EFiled: Jan 30 2023 04:10PM EST
Filing ID 69018374
Case Number Multi-Case

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: INFINITY Q CAPITAL MANAGEMENT, LLC	:	No. 334, 2022 No. 335, 2022 No. 339, 2022
	:	Case Below: Superior Court of the State of Delaware In and For New Castle County C.A. No. N21C-07-158-EMD-CCLD

ANSWERING BRIEF OF APPELLEES TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, AXIS INSURANCE COMPANY, AND ARCH INSURANCE COMPANY

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Dated: January 13, 2023
PUBLIC VERSION Filed:
January 30, 2023

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NATURE OF THE PROCEEDINGS

The Insureds—Plaintiff-Appellants Infinity Q Capital Management, LLC ("Infinity Q"), Leonard Potter, and Scott Lindell (collectively the "Infinity Q Insureds"), Plaintiff/Intervenor-Appellant James Velissaris ("Velissaris"), and Plaintiff/Intervenor-Appellants the Trust for Advised Portfolios (the "Trust"), on behalf of the Infinity Q Alpha Fund (the "Fund"), Christopher Kashmerick, Russell Simon, and Steven Jensen (collectively, the "Trust Insureds")—seek coverage under excess insurance policies issued to Infinity Q by Defendant-Appellees Travelers Casualty and Surety Company of America ("Travelers"), AXIS Insurance Company ("AXIS"), and Arch Insurance Company ("Arch") (collectively, the "Excess Insurers"). Specifically, the Insureds seek excess liability coverage for criminal, regulatory, and civil matters arising from the manipulation of values for fund assets by Velissaris, Infinity Q's former Chief Investment Officer. The Superior Court correctly granted the Excess Insurers' motion for summary judgment, enforcing the unambiguous terms of a prior knowledge exclusion in warranty letters Infinity Q provided to the Excess Insurers, which were new to the risk and required the letters before issuing their excess policies.

The undisputed material facts present a "stark" reality, as the Superior Court observed. Opinion ("Op.") at 24. In August 2020, Infinity Q quadrupled its professional liability insurance, purchasing $15 million in coverage from the Excess

Insurers. At the time, Infinity Q, Velissaris, and Lindell, along with executives at the Trust, knew the Division of Enforcement for the U.S. Securities and Exchange Commission (the "SEC") was conducting an [redacted] inquiry into Infinity Q's valuation of fund assets that could lead to a claim under the excess policies. They knew this, in part, because the SEC had sent Infinity Q letters in May and June 2020 [redacted]. Nevertheless, to procure excess coverage, Infinity Q submitted warranty letters to the Excess Insurers (the "Warranty Letters"), (1) affirming that ***no*** insured had ***any*** knowledge or information of ***any*** facts or circumstances that ***may*** give rise to a claim under the excess coverage, and (2) agreeing that ***any claim*** for, based upon, arising from, or in any way related to any such facts or circumstances known by ***any*** insured shall be excluded from coverage (the "Prior Knowledge Exclusion"). Less than a month later, the SEC entered a formal order of investigation (for which the Insureds seek coverage as a "Claim" under the policies), which was followed by securities class actions, a criminal indictment (and conviction) of Velissaris, and regulatory enforcement actions against Velissaris, Lindell, and Infinity Q (for which the Insureds also seek coverage) (collectively, the "Noticed Matters").

Finding the Prior Knowledge Exclusion "straight forward and unambiguous," the Superior Court held "that Infinity Q (and its executives) had knowledge of any act, fact or circumstance that may give rise to a claim under the policies." Op. at 24.

Further, applying the Prior Knowledge Exclusion's terms as written, the Superior Court concluded that the Exclusion applies in a non-severable manner, barring coverage where, as here, "any" insured had knowledge, at the time the Warranty Letters were submitted, of "any" facts or circumstances that may give rise to a claim. Op. at 34. In doing so, the Superior Court recognized that the Warranty Letters' Prior Knowledge Exclusion is expressly part of the Excess Insurers' newly-issued excess policies but not the pre-existing primary policy. The Superior Court accordingly held that the primary policy's severability provision, which expressly applies to only one specific exclusion in the primary policy, has no bearing on the Prior Knowledge Exclusion in the excess policies such that the Exclusion bars excess coverage for the Noticed Matters in their entirety. *Id*.

This Court should affirm. The Superior Court correctly applied the unambiguous terms of the Prior Knowledge Exclusion to the undisputed facts. The Court can and should alternatively affirm because prior proceeding exclusions in the excess policies bar coverage for the Noticed Matters—an issue the Superior Court did not reach given its dispositive ruling based on the Prior Knowledge Exclusion.

SUMMARY OF ARGUMENT

1. *Denied*. The Superior Court correctly granted summary judgment for the Excess Insurers. Based on undisputed facts, the Excess Insurers' motion for summary judgment established that when the Warranty Letters were submitted to the Excess Insurers, Insureds knew (1) Infinity Q was the subject of the SEC Division of Enforcement's ongoing inquiry into asset valuation, and (2) the inquiry "***may***" result in a claim, precisely as the SEC's inquiry letters warned. The Prior Knowledge Exclusion therefore bars coverage for the Noticed Matters that followed from the SEC inquiry.

2. *Denied*. The Excess Insurers had no duty to advance defense costs simply because the Superior Court, acting well within its discretion to permit limited discovery, continued the Insureds' motion for partial summary judgment seeking defense coverage a mere 60 days. The Insureds' motion was filed at the very outset of the case in an apparent attempt to prevent the Excess Insurers from obtaining basic information—such as the Insureds' knowledge of the ongoing SEC inquiry at the time of the Warranty Letters' submission—that the Excess Insurers had long-sought in their coverage investigation. In continuing to seek that information, the Excess Insurers never conceded that the Noticed Matters "potentially triggered their Excess Policies," as the Insureds contend. Opening Brief ("Br.") at 10. The Superior Court could have granted summary judgment ***for the Excess Insurers*** based on the

undisputed facts available before discovery, including the May and June 2020 SEC inquiry letters. Instead, the Superior Court properly exercised its discretion under Super. Ct. Civ. R. 56(f) to permit focused discovery, limited in both time and scope. And, because the Superior Court ultimately held that the Prior Knowledge Exclusion bars both defense and indemnity coverage, whether it somehow abused its discretion in allowing limited discovery is an academic point on appeal.

3. *Denied*. The Superior Court correctly determined that the Prior Knowledge Exclusion is unambiguous and applies to exclude coverage for the entirety of the Noticed Matters if "***any***" Insured has the requisite prior knowledge. The Insureds' argument that the Prior Knowledge Exclusion applies severally contradicts its express terms, misapplies a primary policy provision directed at a separate primary policy exclusion not invoked by the Excess Insurers, and is contrary to case law.

COUNTERSTATEMENT OF THE FACTS

A. Infinity Q and the Fund Trade in "Swaps"

Infinity Q is the investment adviser for a hedge fund and for the Fund, which is a mutual fund issued by the Trust. The Fund sought to provide investors with "exposure to strategies often referred to as 'alternative' or 'absolute return' strategies." A00515. One such strategy was investment in "bilateral over the counter positions (the 'Bilateral OTC Positions') that Infinity Q valued using Bloomberg's Evaluated Pricing Tool ('BVAL')." A00550. Bilateral OTC Positions are sometimes referred to as "swaps."

B. The SEC Division of Enforcement's Inquiry into Infinity Q's Asset Valuation Practices

The SEC Division of Enforcement investigates and prosecutes civil enforcement actions for violations of the federal securities laws. B145.[1] On May 13, 2020, the Division of Enforcement sent a letter to Lindell—as Infinity Q's Chief Risk and Compliance officer—with the caption [redacted]" advising that it was [redacted]

[1] Conversely, the SEC Division of Examinations, formerly called the Office of Compliance Inspections and Examinations ("OCIE"), conducts routine examinations. B161; *see also The Options Clearing Corp. v. U.S. Specialty Ins. Co.*, 2021 WL 5577251, at *9 (Del. Super. Sep. 7, 2021) ("Enforcement Actions are not concerned with routine annual compliance examinations" whereas letters from OCIE involve "its function of overseeing annual compliance").

A00636 (emphasis added). The SEC requested [redacted]

[redacted]"[2] A00643. [redacted]

[redacted]. A00654.

The SEC's letter notified Infinity Q that [redacted], stating:

> [redacted]

A00637 (emphasis added). A commentator, explaining SEC Division of Enforcement processes, observed:

> As the SEC explains, "***Facts are developed to the fullest extent possible through informal inquiry***, interviewing witnesses, examining brokerage records, reviewing trading data, and other

[2] A May 14, 2020 email from Lindell confirms that he understood that the SEC inquiry "[redacted]." A01112.

> methods." ***Following an informal investigation, SEC Enforcement Division staff may either elect to terminate the inquiry, enter into settlement negotiations with the target, or pursue a formal investigation***.

B154 (emphasis added); B147.

[redacted] A00638. [redacted] A01097. [redacted] A01118, [redacted] the SEC's April 21, 2020 proposal to "establish a framework for fund valuation practices" that would subject investment advisers determining fair value of investments to additional oversight requirements. B151.

[redacted] A01099. [redacted] A01099. [redacted]. A01102; B163.

A01112. A01112. A01115-16.

. A01120. a press release reporting that SEC had prosecuted an enforcement action against a portfolio manager for "mispricing private fund investments," which resulted in a bar order, disgorgement award, and penalty. B149.

A01123. A01128. B168.

On June 23, 2020, the SEC sent another letter to Lindell that began, [redacted] A00645 (emphasis added), and [redacted] A00652. [redacted] A00646 (emphasis added). [redacted] A01156. [redacted] A01166 (emphasis added). [redacted] A01175 (emphasis added). [redacted]

[redacted] A01185 (emphasis added).

[redacted] A01227. [redacted]

[redacted] A01227. [redacted]

[redacted] A01229.

C. Infinity Q Purchases Three New Layers of Excess Insurance After Learning of the SEC Inquiry

[redacted] A01233; A01236. [redacted]

[redacted] A01234.

Since 2014, Infinity Q had a $5 million policy (the "Primary Policy") from Federal Insurance Company ("Federal") as its only professional liability coverage.

[redacted]

[redacted]

A00848, [redacted] A01234. [redacted] A01234.

On August 12, 2020, Infinity Q's wholesale broker—Gordon Gray of AmWINS Brokerage of New York—sent the Excess Insurers separate emails with "a new business $5M xs $5M Financial D&O/E&O submission for the captioned account Infinity Q Capital Management." A00572; A00678; A00803. The next day, Travelers sent Gray a "$5M xs $5M quote" and advised that Travelers "would need an excess warranty signed if this binds." A00571. On August 19, 2020, AXIS "offer[ed] $5M xs $10M" with "a Fresh warranty," A00673, and Arch quoted the $5 million excess of $15 million layer, advising that "[w]e will need our warranty signed and dated." A00797.

[redacted] A01244. [redacted]," A01244, [redacted]

[redacted]

A01247; A01269.

[redacted] A01281. [redacted]

[redacted]

A01278.

[redacted]

A01277.

[redacted]. A01285. [redacted]

[redacted] A01284.[3]

Later that day, Gray sent the Excess Insurers separate emails stating he "received instructions to bind" their respective quotes "effective 8/20/2020." A00570; A00670; A00796. Attached to Gray's emails were the August 20, 2020 Warranty Letters, signed by Lindell on behalf of Infinity Q. A00580; A00796; A00807.

In receipt of its required Warranty Letter, Travelers issued the Travelers Excess Policy to Infinity Q for the claims-made Policy Period from August 20, 2020 to August 20, 2021, with a $5 million limit of liability excess of the Federal Primary Policy's $5 million underlying limit and a $500,000 retention. A00324. The Travelers Excess Policy's coverage applies in conformance with the terms, conditions, exclusions, and other limitations in the Primary Policy, "except as otherwise provided" in the Travelers Excess Policy. A00328. The AXIS and Arch

[3] AXIS received the same Warranty Letters sent to Travelers and Arch. AXIS later requested a copy of the Warranty Letter specifically for the AXIS Excess Policy. Although AmWins initially indicated that it would send such a letter, on March 7, 2021, AmWins notified AXIS that Infinity Q refused to issue a separate Warranty Letter and believed the "issuance of the AXIS Excess Policy constitute[d] [AXIS's] acceptance of the [Travelers and Arch] warranties provided and agreement that the subjectivities were satisfied." A00717.

Excess Policies also follow form to the Primary Policy except as otherwise provided in those Excess Policies. A00342; A00351.

The Warranty Letters are, by their express terms, "incorporated into" each Excess Policy (but not the Primary Policy). The Excess Policies also contain their own prior proceeding exclusions not found in the Primary Policy. That exclusion in the Travelers Excess Policy bars coverage for "any claim based upon or arising out of any prior or pending civil, criminal, administrative or regulatory proceeding against any Insured as of or prior to the Specified Prior or Pending Proceeding Date." A00330. The AXIS Excess Policy bars coverage for any claim "based upon, arising from, or in consequence of Pending or Prior Litigation," which is defined as "any demand, arbitration, suit, administrative, regulatory, criminal or other proceeding pending against . . . any Insured, on or prior to" August 20, 2020. A00344. The Arch Excess Policy bars coverage for loss "arising out of, based upon or attributable to" "any demand, suit, formal or informal investigation occurring prior to, or pending as of, 8/20/2020" or "any Wrongful Act which gave rise to such prior or pending demand, suit or formal investigation or any Interrelated Wrongful Acts thereto." A00353.

Infinity Q renewed the Federal Primary Policy for the claims-made policy period from August 20, 2020 to August 20, 2021. A00222. The Primary Policy has four separate coverage parts. Applicable here, the Infinity Q Insureds and Velissaris

seek coverage only under the Professional Liability Coverage Part's Fund Adviser Liability Coverage, while the Trust Insureds seek coverage under the Primary Policy's Investment Company Liability Coverage Part. The relevant insuring agreements extend coverage only to "any Claim first made . . . during the Policy Period" against Investment Advisers (for the Infinity Q Insureds) and Investment Companies (for the Trust Insureds). A00063; B7-8; B29.

The Primary Policy defines "Claim" to include, in pertinent part, "a written demand for monetary damages or non-monetary relief," "a civil proceeding commenced by the service of a complaint," or "a formal administrative or formal regulatory proceeding commenced by . . . entry of a formal order of investigation," against an Insured for a Wrongful Act. A00241-42.

Finally, the Primary Policy includes the following exclusion in its Subsection XII.(B):

> (B) In the event that the **Application** contains any material misrepresentations, untruthful information or inaccurate statements made with the actual intent to deceive or which materially affect the acceptance of the risk or the hazard assumed by the Company, and there is a **Claim** made based upon, arising from, or attributable to, any such misrepresentations, untruths or inaccuracies, no coverage shall be afforded under this Policy for such **Claim** as to any **Insured Person** who knew of such misrepresentations, untruths or inaccuracies, or to any **Insured Entity** to which such statements are imputed.

A00233-34; A00274 (emphasis in original). The Primary Policy also includes a severability provision in its Subsection XII.(C) that is ***expressly limited in its operation only to the foregoing exclusion in Subsection XII.(B)***. The severability provision reads:

> (C) *For purposes of Subsection XII.(B) above*:
>
> (1) the knowledge of any **Insured Person** who is a past, present or future chief executive officer, chief financial officer, president, managing partner, managing member, in-house general counsel, chief compliance officer, or chief operating officer of an **Insured Entity** shall be imputed to such **Insured Entity** and all of its **Subsidiaries**;
>
> (2) the knowledge of the persons who signed the **Application** shall be imputed to all **Insured Entities**; and
>
> (3) the knowledge of any **Insured Person** shall not impute to any other **Insured Person**.

A00234 (boldface emphasis in original and italics/underlined emphasis added).

D. The SEC Issues a Formal Order of Investigation

On September 15, 2020, less than a month after Infinity Q submitted the Warranty Letters and the new Excess Policies incepted, the SEC issued its formal Order Directing Private Investigation and Designating Officers to Take Testimony [redacted] A00583. The Order stated that [redacted]

[redacted] A00584.

E. The Fund Liquidates Because Its Asset Valuation Was Unreliable

On December 30, 2020, the Fund filed a supplemental Prospectus and notice with the SEC, announcing it was closing to new investment. A00380. In February 2021, Infinity Q and the Trust requested an order from the SEC suspending the right of redemption of the Fund's shares and announcing the Fund's liquidation. A00551; A00588. Infinity Q stated to the SEC that, "on February 18, 2021, based on information learned by the Commission staff and shared with Infinity Q, Infinity Q informed the Fund that Infinity Q's Chief Investment Officer [Velissaris] had been adjusting certain parameters within the third-party pricing model that affected the valuation of the Swaps." A00589. Infinity Q further stated that, "on February 19, 2021, Infinity Q informed the Fund that Infinity Q was unable to conclude that the adjustments were reasonable and further that it was unable to verify that values it had previously determined for the Swaps were reflective of fair value." A00589. Infinity Q removed Velissaris as chief investment officer and restricted his access to trading accounts on February 21, 2021. A00368; A00504. On February 22, 2021, the SEC issued an Order permitting the Fund to suspend redemptions and liquidate its assets. A00590.

F. Investors Allege Velissaris Manipulated Swap Valuations

Investors filed four securities class actions against Insureds in New York shortly after these public announcements. A00359-A00456. A fifth investor action was filed in New York in June 2021. A00509-34. The investor actions alleged Velissaris's "manipulation" of the third-party pricing models for the Fund's swaps materially inflated the reported value of those assets, and therefore the Fund's net asset value, for several years. A00364-65; A00371; A00375.

G. Infinity Q Stonewalls Travelers' Requests for Information

Travelers received notice of the SEC investigation and one of the investor actions from Infinity Q on February 9, 2021. A00458. Travelers advised Infinity Q, on May 4, 2021, that the Travelers Excess Policy attached only after the Primary Policy exhausted and reserved all of Travelers' rights, including its rights under the Warranty Letter. A00472-73. Travelers asked Infinity Q to provide its communications with Federal and the SEC regarding the background and substantive issues of the SEC investigation. A00473-75.

Infinity Q responded on May 10, 2021, stating it can "see no reason" to provide Travelers with its communications with Federal, and that it was "not in the position to provide any further information" about communications with the SEC. A00477-80. Infinity Q also incredibly asserted that it had no "record of being advised" that a warranty was required for the Travelers Excess Policy. A00478.

In a June 15, 2021 letter, Travelers reiterated its requests for information and documents, and also asked for Infinity Q's communications with any insurance broker regarding the Excess Policies' procurement. A00495-96; A00498-99. On July 21, 2021, Infinity Q sent Travelers a letter maintaining its refusal to provide SEC communications because "the SEC's investigation is still ongoing and, as such, communications with the SEC will paint an incomplete picture." A00504. As for communications with Federal, Infinity Q's letter erroneously claimed they were enclosed. A00501, A00561. Infinity Q ignored the request for its broker communications.

H. The Infinity Q Insureds Commence this Coverage Litigation and Immediately Seek Partial Summary Judgment

While stonewalling Travelers' requests, the Infinity Q Insureds commenced this coverage litigation on July 21, 2021, even though the Primary Policy was not exhausted. A00057. The Excess Insurers answered on September 15, 2021. A00078-182. A week later, on September 21, 2021, the Infinity Q Insureds filed a motion for partial summary judgment contending they were entitled to defense coverage as a matter of law. A00183.

I. Existence of the SEC Inquiry at the Time of the Warranty Letters Belatedly Comes to Light

That same day, Infinity Q provided some of the information Travelers had been seeking for months—specifically, 255 pages of emails with Federal—but

nothing else. A00562. In one of those emails, Infinity Q stated, "in May 2020 and in June 2020, the SEC sent Infinity Q a cover letter stating that the SEC was conducting an 'inquiry' of Infinity Q and requested documents." A00599. On September 24, 2021, Travelers asked Infinity Q for a copy of the SEC's inquiry letters. A00562; A00630. Infinity Q continued to withhold those letters, however, until 4:26 p.m. on October 19, 2021—the day before the Excess Insurers' opposition to the Insureds' motion for partial summary judgment was due. A00563; A00633.

On November 12, 2021, after the Excess Insurers filed their opposition to Infinity Q's motion for partial summary judgment, Infinity Q finally provided copies of the communications between Lindell and Velissaris, on the one hand, and Haas of World Insurance Associates brokerage, on the other, regarding procurement of the Excess Policies and the required Warranty Letters. A01090; A01244-85.

J. In its Discretion, the Court Continued Infinity Q's Motion For Partial Summary Judgment for 60 days

On November 23, 2021, the Superior Court heard argument on Infinity Q's motion for partial summary judgment. A00894. The Excess Insurers requested discovery under Rule 56(f) given the Insureds' slow release of documents during briefing on their motion, but also argued that the Prior Knowledge Exclusion barred coverage based on the record available at the time of the hearing. A00922. Infinity Q's counsel tacitly acknowledged as much by asserting that "a little over half the time there are actually enforcement actions" after an SEC inquiry. A00915. The

court retorted "that's not very helpful" because "50 percent is pretty high." *Id*. Nevertheless, ruling from the bench, the court exercised its "broad discretion" under Rule 56(f) to continue the motion to allow 60 days for limited document discovery. A00958-60. Observing that "[t]his isn't a situation where [the Excess Insurers] have slept on their rights," the court determined that they "are entitled to develop a factual record to oppose the motion for [partial] summary judgment." A00959.

K. Criminal and Regulatory Actions

On February 16, 2022, the United States unsealed an indictment, captioned *United States v. Velissaris*, No. 1:22-cr-00105-DLC (S.D.N.Y.) (the "Indictment"). A01312. The Indictment alleged Velissaris defrauded investors from at least 2018 through February 2021 by, among other things, manipulating the computer code of the third-party asset pricing model and inputting into that model false transaction terms to inflate the reported value of Infinity Q fund assets. A01312-13; A01323-29. The Indictment also alleged Velissaris (and Lindell) obstructed the SEC's inquiry in May and June 2020 by altering or forging documents produced to the SEC. A01314-15, A01332-34. Velissaris also allegedly submitted fabricated documents to Infinity Q's fund auditor. A01314; A01330-31.

On February 17, 2022, the SEC and CFTC filed complaints in civil enforcement actions, captioned *SEC v. Velissaris*, No. 1:22-cv-01346 (S.D.N.Y.) (the "SEC Action"), A01349, and *CFTC v. Velissaris*, No. 1:22-cv-01347

(S.D.N.Y.) (the "CFTC Action"), A01415. The SEC and CFTC Actions (collectively, the "Enforcement Actions") also alleged Velissaris inflated asset valuations by manipulating the third-party pricing model's computer code and inputting false transaction terms continually from 2017 through 2021. A01349-51; A01367-82; A01415-16; A01427-36. The Enforcement Actions further alleged that Velissaris attempted to conceal the fraud by forging documents provided in response to the SEC inquiry and provided to Infinity Q's auditor. A01351-52; A01394-99; A01416; A01439-41.

The Indictment and Enforcement Actions were noticed to the Excess Insurers for coverage along with the prior SEC formal investigation and the investor class actions (i.e., the "Noticed Matters").

L. Status of the Noticed Matters

Velissaris recently pleaded guilty to Count I of the Indictment for criminal securities fraud and consented to forfeiture of $22 million. *See* Consent Order, Dkt. No. 66, *U.S.A. v. Velissaris*, No. 22-cr-105 (S.D.N.Y.) (Nov. 21, 2022). A sentencing hearing is set for March 3, 2023.

Meanwhile, on September 30, 2022, the SEC filed a civil enforcement action against Lindell, captioned *SEC v. Lindell*, No. 1:22-cv-08368 (S.D.N.Y.), alleging, among other things, that "Lindell, at Velissaris's direction, . . . helped Velissaris submit misleading documents to the SEC staff in response to the SEC's initial

inquiries." Compl., ¶ 8, Dkt. No. 1, 1-22-cv-08368. The SEC also alleged that, by "mid-2020," Lindell was aware of allegations that certain Fund positions were given "mathematically impossible values." *Id.* at ¶ 61. On October 5, 2022, Lindell consented to a judgment against him for injunctive relief. *See* Consent of Def. S. Lindell, Dkt. No. 8, 1-22-cv-08368. Lindell agreed that once monetary relief and civil penalties are resolved, he "will be precluded from arguing that he did not violate the federal securities laws as alleged in the Complaint." *Id.*, ¶ 3.

Finally, the Insureds agreed to a settlement of the securities class actions on or about September 7, 2022. Am. Stip. of Settlement, Dkt. No. 177, *In re Infinity Q Diversified Alpha Fund Securities Litig.*, Case No. 651295/2021 (Supr. Ct., N.Y. Cnty., N.Y.). A motion for judicial approval of that settlement was filed on December 27, 2022. Notice of Mot. for Final Approval, Dkt. No. 210, Case No. 651295/2021.

M. The Superior Court's Summary Judgment Ruling

The Superior Court granted summary judgment for the Excess Insurers and denied the Insureds' motion for partial summary judgment as to defense coverage. It found "there is no genuine issue of fact as to whether the Warranty Letter bars coverage" and "the Insurers are entitled to judgment as a matter of law" based on the "straightforward and unambiguous" language of the Prior Knowledge Exclusion. Op. at 24. The court determined "the facts relating to the SEC Inquiry are stark and

lead to the conclusion that Infinity Q (and its executives) had knowledge of any act, fact or circumstances that may give rise to a claim under the policies that would be issued by the Insurers." Op. at 24.

The Superior Court also rejected the Insureds' argument that the Warranty Letters are severable, determining that the Warranty Letters' non-severable language is "clear and unambiguous." Op. at 34. The court also found "the severability provision in the Primary Policy [Subsection XII.(C)] is expressly applicable to [the Primary Policy's] Subsection XII.(B)," and thus not applicable to the Excess Policies. *Id.* The court did not reach the Excess Insurers' alternative argument based on the Excess Policies' prior proceeding exclusions. Op. at 35.

This appeal followed.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY GRANTED SUMMARY JUDGMENT FOR THE EXCESS INSURERS BECAUSE THE PRIOR KNOWLEDGE EXCLUSION BARS COVERAGE FOR THE NOTICED MATTERS

A. Question Presented

Whether the Superior Court correctly granted the Excess Insurers' motion for summary judgment and denied the Insureds' motion for partial summary judgment because the undisputed material facts demonstrate, as a matter of law, that the Prior Knowledge Exclusion bars coverage for the Noticed Matters. (Preserved at B125-126).

B. Scope of Review

"This Court reviews a grant or denial of a motion for summary judgment *de novo*." *In re Solera Ins. Coverage Appeals*, 240 A.3d 1121, 1130 (Del. 2020). Similarly, "the interpretation of contractual language, including that of insurance policies, is a question of law," which is reviewed *de novo*. *O'Brien v. Progressive N. Ins. Co*., 785 A.2d 281, 286 (Del. 2001).

C. Merits of the Argument

"[T]he terms of an insurance contract are to be read as a whole and given their plain and ordinary meaning." *O'Brien*, 785 A.2d at 291. "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). "[W]here the language of a policy is clear and unequivocal, the parties are to be bound by its plain meaning." *O'Brien*, 785 A.2d at 288.

Applying these rules of interpretation, the Superior Court correctly held the Prior Knowledge Exclusion bars coverage for the Noticed Matters.

1. The Prior Knowledge Exclusion unambiguously bars coverage when "*any* Insured" has subjective knowledge of any "facts" or "circumstances" that objectively "*may*" result in a claim

The Warranty Letters state that "[n]o person or entity for whom this insurance is intended has any knowledge or information of any act, error, omission, fact or circumstance that may give rise to a claim under the proposed insurance." A01285. The Prior Knowledge Exclusion then provides that "any claim for, based upon, arising from, or in any way related to any act, error, omission, fact, or circumstance

of which any such person or entity has any knowledge or information shall be excluded from coverage under the proposed insurance." A01285.

Warranty letters with prior knowledge exclusions are commonly used when new insurance is purchased. *See, e.g., Patriarch Partners, LLC v. Axis Ins. Co.*, 758 F. App'x 14, 18 (2d Cir. 2018); *Rivelli v. Twin City Fire Ins. Co*., 359 F. App'x 1, 2-3 (10th Cir. 2009). Courts have held that warranty letters and prior knowledge exclusions, similar to that in the Warranty Letters, are unambiguous. *See Patriarch Partners*, 758 F. App'x at 16 ("we conclude that the Warranty, read as a whole to determine its purpose and intent, contains no ambiguity" (internal citation and quotation marks omitted)); *B Five Studio LLP v. Great Am. Ins. Co.*, 414 F. Supp. 3d 337, 340 (E.D.N.Y. 2019) ("The prior-knowledge condition of the Policy is clear and unambiguous."). Courts also have applied prior knowledge exclusions to bar both defense and indemnity coverage where any insured had prior knowledge of facts or circumstances that may result in a claim. *See Patriarch Partners*, 758 F. App'x at 22 ("[t]he Warranty . . . excludes Patriarch's losses arising from its defense of the SEC investigation Claim" based on insured's prior knowledge of SEC inquiry preceding developments in SEC investigation); *CPA Mut. Ins. Co. of Am. Risk Retention Grp. v. Weiss & Co*., 915 N.Y.S.2d 57, 57 (App. Div. 2011) (affirming summary judgment holding that prior knowledge exclusion barred defense and indemnity coverage based on prior knowledge of client's fraudulent scheme).

To determine whether an insured had knowledge of facts or circumstances that may give rise to a claim, courts apply a mixed subjective/objective test, considering "the insured's [subjective] knowledge of the relevant facts and [making] an objective determination of whether a reasonable person in the insured's position should have expected such facts to be the basis of a claim." *B Five Studio*, 414 F. Supp. 3d at 340; *see also Sycamore Partners Mgmt. LP v. Endurance Am. Ins. Co.*, 2021 WL 4130631, *24 (Del. Super. Sept. 10, 2021) (finding warranty letter would bar coverage if insured "had actual knowledge or information about an act, error or omission that, at the time of contracting, reasonably could be expected to create a Claim under the Policies"). As explained in *CPA Mut. Ins. Co. of Am. Risk Retention Group*, 915 N.Y.S.2d at 58, an insured's "subjective belief [it was] not facing a claim" is irrelevant where, as here, the facts establish that prior to the policy's effective date "it was unreasonable for [the insured] to have failed to foresee that these facts might form the basis of a claim against them."[4]

Infinity Q argues that a strict subjective standard applies here because the Warranty Letters do not use certain words, such as "reasonable insured" or "might

[4] *See also Am. Special Risk Mgmt. Corp. v. Cahow*, 192 P.3d 614, 625 (Kan. 2008); *Colliers Lanard & Axilbund v. Lloyds of London*, 458 F.3d 231, 237-38 (3d Cir. 2006) (N.J. law); *Selko v. Home Ins., Co.*, 139 F.3d 146, 151-52 (3rd Cir. 1998) (Pa. law); *International Ins. Co. v. Peabody Int'l Corp.*, 747 F. Supp. 477, 482 (N.D. Ill. 1990).

reasonably be expected." Br. at 28. But the absence of such words from the Warranty Letters does not require a strictly subjective standard.

The ruling in *XL Specialty Ins. Co. v. Agoglia*, 2009 U.S. Dist. LEXIS 36601 (S.D.N.Y. Mar. 2, 2009), *aff'd sub nom.*, *Murphy v. Allied World Assur. Co*., 370 F. App'x 193 (2d Cir. 2010), is instructive. The trial court and appellate court addressed differently worded prior knowledge exclusions in three separate policies issued by Allied World Assurance Company ("Allied World"), Arch, and XL Specialty Insurance Company ("XL"). The Allied World exclusion applied if any insured knew facts or circumstances that "a reasonable person would suppose might afford valid grounds for a claim." *Id*. at *9. The XL exclusion applied if any insured knew facts or circumstances "which . . . any insured . . . had reason to suppose might afford grounds for any Claim." *Id*. at *11. The Arch exclusion—using wording very similar to the Prior Knowledge Exclusion in this case—applied if any insured knew facts or circumstances "that might give rise to a Claim under this Policy." *Id*. at *10.

Although the exclusions had different wording, the courts interpreted and applied them ***precisely the same way***, finding that there were three requirements for them to apply: (1) as of the inception of the policy, any insured had to have knowledge of facts or circumstances that might give rise to a claim; (2) that insured must have had reason to suppose the facts or circumstances might afford grounds for a claim; and (3) the claim must arise out of those facts or circumstances." *Id*. at *18.

The court explained that the second element is "an objective standard; the appropriate line of inquiry is whether a reasonable person would understand that, given the facts or circumstances, there may be grounds for a claim to be made under the Policy." *Id*. at *24. *Agoglia* shows that the Warranty Letters' use of the phrase "may give rise" to a claim requires application of the mixed subjective/objective test.

2. Insureds had subjective knowledge of the SEC inquiry that a reasonable person would have understood may give rise to a claim

The record indisputably establishes that Insureds—including Lindell, Velissaris, Jensen, and the Trust's board members—knew the SEC Division of Enforcement had an ongoing inquiry into Infinity Q's valuation of fund assets when the Warranty Letters were signed.

Lindell received the SEC's May 13, 2020 inquiry letter stating that it was conducting its inquiry of Infinity Q [redacted] A00636-37. [redacted] A01097. [redacted]

A01118.

A01120.

A01236.

A01166.

A01185.

A01227.

A01101-A01110. One of the Dechert lawyers, Anthony Kelly, was a former co-chief of the SEC Division of Enforcement's Asset Management Unit. B163.

[redacted] A01099.

For all these reasons, the SEC inquiry was a fact or circumstance that ***may*** give rise to a claim under the Excess Policies. Indeed, the SEC inquiry gave rise to an SEC order of formal investigation—[redacted]—just a few weeks after Lindell signed the Warranty Letters. It is beyond dispute that the SEC investigation, securities class actions, and government indictments and enforcement actions are claims "for, based upon, arising from, or in any way related to" the SEC's inquiry of Infinity Q's asset valuation practices. Therefore, as the Warranty Letters provide, those matters "shall be excluded from coverage" under the Excess Policies.

Infinity Q argues that *Patriarch Partners*, 758 F. App'x 14, and *Rivelli*, 359 F. App'x 1, show that "an insurance company needs exacting evidence of knowledge needed to invoke a warranty letter—evidence that is not present here." Br. at 29. To the contrary, as the Superior Court found, these cases show that "[t]he court is to look to the undisputed facts and determine whether the fact[s] demonstrate the knowledge required by the policy that 'may' lead to a claim." Op. at 29. Here, the undisputed material facts demonstrate that Insureds had knowledge implicating the Prior Knowledge Exclusion. Furthermore, the Insureds have failed to cite any case in which a court concluded that insureds—including a chief investment officer

and two chief compliance officers of sophisticated financial enterprises with knowledge that the SEC Division of Enforcement was conducting an inquiry into their asset valuation practices—were nevertheless unaware of any fact or circumstance that "may" give rise to a claim.

Infinity Q's effort to distinguish *Rivelli* is unavailing. In *Rivelli*, the insureds sought an increase in excess insurance and provided the excess insurer with a warranty letter that made nearly the same representations and had the same prior knowledge exclusion as the Warranty Letters here. *Rivelli*, 2008 WL 5054568, at *2 (D. Colo. Nov. 21, 2008), *aff'd*, 359 F. App'x 1. The district court held that SEC allegations of a fraudulent accounting scheme involving insured persons were sufficient to trigger the warranty letter's exclusion. *Id*. at *5. The court rejected the argument that an insured "could have failed to appreciate the wrongful nature of [the insured company's] accounting practices," finding as follows:

> This argument is unavailing because it ignores basic information that a CEO or CFO of a publicly traded company must know. Anyone holding those positions could not fail to appreciate the potential for liability created by activities such as recognizing income on transactions having contingencies due to disguised side agreements, or recognizing income on products held in a company-controlled warehouse, while the company paid for the storage costs.

Id. at *8-9. The Tenth Circuit agreed, finding it "untenable" that the insureds "could have failed to appreciate the potential for liability from the actions they are alleged to have taken" prior to submitting the warranty letter. *See Rivelli*, 359 F. App'x. at

7; *see also Ironshore Indem. Inc. v. Kay*, 2022 U.S. Dist. LEXIS 168561, at *13-14 (D. Nev. Sept. 16, 2022) (prior knowledge exclusion applied where insured allegedly committed securities fraud by falsifying bank statements for public offerings because he had knowledge of "an[] act, error[,] or omission [that] might give rise to a claim"); *CPA Mut. Ins. Co.*, 915 N.Y.S.2d at 58 (insured's purported "subjective belief they were not facing a claim" is irrelevant because it is unreasonable).

Infinity Q argues that *Rivelli* is "a far cry from Infinity Q" because "Velissaris had the right and responsibility to value these positions in certain instances to arrive at the Fund's valuation and has publicly stated (and continues to maintain) that he did so in good faith." Br. at 31.[5] In making this argument, Infinity Q conflates the Warranty Letters with exclusions that apply only upon, for example, a final adjudication of fraudulent conduct. *See, e.g., Arch Ins. Co. v. Murdock*, 2016 WL 7414218, at *3 (Del. Super. Dec. 21, 2016); *see also Ironshore*, 2022 U.S. Dist. LEXIS 168561, at *13-14 (finding similar prior knowledge exclusion "does not require . . . any final determination before it can be triggered").

[5] Yet Velissaris pleaded guilty to criminal securities fraud on November 21, 2022, a mere ten days after the Insureds filed their opening briefs. *See supra* at 24. The guilty plea belies the Insureds' argument that Velissaris was not subjectively aware of any improper asset valuation at Infinity Q because, "even after the indictment," he maintained that he "managed investments at Infinity Q with the highest integrity" and pleaded "not guilty." Br. at 5, 34-35.

Here, application of the Prior Knowledge Exclusion does not depend on the merits or outcome of a potential future claim; it turns on knowledge of facts or circumstances that may give rise to a claim before the claim exists. Velissaris's initial defense of the allegations against him does not eliminate the fact that he and other Insureds knew the SEC Division of Enforcement had an ongoing inquiry into Infinity Q's valuation practices—which was a fact or circumstance that may give rise to a claim—when Infinity Q procured excess coverage for the first time in August 2020. Furthermore, the government and investors alleged Velissaris exceeded his valuation discretion and defrauded investors by manipulating the third-party asset pricing model's computer code to inflate asset valuation. Just as the Tenth Circuit in *Rivelli* found it "untenable" that the insureds "could have failed to appreciate the potential for liability from the actions they are alleged to have taken" prior to submitting their warranty letter, *Rivelli*, 359 F. App'x at 7, Velissaris and the other Insureds had actual knowledge or information when Infinity Q submitted the Warranty Letters that the SEC Division of Enforcement was inquiring into Infinity Q's valuation practices, which is a fact or circumstance "that indisputably could give rise to a claim under the policy." *Id*. at 13.

Infinity Q points to statements in the SEC's letters that the [redacted] and [redacted]

[redacted] and argues those [redacted] somehow precluded the Superior Court's finding that the inquiry was a fact or circumstance that may give rise to a claim. Br. at 33. Infinity Q ignores, however, that those very same letters state [redacted] A00636-37. In any event, the fact that a claim had not yet been asserted and was not guaranteed to follow the SEC inquiry is irrelevant under the plain language of the Prior Knowledge Exclusion. The Exclusion precludes coverage if any Insured knew of any facts or circumstances that "***may*** give rise to a claim." A01285. The Prior Knowledge Exclusion is not limited only to facts or circumstances that ***would*** give rise to a claim. "***May***" is much broader than "***would***" because the former connotes a possibility and the latter a certainty. *See Koransky, Bouwer & Poracky, P.C. v. Bar Plan Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 16909, at *44 (N.D. Ind. Feb. 8, 2012) (observing that whether a circumstance "may give rise to a Claim" is not the same as whether it "will give rise to a Claim").

Moreover, [redacted] A01733. [redacted]

[redacted] cannot possibly mean the SEC inquiry was not a fact or circumstance that may give rise to a Claim.

Infinity Q also argues that the SEC inquiry was not a fact or circumstance that may result in a claim because Infinity Q responded to one of the SEC's May 2020 document requests that it "had no documents relating to [redacted] about valuations." Br. at 18, 34. To be more precise, Infinity Q stated that [redacted] A01602. But Infinity Q's legal strategy of how to respond to the SEC's inquiry, says nothing about what the SEC told Infinity Q it was inquiring about—[redacted]—and what enforcement action might follow.

Here, the Insureds cannot avoid the undisputed material facts showing as a matter of law that, as of August 20, 2020, when the Warranty Letters were submitted to the Excess Insurers, Insureds knew facts or circumstances that may give rise to a claim.

3. The Prior Knowledge Exclusion precludes coverage even if a subjective test applies

Even if the language of the Prior Knowledge Exclusion required the subjective test advocated by Insureds (and it does not), the undisputed evidence in the record

shows that Insureds subjectively knew, on August 20, 2020, that a claim—such as an SEC formal investigation—may arise based upon allegedly improper valuations.

First and foremost, the SEC's May inquiry letter advised Infinity Q that: [redacted] A00636 (emphasis added). The SEC's June inquiry letter repeated this same sentence, but added the opening clause, [redacted] A00645. Both inquiry letters advised Infinity Q of [redacted]. A00637; A00646. The Insureds do not dispute that Lindell and Velissaris reviewed and discussed the SEC's inquiry letters before submitting the Warranty Letters. They also do not dispute that Lindell expressly wrote to Velissaris that [redacted] A01166. These undisputed material facts show that Lindell and Velissaris were subjectively aware that the SEC Division of Enforcement's open inquiry of Infinity Q might give rise to a claim.

Moreover, shortly after receiving the SEC's May 2020 inquiry letter, Velissaris and Lindell exchanged messages containing [redacted]

[redacted] A01118; A01120. Thus, Velissaris and Lindell undeniably understood that the SEC's inquiry into Infinity Q's asset valuation might give rise to a subsequent formal investigation and then an enforcement action (as it ultimately did).

Perhaps most tellingly, Velissaris and Lindell, [redacted] Just days after they received the SEC's May 2020 inquiry letter, while exchanging messages about [redacted] A01233.

Infinity Q's brief ignores the undisputed fact that Infinity Q quadrupled its insurance coverage after learning of the SEC inquiry. Infinity Q argued below that Infinity Q purchased the Excess Policies [redacted] A01551. But as the Insureds observed below, [redacted] A01551. Infinity Q did not purchase any excess coverage in 2019 because [redacted] A01551. In late May 2020, however, after Infinity Q received the SEC Division of Enforcement's May 2020 inquiry letter and in conjunction with messages considering its

implications, [redacted] A01233. With an SEC Division of Enforcement inquiry into asset valuation looming, Lindell and Velissaris made sure to purchase additional insurance. These undisputed facts further demonstrate that Insureds knew and understood that the SEC's open inquiry of Infinity Q's valuation practices might result in a claim.

II. THE SUPERIOR COURT PROPERLY EXERCISED ITS DISCRETION TO CONTINUE INFINITY Q'S MOTION FOR PARTIAL SUMMARY JUDGMENT

A. Question Presented

Whether the Superior Court property exercised its discretion by continuing Infinity Q's motion for partial summary judgment for 60 days to permit limited document discovery. (Preserved at B69-70).

B. Scope of Review

The Superior Court's decision to continue the motion for partial summary judgment to permit discovery under Rule 56(f) is subject to an abuse of discretion standard. *See Rhudy v. Bottlecaps Inc.*, 830 A.2d 402, 408 (Del. 2003).

C. Merits of the Argument

The Insureds argue the Superior Court immediately should have granted their motion for partial summary judgment seeking defense coverage once the court decided to allow limited discovery. To make the argument, the Insureds erroneously assert that the Insurers "never even contended that the mere fact of the SEC Inquiries was sufficient to trigger the Warranty Letters" and effectively conceded—merely by asking for discovery—that "there is at least a potential for coverage and thus a duty to advance defense costs." Br. at 3, 4-5. Based on these demonstrably false assertions, the Insureds argue that the Superior Court improperly continued their

motion for partial summary judgment to permit the Insurers to conduct limited discovery. Br. at 39-43.

Contrary to the Insureds' assertion, the Excess Insurers never conceded that the Noticed Matters "potentially triggered their Excess Policies." Br. at 10. The Excess Insurers' opposition to the Insureds' motion argued the motion should be denied based on the Noticed Matters' allegations and undisputed facts in the record before discovery, including the May and June 2020 SEC inquiry letters that the Excess Insurers received the night before their opposition was due. B50-53. The Excess Insurers further advised the Superior Court during the November 23, 2021 hearing that the Prior Knowledge Exclusion applies based on Infinity Q's receipt of the SEC inquiry letters. As counsel stated, "facts already in the record . . . show the prior knowledge exclusion applies because people like Scott Lindell, the Chief Risk Officer and Compliance Officer, knew that the [SEC] was already starting its investigation by way of formal inquiries and investigatory tool with the [SEC]." A00922. Counsel also stated, "As the record currently stands, the exclusions do apply." A00925.

Although the Superior Court could have granted summary judgment for the Excess Insurers based on the record before discovery, it appropriately exercised its discretion to continue the Insureds' motion. *See Primestone Inv. Partners Ltd. P'ship v. Vornado PS, L.L.C.*, 822 A.2d 397 (Del. 2003); *see also Rhudy*, 830 A.2d

at 408 (under Rule 56(f), "[t]he trial court must exercise its discretion to tailor discovery so that its scope is coextensive with the issues necessary to resolve the motion for summary judgment"). An insurer is permitted to conduct a reasonable coverage investigation, and the insured's refusal to cooperate with the investigation is grounds for a denial of coverage. *See Harris v. Prudential Prop. & Cas. Ins. Co.*, 632 A.2d 1380, 1382 (Del. 1993); *see also Choinsky v. Emps. Ins. Co.*, 938 N.W.2d 548, 557 (Wis. 2020) ("an insurer has the right and obligation to make timely investigation as a condition precedent to [its] contractual duties of defense and coverage") (internal quotation marks and citation omitted); *Price v. N.J. Mfrs. Ins. Co*., 867 A.2d 1181, 1187 (N.J. 2005) ("an insurer is entitled to a reasonable period of time in which to investigate whether the particular incident involves a risk covered by the terms of the policy").

When presented with Infinity Q's stonewalling of Travelers' investigation, B64-68, the Superior Court determined that "[t]his isn't a situation where [the Excess Insurers] have slept on their rights," and ruled that they are "entitled to develop a factual record" to oppose the Insured's motion for partial summary judgment. A00959. The Superior Court permitted "limited discovery" over a "60-day period" concerning any Insured's "knowledge as to the [SEC] claim." A00960. The Superior Court expressly prohibited discovery regarding "whether the [SEC]'s claim is valid or not" so that the discovery would not prejudice the Insureds.

A00961. The Superior Court's ruling was appropriate and certainly not an abuse of discretion. If anything, the Superior Court used its discretion to elevate substance over litigation tactics that seek to (mis)use the court's own procedures as means to secure an early victory in deliberate substantive darkness.

The Insureds' reliance on *Expedia, Inc. v. Steadfast Ins. Co*., 329 P.3d 59 (Wash. 2014), and *Haskel v. Superior Court*, 39 Cal. Rptr. 2d 520 (Cal. Ct. App. 1995), is of no avail. In *Expedia*, the trial court deferred a ruling on summary judgment while ordering discovery, even though the trial court "agree[d] with Expedia that there is a dangerous overlap" between the insurers' requested discovery and the ultimate issue in the underlying claim such that "discovery that Expedia might be forced to give . . . could be injurious to its interests" in the underlying claim. *Expedia*, 329 P.3d at 63. The Washington Supreme Court reversed and remanded with an order to "stay discovery in the coverage action until [the trial court] can make a factual determination as to which parts of discovery in the coverage action are potentially prejudicial to Expedia in the underlying litigation." *Id.* at 67. In *Haskel*, the court was "presented an almost identical question to the discovery issue" as *Expedia*. *Id.* at 66; *see also Haskel*, 39 Cal. Rptr. 2d at 529-30.

Here, unlike those cases, there was no "dangerous overlap" between the discovery the Superior Court permitted and the ultimate issues in the Noticed Matters. Indeed, the Superior Court placed specific limitations on discovery to

prevent the prejudicial discovery underlying the holdings in *Expedia* and *Haskel*. A00960-61. And that distinction is important here because the truth or falsity of the underlying allegations are largely beside the point; what matters is whether an Insured has knowledge that a claim may possibly be made, not its relative merits.

Finally, the Insureds' reliance on *HLTH Corp. v. Axis Reinsurance Co*., 2010 Del. Super. LEXIS 4, at *12 (Del. Super. Jan. 7, 2010), also is misplaced. There, the trial court denied the insurers' motions for summary judgment based on certain exclusions, and when that interlocutory ruling was pending review by the Supreme Court, the insured filed its motion seeking advancement of defense costs. *Id*. at *3-4. The trial court ***granted*** the insurers' request for a stay of that motion for advancement of defense costs, *id.* at *12, expressly ***rejecting*** the insured's argument that "public policy in favor of advancing defense costs" required immediate consideration of its motion, *id*. at *5. The *HLTH* court agreed with the insurer that "a stay is appropriate because, if the Supreme Court were to reverse [the Superior] Court's holding [as to the exclusion], [the insurer] would be forced to recover defense costs paid to [the insureds] that were never owed." *Id*. at *5.

Just as the court appropriately exercised its discretion to stay the insured's motion in *HLTH*, the Superior Court in this case appropriately continued the Insured's motion for partial summary judgment. And, the Insureds' argument here makes even less sense than the insured's position in *HLTH* because even if the

Superior Court somehow abused its discretion by permitting discovery (and it did not), the record following that discovery is now replete with unrefuted evidence that Infinity Q's receipt of the SEC Division of Enforcement's inquiry letters gave Insureds knowledge or information on August 20, 2020 of facts and circumstances that may give rise (and did in fact give rise) to a claim. Irrespective of the merits of the Superior Court's exercise of broad discretion under Rule 56(f), its ultimate decision that the Prior Knowledge Exclusion applies would still stand and bar coverage for the Noticed Matters. *See Travelers Indem. Co. v. CNH Indus. Am.*, 2018 Del. LEXIS 334, at *4 n.2 (Del. July 16, 2018) (declining to decide an issue unnecessary to resolve appeal).

III. THE SUPERIOR COURT CORRECTLY DETERMINED THE PRIOR KNOWLEDGE EXCLUSION IS UNAMBIGUOUSLY NON-SEVERABLE

A. Question Presented

Whether the Superior Court correctly determined the Prior Knowledge Exclusion is unambiguously non-severable. (Preserved at B134).

B. Scope of Review

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

C. Merits of the Argument

The Insureds argue the Prior Knowledge Exclusion is severable, applying separately to each Insured based on their own knowledge. This argument is without support in the Warranty Letters' terms and relevant case law. The Superior Court correctly rejected it. Op. at 32-34.

The Warranty Letters unambiguously provide that "***[n]o person or entity*** for whom this insurance is intended has any knowledge or information of any act, error, omission, fact or circumstance that may give rise to a claim under the proposed insurance," and that "[i]t is agreed that ***any*** claim for, based upon, arising from, or in any way related to any act, error, omission, fact or circumstance of which ***any such person or entity*** has any knowledge or information shall be excluded from coverage under the proposed insurance." A01285 (emphasis added). The district

court in *Rivelli* ruled that a nearly identical warranty letter's exclusion was non-severable:

> The Warranty Letter explicitly states that the exclusion is non-severable. That is, if – at the time the Warranty Letter was signed – any insured person had knowledge of 'any act, error, omission, fact, or circumstance' that would give rise to a claim, the [excess insurance] is affected for all insured persons, even those without such personal knowledge. Accordingly, if any of the [insureds] had such knowledge, all of them are within the exclusion.

2008 WL 5054568, at *6; *see also Murphy v. Allied World Assur. Co.*, 370 F. App'x at 194 ("[i]n the context of the [prior knowledge exclusions], the words 'any insured' unambiguously precludes coverage for innocent co-insureds"); *Ironshore*, 2022 U.S. Dist. LEXIS 168561, at *16-17 (finding similar exclusion expressly non-severable); *Delaware Ins. Guar. Ass'n v. Valley Forge Ins. Co.*, 1992 WL 147998, at *6 (Del. Super. Jun. 9, 1992) (exclusion of claims arising out of business pursuits of "any insured" unambiguously bars coverage for all insureds).

The Insureds do not argue that anything in the language of the Prior Knowledge Exclusion itself makes it severable because they cannot. On its face, once the requisite knowledge of any insured is established, coverage for the entire claim is excluded without regard to whom the claim is against. Recognizing that the language of the Prior Knowledge Exclusion rebuts their severability argument, the Insureds argue that a severability provision in the Primary Policy somehow imbues the Warranty Letters' Exclusion with a severability component not otherwise there.

The argument is inconsistent with the express terms of the Primary Policy and the Excess Policies.

The Primary Policy's severability provision in Subsection XII.(C) expressly applies only to one exclusion set forth in the Primary Policy's Subsection XII.(B). A00234. That referenced exclusion in Subsection XII.(B) of the Primary Policy is not a prior knowledge exclusion, and it certainly is not the Prior Knowledge Exclusion in the Warranty Letters incorporated into the Excess Policies only. The Insureds ignore this limitation on the scope of the Primary Policy's severability provision, which, by its terms, does not apply to the separate Prior Knowledge Exclusion in the Warranty Letters that is made part of and applicable only to the Excess Policies.

Furthermore, the Primary Policy's limited severability provision does not and cannot override the non-severable Prior Knowledge Exclusion, which is part of and applicable only to the Excess Policies. The Excess Policies follow form to the Primary Policy "***except as otherwise provided***" in the Excess Policies. A00328 (emphasis added). Therefore, if the Primary Policy's Subsections XII.(B) and (C) are inconsistent with the Warranty Letters' Prior Knowledge Exclusion, it is the Warranty Letters' Prior Knowledge Exclusion that overrides Subsections XII.(B) and (C), not *vice versa*. *See Axis Reins. Co. v. Bennett*, 2008 WL 2485388, at *10 (S.D.N.Y. June 19, 2008); *see also Murphy*, 370 F. App'x at 194 ("because the

language in the excess policies cannot be reconciled with the severability provision of the underlying policy, the language in the excess policies controls"); *Ironshore*, 2022 U.S. Dist. LEXIS 168561, at *14-16 (finding non-imputation clause of primary policy inapplicable to warranty letter provided to excess insurer).

Infinity Q's focus on the Primary Policy's defined term "Application" found at the Primary Policy's Subsection XII.(B), but not in the Warranty Letters, is thus beside the point. The Excess Insurers did not invoke the "Application" misrepresentation exclusion in the Primary Policy to which severability might apply. As the Superior Court correctly held, the separate Prior Knowledge Exclusion residing only in the Excess Policies is not applied severally based on its plain language.

Infinity Q's argument about an Insured's "reasonable expectations" also is irrelevant (and belied by the undisputed emails conditioning issuance of the Excess Policies on provision of the Warranty Letters). Absent ambiguity, and there is none here, the Court must give policy terms their plain and ordinary meaning. *O'Brien*, 785 A.2d at 288. The Superior Court correctly found the Warranty Letters' non-severable language is "clear and unambiguous," Op. at 34, and the Insureds' briefing does not argue otherwise.

Instead, the Insureds argue that "none of the Excess Policies mention a Warranty Letter (or the prior knowledge exclusion in the Warranty Letter) as being

part of the Excess Policies," and that the Excess Insurers "could have issued the Excess Policies providing that the Warranty Letters apply notwithstanding any severability provision." Br. at 49. Based on the undisputed facts, however, Infinity Q unquestionably knew the Excess Policies incorporated the Warranty Letters and their unambiguously non-severable Prior Knowledge Exclusion. Infinity Q emails show that [redacted], and [redacted] A01277-A01285. Indeed, the Warranty Letters signed by Lindell on behalf of Infinity Q specifically acknowledge that the Letters "shall be deemed incorporated into any insurance policy issued for the proposed insurance." A01285. The Insureds put no evidence in the record to refute those facts.

Finally, the Insureds argue that "Delaware's strong public policy to protect directors and officers from personal liability" requires the Court to disregard the Prior Knowledge Exclusion's expressly non-severable terms. Br. at 50. To be sure, *Hibbert v. Hollywood Park, Inc*., 457 A.2d 339, 343-44 (Del. 1983), acknowledged Delaware's public policy of encouraging service as corporate directors through legislation permitting ***the directors' corporation*** to provide indemnification. But, the Insureds have cited no case requiring an insurer to issue D&O insurance to Delaware corporations, or prohibiting an insurer newly added to the risk from

limiting its coverage based on the unambiguous terms of a warranty letter. And, it is well-established under Delaware law that courts must enforce unambiguous policy terms, such as the Prior Knowledge Exclusion in this case. *See In re Solera*, 240 A.3d at 1131 ("Delaware courts will not 'destroy or twist' the words of a clear and unambiguous insurance contract"); *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 69 (Del. 2011) ("where the language of a policy is clear and unequivocal, the parties are to be bound by its plain meaning" and "creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented").

IV. THE PRIOR PROCEEDING EXCLUSIONS INDEPENDENTLY BAR COVERAGE

A. Question Presented

Whether, alternatively, the Superior Court could have granted summary judgment for the Excess Insurers because the undisputed material facts demonstrate as a matter of law that the Excess Insurers' prior proceeding exclusions bar coverage for the Noticed Matters. (Preserved at B126).

B. Scope of Review

The standard of review is *de novo*. *See* Argument Section I.A., *supra*. The Superior Court did not address the prior proceeding exclusions below, but they were adequately presented, and this Court may 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

The Noticed Matters undeniably constitute a Claim under the Primary Policy to which the Excess Policies follow form, as they must for the Insureds to assert coverage in the first place. That Claim—the Noticed Matters—is excluded by the three separate prior proceeding exclusions of each of the Excess Policies, none of which require that the Noticed Matters relate to a prior Claim. Instead, the Travelers Policy bars coverage for "any claim [i.e., the Noticed Matters] based upon or arising out of any prior or pending civil, criminal, administrative or regulatory proceeding against any Insured as of or prior to the Specified Prior or Pending Proceeding Date."

A00330. Likewise, the AXIS Policy bars coverage for any claim "based upon, arising from, or in consequence of Pending or Prior Litigation," defined as "any demand, arbitration, suit, administrative, regulatory, criminal or other proceeding pending against . . . any Insured, on or prior to" August 20, 2020. A00344. And the Arch Policy bars coverage for loss "arising out of, based upon or attributable to" "any demand, suit, formal or informal investigation occurring prior to, or pending as of, 8/20/2020" or "any Wrongful Act which gave rise to such prior or pending demand, suit or formal investigation or any Interrelated Wrongful Acts thereto." A00353.[6]

The SEC Enforcement Division commenced its inquiry into Infinity Q no later than May 13, 2020, when Infinity Q received the SEC's document requests and notice. A00636. The SEC inquiry was a "regulatory proceeding" for the purpose of the Travelers and AXIS Excess Policies' prior proceeding exclusions. Their prior proceeding exclusions apply to "***any*** . . . regulatory proceeding" without the requirement that the proceeding be "formal" or "commenced by . . . entry of a formal order of investigation" and without the necessity that the proceeding constitute a

[6] The Specified Prior or Pending Proceeding Date is not expressly stated in the Travelers Excess Policy, A00330, but it necessarily is August 20, 2020, the date the Travelers Excess Policy's coverage commenced. The AXIS and Arch Excess Policies expressly state the date as August 20, 2020, showing the mutual intent of Infinity Q and the Excess Insurers to make it August 20, 2020.

Claim under the Primary Policy. A00330; A00344. Thus, the SEC's pre-policy inquiry and document requests were a "regulatory proceeding" triggering the prior proceeding exclusions in the Travelers and AXIS Excess Policies.

Likewise, the SEC inquiry was an "informal investigation" for the purpose of the Arch prior proceeding exclusion, and its [redacted] document requests [redacted] were "any demand" against Infinity Q for the purpose of both the AXIS and Arch exclusions. *See Weaver v. Axis Surplus Ins. Co.*, 2014 WL 5500667, at *8 (E.D.N.Y. Oct. 30, 2014) (letter is a "demand" if it is "a requisition or request to do a particular thing specified under a claim of right on the part of the person requesting, which puts the recipient on notice that those legal obligations have been triggered" (internal citation and quotation marks omitted)).

There can be little doubt that the Noticed Matters are based upon, arise out of or are attributable to the SEC inquiry in May 2020. To be sure, the SEC's formal investigation and enforcement action were the very result of that inquiry and conduct being examined, and the other criminal, regulatory and civil matters that followed further challenged that same conduct. *See First Solar, Inc. v. National Union Fire Ins. Co.*, 274 A.3d 1006, 1013-15 (Del. 2022) (describing substantially similar "related claims" clause as "broad" and holding that two lawsuits were related notwithstanding some differences because they both concerned alleged misrepresentations about the cost of solar power).

For all of these reasons, the Excess Policies' prior proceeding exclusions bar coverage for the Noticed Matters.

CONCLUSION

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

Dated: January 13, 2023

PUBLIC VERSION
FILED: January 30, 2023

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CERTIFICATE OF SERVICE

I, Carmella P. Keener, hereby certify that on this 30th day of January 2023, I caused

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Transaction Details

Court: DE Supreme Court

Document Type: Other

Transaction ID: 69018374

Document Title: PUBLIC VERSION of Answering Brief of Appellees Travelers Casualty and Surety Company of America, AXIS Insurance Company and Arch Insurance Company. (eserved) (jkh)

Submitted Date & Time: Jan 30 2023 4:10PM

Case Details

Case Number	Case Name
334,2022C	In re Infinity Q Capital Management, LLC
335,2022C	In re Infinity Q Capital Management, LLC
339,2022C	In re Infinity Q Capital Management, LLC