to Montana law, which required the Insurers to defend under a reservation of rights and seek a timely declaration as to coverage. *Staples*, 90 P.3d at 384-85 (citing §28-11-316, MCA). As a Montana citizen with its principal place of business in Stillwater County, Montana, Stillwater justifiably expected, as alleged in the amended complaint, that the stringent Montana requirements for insurers' defense obligations would apply to any claims under the D&O Policies, and that the Insurers would otherwise follow Montana law since the policies were to be performed in, and were negotiated in, Montana. (A0183-84, ¶¶52-53); *see also* §28-11-316, MCA ("[d]uty of person indemnifying to defend"); and §28-3-102, MCA (interpretation of indemnity contract is by "law and usage" of "place of performance [or] place where it is made"). Stillwater also justifiably expected the Insurers must comply with Montana's UTPA. Unlike Delaware's' statutory scheme, violations of Montana's UTPA are enforceable by an independent statutory cause of action by insured against insurer, which Montana's legislature adopted as part of Montana's regulatory system. *See* §33-18-242(1), MCA ("independent cause of action against an insurer for actual damages caused by the insurer's violation" of UTPA).

From the time of Stillwater's demand for defense and indemnification made in April 2016, until July 31, 2019, there was no legal authority nationwide interpreting whether actions under Delaware's appraisal statute constituted a covered Loss under a D&O policy. Thus, when Stillwater tendered the Appraisal Action to the Insurers, the claim at least potentially implicated the D&O Policies' coverage for Securities Claims. (A0184, ¶58). However, NUFI failed either to accept coverage for Stillwater's defense of the Appraisal Action (merely advising it would issue a disclaimer letter that was never sent) or to seek a judicial determination of coverage, despite the lack of applicable legal authority. (A0185, ¶¶57-58, 65-66).

Stillwater defended itself in the Appraisal Action without any contribution from the Insurers. (A0565). That action was resolved in Stillwater's favor after trial by the chancery court on August 21, 2019, and affirmed on appeal by this Court on October 12, 2020. *Brigade Leveraged Capital Structures Fund, Ltd. v. Stillwater Mining Co*., 240 A.3d 3 (Del. 2020). Stillwater incurred over $23 million in attorneys' fees and other costs defending the Appraisal Action. (A0180, ¶38).

On July 31, 2019 – prior to the resolution of the Appraisal Action in Stillwater's favor – the Delaware Superior Court held that D&O insurers were obligated to cover an insured's losses resulting from an appraisal action. *Solera I*,

213 A.3d 1249. On November 5, 2019, Stillwater again demanded that NUFI pay defense costs incurred in the Appraisal Action, and notified the Excess Insurers. (A0299, A0565, ¶29). On November 12, 2019 – over two and a half years after tender – NUFI for the first time disclaimed coverage for the Appraisal Action, refusing to pay defense costs to Stillwater despite the ruling in *Solera I*. (A0564, ¶25). On February 11, 2020, Stillwater entered into mediation with the Insurers per the Policy's terms, and the Insurers continued to reject Stillwater's demands for advance pay of its defense costs. (A0565, ¶27). Stillwater's payment demands were made from its Montana offices, and had the Insurers met their obligations, payment would have been made to Stillwater in Columbus, Montana. (A0565, ¶29).

C. THE DELAWARE COVERAGE ACTION

Following mediation, on the first day allowed under the policy's language, April 13, 2020, NUFI rushed to the courthouse here and filed its action in Delaware Superior Court. (A0219). NUFI sought a coverage determination that, contrary to *Solera I*, the D&O Policy did not provide coverage for the Appraisal Action. (Mem. Op., p. 7). NUFI, thus, won the race to establish the coverage forum, and in the absence of any conflict of law, Stillwater filed a countersuit for indemnification under the D&O Policies as interpreted under Delaware law. (Mem. Op., p. 8). Stillwater filed a motion for judgment on the pleadings based

primarily on *Solera I.* (Mem. Op., p. 10). The Superior Court stayed briefing pending the appeal of *Solera I.* (Mem. Op., p. 10). The Superior Court then consolidated the two actions, re-aligned the parties, and named Stillwater the plaintiff. (D.I. 35).

D. DEVELOPMENT OF THE CONFLICT OF LAW

On October 23, 2020, this Court reversed *Solera I*, holding for the first time that an action under Delaware's appraisal statute is not for a "violation" of law. *Solera II*, 240 A.3d at 1121. As a result of *Solera II*, Delaware law now holds that a D&O insurer has no duty to provide coverage or defense for an appraisal action where the policy at issue requires a violation of law. Montana law, however, requires all insurers who provide policies to Montana insureds to provide a defense *until* the insurer either unequivocally demonstrates that no possibility of coverage exists *or* obtains a declaratory judgment that no duty to defend exists. *Staples*, 90 P.3d at 384-85. Thus, regardless of the ruling in *Solera II*, Montana law – which governs NUFI's conduct in handling claims – required NUFI to pay for Stillwater's defense at least until the Superior Court lifted the stay after *Solera II* and made a determination as to the duty to defend. Furthermore, because NUFI and the Excess Insurers had completely failed for over two years to reserve rights to deny coverage under any policy provision whatsoever, the Insurers are estopped from raising policy defenses to coverage. Under Montana law, the "consequence"

of the failure to defend is the loss of "the right to invoke insurance contract defenses as well as the right to assert policy limits." *Tidyman's Mgmt. Servs. v. National Union Fire Ins. Co.*, 378 P.3d 1139, 1186 (Mont. 2014) ("*Tidyman's II*").

NUFI is well aware that Montana's insurance regulatory scheme requires an insurer to provide a defense until making an unequivocal demonstration that coverage is not implicated, having been a losing party in two seminal cases before the Montana Supreme Court. In *Newman v. Scottsdale Ins. Co. and National Union Fire Ins. Co. of Pittsburgh, PA*, 301 P.3d 348 (Mont. 2013) ("*Newman*"), the Montana Supreme Court advised NUFI on how to avoid breaching Montana's duty to defend law. The Montana Court specifically instructed NUFI, there an excess insurer, "that there must exist an unequivocal demonstration that the claim against the insured does not fall within the policy coverage **before** an insurer can refuse to defend; otherwise the insurer has a duty to defend." *Id.* at 359 (emphasis added).

A year after *Newman*, NUFI again argued to the Montana Supreme Court, this time as a primary insurer, that a breach-of-the-duty-to-defend award should be reversed despite NUFI's decision to stop paying defense costs under a D&O policy similar to the one it issued to Stillwater. NUFI's appeal was unsuccessful. The Montana Supreme Court again instructed NUFI that "where an insurer believes it is not required to provide a defense under the policy, the prudent course of action

is to defend the insured under a reservation of rights and file a declaratory judgment action to discern coverage." *Tidyman's I*, 330 P.3d at 1149. Under Montana law, NUFI could not refuse to "advance defense costs" as they were incurred by its insured unless and until NUFI had unequivocally demonstrated that the tendered complaint did not "potentially implicat[e] the Policy." *Id.* at 1150. NUFI could not seek a later judicial determination of coverage under the policy because "by failing to defend under a reservation of rights while awaiting judicial determination" an insurer breaches the duty to defend and "is estopped from denying coverage." *Id.* at 1150-1152. In the follow-up appeal, the Montana Supreme Court further explained to NUFI that for insurers issuing policies in Montana, estoppel is the "punish[ment]" for denying defense before making the necessary "unequivocal demonstration." *Tidyman's II*, 378 P.3d at 1185.

Delaware law does not allow an individual cause of action to enforce violations of Delaware's claims-handling statute. Montana law allows an individual insurer to assert individual *statutory* causes of action against its insurer as part of Montana's regulation of insurers that issue policies in Montana. §33-18-242, MCA. Moreover, Montana law does not allow a non-defending insurer, such as NUFI, to assert coverage defenses never reserved by the insurer. *Id.* The Superior Court correctly acknowledged this actual conflict between Delaware and Montana law in the wake of *Solera II.* (Mem. Op., p. 18).

E. THE MONTANA ACTION

After *Solera II*, Stillwater sought to enforce its rights as a Montana insured to obtain a defense until an unequivocal demonstration of non-coverage is made by the insurer. *Staples*, 90 P.3d at 384. Stillwater filed suit against the Insurers and AIG Claims, Inc., the adjuster, in Montana state court. *Stillwater Mining Co. v. AIG Claims, Inc. et al*, DV 20-117, Montana Twenty-Second Judicial Court, Stillwater County, Montana. The Insurers removed the case to federal court based on diversity, claiming the adjuster – AIG Claims – was fraudulently joined. (A0384, A0387). Specifically, the Insurers asserted that Delaware law must apply, and that Delaware law does not allow Stillwater's claim against AIG's adjusting company. (A0390). The federal district court remanded, holding that because Montana law might well apply (A0391), and because Montana has long recognized a viable individual claim against an adjuster for violation of the claims-handling requirements of Montana's UTPA, the Insurers had wrongfully removed the action. (A0395). Longstanding precedent guided the federal court to this obvious result. (A0393). Nonetheless, the Insurers had succeeded in delaying the Montana action for six months by, *inter alia*, arguing Delaware law should control despite the "conformance to Montana law" provisions of the policy and Montana's statutory requirement that place of performance – Montana – provide the controlling law.

Upon remand to Montana state court, Insurers moved to dismiss Stillwater's action and Stillwater moved for summary judgment on the duty-to-defend claim. (A0539). By the time of remand on September 28, 2021, however, the Insurers had aggressively pushed the Delaware proceedings forward, but not towards a merits adjudication. The Superior Court had denied Stillwater's motion for voluntary dismissal and had heard argument on the Insurers' motion to dismiss. (A0001-38). The Insurers sought a stay in Montana, which was granted over Stillwater's objections based on the status of the Delaware proceedings.

F. THE DELAWARE ACTION AFTER *SOLERA II*

Having filed its insurance claims-handling action in Montana, the state which regulates the Insurers' claims-handling conduct, Stillwater simultaneously moved to voluntarily dismiss its Delaware complaint. (A0044). The Superior Court denied this relief, requiring Stillwater, instead, to amend its complaint to assert its Montana-law defense-based claims in the Delaware action, which Stillwater did. (A0153-55, A0167). Stillwater moved to stay the Delaware action in favor of the Montana action, but that motion was denied. (A0601-02). The Insurers moved to dismiss Stillwater's claims with prejudice pursuant to Rule 12(b)(6). (A0601). The Superior Court granted the motion, resulting in this appeal. (Mem. Op.)

II. ARGUMENT

A. THE SUPERIOR COURT INCORRECTLY DETERMINED THAT DELAWARE LAW APPLIES TO THE CLAIMS ASSERTED BY STILLWATER.

1. Question Presented, Affirmatively Stated

The Superior Court committed reversible error in determining that Delaware law applied to coverage claims, and in extending that incorrect ruling to the other two claims without any legal basis. Preserved on appeal at (A0305-382; A0434-501).

2. Scope of Review

Choice of law is a legal question reviewed *de novo*. *RSUI Indem. Co. v. Murdock*, 248 A.3d 885, 896 (Del. 2021) ("*Murdock*").

3. Merits

a. Montana law has the most significant relationship to the current litigation.

The Superior Court correctly determined that a conflict existed between Montana and Delaware law after this Court's decision in *Solera II*. (Mem. Op., pp. 18-19). The Superior Court then analyzed whether to apply Delaware or Montana law based on the "most significant relationship test" articulated in Restatement (Second) of Conflict of Laws, §§188 and 193, but erred in that analysis. As shown above, Montana imposes an immediate statutory duty to defend on insurers, has established a statutory UTPA claim focused on timely

investigation and decision on a claim, and enacted a statutory choice of law for the "place of performance" for Montana indemnity contracts like the D&O insurance policy at issue here. This strict statutory structure is clear evidence that via these "*relevant policies*," the "*relative interests of*" Montana are stronger than whatever interest Delaware might have in granting refuge to insurance companies running from Montana's courts; companies that are neither incorporated nor domiciled in Delaware, and which issued insurance contracts in Montana to a Montana-domiciled business. *Murdock* at 897 (quoting Section 6(c) of the *Second Restatement*) (emphasis added). As this Court held in *Murdock*, these "Section 6" components of the *Restatement* test, which so heavily favor application of Montana law, are the "*overarching choice-of-law considerations*" a Delaware court must consider. *Id.* (emphasis added). Yet the Superior Court here virtually ignored Section 6 and Montana's rock-solid interests in favor of a rote (and erroneous) application of this Court's ultimate conclusion in *Murdock*, not its holdings.

Relying exclusively on *Murdock,* the Superior Court incorrectly determined that Delaware – and not Montana – had the "most significant relationship" to the current litigation. The Superior Court reached its decision based not on *any* facts in the record, indeed by ignoring the only facts before it, those in the declarations from two Stillwater employees. It relied solely on certain statements in *Murdock*, a factually distinct insurance dispute where an insurance company tried to enforce a

California statute prohibiting certain types of D&O coverage directly against the interests of officers and directors of a company incorporated in Delaware.

In *Murdock,* this Court applied Delaware, rather than California law, to the interpretation of the D&O policy in dispute, holding that Delaware "had the more significant interest on the subject matter of the policy." *Id.* The Court expressed Delaware's strong interest in disputes involving D&O coverage and suggested that the state of incorporation is the "center of gravity of the typical D&O policy." *Id*. at 901. However, that determination was based on the Delaware interest identified by this Court in "permit[ting] Delaware corporations to provide broad indemnification and advancement rights to their directors and officers and to purchase D&O policies to protect them even where indemnification is unavailable." *Id*. at 900. That interest is *not* served by applying Delaware law to these claims-handling and duty-to-defend claims asserted by Stillwater under its rights as a Montana insured. Applying Delaware law here does not protect directors' and officers' ability to obtain indemnification, but rather deprives Stillwater of its right to enforce claims-handling and defense duties statutorily imposed upon NUFI when it issued a policy in Montana.

While Delaware has a strong interest in the availability of D&O coverage like that sold by NUFI to Stillwater in Montana to Delaware-incorporated companies, there can be no doubt that Montana has the most significant

relationship to this litigation over the Insurers' defense and claims-handling duties under the specific Montana-issued policy. All four counts of the Amended Complaint involve the regulation of the Insurers' refusal to defend and its handling of claims brought by shareholders against Stillwater, *not* the protection of directors and officers. There is simply no doubt that "Montana law imposes on an insurer a higher burden (and more significant consequences) for refusing to defend," a fact acknowledged by the Superior Court in determining that a conflict of laws exists. (Mem. Op., p. 19); *see Staples*, 90 P.3d at 384; *Tidyman's I*, 330 P.3d at 1150-1152. Montana has such a strong interest in these policies that it has enacted strict "punishments" against insurers for violating these claims-handling requirements. *Tidyman's II*, 378 P.3d at 1185-86. This alone clearly signals that the Superior Court got wrong the "weigh[ing] of the relative importance" of pertinent Montana and Delaware contacts required under *Murdock*. 248 A.3d at 897.

Moreover, in providing insurance policies delivered to Stillwater in Columbus, Montana, the Insurers subjected *themselves* to the regulation of the Montana Insurance Code. §33-15-101(2), MCA. The Montana Legislature enacted the Code in 1957 for the specific purpose of "govern[ing] and regulat[ing] the business of insurance." *Shattuck v. Kalispell Regional Medical Center, Inc.*, 261 P.3d 1021, 1026 (Mont. 2011); *Ogden v. Montana Power Company*, 47 P.2d 201, 204 (Mont. 1987). As part of that governance, one section of the Code – the

UTPA– regulates insurers' handling of claims. §33-18-201, MCA, *et seq*. The Montana Legislature, unlike the Delaware Legislature, specifically authorized Montana insureds to bring independent statutory causes of action based on violations of specific code provisions. §33-18-242(1), MCA. Thus, unlike in *Murdock*, Montana law has the most significant relationship to this cause of action because Montana statutes and common law prescribe specific claims-handling duties with which NUFI was required to comply, and Montana – unlike Delaware – explicitly grants the insured the right to enforce those duties in a private cause of action.[4] Montana law also allows Stillwater to bring an action against the adjusting company, not only its insurers, as noted by the Montana federal district court in finding that the insurers had wrongfully removed Stillwater's Montana complaint to federal court. (A0395). As such, unlike in *Murdock*, by its rulings the Superior Court protected non-Delaware insurance companies, *not* corporate officers or directors of a Delaware-incorporated company, and wrongly weighed the "relative importance" to Delaware and Montana of their actually pertinent insurance-related policies. *Id.* at 897.

[4] Another clear sign that the Superior Court erred in the required "weighing" of the Montana and Delaware contacts is the fact that the Delaware Legislature prescribes similar duties in its Unfair Trade Practices Act, but the Delaware courts do *not* allow insureds to enforce these duties through a private cause of action. *Thomas v. Harford Mut. Ins. Co*., 2003 WL 220611, *4-5 (Del. Super. 2003) (no private cause of action under Delaware UTPA).

The Montana Supreme Court has carefully guarded the state's interest in regulating insurer conduct through the Montana Insurance Code and the private causes of action authorized by the Code in the UTPA. Indeed, the Montana Supreme Court has refused to give full faith and credit to a North Dakota Supreme Court coverage determination based in part on Montana's grant of the right to sue for UTPA violations. *Wamsley v. Nodak Mut. Ins. Co.*, 178 P.3d 102, 111 (Mont. 2008).

The Montana Supreme Court has also vigilantly enforced a Montana insured's right to a defense from the date of tender until the insurer has either unequivocally demonstrated that no possibility of coverage exists or until a court has adjudicated coverage. *Staples*, 90 P.3d at 386. NUFI is well aware of the Montana law requirements for handling Stillwater's tender of the Appraisal Action. (*See* Statement of Facts, Part D, above). Indeed, the Montana Supreme Court has repeatedly advised NUFI *itself* that when it refuses to defend a Montana insured, "it does so at its peril." *Tidyman's I*, 330 P.3d at 1149. "By failing to defend under a reservation of rights while awaiting judicial determination" an insurer breaches the duty to defend and "is estopped from denying coverage." *Id.* at 1150-1152; *see also Tidyman's II* and *Newman*. Four years after receiving this lesson from the Montana Supreme Court, when Stillwater tendered the Appraisal Action, NUFI flouted the Montana Supreme Court's recommendation once again. For

three years, NUFI did not defend; did not reserve rights; and did not seek judicial determination of the duty-to-defend. (A0564-565). Properly applying the "overarching" Section 6 considerations, Montana clearly has the most significant relationship with the enforcement of an insurer's claims-handling and defense duties, and the Superior Court erred in failing to reach this proper conclusion.

b. The Superior Court failed to balance subject-matter-specific factors, all of which support application of Montana law.

Delaware courts must also look at "broader subject-matter-specific factors that bear on the significance of the different states' relationship to the contract." *Id.* at 896. Along with the Section 6 factors, under *Murdock*, the choice-of-law analysis must also take into account the familiar list of state contacts from the Restatement Section 188, namely: the place of contracting; the place of negotiation of the contract; the place of performance; the location of the subject matter of the contract; and the domicile, residence, nationality, place of incorporation and place of business of the parties. 248 A.3d at 896. The insurance contract was not negotiated in Delaware, and neither party to the contract has a presence in Delaware. The Policy specifies in the Declarations that the insured entity, Stillwater, is domiciled in Columbus, Montana. (A0201). The *undisputed*, sworn testimony establishes that Stillwater employee Ranetta Jones reviewed, selected and procured the policy in Columbus, Montana. (A0555-56). The *undisputed*, sworn testimony also established that the duties at issue in this

litigation – tender, denial, and any receipt of advanced defense costs – were to be performed in Montana, not Delaware. (A0561-565). Had NUFI met its obligation to advance the defense costs, those payments would have been made to Stillwater in Montana. (A0565). Instead, NUFI denied payment of Stillwater's defense costs by letter from New York City (not Delaware), and directed to Stillwater in Montana. (A0304).

Stillwater supplied sworn testimony establishing that all these broader factors weigh in favor of Montana law. (A0554; A0561). Stillwater also established that the Insurers had conceded in Montana courts that a Montana statute controlled the choice-of-law analysis. (A0512). NUFI and the Excess Insurers did not provide any evidence to refute or counter Stillwater's showing. The Superior Court did not address or consider this record evidence, but simply applied the conclusion of *Murdock* to this case without any meaningful review of the broader subject-matter factors, all of which – as with the Section 6 "overarching" factors – favor application of Montana law.

The Superior Court also improperly discounted the terms of the policy, which provide for conformity to Montana law. This Court has long held that "the *Second* Restatement provides a presumption for insurance contracts[] that, as a general matter, the law of the state 'which the parties understood was to be the principal location of the insured risk' should be applied because that state will have

the most significant relationship." *Murdock,* 248 A.3d at 896, *quoting Certain Underwriters at Lloyds, London v. Chemtura Corp.*, 160 A.3d 457, 465 (Del. 2017) ("*Chemtura*"). NUFI's insurance policy establishes by its explicit terms that NUFI agreed to conform to Montana law. The first three Policy endorsements require the use of "Montana" billing and practice rules (Endorsement 1, A0233); amend the policy to comply with Montana law on cancellation and renewal (Endorsement 2, A0234) and require "conformity with Montana statutes" (Endorsement 3, A0236). One of the Montana statutes which the Endorsement 3 conforms the Policy to is §28-11-316, MCA, which imposes a statutory "[d]uty of person indemnifying to defend" that underlies Stillwater's claims. *See Staples*, 90 P.3d 381, 386. The Insurers also contracted to conform to the requirements of Montana's UTPA, and to Montana's "place of performance" applicable law statute for indemnity contracts. §33-18-201, MCA; *Peris*, 916 P.2d at 784; §28-3-102, MCA. The Policy does not contain a Delaware Amendatory Endorsement. (A0199-284).

The Superior Court erred in adopting *Murdock*'s conclusion without balancing the factors required by *Murdock* to this case. Although Delaware has an interest in protecting directors and officers of corporations incorporated in Delaware, to make certain they have access to indemnification insurance, that interest does not outweigh Montana's interest in regulating insurers which provide

policies to Montana citizens such as Stillwater. This is especially true here, where that *Murdock* identified-interest is not at stake, and what the ruling does instead is protect non-Delaware insurance companies seeking refuge from Montana's *pro-insured* protections. It is further true when the overarching Section 6 factors, as well as the broader subject-matter-specific factors, are properly considered. As a Montana insured, Stillwater has the right to insist that NUFI and the excess insurers comply with the Montana UTPA – a right which Montana's Legislature and courts have zealously guarded for Montana insureds, and a right that Delaware has no identified interest in stripping away from a Montana domiciled company. Under the Restatement (Second), properly applied, Montana law applies to all of Stillwater's claims.

c. The Superior Court erred in refusing to apply Montana law to the duty-to-defend and UTPA claims in Counts 3 and 4.

Even if Delaware law applies to the interpretation of the D&O policies, Montana law should nonetheless apply to the claims-handling causes of action in Counts 3 and 4. (Mem. Op., p. 26). The Superior Court dismissed this argument – and dismissed Stillwater's viable Montana law claims – without analysis of the merits. The Superior Court merely noted that the application of two states' laws in one action is "disfavored generally" as inefficient. (Mem. Op., pp. 26-27).

The general rule does not apply here. As recognized by Delaware courts, circumstances may warrant application of different states' laws to distinct claims

arising from the same circumstances – a concept known as *dépeçage* – in the insurance context. *See Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Servs., Inc*., 2008 WL 2133417, *2, *5 (Del. Ch. May 21, 2008), *aff'd sub nom.* 962 A.2d 916 (Del. 2008) (holding that where insurer and insured jointly sued broker for negligent misrepresentation, Maryland law governed the insurers' claims, but Texas law applied to the insureds' claims); *see also Naghiu v. Inter-Cont'l Hotels Group, Inc.*, 165 F.R.D. 413, 422 n. 4 (D. Del. 1996) (citing *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 41, 47 (Del. 1991) (explaining that *dépeçage* has been tacitly embraced in Delaware, and applying different states' law to negligence and bailment). Specifically, where different states' policies are not in conflict and lead to differences in concluding which state has the "most significant relationship on an issue," *dépeçage* may be applied to give effect to both states' policies. *Pittman v. Maldania, Inc.*, 2001 WL 1221704, at *3-4 (Del. Super. July 31, 2001).

In *Murdock*, this Court held that Delaware has an interest in D&O coverage disputes. 248 A.3d at 901. This Court has never determined that Delaware has any interest whatsoever in the regulation of insurers' defense or claims-handling practices with respect to D&O policies issued elsewhere. Montana, on the other hand, has consistently guarded its interest in regulating insurance policies issued in

Montana, including D&O policies. §33-15-101(2), MCA; *See Shattuck*, 261 P.3d at 1026; *Ogden*, 747 P.2d at 204; *Tidyman's I*, 330 P.3d at 1149.

As noted above, unlike Delaware, Montana enforces its regulatory claims-handling structure, in part, through independent actions brought under statutory guidelines by insureds against insurers. §33-18-242, MCA. In refusing to recognize Stillwater's Montana-law causes of action, the Superior Court deprived Stillwater of its statutory right to enforce the duty-to-defend and UTPA through an independent action, a right every Montana-insured has but that Superior Court has now taken from Stillwater for the sole reason that Stillwater is incorporated in Delaware. That cannot be the outcome this Court intended via its *Murdock* decision. In addition, the Superior Court's dismissal of Stillwater's state-law claims interferes with the *State of Montana's* regulation of the claims-handling conduct of insurers, another outcome it seems unlikely this Court meant to flow from its decision in *Murdock*.

d. Stillwater did not concede Delaware law applies to its claims.

The Superior Court implied that Stillwater is bound by an acquiescence to the application of Delaware law to its breach of contract claim prior to this Court's decision in *Solera*, and prior to amendment of its complaint. (Mem. Op., p. 1). In its original complaint, filed in response to the Insurers' race-to-the-courthouse declaratory action, Stillwater sought declaratory judgment establishing the

Insurers' breach of contract in refusing to indemnify it and pay current the defense costs incurred under the policy. Stillwater's claims relied upon *Solera I.* The Superior Court stayed this action pending the appeal of *Solera I* "because Stillwater's coverage claim turned in large part on that case." (Mem. Op., p. 10).

At the time Stillwater filed its original complaint, no conflict existed, so Delaware law *perforce* would apply. It was only after this Court reversed in *Solera II* that a conflict of law developed between Montana law and Delaware law. (*See* Statement of Facts, Part D, above). The Superior Court confirmed as much, stating correctly later that "[i]f no conflict is found, no choice-of-law analysis needs to be applied." (Mem. Op., p. 18). Stillwater filed its Montana law claims in Montana state district court quickly thereafter, and sought to voluntarily dismiss its Delaware action. When the Superior Court (erroneously) denied that motion, Stillwater amended its Delaware complaint to include Montana law claims, and with a conflict of law now evident, sought to stay this action in favor of pursing its Montana law claims in a Montana court. As soon as the conflict existed, Stillwater asserted its right to rely upon Montana law and asserted Montana law claims. Under these undisputed facts, it was error for the Superior Court to conclude – much less give the "overarching weight" reserved for *Restatement Second* Section 6 factors – to a purported concession in an earlier complaint regarding application of Delaware law wiped clean by *Solera II* and the filing of an amended complaint.

B. THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR IN GRANTING THE INSURERS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM.

1. Question Presented, Affirmatively Stated

The Superior Court committed reversible error in dismissing all three of Stillwater's claims with prejudice without ever addressing the viability of the three claims. Preserved on appeal at (A0350-382; A0434-501).

2. Scope of Review

The grant of a motion to dismiss for failure to state a claim is reviewed *de novo*. *City of Fort Myers General Employees' Pension Fund v. Haley*, 235 A.3d 702, 716 (Del. 2020).

3. Merits

"The Court will grant a motion to dismiss under Rule 12(b)(6) only if the 'plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.'" *Id., quoting Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings*, *LLC*, 27 A.3d 531, 536 (Del. 2011). In deciding the motion, the Superior Court was required to accept all well-pleaded factual allegations in the Complaint as true and draw all reasonable inferences in favor of the plaintiff. *Id.* Here, the Superior Court addressed only one of Stillwater's three separate claims, and then incorrectly dismissed all claims on two faulty bases: (1) that the resolution of the conflict of laws question "is dispositive to this case;" and that

Delaware law "bars Stillwater from receiving coverage for the Appraisal Action, effectively deciding the instant action." (Mem. Op., p. 16).

a. The Superior Court did not resolve choice of law for all three claims or justify dismissal of all three claims.

As shown above, the Superior Court erred in determining that Delaware law, and not Montana law, applies to Stillwater's claims. Further compounding this error, the Superior Court did not address the choice-of-law issue with respect to all three claims, but only resolved the conflict with respect to Stillwater's "coverage claims." (Mem. Op., pp. 1, 10, 15, 17, 27). Stillwater alleges "coverage claims" against NUFI in Count 1 and against the excess insurers in Count 2 of the Amended Complaint. In addition to the "coverage claims," Stillwater pleads two other separate and independent Montana-law claims. Stillwater alleges breach of the duty to defend in Count 3. In Count 4, Stillwater also alleges violations of Montana's UTPA, which is not a "coverage claim" but rather a claims-handling cause of action.

Although the Superior Court acknowledged that Stillwater asserts two causes of action separate from the coverage claims (Mem. Op., p. 13, 15), the court did not address or analyze them. To dismiss the three claims based on Rule 12(b)(6), the Insurers were required to establish, and the Superior Court was required to determine, that Stillwater could not prevail under any reasonably conceivable set of circumstances. *Id.* The Superior Court only determined that

"the Delaware Supreme Court's *Solera II* decision bars Stillwater *from receiving coverage* for the Appraisal Action, effectively deciding the instant action." (Mem. Op., p. 16, emphasis added). Even if *Solera II* were to bar the coverage claims in Counts 1 and 2, *Solera II* does not address, much less resolve, an insurer's duty to defend or the duty handle the claim in a fair manner under Montana law.

The Superior Court devoted just one paragraph to its analysis of the motion to dismiss and only determined that Stillwater had not met its "burden of proving that its insuring agreements afforded it coverage for the alleged loss at issue. . . ." (Mem. Op., p. 28). The Superior Court did not address the other two claims asserted by Stillwater. The Superior Court failed to identify any legal basis to dismiss Stillwater's claims for breach of the duty to defend and violation of the UTPA, and the decision must be reversed on that basis alone.

b. Stillwater Pleads Viable Claims Against the Insurers under Montana Law.

To avoid dismissal pursuant to Rule 12(b)(6), Stillwater need only show that it "may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint" to defeat a motion to dismiss. *Strimel v. Westfield Ins. Co.*, 2014 WL 1382413, *1 (Del. Super. Apr. 9, 2014). Stillwater's allegations easily cleared this minimal bar with respect to the Montana law claims asserted in the Amended Complaint – breach of duty to defend and breach of the UTPA. Those causes of action are viable without reaching the coverage question.

(1) Count 3 alleges a viable claim of breach of the duty to defend.

As Stillwater alleges in its pleadings: "For more than three years after receiving notice of the Appraisal Action, AIG knew that the Appraisal Action potentially implicated coverage under the Primary Policy; however, AIG failed to unequivocally demonstrate that the Appraisal Action did not fall within the Primary Policy's coverage to advance Stillwater's Defense Costs." (A0188, ¶76); *see also* A0191, ¶87 (alleging similar claims against QBE and ACE); A0192, ¶93 (concerning advancement of defense costs); and A0193, ¶98-101 (alleging that the Insurers failed to communicate, investigate, and issue a coverage decision on Stillwater's claim in a reasonable time). These allegations present a *prima facie* case of a viable cause of action.

As shown above, under Montana law, a court does not reach the coverage, *i.e*., "duty to indemnify" question in determining whether NUFI breached the separate duty to defend. *Tidyman's I*, 330 P.3d at 1151. Instead, the court only considers whether the insurer made an unequivocal demonstration that coverage was not implicated by the complaint in the underlying action. *Id.* The duty-to-defend allegations in Count 3 constitute an actionable claim because an insurer's defense obligations are triggered as soon as the insurer is "on notice that the Policy was potentially implicated." *Tidyman's I*, 330 P.3d at 1150. Once the insurer's defense obligation is triggered, the insurer must provide a defense "[u]nless there

exists an unequivocal demonstration that the claim against an insured does not fall within the insurance policy's coverage." *Staples*, 90 P.3d at 386. This analysis is focused on what the insurer knew at the time the contested actions were taken, and the analysis does not include a determination of coverage. *Id.* at 1151; *Draggin' Y Cattle Co. v. Junkermier, Clark, Campanella, Stevens, P.C.*, 439 P.3d 935, 943 (Mont. 2019).

Here, as alleged in Stillwater's Amended Complaint, the Insurers were on notice of the appraisal demands against Stillwater in April 2017, and failed to make any demonstration – much less an unequivocal demonstration – that coverage was not implicated. (A0188). NUFI did not affirm, deny or reserve rights for two years. (A0564, ¶25). Moreover, even if NUFI had attempted to explain its refusal to defend in 2017, NUFI's demonstration could not have been unequivocal. As shown above, at that time, there was no legal authority *nationwide* on D&O coverage for Delaware appraisal actions or once *Solera I* was decided, the only on-point decision required a defense. Despite the fact that coverage was clearly "potentially implicated," the Insurers failed to provide a defense to Stillwater by advancing defense costs.

Crucially, when an insurer violates this separate obligation to defend until the duty has been judicially determined, the insurer loses its right to invoke insurance contract defenses and is estopped from denying coverage. *Draggin' Y*

Cattle Co., 439 P.3d at 941 (insurer estopped from denying coverage based on failure to cooperate where it breached the duty to defend); *Tidyman's I,* 330 P.3d at 1152 (insurer estopped from contesting coverage after breaching duty to defend). Hence, the Montana Supreme Court advises insurers – and specifically advised NUFI in *Tidyman's I* – to defend under a reservation of rights and file a declaratory action. *Tidyman's I*, 330 P.3d at 1150, 1152. NUFI flouted this advice when handling Stillwater's claim, which explains NUFI's extreme attempts to avoid application of Montana's laws and venue in its courts.

The much-delayed filing of the declaratory action in this case alone violates Montana law. As the Montana Supreme Court recently explained, "a declaratory judgment's purpose is to discern the extent of coverage under a policy so that an insurer may know the extent of its legal duties relative to the insured. It is not a Sword of Damocles to be hung over the insured's head through the entire course of the litigation." *Nat'l Indem. Co. v. State*, 499 P.3d 516, 534 (Mont. 2021) (holding delay in filing estopped the insurer from contesting coverage). There is no set time by which an insurer must file the declaratory action, but the court may consider prejudice to the insured and lack of reason for delay. *Id.*

Here, the Insurers wielded – and the Superior Court cut loose – the Sword of Damocles. The Insurers delayed the determination of the obligation to defend for years, until after the defense was complete, and then fled from the Montana courts,

seeking a friendlier forum. The Superior Court's ruling allowed the Insurers to avoid the effect of the very Montana law to which they had conformed the contracts they sold in Montana. NUFI *knows* that its actions in this case violated Montana law and is desperate to evade Montana's insurance-regulatory scheme. NUFI sold its policy to Stillwater in the state of Montana, and thereby subjected itself to the regulation of the Montana Insurance Code. As detailed in the Statement of Facts, above, in the last decade, NUFI has twice been judged to have breached the duty to defend by the Montana Supreme Court under similar circumstances. *Tidyman's I*, 330 P.3d at 1152; *Newman*, 301 P.3d 348. NUFI's conduct supports valid claims under Montana law, and the Superior Court erred to dismiss those claims under Rule 12(b)(6), with no analysis, no evidence and no discovery allowed.

c. Count 4 presents a viable claim of either a violation of Montana's Unfair Trade Practices Act.

There can be no doubt that Stillwater pleads a viable cause of action for violation of fair claims-handling processes under Montana law. Montana's legislature has specifically authorized the exact cause of action pled by Stillwater, and the claim is well established in Montana. *Redies v. Attorneys Liability Protection Soc.*, 150 P.3d 930, 937 (2007). ("Specifically, §33-18-242(1), MCA, creates an independent cause of action by an insured . . . against an insurer "for actual damages caused by the insurer's violation of subsection (1), (4), (5), (6), (9)

or (13) of 33-18-201."). In fact, Montana courts hold that UTPA claims can go forward even if the insurer did not breach the insurance contract. *Graf v. Continental Western Ins. Co.*, 89 P.3d 22, 26 (Mont. 2004) ("In the UTPA claim, the issue is whether the insurance carrier conducted a reasonable investigation and attempted in good faith to effectuate settlement of the claim when liability had become reasonably clear.") The Superior Court erred in disposing of this litigable issue on a Rule 12(b)(6) motion.

C. THE SUPERIOR COURT ABUSED ITS DISCRETION IN DENYING STILLWATER'S MOTION TO VOLUNTARILY DISMISS ITS CLAIMS.

1. Question Presented, Affirmatively Stated

The Superior Court first committed reversible error in denying Stillwater's motion to voluntarily dismiss its claims pursuant to Super. Ct. Civ. R. 41(a)(2). The Superior Court misapplied the four-part standard applicable to the motion. Preserved on appeal at (A044-51; A0078-100; A0101-103).

2. Scope of Review

Denial of a motion to voluntarily dismiss a claim is reviewed for abuse of discretion. "An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice to produce injustice." *Harper v. State*, 970 A.2d 199, 201 (Del. 2009), *citing Culp v. State*, 766 A.2d 486, 489 (Del. 2001).

3. Merits

Delaware law is abundantly clear as to the rules to be applied in considering a motion to voluntarily dismiss a complaint. Voluntary dismissal should be granted unless the opposing party – in this case the Insurers – would suffer "plain legal prejudice" in the event of a voluntary dismissal. *Draper v. Paul N. Gardner Defined Plan Trust*, 625 A.2d 859, 863 (Del. 1993). Here, the Insurers did not establish, and the Superior Court did not find, that the insurers would suffer any prejudice, much less "plain legal prejudice."

To determine whether plain legal prejudice exists, the Superior Court should have considered factors including: (1) the defendants' effort and expense in preparation for trial; (2) excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action; (3) insufficient explanation for the need to take a dismissal; and (4) the fact that a motion for summary judgment has been filed by the defendant. *Id.* at 864; *see also Pace v. Southern Express Co.*, 409 F.2d 331, 334 (7th Cir.1969); *Kovalic v. DEC Int'l, Inc*., 855 F.2d 471, 473–74 (7th Cir.1988).

The Superior Court did not issue a memorandum, but instead ruled from the bench. It quoted the correct standard, acknowledging that voluntary "dismissal is granted unless the defendant can demonstrate plain legal prejudice." (A0152). The Superior Court also acknowledged that it should consider the factors set forth in *Draper.* (A0152). Indeed, the Superior Court correctly determined that three of the four factors favored Stillwater's request for voluntary dismissal:

> There's no summary judgment motion that's been filed. There hasn't been a showing of excessive delay or lack of diligence, and there hasn't really been a substantial effort toward trial preparation. The bulk of the time that this case has been pending, of course, has been stayed awaiting decision of the Supreme Court's *Solera* appeal.

(A0153).

The Superior Court, thus, explicitly resolved three factors in favor of voluntary dismissal, and then mistakenly concluded that *because* of the absence of

delay, motions and litigation, there was no sufficient reason to allow dismissal. (A0153). The Superior Court did not deem Stillwater's explanation of its reason for seeking dismissal *insufficient*. Instead, the court stated that it did not "really see that there is a sufficient explanation here for a need to dismiss or to pursue this action in Montana as opposed to Delaware," which is *not* the standard. (A0153). The court noted "there's really been no argument to me that this is an inconvenient place for plaintiff to litigate this case." (A0153). This absence of argument required a finding that *the Insurers* had failed in *their* burden to establish plain legal prejudice. In requiring *Stillwater* to establish a compelling reason to dismiss without prejudice, rather than requiring Insurers to establish Stillwater's reasons were insufficient, the Superior Court misapplied established law.

In addition, the Superior Court failed to provide reasons for the judicial determination denying voluntary dismissal. "It is established law in this State that a judge must state the reasons for the decision." *Ball v. Division of Child Support Enforcement*, 780 A.2d 1101, 1004 (Del. 2001). The Superior Court did not issue a written opinion. Ruling from the bench, the Court addressed the factors which are considered in determining whether the Insurers would suffer plain legal prejudice. The court addressed issues which might later come before it, and signaled how it might rule on various future issues. But the Court did not state any

reason or conclusion as to the ultimate question presented by Stillwater's motion for voluntary dismissal: whether the Insurers would suffer plain legal prejudice.

Clearly, based on the Superior Court's factual findings, the Insurers would suffer no prejudice: very little preparation had occurred in the Superior Court; no dispositive motions had been filed; and the parties had not delayed the matter. (A0153). In fact, the "bulk of the time that this case has been pending, [the litigation] has been stayed. . . ." (A0153). As such, the Superior Court plainly erred by failing to state the basis for its decision, which requires analysis of *whether* the Insurers proved they would suffer plain legal prejudice.

In denying Stillwater's motion, the Superior Court first raised the specter of "forum shopping." (A0154). This is not a *Draper* factor, nor should it be. Of course, Stillwater prefers a Montana forum because of Montana courts' deep experience with these unique state-law claims of breach of the duty to defend and UTPA violations. Because Delaware law does not allow a private cause of action under its UTPA, Delaware courts have no experience with the standards applied to discovery, to motion practice, admissibility of evidence in an action for violations of the UTPA, or jury instructions. Just as much (or more), NUFI prefers for Delaware law to apply and rushed to a Delaware court as *its* preferred forum. It was NUFI, not Stillwater, that originally chose Delaware, racing – as explained in the Statement of Facts – to file the first day the Policy allowed. (A0219). Since

that original forum shopping, the Insurers have taken extreme measures to restrict Stillwater's access to Montana's courts, including the delay of a wrongful removal to federal court, culminating in this unprecedented dismissal with prejudice of Stillwater's Montana law claims without any merits adjudication of those causes of action.

Under these facts, the Superior Court plainly abused its discretion in denying Stillwater's motion to voluntarily dismiss its Delaware complaint as constituting – or at least having a "whiff" of – forum shopping. It was, in fact, NUFI that forum shopped. The abuse caused by the Superior Court getting this wrong is best demonstrated by the consequences. Rather than allowing Stillwater its Montana law remedies in Montana, the Superior Court essentially required Stillwater to prepare a Delaware complaint to plead its Montana law claims here, only to have that same Delaware court dismiss those claims without a merits adjudication based solely on the determination that Delaware law applies to Montana-law claims under a Montana-conformed policy. Because of *NUFI's* deliberate forum shopping, Stillwater has been completely denied an adjudication of the rights held by every Montana insured.

D. THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT THE REQUESTED STAY OF THIS ACTION IN FAVOR OF STILLWATER'S MONTANA ACTION.

1. Question Presented, Affirmatively Stated

The Superior Court abused its discretion when it misapplied the *Cryo-Maid* factors and misstated the record in denying Stillwater's request for a stay. Preserved on appeal at (A0152; A0502-599).

2. Scope of Review

Denial of a motion to stay is reviewed for abuse of discretion. As noted above, "[a]n abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice to produce injustice." *Harper*, 970 A.2d at 201.

3. Merits

On a motion to stay proceedings in favor of an action in another jurisdiction, the standard is the balancing test set forth in *General Foods Corp. v. Cryo-Maid, Inc.*, 198 A2d 681 (Del. 1964), *overruled in part by Pepsico, Inc. v. Pepsi-Cola Bottling Co. Of Asbury Park*, 261 A.2d 520 (Del. 1969); *see National Union Fire Ins. Co. v. Crosstex Energy Servs., L.P.*, 2013 WL 6598736, at *2 (Del. Super. Dec. 13, 2013) ("*Crosstex*"). The six *Cryo-Maid* factors are: "(1) whether Delaware law governs the case; (2) the relative ease of access to proof; (3) the availability of compulsory process for witnesses; (4) the possibility of a view of the premises; and (6) all other practical considerations that would make the trial easy,

expeditious, and inexpensive." To prevail, the movant "need only demonstrate that the preponderance of applicable forum factors 'tips in favor' of litigating in the non-Delaware forum. *Crosstex*, 2013 WL 6598736, at *2 (citation omitted).

The Superior Court abused its discretion by exceeding the bounds of reason in weighing the *Cryo-Maid* factors. The Superior Court's primary reason for denying the stay – timing of the motion – is clearly erroneous. The court stated that "Plaintiff's Motion to Stay comes much too late. . .," incorrectly concluding that "Plaintiff waited too long to seek this relief; Plaintiff did not pursue a stay until months after the parties fully briefed and argued Defendants' motion to dismiss this action with prejudice." In actuality, Stillwater requested a stay in conjunction with its months-earlier motion to voluntarily dismiss. (A0151-152).

In order to justify a stay "the movant need only demonstrate that the preponderance of the applicable forum factors 'tips in favor' of litigating in the non-Delaware forum. In balancing all of the relevant factors, the focus of the analysis should be which forum would be the more 'easy, expeditious, and inexpensive' in which to litigate." *Crosstex*, 2013 WL 6598736, at *2. The "first-filed priority status" is generally not granted to an insurer who, like NUFI, won "a race to the courthouse." *Id.* at *3-5. Rather, the court must consider judicial economy and principles of comity. *Id.* at *1, 10.

All the evidence before the Superior Court favored litigating in Montana.[5] First, the Insurers agreed that Montana' "place of performance" statute – §28-3-102, MCA – "governs the conflict-of-law question." (A0512). Second, uncontroverted declarations established that most of the witnesses who will testify regarding the dispute are officed and reside in Montana, and all pertinent original documents are in Montana. (A0554; A0561). Third, the parties had both filed dispositive motions in the Montana action at the time of the motion to stay. (A0511). Fourth, the efficient administration of justice tipped in favor of Montana, where most of the witnesses are located and where the courts are familiar with the unique Montana causes of action. (A561-566). No witnesses are located in Delaware and no party is domiciled in Delaware. The other *Cryo-Maid* factors – need to view the premises and availability of compulsory process – are neutral.

The Insurers provided no evidence to support tipping the balance in favor of litigating these Montana claims in Delaware. The lack of evidence, coupled with the Superior Court's incorrect factual determination regarding the timing of Stillwater's motion, establishes abuse of discretion and requires reversal.

[5] Here again, Stillwater provided the superior court with actual evidence in the form of two sworn declarations (A0551-602) and signed briefs (A0529-A0550) from the Montana litigation. The Insurers, again, provided only arguments of counsel, not evidence.

CONCLUSION

The Superior Court committed reversible error, first in determining that Delaware law applied to Montana claims, and second by dismissing the Montana law claims *with* prejudice without addressing the viability of all the claims under any reasonably conceivable set of circumstances. This reversible error by the Superior Court built on its earlier reversible error, first in applying the wrong standard to dismissal *without* prejudice, and then denying a request for stay as untimely, which it had earlier conceded to be timely. Based on these errors, Stillwater respectfully requests that this Court reverse the Superior Court's order dismissing Stillwater's claims with prejudice, and remand to the Superior Court with instruction that it grant Stillwater's motion for dismissal without prejudice, and stay the Insurer's declaratory claims, to allow Stillwater to pursue its direct action Montana claims in a Montana state court.

[Signature on next page.]

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